DISCRIMINATORY TAXATION OF
FOREIGN CORPORATIONS

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FOREIGN corporations have long been victims of discriminatory taxation by the several states. The right to burden them with taxes which either were not levied on domestic corporations or were levied in a considerably smaller proportion was unquestioned until comparatively recent times.1 It is in the equal protection clause of the Fourteenth Amendment of the Federal Constitution that foreign corporations have finally found a sanctum from this oppression.

The present day rule seems to be that unless the taxes paid to the state by foreign corporations are substantially equal and fairly equivalent to those paid by domestic corporations of the same kind, there is an unconstitutional discrimination against foreign corporations.2 However, this principle has not yet been generally applied in corporation and tax legislation, and there is considerable pioneering yet to be done. Of course, there has also been discrimination in favor of foreign corporations and against domestic corporations.3 The states have

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1 "Constitutional Limits upon Franchise Taxation of Foreign Corporations," 38 Harv. L. Rev. 361 (1925); "Changing Law of Foreign Corporations," 33 Pol. Sci. Quar. 549 (1918); "The Doctrine of Unconstitutional Conditions," 15 Cal. L. Rev. 316-26 (1927); "The State's Power over Foreign Corporations," 9 Mich. L. Rev. 549-75 (1911). The foregoing articles also discuss the question of taxing intangible property of the foreign corporations located outside of the state and related questions which come within the purview of the due process clause of the Federal Constitution which are not germane to this subject.


3 Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132, 38 S. Ct. 444, 62 L. Ed. 1025 (1918). See generally, Fletcher Cyclopedia of Corporations (Permanent Edition, Callaghan & Company, Chicago, 1932), XIV, 461, sec. 6926. In Spokane International R. Co. v. State, 162 Wash. 395, 299 P. 362 (1931), the court stated that such discrimination is "on the theory that there is a taxable interest in the one not present in the other—that the domestic corporation may not only be taxed on the privilege granted to
not, however, carried this discrimination to the extent and, often, the gross inequity that they have in regard to foreign corporations.

**APPLICATION OF EQUAL PROTECTION CLAUSE TO FOREIGN CORPORATIONS**

The conception of a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law" and the lack of constitutional protection permitted such discrimination. The enactment of the Fourteenth Amendment to the United States Constitution in 1868 was for some time construed to be of no benefit to foreign corporations.

The last sentence of Section 1 of that amendment, often referred to as the "equal protection clause," declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Foreign corporations, in other instances, had long been held to be "persons." If the state admitted a foreign corporation and it carried on business therein, paid all the taxes required, and filed all the prescribed reports, statements, and the like each year with the proper state officials, obviously it was a "person within its (the state's) juris-

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4 Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (1819).
5 In Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (1869), the Federal Supreme Court in discussing foreign corporations stated: "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States... Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."
diction." Nevertheless, the Supreme Court refused, at first, to so hold,⁷ although in *Philadelphia Fire Association v. New York*,⁸ Justice Harlan, in a strong dissenting opinion, said that a foreign corporation doing business in another state with the consent of the latter was to be deemed "at least in respect to that business" a person within the state's jurisdiction and to be protected by the equal protection clause. In 1907 the court went even further⁹ and allowed a state to eject a foreign corporation, because, since it could have prohibited the corporation from entering the state in the first instance, then, "as it had that right before the corporation got in, so it had the right to turn it out after it got in."

However, in 1910, "in that epoch-making series of cases"¹⁰ the court finally recognized the language of the Fourteenth Amendment and its application to foreign corporations. In three of the cases¹¹ the court applied the due process and commerce clauses in invalidating certain state tax laws discriminating against foreign corporations. In the last case, *Southern Railway Company v. Greene*,¹² the State of Alabama passed an act compelling foreign corporations to pay a franchise tax measured by the value of the property employed by them in the state, in spite of the fact that they were already paying the same taxes as domestic corporations. In holding the statute void under the equal protection clause, the United States Supreme Court pointed out that the Southern Railway Company had been admitted and had acquired a large amount of railroad property by authority and


⁸ 119 U. S. 110 at p. 120, 7 S. Ct. 108, 30 L. Ed. 342 (1886).


¹⁰ Annotation in 79 Am. L. Reg. 1119, 1125.


¹² 216 U. S. 400, 30 S. Ct. 287, 54 L. Ed. 536 (1910).
in compliance with the laws of the state, was subject to the jurisdiction of its courts, had always paid all taxes and had been for many years doing business therein. The court concluded, "We can have no doubt that a corporation thus situated is within the jurisdiction of the State."

The principle of the Greene case was at first not extended. Because of the words, "a corporation thus situated" subsequent decisions limited the doctrine to foreign corporations which had carried on business in the state for some time and had therein large amounts of property of a fixed and permanent nature. There were some later decisions, each with a dissenting opinion on the point, taking a very broad view as to what constitutes presence within the jurisdiction. However, in 1926 in Hanover Fire Insurance Company v. Harding the court extended the rule to a foreign insurance corporation licensed by the state and doing a substantial amount of business therein. In 1927, after stating it was considering only foreign corporations "having a fixed place of business" in the state, the court held that a statute denied foreign corporations the equal protection of the law.


