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Conflict of Laws -- Insurance -- Service of Process

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Conflict of Laws—Insurance—Service of Process.

Action was instituted by plaintiff, a citizen and resident of Mississippi, upon a default judgment rendered by a County Court of the State of Mississippi upon a policy of insurance issued as a result of the solicitation of defendant's Mississippi agent, defendant being a North Carolina corporation. It appeared from the Mississippi judgment that at the time of the institution of the action in the courts of Mississippi, defendant company was no longer doing business there and process was served on it by service on the Insurance Commissioner under a Mississippi statute requiring foreign insurance companies to appoint the Insurance Commissioner as their attorney to accept service so long as any liability of the company remained outstanding in the state. Summons was also served on the resident agent who had represented defendant company at the time the policy was issued. Defendant contends that the Mississippi Court did not have jurisdiction because it was not doing business in the State and had not appointed the Insurance Commissioner its attorney to accept service. *Held,* for plaintiff. Defendant was estopped to set up its noncompliance with the statute and it was conclusively presumed to have complied with such statute.[1]

Under the well settled rule that a state has the power to exclude, restrict or regulate foreign corporations, doing or seeking to do business within its borders,[2] statutes have been passed requiring the corporation before doing business in the state to have an agent in the state upon whom service of process may be had.[3] More particularly, foreign insurance companies, which may be regulated under the police power,[4] must designate some statutory agent such as the Insurance Commissioner to accept service of process.[5] These statutes have been held valid[6] and

[1] Dansby v. N. C. Mut. Life Ins. Co., 211 N. C. 120, 189 S. E. 122 (1937). See also 209 N. C. 127, 183 S. E. 521 (1936).

[2] Paul v. Virginia, 75 U. S. 168, 19 L. ed. 357 (1869); State of Wash. *ex. rel.* Bond and Goodwin and Tucker, Inc. v. Superior Court of Wash. for Spokane County, 289 U. S. 361, 53 Sup. Ct. 624, 77 L. ed. 1256 (1932); Northwestern Mut. Life Ins. Co. v. Wis., 247 U. S. 132, 38 Sup. Ct. 444, 62 L. ed. 1025 (1917) (The business of insurance, as ordinarily conducted, is not interstate commerce, and a state may absolutely exclude a foreign insurance company from doing business within the state or may permit it to come within the state under such restraints and regulations as the state may choose.); Fisher v. Trader's Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667 (1904); Lunceford v. Commercial Travelers' Mut. Acc. Ass'n of America, 190 N. C. 314, 129 S. E. 805 (1935); 17 FLETCHER, PRIVATE CORPORATIONS (Perm. ed., 1933) §§8386, n. 5, 8416, n. 3 (cases collected).

[3] 18 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8697 (statutes collected under footnote 54). As to jurisdiction of partnerships see Flexner v. Farson, 248 U. S. 289, 39 Sup. Ct. 97, 63 L. ed. 250 (1918).

[4] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011 (1914) (Insurance business clothed with public interest and may be regulated under state's police power.); La Tourette v. McMasters, Ins. Comm'r, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. ed. 362 (1919).

[5] MISSISSIPPI CODE ANN. §5165(3); N. C. CODE ANN. (Michie, 1935) §6411.

[6] Mut. Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47

are said to become part of insurance policies.[7] The limitations, conditions, restrictions and burdens imposed by these statutes must of course not infringe upon the rights accorded by the provisions of the Federal or State Constitutions.[8] In some types of situations the above mentioned statutes must, to be constitutional, require that the agent give the foreign corporation notice of the service of process upon him.[9] There is a difference of opinion as to the effect of the failure of a foreign corporation to appoint a designated state official its agent to receive service of process.[10] The most logical rule is found in those cases holding that when a foreign insurance corporation does business in a state but fails to comply with the statute requiring the appointment of a designated state official as its process agent, the corporation will nevertheless be bound by such service for all causes of action arising out of business transacted within the state;[11] as in the principal case, but not

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L. ed. 987 (1903); Biggs v. Mut. Reserve Fund Ass'n, 128 N. C. 5, 37 S. E. 955 (1901); Moore v. Mut. Reserve Fund Ass'n, 129 N. C. 31, 39 S. E. 637 (1901); Mut. Reserve Fund Ass'n v. Scott, 136 N. C. 157, 48 S. E. 581 (1904); 18 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8762, n. 97.

