

June 2014

Corporations--Disregard of Corporate Fiction--Licensing of Insurance Agents (State ex rel. Marsh & McLennan Co. v. Safford, State Superintendent of Insurance, 159 N.E. 829 (Ohio 1927))

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

parties and the subject matter in suit shall be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered, and be equally conclusive upon the merits.⁴ This is likewise true where a judgment in one State is based upon a cause of action which arose in the State in which it is sought to be enforced; and the judgment, if valid where rendered, must be enforced in such other state though repugnant to its own statutes.⁵

In *Fauntleroy v. Lum*⁶ the original cause of action arose in Mississippi out of a gambling contract in cotton futures. Such contracts were by statute in that State unenforceable. Suit was, however, instituted in Missouri, the defendant being temporarily there and a judgment for the plaintiff was recovered. When suit was brought in Mississippi on the Missouri judgment, the defendant had judgment which was affirmed by the Supreme Court of Mississippi. This decision was reversed in the United States Supreme Court where the rule which is controlling was reiterated. "A judgment is conclusive as to all the media concludendi, and it needs no authority to show that it cannot be impeached in or out of the State by showing that it was based upon a mistake of law."

In the instant case the Oregon judgment, being valid and conclusive between the parties in that State, was equally conclusive in the Courts of Washington and under the full faith and credit clause should have been enforced by them. The defendant could not avail himself of the obvious error of the Oregon court in its interpretation of the Washington statute of limitations.

CORPORATIONS—DISREGARD OF CORPORATE FICTION—LICENSING OF INSURANCE AGENTS.—The Supreme Court of Ohio has lately contributed a most interesting adjunct to that steadily expanding body of law centred about the disregard of the corporate fiction. An Ohio corporation organized in 1916 for the purpose of acting as local agent for fire insurance companies, sought a license for the conduct of its business for the fiscal year ending February, 1928. All formal statutory prerequisites had been met. The State Superintendent of Insurance denied the application, on the ground that "no person may be licensed to act as an insurance agent unless a resident of this state."¹ It appeared that a controlling interest in the Ohio corporation was owned by a foreign corporation extensively engaged in insurance brokerage and, at the time, the holder of an Ohio foreign insurance broker's license. The domestic corporation resorted to mandamus, setting forth in its petition the above facts and the avowed ground of the superintendent's refusal. Respondent demurred. *Held*, demurrer sustained. *State ex rel. Marsh & McLennan Co. v. Safford*, State Superintendent of Insurance, 159 N. E. 829 (Ohio, Dec. 28, 1927).

⁴ *Hampton v. McConnel*, 3 Wheat. 234, 4 L. Ed. 378 (1818); *Hancock National Bank v. Furnum*, 176 U. S. 640, 20 S. Ct. 506, 44 L. Ed. 619 (1899).

⁵ *Fauntleroy v. Lum*, 210 U. S. 231, 28 S. Ct. 641, 52 L. Ed. 1039 (1907); *Kenney v. Supreme Lodge*, 252 U. S. 411, 40 S. Ct. 371, 64 L. Ed. 683 (1919).

⁶ *Supra* note 5.

¹ Ohio General Code § 644.

The Court prefaced its discussion with a brief consideration of the constitutionality of the statute restricting agency licenses to residents of the state. This was declared sustained by two United States Supreme Court decisions,² the latter of which merely mentioned the statute in passing.³ More deserving of attention, however, is that portion of the opinion wherein the Court proceeds to the "conclusion that the relator company is but the *alter ego* of a nonresident insurance broker corporation desiring to write insurance in Ohio, but unable to obtain a resident license, and that the course pursued by it is but an attempt to do by indirection that which cannot be accomplished by direct and legal methods."⁴

At the outset, the Court seized upon the fact that the foreign corporation, owner of a controlling interest in the relator, was the holder of a foreign insurance broker's license which "would be surrendered upon the awarding of a license of the relator as a local agent." This the Court reasoned made it "plain that the purpose of the securing of a license by the relator company is to enable Marsh & McLennan, Incorporated, * * * to circumvent the statute of Ohio which prevents such license being secured by other than a resident of the State of Ohio." Having become thus satisfied, there remained but to interpolate a stock statement of the circumstances under which courts will disregard the fiction of corporate entity—as the Ohio decisions declare, "when it is attempted to be used as a means of accomplishing a fraud or an illegal act."⁵ This discussion leads to an apparent *non sequitur*, "The principle of denying the right to do by indirection what cannot be done by direct method is thus clearly recognized. If a non-resident insurance company cannot write insurance in Ohio without a resident license, how can this desired result be acquired by coming into the state in the guise of an owner of a controlling interest in a domestic corporation, thus seeking

² *La Tourette v. McMaster*, 248 U. S. 465, 39 Sup. Ct. 160 (1919); *Palmetto Fire Insurance Co. v. Conn.*, 272 U. S. 295, 47 Sup. Ct. 88 (1926).

