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Thomas G. Rutledge

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ANTI-REMOVAL STATUTES RELATING TO INSURANCE COMPANIES

Missouri and a majority of the states have statutes which provide in effect that if any foreign or non-resident insurance company, incorporated under the laws of any other state and doing a local business under authority of the Superintendent of Insurance, shall remove any suit from the state to the Federal courts, or institute any proceeding in any Federal Court against a resident of the state, it shall forthwith be the duty of the Insurance Commissioner to revoke the license and all authority of such Insurance Company to do business within the State.

Several similar statutes applicable to railroad companies which do an interstate business have been declared unconstitutional by the Supreme Court of the United States, and on this account it is frequently asserted with much vigor that the Statutes relating to insurance companies must also be unconstitutional if a strict logic be consistently applied.

However, under the authority of the decisions of the Supreme Court of the United States, there is no question at present that State Statutes are constitutional which provide for the cancellation of the license of a foreign insurance company in the event that it removes a suit from the State to the Federal Court. It is held that the question of the constitutional right of the insurance company to remove is not at all involved. The only question is the power of a state to impose the terms on which a foreign insurance company can receive a license to do business or to continue to do business.

The subject has been discussed by the Supreme Court in more than a dozen important cases, and some confusion has existed owing to the fact that corporations engaged in interstate commerce, such as

railroad and telegraph companies, cannot be treated altogether as the state is permitted under the law to deal with a foreign insurance company doing only a local business. The cases, therefore, fall into two classes: first, those relating to insurance companies, and, second, those relating to corporations engaged in interstate commerce. There are two cases in the first division:

Doyle v. Continental Ins. Co., 94 U. S. 535;
Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 248.

All of the other cases are in the second division and relate to interstate commerce.

The Doyle and Prewitt cases are discussed and distinguished in all of the decisions in the second division relating to interstate commerce, but have never been overruled, and are today the law on this question. In both cases, the corporations whose licenses were revoked were foreign insurance corporations, which could not possibly engage in any other than a local business, under the well-settled rule that insurance is not commerce.

The distinction between the two groups of cases is one based upon an interference with interstate commerce. In the Doyle and Prewitt cases it was held, and in all the subsequent cases it was recognized, that a state could, with or without reason and without violating the Constitution, fix the terms on which a foreign insurance company could do business, and revoke its permit to do business within its limits. In the case of a company engaged in interstate commerce another and different question arises. There the state's power is not absolute, and the constitutional right to remove cannot be interfered with. The Supreme Court has held (226 U. S. 204) that the right to carry on interstate commerce is not a privilege granted by the state, or to be interfered with by the State, but is a right which every citizen of the United States has a right to exercise without the imposition of any restrictions by the State. In case of the insurance company, however, there is no reason why the state may not impose any restriction, reasonable or unreasonable, as a condition to doing business.

In the Doyle case, which went up from Wisconsin in 1876, a foreign insurance company had complied with the local statute, and had received a license to do business in the State. Afterward, it removed into the Federal Court a suit brought against it in a State Court of Wisconsin. The state authorities threatened to revoke its license. The company filed a bill in the Federal Court praying for an injunction to restrain the revoking of the license. The Supreme Court said, when the case went there:

"A license to a foreign corporation to enter a state does not involve a permanent right to remain, subject to the laws and constitution of the United States. Full power and control over its territories, its citizens and its business belong to the state.

"If the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus the pleading before us alleged that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal Court.

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry either as to the act itself or as to the reason for it. The State of Wisconsin (except so far as its connection with the Constitution and laws of the United States alters its position) is a sovereign state, possessing all the powers of the most absolute government in the world. * * *

* * * If the act done by the state is legal, is not in violation of the Constitution or Laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law. * * *

* * * If the state has the power to cancel the license it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.* * * The state may compel the foreign company to abstain from the Federal Courts or to cease to do business in the state. It gives the company the option. *This is justifiable because the complainant has no constitutional right to do business in that state; that state has authority at any time to declare that it shall not transact business there.*

"This is the whole point of the case and without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws of Constitution of the United States by its exclusion from the state is infringed; and this is what the state now accomplishes. There is nothing, therefore, that will justify the interference of this court."

The Doyle case was frequently cited and distinguished by the Supreme Court of the United States during the next twenty years.

It was followed and approved in 1906 in a decision of Mr. Justice Peckham in the Prewitt case (202 U. S. 246). In this case, the Supreme Court sustained the constitutional validity of a Kentucky Statute, providing, among other things, that if a foreign insurance company should remove a suit to the Federal Court, without the consent of the other party, any permit previously granted to it to do business in Kentucky should be forthwith revoked. No other question was determined. Mr. Justice Peckham approved the decision in the Doyle case and said that as the state had the right to entirely exclude such company from doing business in the state, the means by which it caused such exclusion, or the motives of its action, were not the subject of judicial inquiry. Some question had been raised as to whether or not the case of *Barron v. Burnside*, 121 U. S. 186, had not overruled the Doyle case. As to this, Mr. Justice Peckham held that the Doyle case had not been overruled and that "*if it had been the intention of the court in Barron v. Burnside to overrule the Doyle case, it was easy to have said so.*" Mr. Justice Peckham then went on to say, at page 257:

"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 for a valid act is immaterial.