15 272 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372 (1926), wherein the court stated: "In the present case, there is no such permanent investment in the State of Illinois as there was in the Greene case in Alabama, but the averments of the bill show that the complainant has from year to year secured renewal of its license in the State of Illinois, and has through many years past built up a large good will in the State of Illinois and has associated with it a large number of agents in the various counties of the State, whose connection with it has resulted in a large and profitable business to the complainant, and that it has large numbers of records containing information respecting its policy holders, the character and nature of their policies, and other records, the value of all of which would be destroyed if excluded from the State by a denial of the equal protection of the laws. In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the State, the State must not enforce against its licensees unconstitutional burdens."
where the statute permitted foreign corporations to be sued, in transitory actions, anywhere in the state, whereas domestic corporations and natural persons could be sued only in the county where they resided or had a place of business. But, in a case decided in 1935, the court, without considering whether the foreign insurance corporation had any permanent investments in the state or a large or fixed place of business there, stated that it could assume that the corporation, by entering the state and carrying on business there, is not barred from asserting that a law of the state violated the fourteenth amendment because not likewise applied to domestic corporations.

It is apparent that it is not yet clearly established that any foreign corporation which has entered a state may rely upon the equal protection clause, and that in the future the courts will again be called on to extend further its application or to prescribe its limits. It must be remembered, however, that it applies only to foreign corporations "within its [the state's] jurisdiction," and that at least one limitation will be that the foreign corporation must have been properly admitted into the state.

Although various taxes and fees are levied by the states on foreign corporations, they are in fact only of two general classes: those paid in order to secure admission into the state, and those paid after admission, usually annually. Inasmuch as a foreign corporation

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17 Metropolitan Cas. Ins. Co. v. Brownell, 294 U. S. 580, 55 S. Ct. 538, 79 L. Ed. 1070 (1935). In this case an Indiana statute prohibited foreign casualty insurance corporations from limiting by agreement suits against them on their contracts to less than three years, whereas domestic corporations were free to stipulate for any limitation that was reasonable. The court held the statute was not a denial of equal protection of the laws.


19 Some are: property taxes, income taxes, franchise taxes, excise taxes, inheritance taxes, privilege taxes, license fees, and occupation taxes.

applying for admission is not a "person within its [the state's] jurisdiction," the equal protection clause of the Federal Constitution does not apply.21

ADMISSION TAXES

Unfortunately, in sanctioning the discrimination in admission fees of foreign corporations as against the smaller organization fees of domestic corporations, the courts have not clearly defined the theory or the power, if any, exercised by the state in the admission of foreign corporations. The explanations which have been made are not above criticism. It has repeatedly been stated that under principles of comity a foreign corporation is permitted to enter other states and there exercise its corporate powers or otherwise engage in business.22 The courts have then said that under the doctrine of comity the state may levy a fee on the foreign corporation for the privilege of entering.23 However, comity has been defined as the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having

71 L. Ed. 372 (1926), the court stated: "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."


23 Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (1868). See note 22, supra.
due regard both to international duty and convenience, and to
the rights of its own citizens or of other persons who are under
the protection of its laws.\textsuperscript{24} Although the existence of a foreign corporation in the
state where it is created and resides is, by comity, recog-
nized in the other state, the latter is under no constitu-
tional compulsion to recognize it as a person entitled to
admission, and therefore is at liberty to exclude it. It has
been said that since the states may exclude foreign
corporations entirely, they may admit them on condi-
tion, that is, that such corporations first pay certain
taxes.\textsuperscript{25} This would seem to be begging the question. Both
the exclusion and conditional admission of foreign cor-
porations is permitted because of some power which the
state exercises. The exclusion or admission on prescribed
terms is the expression of that power. Nor is it sufficient
to say that this is an exercise of sovereign power. Sov-
ereignty is the exercise or right to exercise supreme
power or dominion and is a status, not an attribute.\textsuperscript{26} All
laws and conduct by the state could, under that reasoning,
be said to be the exercise of sovereign power. Here again
it seems it is an exercise of some power which the state
has by virtue of its sovereignty.

Certain language in the Hanover case\textsuperscript{27} suggests that,
at least as to the admission fees or taxes which the foreign
corporation must pay, this is an exercise of the police
power of the state. In that case the court held that a
statute, which the Illinois courts had construed to levy a

\textsuperscript{24} Hilton v. Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895).
\textsuperscript{25} Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 L. Ed.
127 (1913); Pembina Cons. Silver Mining Co. v. Penn., 125 U. S. 181, 8 S.
Ct. 737, 31 L. Ed. 650 (1888).
1914), III, 3096, defines sovereignty as: "The union and exercise of all
human power possessed in a state: it is a combination of all power; it is
the power to do everything in a state without accountability—to make laws,
to execute and to apply them, to impose and collect taxes and levy con-
tributions, to make war or peace, to form treaties of alliance or of commerce
with foreign nations, and the like."
\textsuperscript{27} Hanover Fire Ins. Co. v. Harding, 272 U. S. 494, 47 S. Ct. 179, 71
L. Ed. 372 (1926).
tax at 100 per cent on the net receipts collected by foreign insurance corporations in the state whereas domestic insurance corporations paid a tax on only 30 per cent of the value of their receipts, denied foreign insurance corporations the equal protection of the laws. In the course of its opinion the court said that in considering the matter it must re-examine the question as to whether the law complained of was a part of the condition upon which admission to do business of the state is permitted and is merely a regulating license by the State to protect the State and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the State as they are made by other taxpayers of the State.

