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CORPORATIONS-FOREIGN CORPORATIONS-ENTRANCE FEES- CONSTITUTIONALITY

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CORPORATIONS—FOREIGN CORPORATIONS—ENTRANCE FEES—CONSTITUTIONALITY — A Virginia statute, providing that foreign corporations desiring to carry on intrastate business there must pay an entrance fee graduated according to authorized capital stock, imposed on plaintiff a fee of \$5,000.¹ Only two-thirds of plaintiff's authorized stock was issued. A considerable amount of its assets were used in interstate commerce, though the sum invested in Virginia was negligible. Plaintiff contended that such an entrance fee burdened interstate commerce because measured by property used in interstate commerce, that it denied due process because measured by property without the state, and that it denied equal protection of the laws because measured by authorized capital stock, not all of which was issued. In affirming a prior decision upholding the same statute,² the court *held* that, the state having authority to charge such a fee, it is unimportant how that fee is measured. *Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 58 S. Ct. 75 (1937).³

The Federal Constitution does not confer upon foreign corporations the right to engage in intrastate commerce unless the consent of the state is secured. As this consent may be arbitrarily refused, the states are in a position to bargain with the corporations. But this bargaining power of the state has, in recent decades, become limited to the extent that no state is permitted to condition the entrance of foreign corporations on the surrender of any of its constitutional rights.⁴ Objections most commonly made to these conditions are that they burden interstate commerce, deny due process, and deny equal protection of the laws. To be within the jurisdiction of the state for the purpose of demanding equal protection of the laws, a foreign corporation must obtain the consent of the state to its admission.⁵ Consequently, though the objection is pertinent to the regulation of the corporation once within the state, it does not apply to an entrance fee, however discriminatory in favor of domestic corporations.⁶ And as the payment is compensation for receipt of a privilege, due process is

¹ Va. Tax Code (1930), § 207.

² *General Railway Signal Co. v. Virginia*, 246 U. S. 500, 38 S. Ct. 319 (1917).

³ The case in the state supreme court is reported in 165 Va. 492, 183 S. E. 243 (1936), and is noted in 22 VA. L. REV. 958 (1936).

⁴ Hale, "Unconstitutional Conditions and Constitutional Rights," 35 COL. L. REV. 321 (1935). Until 1906 it was thought that a state might impose any restriction at all on the corporations coming into it. 79 UNIV. PA. L. REV. 1119 at 1130 (1931). At 1132 certain rules are suggested for the determination of the right to exclude foreign corporations.

⁵ 14A C. J. 1250 (1921).

⁶ *Pembina Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 S. Ct. 737 (1888).

hardly an obstruction unless there are additional factors making the charge particularly onerous.⁷ But the states have been forbidden to condition entry of the corporation upon assent to taxes which are otherwise unconstitutional.⁸ As taxes on extraterritorial property, or on property used in interstate commerce, or on the authorized stock of a foreign corporation engaged in interstate commerce are invalid,⁹ the distinction between taxation and compensation for the privilege of doing business becomes of utmost importance. The tendency seems to be to classify levies which would permit evasion of these tax decisions as unconstitutional conditions. Thus corporations which have been admitted into a state and have built up a substantial business there have generally been held not subject to fees which would be unconstitutional as taxes.¹⁰ Furthermore, there is some indication that states will not be permitted to give short term licenses and condition renewals on payment of a fee amounting to an unconstitutional tax.¹¹ Although the immediate case permits an entrance fee graduated according to the authorized capital stock of a corporation engaged in interstate commerce, a method which as a tax would be unconstitutional, elements are present which eliminate the danger of the decision providing a means to evade the tax decisions. The essential facts are that plaintiff had not previously built up an intrastate business in Virginia and that the fee is comparable to the charter, or incorporation, fee which must be paid by domestic corporations.¹²

Charles E. Nadeau

⁷ Objections to due process are more easily sustained when there has been an irretrievable investment and the state imposes conditions amounting to expulsion. Oppenheim, "Unconstitutional Conditions and State Powers," 26 MICH. L. REV. 176 (1927).

⁸ Merrill, "Unconstitutional Conditions," 77 UNIV. PA. L. REV. 879 (1929).

⁹ Of course, there are many other types of tax statutes which have been held to be unconstitutional. The ones here mentioned are those argued in the immediate case. *Union Refrig. Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 481 (1905); *Western Union v. Kansas*, 216 U. S. 1, 30 S. Ct. 190 (1909); *Looney v. Crane Co.*, 245 U. S. 178, 38 S. Ct. 85 (1917). But per contra, see *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 34 S. Ct. 15 (1913).

¹⁰ *Hanover Fire Ins. Co. v. Carr*, 272 U. S. 494, 47 S. Ct. 179, 49 A. L. R. 713 at 726 (1926), noted in 40 HARV. L. REV. 777 (1927) and 15 CAL. L. REV. 316 (1927); *Cudahy Packing Co. v. Hinkle*, 278 U. S. 460, 49 S. Ct. 204 (1928); the decision of the lower federal court is noted in 27 MICH. L. REV. 108 (1928) and 14 VA. L. REV. 660 (1928). See also cases in note 9, supra.

¹¹ *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 7 S. Ct. 108 (1886), seems to stand for the proposition that a state may impose any conditions whatever on renewal. But this is an old case and seems to be qualified by *Hanover Fire Ins. Co. v. Carr*, 272 U. S. 494, 47 S. Ct. 179 (1926), where the ruling was in part based on the fact that there were annual renewal payments. Also see *International Paper Co. v. Massachusetts*, 246 U. S. 135, 38 S. Ct. 292 (1918).

¹² Va. Tax Code (1930), §§ 205, 206. The provisions here provide for public service corporations in a separate class. But in either instance the fees are measured by the authorized capital stock. But the scales used in these sections of the statute are not the same as the section involved in the immediate case.