"Counsel for the companies, in their brief, admit that the state 'has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute of expulsion would not be affected by the motives of the state in so doing, when though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the state any longer than it chose to allow; and the statute would not abridge any right of removal—for, as the case had already been removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence.'

"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, but what the companies deny is the right of a state to enact in

advance that if a company remove to a Federal Court its license shall be revoked.

"We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. 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 remove a case into a Federal Court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle case we think is good."

The dissenting opinion in this case by Mr. Justice Day, concurred in by Mr. Justice Harlan, indicates how thoroughly the court considered every question that was then or has since been advanced against the constitutionality of the law. The following quotations from this dissenting opinion indicate the strength and nature of the arguments unsuccessfully contended for:

"If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the state may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. * * *

"Conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the state would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the state, and, as we have pointed out, the state might deprive every foreign corporation of the right to do business within its borders, except

upon the condition that it strip itself of the protection given it by the Federal Constitution. * * *

"While we concede the right of a state to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States. * * *

"This court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitution. The Federal authority gives no right to deny to the citizens of a state access to the local courts of a state. For wise purposes the Federal Constitution has provided courts for citizens of different states, believed to be free from local influence and prejudice, and laws have been passed by Congress to make the privilege of resort to them effectual. In our view no state enactment can lawfully abridge this right or destroy it, directly or indirectly, by affixing heavy penalties to its assertion by those lawfully entitled to its enjoyment."

Since 1906, the Supreme Court has not directly passed on this question in an insurance case, but it has discussed the principles involved in the Doyle and Prewitt cases on numerous occasions, and in 1914, in the case of *Harrison v. St. Louis & San Francisco R. R. Co.*, 232 U. S. 318, Chief Justice White, in delivering an opinion relating to the removability of causes by a foreign interstate railway carrier, took occasion to review the Doyle and Prewitt cases, in view of the insistence of counsel that those cases were improperly decided. Chief Justice White 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.*, 94 U. S. 535, and *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 248, is, we think, plainly unfounded. Those cases involve 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 power. 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 since been so repeatedly passed upon as to cause the question not to be open. *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *International Text-Book Co. v. Pigg*, 216 U. S. 91; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, and *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135. The grounds of the decision in the last case show the extremely narrow scope of the rulings in the *Doyle* and *Prewitt* cases, and render their inapplicability to this case certain. Indeed, the ruling in the *Herndon* case and in those subsequent to the *Doyle* and *Prewitt* cases, most of which were reviewed in the *Herndon* case, demonstrated that no authority is afforded by those two cases, for the conception that it is within the power of a state in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and the laws of the United States."

This is the last reference to the *Doyle* and *Prewitt* cases by the Supreme Court of the United States and seems to leave the authority of those decisions in full force, while indicating their inapplicability to the case of a corporation engaged in interstate commerce.

In practically all of the second group of cases relating to foreign corporations doing an interstate business, the distinction between the two groups is clearly noted and the court on several occasions indicated that an interstate railway or telegraph company, acting as a common carrier, or serving the Government in transporting the mails, troops, munitions of war and sending messages for the Government, cannot be denied the right to operate, conduct or do any business within a state through which its line runs, because it removes a suit brought against it from the State Court to the Federal Court. The states cannot deny to these federal corporations the right to enter the states or do business in the states; neither can they announce conditions for noncompliance with which the federal corporations will be excluded from the states, and it is inconceivable that a state could exclude from its borders the federal corporations used as Government agencies, when these corporations decline to surrender their right to litigate in the Federal courts. Therefore while a state may not deprive a foreign corporation engaged in interstate commerce of its right to remove cases, there is nothing to interfere with the right of the state to dictate the terms on which a foreign corporation shall be licensed to do a local business within the state, and to make those terms as difficult, unpleasant or onerous as it pleases. In the case of corpo-

rations engaged in interstate commerce a constitutional right is involved, and not merely the right of the state to exclude a corporation.

In the *Prewitt* case, the Supreme Court stated the general rule which has always obtained in our jurisprudence that a corporation, a mere artificial person, chartered under the laws of one state, not engaged in interstate commerce, could not migrate to another state and exercise its powers there without the consent of that state. As a foreign corporation has no right to come into the borders of another state to do a local business, the court held that such state might deny it admission in the first instance, or not having prescribed conditions in advance and merely permitted the foreign corporation to remain by mere sufferance, or by comity, might, nevertheless, afterward entirely expel it for removing a suit to the Federal court, or for any other reason or motive which the state might deem sufficient.