The use of the words "regulating license" and "to protect the State and its citizens" strongly intimates police power. Other courts also have spoken on the matter, although in obiter dictum, and the few cases on the point are in conflict.²⁸

²⁸ In Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 295 P. 1 (1931), the court stated: "The law is well settled that a state, by virtue of its police power, may entirely exclude foreign corporations from the right to do intrastate business within its borders, and therefore may permit them to do business here upon such conditions or subject to such restrictions as it may see fit to impose." In St. Louis Southwestern Ry. Co. v. Stratton, 353 Ill. 273, 187 N. E. 498 (1933), it is said: "The distinction seems clear between an initial or admission fee, by which the State, largely as a protective measure, may exact, in its discretion, either large or small fees from foreign corporations for the privilege of doing business in the State, and a franchise or excise tax, levied principally for revenue purposes upon the exercise of the franchise or contract rights previously granted." "Protective" suggests police power.

Contra, in F. E. Nugent Funeral Home v. Beamish, 315 Pa. 345, 173 A. 177 (1934), in holding valid a statute requiring officers of a corporation engaged in the undertaking business to be licensed undertakers, as applied to a foreign corporation seeking to do business as such, the court stated: "It must be remembered that this condition of entry is not imposed under the police power, but is a regulation judged by the principles of comity. A foreign corporation seeking to do business in a state is not denied equal protection of the law under the Fourteenth Amendment by any state statute since it is not within the jurisdiction of the state." Bracey v. Darst, 218 F. 482 (1914), in holding a blue sky law invalid as to individuals, partnerships and voluntary associations commented on the power of states over corporations, saying: "So far as they are concerned, it is not a question of police power nor of interstate commerce, but purely and simply the exercise of a well-recognized sovereign power over these artificial bodies."
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the protection of the citizens of the state and are, therefore, police power measures. Unless the admission fees can be separated from the other requirements, then they also are fees levied under the police power. If levied under the police power the purpose is regulation and the amount charged must be commensurate with the purpose of the statute and the expense incurred by the state in the supervision and regulation of the foreign corporation, its books and records, financial condition, and the like. Under this theory the entrance fees charged foreign corporations may be deemed to be excessive. However, the entire argument exists only in obiter dictum and if squarely presented to the courts may be repudiated, especially in view of the continued reference to the doctrine of comity.

Connected with the admission of foreign corporations is the question of their status in the state after the expiration of the license theretofore granted to do business therein. Often the state statute will provide for the issuance to the corporation, on being admitted, of a license to do business in the state for one year, and annually thereafter the license is renewed. At the expiration of the license the corporation can be said to be "out" of the state and, in applying for a renewal of its license, as again seeking permission to come in. The courts early adopted this theory and accordingly held that, as a con-

29 The state officials examine its articles of incorporation to see that it is not such a corporation as the state prohibits; they examine its balance sheet and the like to determine whether it has sufficient assets to pay its debts; the corporation designates a resident agent or the secretary of state as agent for process and can thereafter be sued in the state for obligations there incurred.


31 Restatement of Conflict of Laws (American Law Institute Publishers, St. Paul, Minnesota, 1934), Ch. 6, sec. 176 suggests a satisfactory solution to the problem which may be adopted by the courts: "Under the Constitution of the United States, a State cannot make a condition of a foreign corporation's doing business in the State the payment of a tax which it could not constitutionally impose if the corporation had already been permitted to do business in the State."
dition to renewal of the license, discriminatory taxes could be levied on the foreign corporation.\textsuperscript{32} The Hanover case comments on the question.\textsuperscript{33}

However, it would seem that under the equal protection clause the courts will in the future prevent such discrimination, especially in view of the growing tendency to apply it to all foreign corporations.\textsuperscript{34} There is a substantial difference between a foreign corporation applying for admission and one in the state applying for renewal of its license to remain there. A distinction in this regard might be made between those which, at the time of the application for renewal of their licenses, have investments or property in the state the value of which will be materially impaired if removed therefrom if this can be done at all, and those which have little or no property in the state.\textsuperscript{35} It may perhaps be said that any distinction in the future will be between foreign corporations applying for admission in the first instance and those already in, whether their licenses be unlimited or not.\textsuperscript{36}

\textsuperscript{32} Fire Ass'n of Philadelphia v. New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. Ed. 342 (1886); Ashley v. Ryan, 153 U. S. 436, 14 S. Ct. 865, 38 L. Ed. 773 (1894). See also American Smelting Co. v. Colorado, 204 U. S. 103, 27 S. Ct. 198, 51 L. Ed. 393 (1907). In the Philadelphia Fire Ass'n case the foreign corporation had annually received a license and the court remarked: "The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. . . . It could not be of right within such jurisdiction, until it should receive the consent of the State to its entrance therein under the new provisions; and such consent could not be given until the tax, as a license fee for the future, should be paid."