[7] Collier v. Mutual Reserve Fund Life Ass'n, 119 Fed. 617 (D. C. Mass., 1902); Am. Loan and Investment Co. v. Boraas, 156 Minn. 431, 195 N. W. 271 (1923); Woodward v. Mut. Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10 (1904).

[8] Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. ed. 915 (1887); Horn Silver Mining Co. v. N. Y., 143 U. S. 305, 12 Sup. Ct. 403, 36 L. ed. 164 (1891) (state cannot interfere with interstate or foreign commerce); So. Pacific v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. ed. 915 (1887); Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. ed. 297 (1895); (Thus a corporation cannot be deprived of the right to enter a state and transact business therein, when it has derived its existence from an Act of Congress, and is a lawful agency for the performance of governmental or quasi-governmental functions.); Liggett v. Baldridge, 278 U. S. 105, 49 Sup. Ct. 57, 73 L. ed. 204 (1928); Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53 (1904), *aff'd*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. ed. 451 (1905); State v. Agcy, 171 N. C. 831, 88 S. E. 726 (1916); Brust v. First National Bank of Stevens Point, 184 Wis. 15, 198 N. W. 749 (1924) (Nat. bank cannot be excluded); 17 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8390, n. 32. (cases collected).

[9] State of Wash. *ex rel.* Bond and Goodwin and Tucker v. Superior Ct. of Wash. for Spokane County, 289 U. S. 361, 53 Sup. Ct. 624, 77 L. ed. 1256, 89 A. L. R. 658 (1933) (Statute not invalid for failure to require state official to give foreign corporation notice of service on him since foreign corporation could have appointed its own agent.); Consolidated Flour Mills Co. v. Muegge, 278 U. S. 559, 49 Sup. Ct. 17, 73 L. ed. 505 (1928) (Where a foreign corporation has done business within the state in defiance of statutory conditions and then withdrawn, it may be brought into court by service on a state officer only if the statute imposes a duty to notify.); Note (1933) 89 A. L. R. 658 (review of holdings).

[10] Rothrock v. Dwelling House Ins., 161 Mass. 423, 37 N. E. 206, 23 L. R. A. 863 (1894) (service on state official whom the statute requires to be designated but who has not in fact been designated held insufficient to confer jurisdiction to render judgment against the corporation); Mason's Frat. Acc. Ass'n v. Riley, 60 Ark. 578, 31 S. W. 148 (1895).

[11] Funk v. Anglo-Am. Ins. Co., 27 Fed. 336 (C. C. E. D. Mo., 1886); Knapp, Stout and Co. v. Nat. Mut. Fire Ins. Co., 30 Fed. 607 (C. C. E. D. Mo., 1887); Sparks v. Nat. Masonic Acc. Ass'n, 100 Iowa 458, 69 N. W. 678 (1896); Kulberg v. Frat. Union of Am., 131 Minn. 131, 154 N. W. 748 (1915); Braunstein v. Frat. Union of Am., 133 Minn. 8, 157 N. W. 721 (1916); Richardson Machinery v.

as to business transacted out of the state.[12] This rule is based on the theory that by doing business in the state the corporation is said to have consented to jurisdiction,[13] such consent being presumed;[14] or on the theory that the corporation is estopped to set up its violation of the statute.[15] The consent that is said to be implied in such cases is of course a mere fiction, justified by the accepted doctrine that the state could exclude the foreign corporation altogether, and could, therefore, establish this obligation as a condition to its admission to the state.[16]

By the great weight of authority under statutes similar to those under discussion, the withdrawal of the corporation from the state does not revoke the authority of the agent to receive service in an action arising in the state out of business done by the corporation therein[17] as the appointment of a state official is a power coupled with an interest and, therefore, irrevocable.[18] If this were not true the corporation would be able to avoid jurisdiction and thus place a great hardship upon those who had dealt with it. As was expressed in one case, "the end sought to be attained [protection of those dealing with the foreign corporation by providing statutory agent for receiving service] would be as illusory as a will o' the wisp, which fleets when it is sought to grasp it."[19] In addition to service upon a designated state

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Scott, 122 Okla. 125, 251 Pac. 482 (1926); Conques v. La. Western Ry., 295 S. W. 935 (Tex. 1937).