³ "These statutes forbid the insurance of property in the State except by a legally authorized agent, resident in Ohio, and tax the business lawfully done there. * * * Exactly how far the laws can go and what proceedings can or cannot be taken, may be left to be determined, if the questions arise, in the State Courts." 272 U. S. 295, 303, 306.

⁴ 159 N. E. 829, 831.

⁵ To support the proposition of the text, the Court cited cases admittedly representative of the general rule as to the disregard of the corporate entity, but, it is submitted, failed to bring the instant case within their authority. In *First National Bank of Chicago v. Trebein Co.*, 59 Ohio St. 316 (1898), where a failing debtor formed a closed corporation to which he transferred all his assets, the decision was "placed on the ground that the conveyance by T. to the company was fraudulent as to his other creditors, and should be set aside." *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892) was concerned with the action of a majority of shareholders in pooling their stock in an illegal combination; while in *Brundred v. Rice*, 49 Ohio St. 640 (1892), the promoters of a corporation formed to secure illegal discrimination in freight rates were not permitted to avail themselves of the corporate entity by way of defense.

to circumvent the statute relative to resident licenses?" The final conclusion we already have.

The determination in the instant case is indeed a far cry from those decisions of not many years past, holding a corporation incapable of acting beyond the state of its creation.⁶ Here we have a foreign corporation, represented merely by stock ownership, held capable of "a fraud or an illegal act" in the event that the domestic corporation, in which it is financially interested, applies for a license procurable by residents of the state.⁷ From the opinion,⁸ there appears no ground of objection to the conduct of the proposed business by the domestic corporation. Assuredly, if facility of control be the desideratum, a domestic corporation would seem preferable. Apparently, the Court, following the interpretation of the Insurance department "under facts so similar as to make the situation almost parallel," has seen fit to superimpose a further requirement in addition to that of residence, and will insist that the source of the capital used be domestic. In a word, the rule here enunciated seems neither practicable in administration nor conducive to the honest and convenient conduct of business.

DOMESTIC RELATIONS—MARRIAGE—ANNULMENT—FORMER HUSBAND OR WIFE LIVING.—The petitioner seeks an annulment of his marriage with the respondent under section 3004 of the Delaware Code, providing that the court may annul a marriage contracted while either party has a husband or wife living. It appeared that the wife had a husband living when she married the petitioner, but that the petitioner, after he had learned that she had not been divorced from her former husband, had continued to live and cohabit with her. The court granted the annulment on grounds of public policy, holding that the equitable maxim of unclean hands was not applicable in such a case. *Seacord v. Seacord*, 139 Atl. 80, Advance Sheets of November 24, 1927.

The question at issue in this case was whether or not the act of the petitioner in cohabiting with the respondent after knowledge of the prior existing marriage precluded the granting of relief. At the common law such a marriage was absolutely void.¹ By the statutes of Delaware such a marriage was unlawful.² The rule of *pari delicto* does not apply in annulment cases. Because the state is an interested party the equitable maxim that "He who comes into equity must do so with clean hands" cannot be resorted to.³ *Rice, J.*, in directing the entry of a decree annulling the marriage, referred to what is considered the leading case in New

⁶ See 1 St. John's L. Rev. 48.

⁷ The fact that the relator had been incorporated in Ohio prior to the passage of the resident agents law was regarded as "immaterial."

⁸ The record upon which the court passed may have included further facts, but the opinion is apparently based upon the conviction that the relator had resorted to subterfuge.

¹ 2 Schouler on Marriage, Divorce, Separation and Domestic Relations, 6th ed., 1386.

² Delaware Rev. Code, 1915, §§ 3004, 3008 and 4785; also § 3016 Rev. Code 1915, as amended by chapter 217, 28 Laws of Delaware.

³ 2 Schouler, *op. cit.*, *supra*, note 1, 1420.