\textsuperscript{33} As reported in 272 U. S. the court said on page 509: "Pending the period of business permitted by the State, the State must not enforce against its licensees unconstitutional burdens." On page 515 the court says that the case of Southern Ry. Co. v. Greene (\textit{supra}, note 11) shows: "That any attempt, in a renewal, to vary the terms of the original license, which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its Federal constitutional rights, can not be effective."

\textsuperscript{34} It was so held in State v. Conn, 116 Ohio St. 127, 156 N. E. 114 (1927).

\textsuperscript{35} But notice also how the Hanover case extended the doctrine of the Greene case which held that equal protection of the laws must be accorded a foreign corporation with fixed investments in the state.

\textsuperscript{36} Note, 15 Cal. L. Rev. 316 (1927).
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Of course, if the foreign corporation is a Federal instrumentality or is engaged in interstate commerce, no admission fee can be exacted. This has already been well discussed and does not involve the question of the unreasonable classification of foreign as against domestic corporations. In this regard the recent decisions of the Supreme Court sustaining the Wagner Labor Relations Act should be noted. The court, in those cases, laid down a very broad definition of interstate commerce. The court may restrict this definition in the future to cases involving the Wagner Act, or it may apply it to all interstate commerce cases. If it pursues the latter course, then the class of corporations coming within the purview of the commerce clause will be greatly enlarged and correspondingly the power of the states over such corporations will be reduced. Future decisions will determine whether those cases may be so interpreted as to further limit the states' powers over foreign corporations.

Post Admission Taxes

Passing to the status of a foreign corporation properly admitted into a state with an unlimited license or during the period of its limited license, the equal protection clause of the Fourteenth Amendment prohibits arbitrary discrimination in favor of domestic corporations. After its admission the foreign corporation stands equal to and


is to be classified with domestic corporations of the same kind.\textsuperscript{40}

The states cannot circumvent this prohibition in the admission requirements, for a foreign corporation’s entry cannot be conditioned upon a surrender of its constitutional rights.\textsuperscript{41} That is, the state cannot require that as a condition upon its entrance it waive the privilege of being accorded due process of law, equal protection of the laws, and the like; nor is such waiver implied by seeking and obtaining admission.\textsuperscript{42} In this respect it is immaterial whether the discriminatory statute was enacted before or after the foreign corporation was admitted.\textsuperscript{43}

The question whether the particular statute denies foreign corporations the equal protection of the laws is not easily answered. If the statute is applicable only to foreign corporations or only to domestic corporations and there is no substantial difference between them in the subject covered by the statute, then the classification is unreasonable. In \textit{Metropolitan Casualty Insurance Co.}


\textsuperscript{42} \textit{Supra}, note 41.

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v. Brownell the court stated that mere classification of foreign as against domestic corporations is not permitted under the equal protection clause, and that the ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made.

Applying those principles the court held that an Indiana statute forbidding foreign casualty insurance corporations to limit by agreement to less than three years the time within which suit may be brought against them on their contracts, whereas similar domestic corporations were free to stipulate for any limitation that was reasonable, was not a denial of equal protection of the laws to such foreign corporations but was justified because of the differences between the two classes of corporations with respect to the security and collection of claims against them. On the other hand, in the Saunders case, after stating that the “classification must rest on differences pertinent to the subject in respect of which the classification is made,” the court held that an Arkansas statute restricting venue in transitory actions if against a domestic corporation to a county where it had a place of business or its chief officer resided and against natural persons to the county where he resided or was found, but which permitted such actions, when against a foreign corporation, to be brought in any county of the state, was unreasonable and arbitrary and denied foreign corporations, doing business in the state and having a fixed place of business in one county, the equal protection of the laws.

Obviously, the same principles apply to the taxation of foreign corporations. The tendency has been to deny

45 274 U. S. 490, 57 S. Ct. 678, 71 L. Ed. 1165 (1927).
that any difference exists between them and similar domestic corporations. Thus, in the Greene case,\(^{47}\) the state of Alabama had passed a statute compelling foreign corporations to pay a franchise tax measured by the value of the property employed by them in the state, which tax was not required of domestic corporations. In holding the statute invalid the court pointed out that, since foreign corporations did the same business as domestic corporations, there was a denial of equal protection of the laws.

