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Interstate Commerce and State Control of Foreign Corporations

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NOTE AND COMMENT.

INTERSTATE COMMERCE AND STATE CONTROL OF FOREIGN CORPORATIONS.—Corporations are the creatures of their parent state and outside the borders of the state creating them they have no existence except such as is granted them by comity. *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Lafayette Ins. Co.* v. *French,* 18 How. 404; *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall, 566; *Home Ins. Co.* v. *Morse,* 20 Wall. 445; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28; *Security Mut. L. I. Co.* v. *Prewitt,* 202 U. S. 246. A state may prohibit a foreign corporation from doing business within its borders or allow it to do business there upon such terms and conditions as may be prescribed. Same cases. The power of the states to prescribe such conditions, however, is qualified to the extent that the foreign corporation cannot be required to give up a right or privilege held under the federal constitution or statutes. For example, a condition that the corporation shall not remove any case to the federal courts is invalid and the corporation may remove cases despite the condition. *Home Ins. Co.* v. *Morse, supra.* But for breach of such condition the state may revoke the permit to do business

within its borders. *Doyle* v. *Insurance Co.*, 94 U. S. 535; *Security Mut. L. I. Co.* v. *Prewitt*, supra. "Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives." *Prewitt* case, supra, page 257.

Corporations engaged in interstate commerce may come into a state for the purpose of such interstate commerce, and the foreign state cannot impose any burdens or restrictions in respect of such interstate business. *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Cooper M'f'g. Co.* v. *Ferguson*, 113 U. S. 727; *Crutcher* v. *Kentucky*, 141 U. S. 47. The right to enter a state, however, for the purpose of doing interstate commerce does not necessarily carry with it the privilege of doing intrastate business, for it is conceded that while a state may impose no burdens upon a corporation in respect of its interstate business the right to impose a tax in respect of intrastate business or upon property of the corporation within the state is unrestricted. *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Postal Tel. Cable Co.* v. *Charleston*, 153 U. S. 692; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullmans Pal. Car Co.*, 191 U. S. 171; *Kehrer* v. *Stewart*, 197 U. S. 60. These cases establish the proposition that corporations engaged in interstate commerce may be taxed in respect of their privilege of carrying on domestic or intrastate business. Inasmuch as the power to tax carries with it the power to destroy, a state may totally prohibit the doing of intrastate business by a foreign corporation. Interstate and intrastate business are therefore separable; the one is beyond the control of the states, while the other may be exercised only upon such terms as may be prescribed by the state in which the business is done. Having the power to prohibit absolutely the doing of intrastate business by a foreign corporation a state may permit such business upon such terms and conditions as it sees fit to impose, subject however, to the qualification above referred to, that the corporation is not bound by any condition which requires it to give up a right or privilege held under the constitution or laws of the United States.

A usual condition upon which foreign corporations are permitted to carry on business, not interstate commerce, is the payment of a license tax or fee. If the burden imposed upon the company is in the nature of a tax upon the privilege of doing business in the state exacting such tax, it is immaterial how its amount is measured. Thus in determining the amount of a tax upon corporate business or franchises subjects may be included which in themselves the states have no power to tax. *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Society for Savings* v. *Coite*, 6 Wall. 594; *Home Ins. Co.* v. *New York*, 134 U. S. 594. But where the real nature of the tax is doubtful the manner of its measurement may be important as being indicative of whether or not the exaction is really a privilege tax or something else. In *Horn Silver Mining Co.* v. *New York*, supra, there was considered the validity of a New York statute imposing a tax upon the franchises or business of corporations organized in that state or elsewhere based upon the amount of capital stock. The *Horn Silver Mining Co.* was a Utah corporation, only a small portion of its capital being engaged in business in New

York, and the company objected to the payment of the tax on the ground that it was extraterritorial taxation and a burden upon interstate commerce. The court, however, held that the tax was in the nature of a license fee for the privilege of doing business within the state. Mr. Justice FIELD, in delivering the opinion of the court, said (page 315): "Having the absolute power of excluding the foreign corporation the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, *or a sum proportioned to the amount of its capital.*" (Italics are writer's.) Again on page 317: "The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the state and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company." See also *New York* v. *Roberts,* 171 U. S. 658, involving much the same questions and the same statute, except that the act had been changed so that the amount of the tax was measured by the amount of capital employed within the state.

The very recent decisions of the Supreme Court, however, in *Western Union Tel. Co.* v. *Kansas,* 30 Sup. Ct. 190, and the *Pullman Company* v. *Kansas,* 30 Sup. Ct. 232, cannot be explained, it is believed, except as an overruling of one or more of the propositions above set forth. Both of these cases involved the validity of certain sections of the chapter of the Kansas statutes relating to corporations. The substance and effect of the sections in question was that all corporations after obtaining a permit to organize from a commission created for that purpose should pay into the treasury of the state as a prerequisite to doing business therein a certain graduated fee or tax measured by the authorized capital stock. This provision was in express terms made applicable to foreign corporations seeking to do business within the state. The complaining companies having refused to pay the tax were enjoined from doing intrastate or domestic business, with the qualification, in the case of the Western Union Company, that the decree should not in anywise affect the company's duties to or contracts with the United States. The decisions of the Kansas Supreme Court affirming the decrees entered below were reversed by the Supreme Court on the ground that the provisions of the Kansas act were unconstitutional as applied to the complaining companies for the reason that the tax or fee was a tax upon property without the domain of the state and a burden upon and interference with interstate commerce. The prevailing opinion was written by Mr. Justice HARLAN and concurred in by Mr. Justice MOODY, Mr. Justice BREWER and Mr. Justice DAY. Mr. Justice WHITE concurred specially. A very vigorous dissent concurred in by the Chief Justice and Mr. Justice MCKENNA was written by Mr. Justice HOLMES. Mr. Justice PECKHAM died before the decision, but heard the argument and agreed with the minority. It was the view of the majority that

inasmuch as a very large percentage of the capital stock of the companies was represented by property outside the state of Kansas and engaged in interstate commerce a tax measured upon the entire amount of capital stock was imposed upon property which the state had no power to tax and constituted a direct burden upon interstate commerce, stress being laid upon the latter point.

The court does not expressly overrule any of its earlier decisions. It seems impossible, however, to understand the cases otherwise than as a repudiation of one or more of the principles of the cases hereinbefore referred to. If the tax imposed by the New York statute considered in the *Horn Silver Mining Company* case was a tax or fee exacted for the privilege of doing domestic business in a corporate capacity within the state of New York, only a very small percentage of the company's capital being engaged within the state, it is indeed difficult to see how the tax in the principal cases was of a different nature. The method of measuring the taxes was the same and much the same objections were urged in both cases. So if the court meant to hold that the tax was a tax upon property without the state as distinguished from a license tax or fee for the privilege of doing domestic business, the cases in effect overrule the principle of the *Horn Silver Mining Co.* case. On the other hand if that view of the decision is not taken and the tax is considered as of the same nature as the one imposed in the *Horn Silver Mining Co.* case, the conclusion of the court can only be construed as denying the right of a state to freely tax the privilege of doing domestic business by corporations engaged in interstate commerce, thus in effect overruling the principle clearly established by the cases above cited, namely, that the intrastate busines of a foreign corporation is a proper subject of state taxation. The arguments against the holdings of the court in these two cases are so clearly and forcibly stated in the dissenting opinions of Mr. Justice HOLMES that it would be a mere matter of repetition to set them down here.

R. W. A.