VALIDITY OF STATE STATUTES ATTEMPTING TO EXCLUDE RESORT BY FOREIGN CORPORATIONS TO FEDERAL COURTS.

I.

Statutes exacting an agreement that foreign corporations shall not remove a suit from a state court to federal courts as a condition for doing local business within the state.

A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution.[1]

A statute providing that before a foreign corporation can do business in the state, it shall appoint an attorney in the state on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the Federal courts, is repugnant to the Constitution of the United States and void, and any agreement made by a foreign corporation in pursuance thereof is void.[2] The Constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under that Constitution, the laws of the United States, and the treaties made or which shall be made under their authority—to controversies between a State and citizens of another State, and between citizens of different States.[3] A corporation is a citizen of the State creating it, within this clause of the Constitution.[4] The jurisdiction of the Federal courts under this clause of the Constitution depends upon and is regulated by the laws of the United States, and State legislation cannot confer jurisdiction upon the Federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution.

Agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void. While the right to remove a suit may be waived, or its exercise omitted in each recurring case, a party cannot bind himself in advance by an agreement which might be specifically enforced, to forfeit his rights to remove at all times and on all occasions whenever the case might be presented[5].

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[1]Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246; Doyle v. Continental Ins. Co., 94 U. S. 535; State v. Hodge, 169 S. W. 942.

[2]Ins. Co. v. Morse, 20 Wall. 445.

[3]Art. III, Section 2.

[4]Express Co. v. Kountze, 8 Wall. 342; Railway v. Whitton, 13 Wall. 275.

[5]Barron v. Burnside, 121 U. S. 186; Western Union Telegraph Co. v. Frear, 216 Fed. 199 (1915).

Where a statute provides that the application by a corporation for a permit to transact business in the State shall contain a stipulation that the permit shall be subject to each of the provisions of a certain act, and one of the sections of the act provides that, if any cases commenced in a State court were removed by the corporation into a Federal court, the corporation should thereupon forfeit any permit issued or authority granted to it to transact business in the State, it has been held that such a statute enacts an agreement not to remove a suit into the Federal courts, and, therefore, is unconstitutional and void.[5]

II.

Statutes providing for the revocation of the authority of a foreign corporation to do a local business in the State upon the removal of such corporation of a suit from the State into the Federal courts.

In Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, the question was whether a Kentucky statute which provided that "if any foreign insurance company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of the State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State," was constitutional, it was held that if a statute provides that the foreign corporation must enter into an agreement, before it can obtain a permit, that it will not remove a suit into the Federal court, such agreement is void and that part of the statute which provides for it is unconstitutional, because it violates the provision of the Federal Constitution guaranteeing the right to a trial in the Federal court. But if the statute provides that upon a removal of an action to the Federal courts, the foreign corporation shall lose its right to do further business in the State, there is no restraint upon the right to remove, but it operates only upon the right to do business in the State and the State has the sole power to determine whether a foreign corporation shall do a local business within its borders or not. Mr. Justice Peckham, who wrote the majority opinion, says:

[5]Barron v. Burnside, 121 U. S. 186; Western Union Telegraph Co. v. Frear, 216 Fed. 199 (1915).

"As a State has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none at all for a valid act is immaterial.

"No stipulation or agreement being required as a condition for coming into the State, and obtaining a permit to do business therein, the mere enactment of a statute, which in substance says, if you choose to exercise your right to move a case into a Federal court, your right to do a further business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection."

In Western Union Telegraph Co. v. Julian, 169 Fed. 166, the court, in referring to this case, says:

"As the foreign corporation had no right to come into the borders of another State to do a local business, the court held that the other State might deny it admission in the first instance, or not having prescribed conditions in advance and merely permitted the foreign corporation to remain on pure suffrance, where by comity, it might, nevertheless, afterwards arbitrarily expel it for removing a suit to the Federal court, or for any other reason or motive which the State might deem sufficient. This is the sum and substance of the Prewitt case. That case is far from deciding that a foreign corporation may be expelled under any and all circumstances, at the mere pleasure of the State, and when taken in connection with prior and subsequent decisions of the Supreme Court, it is clear that the case never intended to assert such a doctrine."