In *Leecraft v. Texas Company*,\(^{48}\) the state of Oklahoma had passed an act in 1910 levying an annual license tax upon foreign corporations of one dollar for each one thousand dollars of their capital stock employed in their business done in the state, whereas domestic corporations were taxed only fifty cents for each one thousand dollars. Plaintiff was a foreign corporation and was in the territory when Oklahoma was admitted into the United States in 1907. The court relied on *Southern Railway Company v. Greene*, heretofore mentioned, and held the act void. The court pointed out that the corporation had been admitted, was in the state for a long time, and had certain vested rights, and that to subject it to a higher

\(^{47}\) 216 U. S. 400, 30 S. Ct. 287, 54 L. Ed. 536 (1910), wherein the court said: “The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state does violence to the Federal Constitution.”

\(^{48}\) 281 F. 918 (1922), the court stated: “Plaintiff corporation was not a foreign corporation coming into the state. It was there, it had certain vested rights, and it had been there for a long period of time, between the admission of the state and prior to the passage of the act in question, doing business similar in kind to that transacted by domestic corporations. To subject this plaintiff, under the circumstances disclosed in the record, to a more onerous rule of taxation than domestic corporations for carrying on similar business, is a denial of the equal protection of the laws and violative of the Fourteenth Amendment to the Constitution.”
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tax than similar domestic corporations was a denial of the equal protection of the laws. In 1927, the state of Oklahoma amended the above act to require each foreign corporation to pay an annual license fee of one dollar for each one thousand dollars of its capital invested in the state and each domestic corporation to pay fifty cents for each one thousand dollars of its authorized capital stock. This act was also held invalid in *Sneed v. Shaffer Oil Company* for the same reasons as in the Leecraft case.

*In re Thermiodyne Radio Corporation* involved a New York statute requiring foreign corporations to pay a tax of six cents per share on their no par stock employed in the state as set forth in the statute. After reviewing the New York cases, holding the tax was not an admission fee but was a revenue measure applying after the foreign corporation was in the state, the court held the statute denied foreign corporations the equal protection of the laws.

An Oregon statute permitted insurance corporations to solicit insurance only through registered agents. Two such agents were permitted each company in cities of over 50,000 inhabitants. The fee due from the company was two dollars for each agent and apparently five hundred dollars for each additional agent of foreign insur-

49 35 F. (2d) 21 (1929), the court stated: "Thus the basis of the fee for a domestic corporation is a named rate on its authorized capital stock, and for a foreign corporation a higher rate on its assets within the state, both factors being substantially different. If in a conceivable comparison between a domestic and a foreign corporation it should turn out that the foreign corporation paid no more or less than a domestic the result would be fortuitous: 'the act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application.' Air-Way Corp. v. Day, 266 U. S. 71, 45 S. Ct. 12, 69 L. Ed. 169 [1924]."

"Following, as we believed, the principle announced in Southern Railway Co. v. Greene, 216 U. S. 400, 30 S. Ct. 287, 290, 54 L. Ed. 536, 17 Ann. Cas. 1247 [1910], this court held, in Leecraft v. Texas Co., 281 F. 918 [1922], the Act of 1910 to be in contravention of the Fourteenth Amendment. The Act of 1927 seems to be more obviously open to the attack. Foreign corporations are not classified with domestic corporations of the same kind. The fee exacted of one is to be ascertained in a different and unequal way from the fee exacted of the other."

50 26 F. (2d) 713 (1928), affirmed in memorandum opinion in 28 F. (2d) 1017 (1928).
ance corporations but only two dollars for domestic corporations. A foreign insurance corporation sought to enjoin the state insurance commissioner by a proceeding in the Federal District Court from exacting the five hundred dollar fee on its application for registration of a third agent in Portland. The court granted an injunction, and, after pointing out that although it was not clear the five hundred dollar fee applied only to foreign insurers, it was justified in so assuming, held the classification unreasonable and denied foreign insurance companies the equal protection of the law. In Hanover Insurance Company v. Harding, the court held that foreign insurance corporations were denied the equal protection of the laws when the premiums collected by them were taxed at 100 per cent and domestic corporations were taxed on only 30 per cent of the premiums collected.

One Herbring sought to be the third agent in Portland of the Northwestern National Insurance Company, a foreign corporation. The state insurance commissioner demanded that the $500 fee be paid by the company. In Herbring v. Lee, 126 Or. 588, 269 P. 236, 60 A. L. R. 1165 (1928), the Oregon Supreme Court held the statute valid as a proper condition on the right of foreign insurance companies to do business in the state and refused to compel the insurance commissioner to issue the license for a two dollar fee. On appeal to the United States Supreme Court, 280 U. S. 111, 50 S. Ct. 49, 74 L. Ed. 217 (1929), the judgment was affirmed, on the ground that it did not interfere with any constitutional right of Herbring but declined to pass on the rights of the insurance company. The corporation thereafter enjoined the insurance commissioner from exacting the $500 fee in Northwestern Nat. Ins. Co. v. Lee, 49 F. (2d) 274 (1931).


272 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372 (1926), wherein the court stated: "By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment. But an occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of that property. It is a denial of the equal protection of the laws."