In one or two cases where foreign corporations engaged in interstate commerce had prior to the passage of the anti-removal statutes acquired a property interest in the state, the decisions were made to turn upon this property right and upon the fact that by afterward denying the right to such corporations to remove cases to the Federal court the "equality" clause of the Constitution was violated by depriving the foreign corporation of equal protection of the laws with the domestic company which had the right to resort to the Federal Court.

In the case of *Herndon v. C., R. I. & P. R. Co.*, 218 U. S. 135, the Supreme Court held that the license or permit to do local business given to a foreign interstate railway company which had come into the state in compliance with its laws, and had acquired, under the sanction of the state, a large amount of property within its borders, could not be revoked under the authority of the Missouri Act of March 13, 1907, and the company subjected to penalties because it brought a suit in a Federal Court, especially where a domestic railway company might bring suit in the Federal Court or in a proper case remove one thereto, without forfeiting its right to do business or incurring a liability to penalties. Both the "equality" and "due process" clauses seem to have been applied in this case, and the Court said:

"This is not a case where the state has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. A corporation was within the state, complying with its laws, and had acquired, under the sanction of the state, a large amount of property within its borders and had thus become a person within the state within the meaning of the Constitution and entitled to its protection."

A railroad or telegraph company has a continuing right to do business in the state both by virtue of the Federal and State laws, and it might acquire a property right to continue to do business without being disturbed by a subsequently adopted anti-removal statute. On the other hand, a foreign insurance company, in Missouri at any rate, does not have and has not had since 1869, a continuing right to do business, but secures merely an annual license which must be renewed from year to year in order to permit it to do business at all. Therefore, when the anti-removal statute was passed in Missouri, in 1907, there were no insurance companies which had any rights that were more than a year old, and all of them must of necessity have had their licenses renewed within a year. So it is not likely that an insurance company could be held to have acquired such property right prior to the passage of the anti-removal statute in 1907 as would entitle it to come within the terms of the Herndon case.

In the case of *Western Union Teleg. Co. vs. Kansas*, 216 U. S. 1, an opinion by Mr. Justice Harlan, who had dissented in the *Prewitt* case, reviews all of the decisions and again distinguishes between foreign corporations engaged in interstate commerce and those doing a purely local business, and discusses in particular the *Doyle* and *Prewitt* cases. He said.

"The vital difference between the *Pewitt* case and the one now before us is that the business of the insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the telegraph company was primarily and mainly that of interstate commerce. A decision such as was rendered in the *Prewitt* case, that a state could, with or without reason, and without violating the Constitution, revoke its permit to a foreign insurance company to do business of a domestic character within its limits, cannot be cited as authority for the proposition, upon which the *Kansas* Statute rests, that a state may prescribe such regulations as to corporations of other states engaged in both interstate and local business, as will require them, as a condition of their doing local business, that they shall contribute a given amount, out of their capital stock, representing all their business, interstate and domestic, wherever done, and all their property, wherever located, in or outside of the state for the support of the state's schools. The *Prewitt* case by no means recognized any uncontrollable power in a state to prohibit all foreign corporations, in whatever business engaged, from doing business within its limits. On the

contrary, this court said in that very case that '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,*' citing various adjudged authorities, among them the case of Hooper v. California, 155 U. S. 648. In the latter case, the court recognized, as long settled, the general principle that the right of a foreign corporation to engage in business within the state depended solely on the will of such state. But it took especial care to say that the interstate business of a foreign corporation was a business of an exceptional character, and was protected by the Constitution against interference by state authority. The cases referred to in support of that view are the same as those hereinbefore cited in this opinion. If it be true that the Statute of Kansas, by its necessary operation, imposes a burden on the interstate business of the telegraph company, and subjects its property and business outside of that state to taxation, then the constitutional validity of the statute, in the particulars adverted to, may be here adjudged without any reference whatever to the judgment in the Prewitt case, and without re-examining the grounds upon which that judgment rested. The court did not intend by its judgment in the Prewitt case to recognize the right of Kentucky by any regulation as to foreign insurance companies, to burden interstate commerce, or to tax property located and used without its limits. It could not have done so without overruling numerous decisions of this court on that subject. On the contrary, as we have seen, the court in that case distinctly recognized the principle that a state could not make any prohibition whatever as to a corporation doing business within its limits that would be in violation of the Federal Constitution. In respect to the point actually decided in it, we leave the Prewitt case and the objections urged against the doctrine it announces wholly one one side, and go no further now than is indicated in this opinion."

It will be observed that Mr. Justice Harlan in his decision took no exception to the authority of the Prewitt case in which he had dissented.

The Doyle and Prewitt cases have been so repeatedly approved that the Supreme Court is not now likely to overthrow them after it has so frequently distinguished and reaffirmed them. The Supreme Court is much less likely than any other court to overrule its own decisions, particularly cases which it has so definitely refused to

overrule. Whatever, therefore, may be the logic of the argument against the soundness of the law announced in those cases, they stand, after many a bitter attack, as the law declaring the constitutionality of the anti-removal statutes insofar as they relate to insurance companies, and I seriously doubt whether the Court would again consider the question.

THOMAS G. RUTLEDGE.