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When Foreign Insurance Company Doing Business within State [Palmelto Fire Ins. Co. v. Conn, 47 Sup Ct 88]

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The decision in this case has been deservedly regarded as one of far reaching import. Some critics have been concerned about its potentialities in disrupting the merit system, but it is doubtful if such fears are justified. As pointed out by the Chief Justice, the merit system operates in the realm of those inferior officers appointed by heads of departments and should thus not be affected. If the time should come when Congress thinks it desirable to extend it to some of the inferior officers now excluded—such as collectors of internal revenue, postmasters, and others—they could readily be removed from possible danger, by legal transference of the power to appoint from the President and Senate to the heads of departments. In other directions, however, the results of the decision are likely to be felt. In establishing the numerous boards and commissions that populate the city of Washington today Congress has uniformly adhered to the policy of making them continuous bodies with longer tenures than that of the President, and with the avowed purpose of enabling them to perform their functions, sometimes quasi-judicial in nature, independently of control from the Presidential office. Among such boards may be mentioned the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board, the Shipping Board, and many others. The same may be said of the Comptroller General. Under the act of 1921, he is subject to removal only by impeachment or joint resolution of Congress, but it is difficult to see how these restrictions could protect him should the President desire to oust him. Since all these officers are appointed by the President and Senate, they fall within the general line of reasoning pursued in the majority opinion and would thus be subject to removal exclusively by the President without restrictions imposed by Congress. Presidential control over this type of executive officer can be greatly enhanced by the doctrine of this case.

C. O. GARDNER.

CONSTITUTIONAL LAW — INSURANCE — WHEN FOREIGN INSURANCE COMPANY DOING BUSINESS WITHIN STATE

The extent of the power of a state over foreign corporations engaged in business within its borders has been a fruitful source of litigation both in federal and state courts. That question was involved in an interesting way in the recent case of *Palmetto Fire*

Ins. Co. v. Conn, 47 Sup. Ct. 88 (U. S. 1926), affirming 9 Fed. (2d) 202 (1925).

The Palmetto Fire Ins. Co., a South Carolina corporation, licensed to do business in Ohio, made in Michigan a so-called open contract of insurance with the Chrysler Sales Corporation, a Michigan corporation organized to distribute the Chrysler automobile, whereby the Palmetto Co. agreed to issue certificates of insurance to purchasers of Chrysler cars wherever sold. The contract provided that the Chrysler Co. should collect from its dealers in the various states, whenever cars should be delivered to them, the amount of the premiums for such insurance, and the dealers in turn should collect a like amount from purchasers of cars as a part of the purchase price. It further provided that the Chrysler Co. should make a monthly report of sales and remittance of premiums so collected to the Insurance Co. which would issue certificates direct to the purchasers. The Chrysler dealers in Ohio were not authorized to act as agents of the Palmetto Co. in the manner provided by the Ohio statutes. The defendant Conn, State Insurance Commissioner of Ohio, insisted that the above plan was in violation of the provisions of Gen. Code Ohio, section 5438, prohibiting the insurance of property in the state, except by legally authorized agents, and section 5433, which taxes business lawfully done there, and for that reason cancelled the license of the Palmetto Co. That Company thereupon brought suit in the federal district court for an injunction, which was denied. Upon appeal to the Supreme Court, the Court, speaking through Mr. Justice Holmes, held that this open contract plan was in violation of the Ohio statutes, and that such violation justified the revocation of the plaintiff's license.

It might be well, before passing to an analysis of the decision in the instant case, to determine in a general way, by a brief review of the decisions, to what extent corporations are protected by the guarantees of the Federal Constitution. It was laid down at a relatively early date that a corporation is not a citizen within the meaning of the privileges and immunities clause of Article IV, Section 2, and that a corporation has no legal existence beyond the limits of the sovereignty creating it, and cannot do business in other states against their will.¹ Such other states may in general impose such conditions upon the entrance of foreign corporations as they see fit. This power to exclude does not, of course, extend to corporations engaged in interstate commerce, so

¹Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (1869).

far as their interstate business is concerned, nor to corporations chartered by the Federal Government for the accomplishment of its purposes. Nor do corporations come within the protection of the privileges and immunities clause of the Fourteenth Amendment, since that amendment was restrictively construed to limit only state action which impaired those privileges and immunities enjoyed by virtue of federal citizenship,² and a corporation is not a citizen. But a corporation is a *person* within the meaning of the due process and equal protection clauses of the Fourteenth Amendment.³ It follows that, until a foreign corporation is duly admitted to business in a state, it has no right to be there, and is not a *person* within the jurisdiction.⁴ But when it is admitted and performs the conditions imposed upon it by state law, it in effect has a contract with the state and, during the period for which it is admitted, it falls within the equal protection clause.