See also National Savings & Loan Ass'n v. Gillis, 35 F. (2d) 386 (1929); Michigan Millers Ins. Co. v. McDonough, 358 Ill. 575, 193 N. E. 662 (1934); O'Gara Coal Co. v. Emerson, 326 Ill. 18, 156 N. E. 814 (1927);
DISCRIMINATORY TAXATION

In considering the question whether the foreign corporation was the subject of an arbitrary tax, the courts have not considered the other taxes paid by the foreign and similar domestic corporations. It would seem that foreign corporations are not denied equal protection in taxation merely because the same taxes levied upon them are not also levied upon similar domestic corporations. Because a particular tax is exacted, for example, of a foreign insurance corporation and not of a domestic insurance corporation is not necessarily a denial of equal protection of the laws to the foreign corporation. The equality required is in the total taxes paid. If there is a substantial difference, suggestive of an arbitrary and unreasonable classification, between the total taxes paid by the foreign corporation and by similar domestic corporations, then the foreign corporation has been denied the equal protection of the laws. This was suggested in the Hanover case. However, the question was squarely decided in Concordia Fire Insurance Company v. Illinois. In that case it was urged that the statute arbitrarily discriminated against foreign fire, marine, and inland navigation insurance corporations and in favor of competing domestic corporations, in that it taxed the net receipts of the former, while the latter were

Montgomery Ward & Co. v. Becker, 334 Mo. 789, 69 S. W. (2d) 674 (1934); In re Thomas' Estate, 185 Wash. 113, 53 P. (2d) 305 (1936). In the case of Boteler v. Conway, 13 Cal. App. (2d) 79, 56 P. (2d) 587 (1936), the California court reaffirmed the old doctrine that conditions may be imposed upon foreign corporations which "discriminate in favor of domestic corporations or which are even prohibitive" except such as are instrumentalities of the Federal government or are engaged in interstate commerce.

55 Hanover Ins. Co. v. Harding, 273 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372 (1926). Under the prior construction of the statute in that case, premiums of foreign insurance corporations had been treated as personal property and were valued, for the tax, at 30 per cent, as were the premiums of domestic corporations. The court said that "it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in."

not subject to such a tax or to any equivalent tax. In its answer the state conceded that no tax was laid directly on the net receipts of the domestic corporations but denied that those corporations were not subjected to an equivalent tax. The Supreme Court referred to the above quotation from the Hanover case and stated:

Counsel differ as to whether that statement was necessary to the decision of the case in hand. Be this as it may, the statement recognizes that substantial equality and fair equivalence are important factors in determining the presence or absence of arbitrary discrimination in such situations; and in this respect the statement is in accord with repeated decisions of this Court. Mathematical equivalence is neither required nor attainable; nor is identity in mere modes of taxation of importance where there is substantial equality in the resulting burdens.

By reason of the presumption of validity which attends legislative and official action one who alleges unreasonable discrimination must carry the burden of showing it. This has not been done as respects the claim now being considered. The defendant recognizes that the domestic corporations are subjected to some taxes not laid on the foreign corporations, a capital stock tax apparently being one. But the full situation is not shown; nor is it reflected in the opinion of the Supreme Court or the cases there cited. For aught that appears it may be that taxes not applied to the foreign corporations are laid on the domestic corporations which are the substantial equivalent of the net receipts tax. For these reasons this claim of discrimination must fail.

The decision marks another step in the enlightened treatment of foreign corporations. A foreign corporation may enter a state and thereafter must be granted the equal protection of the laws. They may thereafter still be classified for tax purposes differently from domestic corporations. They may be required to pay different taxes and even taxes which domestic corporations of the same kind do not pay. However, the total taxes paid by the foreign corporations must be substantially equal and fairly equivalent to the total paid by similar domestic corporations. This constitutes reasonable and practical taxation. It is a far cry from Paul v. Virginia. 57

57 Supra, note 5.
NOTES AND COMMENTS

DOES EXTENSION OF ONE MORTGAGE NOTE OF SEVERAL WHICH ARE IN PARITY EFFECT A SUBORDINATION?

An almost universal opinion seems to be held by members of the bar that if the holder of one of several notes secured by a trust deed enters into an extension agreement with the owner of the property, he thereby subordinates his note to the lien of the holders of the balance of the notes. For example, if ten notes are secured by a trust deed, due one each year, beginning one year from date, and the trust deed contains the usual "parity" clause negating any priority of any one note over any other by reason of prior maturity, then if the holder of note number 1, when it matures, grants the owner of the property an extension, no matter how short the extended period may be, he is thought thereby to have reduced his note to the status of a second mortgage on the property.