And the Court seems to be justified in its comment on this case. A State may make its prohibition conditional, and oust a foreign corporation at pleasure or prevent its coming into the State except where its purpose is to engage in interstate business, or where the foreign corporation is a Federal agent, provided that compliance with the condition in order to do business in the State does not necessarily deprive the foreign corporation of the right guaranteed it by the Federal Constitution, or the State by revoking the license of the foreign corporation does not impair the obligation of contract, or deny the equal protection of the law, or infringe upon some other provision of the Constitution.[6] It is to be noticed that in the Prewitt case, by the terms of the statute, the company never lost its right to resort to the Federal court; it was always free to do so, but the State made its act conditional upon the company's doing so. And it is also to be observed that in that case and in

[6]Doyle v. Continental Ins. Co., 94 U. S. 535; Western Union Telegraph Co. v. Kansas, 216 U. S. 1; Southern P. R. R. Co. v. Greene, 216 U. S. 400; Herndon v. Chicago R. I. and P. R. R. Co., 218 U. S. 135.

the case of Doyle v. Continental Insurance Co., 94 U. S. 535, which it followed and affirmed, there were no property rights involved. True that the insurance companies in those cases had expended money in advertisements and in opening up and maintenance of offices, but there was no outlay of money in the acquisition of property such as in the construction of railroads, telegraph systems, etc. This is a vital factor to be taken into consideration,[7] for when a company makes such investments within a State, it becomes a person within that State within the meaning of the fourteenth amendment of the Federal Constitution, and thereby becomes entitled to the equal protection of the laws of that State.[8] And so, a State officer will be restrained from revoking the license of a foreign corporation in pursuance to a statute, where the foreign corporation entered the State and made heavy investments therein, and later the statute was passed, which provided that the license of a foreign corporation should be revoked if it removed a suit into the Federal courts, because under this statute a domestic corporation could remove a suit to the Federal courts without losing its license, whereas a foreign corporation could not, and this amounted to a discrimination by the State between persons within its jurisdiction, and to a denial of the equal protection of its laws.[9]

"The equal protection of the laws," the court says in Southern Ry. Co. v. Greene, 216 U. S. 400, "means subjection to equal laws applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the fourteenth amendment, it is entitled to stand upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

And where the attempted action of the State would be an interference with and burden interstate commerce, such a statute is unconstitutional and void.[10] The limited scope of the Prewitt case is set out in Harrison v. St. L. and San Francisco R. R., 232 U. S. 318. In that case, an Oklahoma statute provided that the domicile of every corporation doing business within that State, and which had complied with or might comply with the constitution and laws

[7]Chi. R. I. and P. R. R. Co. v. Swanger, 157 Fed. 785.

[8]Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

[9]Herndon v. Chi. R. I. and P. R. R. Co., 218 U. S. 135; Southern P. Rlwy. Co. v. Greene, 216 U. S. 400; Western Union Telegraph Co. v. Frear, 216 Fed. 199.

[10]Cases *supra*, and Harrison v. St. L. and San Francisco R. R. Co., 232 U. S. 318; Pullman Co. v. Kansas, 216 U. S. 56.

of that State, should for all purposes be the State of Oklahoma. The second section provided for the immediate revocation of the license or charter to do business within the State of a corporation, which should claim or declare in writing before any court of law or equity within the State, domiciled within another State or foreign country. The court interpreted the statute as forbidding a resort to the Federal Court on the ground of diversity of citizenship in the contingency contemplated, punishing by extraordinary penalties any assertion of a right to remove under the laws of the United States, and attempting to divest the Federal courts of their power to determine, if issue should arise on the subject, whether there was a right to remove. It held that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its Constitutional authority, is a power wholly independent of State action and which, therefore, the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. As the right freely exists to seek removal unchecked or unburdened by State authorities and the duty to determine the adequacy of a prayed removal is a Federal and not a State question, it follows that the States are in the nature of things without authority to penalize or punish one who has sought to avail himself of the Federal right of removal on the ground that the removal as asked for was unauthorized or illegal. A State cannot render the enjoyment of a Federal right impossible by arbitrarily creating a fictitious legal status incompatible with the existence of the right. The court said:

"The proposition that the constitutionality of the statute and the action taken under it is supported by the decisions in Doyle v. Continental Ins. Co. and Security Co. v. Prewitt, is we think plainly unfounded. Those cases involved State legislation as to a subject over which there was complete State authority; that is, the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful powers. But that the application of those cases to a situation where complete power in a State over the subject dealt with, does not exist, has been so repeatedly passed upon as to cause the question not to be open."