[12] Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. ed. 369 (1907).

[13] Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451 (1855).

[14] Knapp, Stout and Co. v. Nat. Mut. Fire Ins. Co., 30 Fed. 607 (C. C. E. D. Mo., 1887) (service prima facie good); Flinn v. Western Mut. Life Ass'n, 187 Iowa 507, 171 N. W. 711 (1919) (conclusive presumption).

[15] North Am. Union v. Oliphant, 141 Ark. 346, 217 S. W. 1 (1919); Erhman v. Teutonia Ins. Co., 1 Fed. 471 (1880) (The receipt of the premium and execution and delivery of the policy by the company are equivalent to an assertion that it has complied with the requirements of the statute to entitle it to do business in the state, and, as between the assured and the company, the latter is estopped upon the soundest principles of the law and morals to say that it has not done so.); Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667 (1904); 17 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8520, n. 36.

[16] Lafayette Ins. Co., v. French, 18 How. 404, 15 L. ed. 451 (1855).

[17] Woodward v. Mut. Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10 (1904); Biggs v. Mut. Reserve Fund Life Ass'n, 128 N. C. 5, 37 S. E. 955 (1901); Hinton v. Mut. Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474 (1904); RESTATEMENT, CONFLICT OF LAWS (1934) §93; Note (1926) 45 A. L. R. 1447; 18 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8762 (excellent treatment of the problem).

[18] Moore v. Mut. Reserve Fund Life Ass'n, 129 N. C. 31, 39 S. E. 637 (1901) (Exception to general rule that agency may be revoked recognized in that agency irrevocable when coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of someone, or some interest.); Frazier v. Steel and Tube Co. of America, 101 W. Va. 327, 132 S. E. 723 (1926). The objective seems to be to give the insured a feeling of security as to an adequate remedy on his policy.

[19] Biggs v. Mut. Reserve Fund Life Ass'n, 128 N. C. 6, 7, 37 S. E. 955, 956 (1901).

official, the former agent of the company which has withdrawn may be served with process so as to bind the foreign corporation, where the matter in controversy arose out of business transacted in the state by the corporation prior to its withdrawal.[20] This is to prevent the miscarriage of justice through efforts of the corporation to withdraw and thus avoid jurisdiction.[21]

North Carolina requires of foreign insurance companies as a condition precedent[22] to doing business in the state that they give the Insurance Commissioner an irrevocable power of attorney so long as any liability of the company remains outstanding in the state.[23] If this requirement is not complied with, service may be had as in the case of other corporations.[24]

The full faith and credit provision of the Constitution does not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.[25] By the weight of authority, however, the foreign judgment is conclusive on collateral attack except for want of jurisdiction or fraud.[26] As to judgments rendered by the courts not of record of another state the earlier cases held that such judgments were not conclusive on the merits,[27] but it is now generally settled that such judgments, when properly proved and when jurisdiction is shown to have existed, are entitled to full faith and credit in other states, and are as conclusive as the judgments of a court of record.[28]

[20] Mut. Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. ed. 987 (1903); Fisher v. Traders' Mut. Life Ass'n, 136 N. C. 217, 48 S. E. 667 (1904); FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8761, n. 67.

[21] Brown-Ketchan Iron Works v. Swift Co., 53 Ind. A. 630, 100 N. E. 584 (1913).

[22] Biggs v. Mut. Reserve Fund Life Ass'n, 128 N. C. 5, 37 S. E. 955 (1901).

[23] Mutual Reserve Fund Life Ass'n v. Scott, 136 N. C. 157, 48 S. E. 581 (1904); N. C. CODE ANN. (Michie, 1935) §6411.