An opinion so widely entertained by the bar usually has some basis in the decided cases. It is therefore interesting to learn that an extensive search of the authorities reveals only two cases in this country in which the question has been raised and adjudicated. One of these is Zalesk v. Wolanski,1 in which the facts were very similar to the above illustration. The owner of note number 1 had granted two extensions, and he finally instituted foreclosure proceedings, in the course of which the owner of the last maturing note contended that because the extensions were granted without the consent of the owners of the other notes, note number 1 had been subordinated to the balance of the notes. No precedents were cited in the briefs of either party on the appeal, and the court disposes of the point summarily by observing that "Whether the time for the payment of note number 1 was extended or not, or whether it was paid at the time of its original maturity or not, could not possibly have affected the rights of the appealing defendant, except that its payment might possibly have bettered this defendant's security. When the makers of note number 9 defaulted in the payment of interest on this note, the Polish National Alliance, its owner, had the right to proceed with the foreclosure of the mortgage in the same manner as plaintiff has proceeded here, if it had chosen to do so, and its rights in the premises in such situation would be the same as the rights claimed and attempted to be exercised by the plaintiff."

1 281 Ill. App. 54 (1935).
It seems obvious that the only equitable ground for holding that an extension of one note subordinates it to the rest would be that such an extension works a hardship upon, or prejudices the rights of, the holders of the rest of the notes. It is submitted that no such result flows from such an extension. It certainly would be incumbent upon any noteholder to make inquiry as to whether any prior maturing note had been paid; he cannot safely assume that this payment has been made, and a written or verbal extension agreement by one noteholder would, as to all other noteholders, be equivalent to a default in payment; to hold that, as to them, it is not a default would be in effect to hold that one party to a multilateral contract can change its provisions without the consent of all parties to the contract. As to all other noteholders, an extension granted by one noteholder can have no other effect than a mere forbearance, or failure to do anything about a default in payment of his note. Certainly such forbearance can not be held to effect a subordination of that note, and it logically follows that an express agreement to extend time of maturity does not work a subordination.

The only other case in this country that bears upon the question is that of *Dakota Trust Company v. Lucky Strike Coal Company.* This was not the case of an ordinary extension, but the facts are analogous. After part of an issue of bonds of the Lucky Strike Coal Company had been sold, the manager of the company, in order to facilitate the sale of bonds, approved a change in their terms, to make them fall due, in September.

"It is contended that no material change could be made in any of the terms of the notes without the consent of every holder of notes issued. It is said that the holder of each note or bond is brought into contract relations with every other holder, and, inasmuch as each note refers to the trust deed securing all of them, that no note can be altered without affecting the contract rights of the holder of an unaltered note. The validity of these contentions, in our opinion, depends on the character and effect of the alterations upon the rights of the holder of an unaltered note. There are two alterations and they must be considered separately. First, the due date is changed from September 25, 1921, to November 1, 1921. What is the effect of this change upon the rights of the holder of an original note? It cannot postpone his right to foreclose the mortgage upon the nonpayment of his note. It cannot affect his right to a personal judgment. It does not
increase the amount for which the trust deed is to stand as security. It can only operate to postpone the time when the holders of the altered notes may avail themselves of the rights enjoyed by the holders of the unaltered notes. It cannot affect the latter prejudicially in the bondholders relations "inter se.""

The reasoning of the court seems unanswerable. Unless and until some court of last resort renders a contrary decision, it will be necessary for the members of the bar to abandon the erroneous and widely entertained opinion that an extension by one note-holder subordinates his note to the balance of the issue.

G. W. McGrew

JOINDER OF PARTIES AND CONSTRUCTION OF THE CIVIL PRACTICE ACT BY THE APPELLATE COURTS

Since the legislature adopted the Civil Practice Act, the bar has generally felt that a liberal construction of its terms, as provided for in the act, would be followed by the courts. However, as is the usual result when any codification of the law is attempted, the interpretation by courts, sitting in different districts, has followed widely divergent lines.

This difference of opinion has been well illustrated by Illinois decisions in the past year. For instance, the effect of sections 23 and 25 of the Act has always been in doubt, although the general trend of opinion probably was that both should be governed by the section calling for a liberal construction. Nevertheless, it is self evident that the courts do not feel bound by the latter expression of legislative intent. Where a strict construction is followed, it often results in very little change, under the Civil Practice Act, from the common law procedure, and it was the realization of this that prompted the Appellate Court of the First District to follow a liberal construction of section 25 in Bobzien v. Schwartz, disregarding decisions upon the same question decided prior to the adoption of the Act.

The issue in this case was whether or not the holder of a tax deed to real property was a proper party to foreclosure proceedings on such property. Previously the Illinois courts had not only held that he was not a proper party, but that when he was

1 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 110, § 128.
2 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 110, § 147.
5 Runner v. White, 60 Ill. App. 247 (1895) ; Bogarth v. Sanders, 113 Ill. 181 (1885) ; Whittemore v. Shiell, 14 Ill. App. 414 (1883) ; Gage v. Perry, 93 Ill. 176 (1879) ; Whitaker v. Irons, 300 Ill. 254, 133 N. E. 265 (1921).
joined as a defendant the court was under a duty to order him dismissed.6 The theory was that only persons whose rights are derived from the mortgagor and mortgagee can be made parties to a foreclosure, since the sole controversy in the foreclosure proceedings is the mortgage and its enforcement as a lien upon the property in question. Under a strict construction of the Civil Practice Act, this privity would still be necessary, but a liberal interpretation gives the action a much wider scope. The Appellate Court held that section 25 of the Act conceded full power to the court and expanded the matters in controversy to a complete determination of all rights, titles, interests, or liens concerning the subject matter, which here was the property subject to foreclosure. Hence, the rights of a holder of a tax deed to the land, as well as those of the parties to the mortgage, can be settled in one litigation with that resultant decreased amount of litigation which it is the intent of the Act to effect. Following this theory, the matters in controversy in a foreclosure action are expanded, and the tax deed grantee becomes, not only a proper party to such proceedings, but at times a necessary party.