The Supreme Court of Arkansas, in the recent decision of State v. Hodges, 169 S. W. 942, gives a summary of the decisions on such statutes in the following words:

"As we understand, from a somewhat exhaustive examination of the Supreme Court of the United States, there are at least two lines of cases where statutes similar to the one in question have been reviewed and passed upon by that court. In cases where the foreign corporation has been admitted to do business in the State upon conditions such as are prescribed in the statute under consideration, and where such corporation is engaged in business which is purely local or intrastate, if the corporation violates the conditions under which it is permitted to come into the State and to do business therein, its license may be revoked and the State may thus exclude such corporation from doing business of a purely local character within its borders. These cases hold that a State may impose upon a foreign corporation as a condition of coming into and doing business within its territory any conditions it may see proper, provided that they are not repugnant to the Constitution and laws of the United States, and that conditions such as are prescribed by the present act are not repugnant to the Constitution or laws of the United States." The cases holding this view are Security Mutual Ins. Co. v. Prewitt, *supra,* Doyle v. Ins. Co., *supra.*

"Other cases hold that where the foreign corporation has been admitted and permitted to do business within the State, if such corporation, although transacting a local business, is also engaged in interstate commerce of the character mentioned therein, the license of such cannot be revoked upon conditions such as prescribed in the act. The latter cases hold that such conditions as those prescribed in the act are repugnant and contrary to the Constitution of the United States and laws made thereunder, and that as to a corporation doing an interstate business the attempt to penalize and restrain the assertion of a Federal right. Such are the cases of Harrison v. St. L. and San Francisco R. R. Co., 232 U. S. 318, also 34 Supreme Court 333; Herndon v. Chi. R. I. & P. R. R. Co., 218 U. S. 135, 30 Supreme Court 633, 54 Law Edition 970; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Supreme Court 190, 54 Law Edition 355, and other cases referred to in those.

"While the cases of Doyle v. Ins. Co. and Security Co. v. Prewitt, *supra,* are confined and limited to an extremely narrow scope, yet they are clearly distinguished from the later cases referred to and certainly have not been overruled by them."

III.

Estoppel of State from exercising its prerogative of preventing a foreign corporation from continuing a domestic business within its borders.

A State may be estopped from exercising its prerogative of preventing, at its own pleasure, any foreign corporation from doing a domestic business within its borders, by the acceptance by a for-

eign corporation of the proposal made by the State in its own laws and by acts done on the face thereof.[11]

So where the State statute provided that a domestic corporation may sell "all its property, roadbed, rights, and franchises" to a foreign railroad corporation, and such property when so purchased, "shall be subject, in all respects, to the laws of the State as if owned by a domestic corporation," the provisions of such a State statute enter into and form part of the obligation of the contract made thereunder between the domestic railroad corporation and the foreign railroad corporation, and the State cannot deny or impair the enjoyment of the vested right gained thereby by the exercise of its arbitrary prerogative."[12] So where a foreign corporation has the constitutional right to do business in the State,[13] the same is true.

If a State has induced a corporation to enter it by the granting of a franchise, which is in the nature of a contract, then it is protected in the enjoyment thereof by article I, section 10, of the Federal Constitution, prohibiting any State from passing any law impairing the obligation of contract.[14]

When a foreign corporation has in compliance with an act of the State, filed its charter, etc., and has become to all intents and purposes a corporation of that State the same as if formally incorporated in that State, it acquires thereby the contract right to be subjected by the State to only such treatment and liabilities as domestic corporations, and such right is unconstitutionally impaired by the passing of an act, which subjects it to forfeiture of all its franchise and charter rights to do business in the State if it shall remove any action into the Federal Court without the consent of the other parties, no such restriction being placed on domestic corporations.[15]

D. B.

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[11]Chi. R. R. & P. R. R. Co. v. Swanger, 157 Fed. 783; W. U. Telegraph Co. v. Julian, 169 Fed. 166.

[12]Seaboard Air Line R. R. Co. v. Railway Commission, 155 Fed. 792 (1907).

[13]Western Union Telegraph Co. v. Julian, 169 Fed. 166.

[14]American Smelting Co. v. Colorado, 204 U. S. 103.

[15]Chi. R. I. and P. R. R. Co. v. Ludwig, 156 Fed. 152.