[24] Hinton v. Mut. Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161 (1904); Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667 (1904); Brenzier v. Supreme Council, Royal Arcanum, 141 N. C. 409, 53 S. E. 835, 6 L. R. A. (N. S.) 235 (1906); Pardue v. Asher, 174 N. C. 676, 94 S. E. 414 (1917); N. C. CODE ANN. (Michie, 1935) §§483, 1137 (service on foreign corporations).

[25] Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897 (1873). To the same effect: Mottu v. Davis, 151 N. C. 237, 65 S. E. 969 (1909).

[26] Lewis v. United Order of Good Samaritans, 182 Ark. 914, 33 S. W. (2d) 53 (1930).

[27] Wood v. Wood, 78 Ky. 624 (1880); Warren v. Flagg, 2 Pick. 448 (Mass. 1824).

[28] Helton v. Turner, 153 So. 866 (Ala. 1934) (In action on a judgment on note rendered by Tenn. justice of the peace court, the courts of Ala. are bound to presume that the Tenn. court legally possessed jurisdiction over the subject matter upon which it professed to adjudicate, until the contrary is made to appear.); Glass v. Blackwell, 48 Ark. 50, 2 S. W. 257 (1886); Banister v. Campbell, 138 Cal. 455, 71 Pac. 504 (1903); Baltimore and Ohio Ry. v. Freeze, 169 Ind. 370, 82 N. E. 76 (1906); Matter of Curtis, 134 App. Div. 547, 119 N. Y. Supp. 556 (1909), *aff'd*, 197 N. Y. 583, 91 N. E. 1111 (1910).

Some courts say that all facts essential to jurisdiction must appear on the face of the record or be shown by competent evidence before the adjudication can be accepted as binding and conclusive.[29] Other courts go so far as to hold that foreign judgments may be attacked for want of jurisdiction, even though jurisdictional facts are recited therein.[30] In determining the question of jurisdiction of the parties in the foreign judgment, courts have made use of certain presumptions[31] which are relied upon only in the absence of evidence or averments respecting the facts presumed.[32] Such presumption of jurisdiction may be either rebuttable[33] or conclusive.[34] In the absence of a presumption the burden of proving want of jurisdiction is on the defendant pleading it.[35] If the record of the judgment shows on its face that the court rendering it did not have jurisdiction, the judgment will not be recognized by the courts of other states.[36] Neither will there be a presumption of jurisdiction if the judgment is in proceedings which are special and statutory and not according to the course of the common law.[37] Once the jurisdiction of the subject matter of the suit and the person of the defendant are obtained, it will be presumed that jurisdiction continued to the judgment in the absence of evidence to the contrary.[38] It has been held that a direct adjudication by the courts of one state

[29] Galpin v. Page, 18 Wall. 350, 21 L. ed. 959 (1873); Helton v. Turner, 153 So. 866 (Ala. 1934); Toler v. Coover, 335 Mo. 113, 71 S. W. (2d) 1067 (1934); Fox Vliet Drug Co. v. Arnold, 84 S. W. (2d) 1012 (Tex. 1935).

[30] Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 37 Sup. Ct. 492, 61 L. ed. 966 (1917); Drummond v. Lynch, 82 F. (2d) 806 (C. C. A. 5th, 1936); Dyke v. Ill. Commercial Men's Ass'n, 358 Ill. 458, 193 N. E. 490 (1935); Mottu v. Davis, 151 N. C. 237, 65 S. E. 969 (1909); Bonnett-Brown Corp. v. Coble, 195 N. C. 491, 142 S. E. 772 (1928); Fisher v. March, 26 Grat. 765 (Va. 1875).

[31] Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F. (2d) 790 (C. C. A., 4th, 1935).

[32] Galpin v. Page, 18 Wall. 350, 21 L. ed. 959 (1873).

[33] McAlister v. McAlister, 214 Ala. 345, 107 So. 843 (1926) (jurisdiction prima facie in absence of showing on face of properly certified transcript of want of jurisdiction); Makorios v. Green Co., 256 Mass. 598, 153 N. E. 11 (1926).