Under similar statutes, other states7 have also adopted this viewpoint, although the weight of authority is apparently more conservative.8 A few decisions are found which hold that where the tax deed is derived subsequent to the mortgage, or from a stranger, it may be litigated in the foreclosure proceedings at the option of the mortgagee, since such title is, in effect, derived from the mortgagor through his failure to pay the taxes.9 These latter decisions certainly are the forerunners of the liberal attitude of this Illinois Appellate Court whose primary desire is to settle all possible questions in one litigation.

In direct contrast to this, the Appellate Court for the Second District adopted a conservative basis for the construction of section 23.10 In Gombie et al. v. Taylor Washing Machine Com-

6 Whittemore v. Schiell, 14 Ill. App. 414 (1883).
7 Upjohn v. Moore, 45 Wyo. 96, 16 P. (2d) 40 (1932).
10 "Section 23. (Joiner of Plaintiffs.) Subject to rules, all persons may join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to
pany, it held that this section merely adopted the equity rule of joinder for actions at law and that it had no effect upon previous holdings as to multifarious bills. The case arose upon the following facts: Harold Gombie and twenty-nine others joined as plaintiffs in the complaint and sought an injunction to restrain the defendant corporation from prosecuting any action at law upon any contract with each plaintiff. The defendant's agent, over a period of three months, had sold each plaintiff a washing machine, made false representations as to its quality, and threatened legal action to collect the installments due on the machines. The defendant filed a motion to dismiss the complaint on the ground of multifariousness, and the plaintiffs' contention was that under the statute this was no longer ground for dismissal.

The original English statute was amended to remedy a situation exactly analogous to this case, and the present amended statute is in the same form as section 23. Later decisions indicate that the effect is to permit a joinder of causes of action as well as a joinder of parties. This English statute was adopted by New York in 1921 and was substantially followed by the draughtsmen of the Illinois Practice Act. In the Gombie case, the Appellate Court held that the former equity rule against multifariousness was not affected, since the statute merely adopted the equity rule as to joinder of parties for law practice. The latter statement, however, cannot be given weight beyond that of dictum, since the present action was in equity and the effect of the section upon actions at law was not in issue.

In attempting to follow the decisions of the New York court, the Appellate Court—after quoting from Akely v. Kinnicutt, where it was said that it was necessary to a joinder under the code that the causes of action not only involve a common question of law and fact, but that they should also arise out of the same transaction—concluded that the instant case did not arise out of

exist, whether jointly, severally or in the alternative, where if such persons had brought separate actions any common question of law or fact would arise: . . ." Smith-Hurd’s Ill. Rev. Stats. (1935), Ch. 110, § 147.

12 Supra, footnote 10.
13 English Order 16, Rule 1.
16 New York Civil Practice Act (1921), sec. 209.
18 238 N. Y. 466, 144 N. E. 682 (1924).
the same series of transactions. However, it must be noted that
the New York Court in the cited case allowed the joinder of one
hundred and ninety-three plaintiffs in a charge of fraud in the
purchase of stock and, after making the quoted statement, con-
tinued: "The transaction in respect of and out of which the
cause of action arises is the purchase by the plaintiff of his stock
... and such purchases conducted by one plaintiff after another
respectively plainly constitute a series of transactions within the
meaning of the statute ... the many purchases by the plaintiffs
respectively do not lose their character as a series of transactions
because they occurred at different places and times extending
through many months." Although the facts in the New York
case differed from those in the instant case in that a prospectus of
the company was issued previous to the sale of the stock, a fact
which might be held to be a connecting link to give the sales the
character of "a series of transactions," the court did not base
its decision upon the issuance of such prospectus, and the New
York holding is certainly not authority for the decision of the
Appellate Court in the instant case.

Although the Supreme Court of Kansas is in accord with the
Appellate Court on this construction,19 Professor McCaskill has
stated that the words "or series of transactions" were added to
the original drafting to avoid any narrow interpretation of the
act.20 The decision in the Gombie case follows the strict rather
than the liberal rule of construction provided for by the legis-
lature, and is divergent from the liberal attitude of the court in
the Bobzien case, but both must now be followed in respect to the
sections construed until a final determination is had from the
Supreme Court.

G. O. HEBEL.

20 O. L. McCaskill, Illinois Civil Practice Act Annotated, (The Founda-
tion Press, 1933), p. 43.