Since a state is conceded to possess the absolute power to exclude foreign corporations from coming within its borders, save for the limited exceptions mentioned, it would seem necessarily to follow that there is no restriction upon the nature of the conditions it may attach to its permission to such corporations to enter the state. And it appeared for a time that this would be the view of the Supreme Court upon the question.⁵ But after considerable vacillation, the Court has overruled its earlier utterances, and has definitely established the doctrine that a state cannot extort a waiver of constitutional rights as the price of its license to a foreign corporation.⁶

A state has no power to tax property or transactions beyond its jurisdiction.⁷ And the power of a state to exclude foreign corporations cannot be used to tax them upon property that upon established principles the state has no power to tax.⁸ Nor

²The Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394 (1873).

³County of San Mateo v. Southern Pac. R. R. 13 Fed. 722 (1882).

⁴Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 Sup. Ct. 737 (1888).

⁵Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 6 Ann. Cas. 317 (1906).

⁶Terral v. Burke Constr. Co. 257 U. S. 529, 66 L. ed. 352, 42 Sup. Ct. 188, 21 A. L. R. 186 (1921).

⁷Union Transit Co. v. Kentucky, 199 U. S. 194 (1905); Frick v. Pennsylvania, 268 U. S. 473, 69 L. ed. 1058, 45 Sup. Ct. 603 (1925).

⁸Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. 190 (1910).

can it use that power as a basis for regulating the conduct of such corporations in other jurisdictions, though they actually be doing business within the state making the attempt.⁹ But it can prevent a corporation doing business within the state save in the manner provided by its laws.

The language used by the lower court in the principal case suggests the view that, since the state of Ohio might have excluded the Palmetto Co. entirely, it might also limit its right to enter into lawful contracts of insurance without the state upon property situated within the state, as the price of its license to that corporation.¹⁰ To this extent its language is clearly in conflict with the decisions cited in the preceding paragraph, and is impliedly disapproved by Justice Holmes in his opinion.

Was the Palmetto Co., on the facts presented, actually doing business in Ohio, or proposing to do so, so as to come within its regulative and taxing powers? That question must be answered in the affirmative, as Justice Holmes recognizes, if the cancellation of the plaintiff's license is to be sustained. And it is submitted that that question should be given an affirmative answer. While it is true that the contract between the Palmetto and Chrysler Companies was a Michigan contract, still it did not of itself purport, nor did it operate to insure anything. No car was insured until actually sold by a dealer. The contract was merely an agreement to issue policies to persons to whom the dealers might sell cars. Consequently, a sale was necessary to impose any insurer's liability whatever upon the Palmetto Co.; it was equally essential to entitle it to a single dollar in premiums. Can there be any doubt that the insurance is placed by the Chrysler dealer in Ohio, as and when a sale is made there, and that the Michigan contract operates in effect to make him the agent of the Palmetto Co. for that purpose? If that be so, the plaintiff was doing business in Ohio, or proposing to do so, in a manner directly violative of the express provisions of the statutes, and its license was properly withdrawn.

It is to be regretted that Justice Holmes did not place the decision clearly and solely upon this basis, though it is believed it is the ground he had in mind. His language renders the problem unnecessarily difficult, and is confusing rather than clarifying.

⁹New York, L. E. & W. R. R. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. 952 (1894); Fidelity & Deposit Co. of Maryland v. Tafoya, 46 Sup. Ct. 331 (March, 1926).

¹⁰9 Fed. (2d) 202, 204 (1925).

He states that the purchaser obtained a benefit in Ohio, and that the act was done in Ohio, and that the capacity to do it came from the law of Ohio. What act? The mere fact that the purchaser obtains a benefit as an incident to his purchase, or that he does an act in Ohio which entitles him to such benefit is, without more, wholly immaterial. It is not the purchaser the state of Ohio is seeking to tax or regulate, but the Palmetto Co. Indeed, it could not, if it wished, deprive the purchaser of the legal capacity to do an act which would entitle him to the benefit of a contract of insurance previously made outside the state. Such would be an invalid interference with freedom of contract.¹¹ Suppose the Palmetto Co. had actually insured one hundred thousand Chrysler cars in Michigan, and had agreed that the Chrysler Co. might assign its rights as beneficiary to purchasers as the cars should be sold. There also an Ohio purchaser, by his act of buying a car in Ohio, might obtain the benefit of an insurance contract entered into by the Palmetto Co. in Michigan. Yet it is not apparent upon what ground it could be held that in such case the Palmetto Co. was transacting business in Ohio, so as to come within its taxing or regulative jurisdiction. The circumstance that the purchaser obtains a benefit in Ohio is not the important thing, but the fact that the transaction in the course of which he gets such benefit constitutes a doing of business within the state by the Palmetto Co. acting through agents not duly authorized according to law.

ARTHUR H. KENT.

SUING IN QUANTUM MERUIT FOR REAL ESTATE COMMISSION.

"No action shall be brought whereby to charge the defendant—*upon an agreement, promise or contract to pay any commission for or upon the sale of an interest in real estate;*— unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."¹¹

The italicized words will be recognized by Ohio lawyers, as the amendment to the Statute of Frauds passed by the General Assembly of the State of Ohio in 1925.

Does this amendment operate to prevent a recovery for services rendered by a real estate broker unless in every case he

¹¹Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427 (1897).

¹²Gen. Code of Ohio, Section 8621, as amended to take effect July 10, 1925.