[34] Brotherhood of Ry. Trainmen v. Agnew, 170 Miss. 615, 155 So. 205 (1934) (Unless the contrary appears from the record, all jurisdictional facts are conclusively presumed to have existed, whether there be recitals in the record to show them or not, and this rule applies, although the judgment attacked was rendered by default, or constructive service of process alleged to be defective. Presumption conclusive on collateral attack; and on direct attack, the defendant must affirmatively show that the defect existed as a matter of fact.). But *cf.* Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1925) (the jurisdiction of the court of the first instance over the parties and subject matter must affirmatively appear).

[35] Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F. (2d) 790 (C. C. A. 4th, 1935); Miller v. Brown, 170 Ark. 949, 281 S. W. 904 (1926); Rodenbeck v. Crews State Bank and Trust Co., 97 Ind. App. 21, 163 N. E. 616 (1928).

[36] Holland v. Universal Life Co., 180 Atl. 328 (Del. 1935); Old Wayne Mut. Life Ass'n v. Flynn, 31 Ind. App. 473, 68 N. E. 327 (1903); Smith v. Central Trust Co., 154 N. Y. 333, 48 N. E. 553 (1897).

[37] Holland v. Universal Life Co., 180 Atl. 328 (Del. 1935) (substituted service statute involved).

[38] Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. ed. 525 (1896).

that the court which rendered a certain judgment had the requisite authority and that the parties were legally brought before the court is conclusive on the question and is not open to collateral attack.[39] Mere irregularities cannot be set up against the judgment when brought in question in another state[40] but it is well settled that the defense may be interposed that the judgment was obtained by fraud.[41]

The principal case follows the weight of authority. The defendant not having shown lack of jurisdiction or fraud in the procurement of the judgment could not overturn it. Defendant was estopped to show lack of jurisdiction by setting up its own violation of the statute requiring it to designate the Insurance Commissioner as its attorney to accept service.

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Constitutional Law—Local Laws—Regulation of Professions—Real Estate Brokers.

In 1868 the General Assembly of North Carolina was given constitutional power to tax trades and professions.[1] In 1899 the first license tax was placed on real estate dealers.[2] A tax on this trade for the purpose of raising revenue has continued to the present[3] and paying this has been the only state-wide legal requirement for engaging in the real estate business.

In 1927 an act[4] was passed which made the qualifications for obtaining a license in eight counties depend upon the applicant's ability to show to the satisfaction of a Real Estate Commission his reputation for honesty and fair dealing and his competency to transact the business in such a manner as to safeguard the public.[5]

This statute was held unconstitutional in *State v. Warren*[6] on the ground that it was local in effect, applying to but eight counties, and was thus discriminatory and in violation of the right to equal protection of the laws. Had the act been applicable to the whole state, the majority opinion implies that it would have been a valid use of the police power.

[39] Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628 (1893); Citizens' Nat. Bank v. Consolidated Glass Co., 83 W. Va. 1, 97 S. E. 689 (1919).

[40] Drummond v. Lynch, 82 F. (2d) 806 (C. C. A. 5th, 1936).

[41] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538 (1890); Jaster v. Currie, 198 U. S. 144, 25 Sup. Ct. 614, 49 L. ed. 998 (1904); Cannon v. Howell, 131 N. C. 125, 42 S. E. 555 (1902); Levin v. Gladstein, 142 N. C. 448, 55 S. E. 371, 32 L. R. A. (N. S.) 905 (1906); Mottu v. Daniels, 151 N. C. 237, 65 S. E. 969 (1909); Roberts v. Pratt, 152 N. C. 731, 68 S. E. 240 (1910); Ring and Wellborn v. Whitman, 194 N. C. 544, 140 S. E. 159 (1927); Bonnett-Brown Corp. v. Coble, 195 N. C. 491, 142 S. E. 772 (1928).

[1] N. C. CONST. art. V, §3.
[2] P. L. N. C. 1899, c. 2, §50.
[3] P. L. N. C. 1935, c. 371, §100.
[4] Public-Local Laws 1927, c. 241.
[5] The act likewise provided eleven causes for which the license might be suspended or revoked.
[6] 211 N. C. 75, 189 S. E. 108 (1937).