INSURANCE:
FOREIGN INSURANCE CORPORATIONS: Section 6007, R.S. Mo. 1939 prohibiting removal of cases from State Courts to Federal Courts by foreign insurance corporations is unconstitutional.

February 16, 1950

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Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Superintendent Leggett:

This will acknowledge receipt of your letter requesting an opinion of this department respecting the right of the Superintendent of Insurance to proceed, under Section 6007, R.S. Mo. 1939, to revoke the license of a foreign insurance company to carry on its business in this State under the provisions of Article 6, Chapter 37, R.S. Mo. 1939, because of the removal by such insurance company to the Federal Court of a cause filed in a State Court without the consent of the opposite party.

Your letter states:

> "Under date of May 23, 1949, the Superintendent of Insurance received a request from Frank Lowry, Attorney At Law, representing a Mrs. Christina C. Mercer, to forthwith revoke the license issued to Millers Mutual Fire Insurance Company, a Corporation, organized under the laws of the State of Pennsylvania, and admitted to do business in the State of Missouri, under the provisions of Article 6, Chapter 37, R.S. Missouri, 1939.
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> "Mr. Lowry's client, Mrs. Christine C. Mercer, a resident of Missouri, filed a suit against Millers Mutual Fire Insurance Company in the Cape Girardeau Court of Common Pleas. Subsequently, the defendant removed the cause to the United States District Court at Cape Girardeau, Missouri, without the consent of

> the plaintiff. The request for the revocation of the license of Millers Mutual Fire Insurance Company is made under the terms and provisions of Section 6007, Revised Statutes of Missouri, 1939.
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> "Will you please advise this Department as to the constitutionality of Section 6007, R. S. Missouri, 1939, and further advise as to whether the Superintendent of Insurance should proceed to take action under the provisions of said Section 6007, R.S. Missouri, 1939, on a request such as the one received in this case."

You submit two questions for our attention:

First: Is said Section 6007 constitutional, and

Second: Should the Superintendent of Insurance proceed to take action under the terms of said Section 6007 to revoke the license of a foreign insurance company upon a request such as the one received in this case.

Section 6007, R.S. Mo. 1939, has not been before our Supreme Court or the Supreme Court of the United States for construction. The constitutionality of statutes having similar provisions as are in Section 6007, from the insurance codes of other States, however, have been determined by the Supreme Courts of those States and by the Supreme Court of the United States.

A Missouri statute, Act of March 13, 1907 (Laws of Missouri, 1970, pp. 174, 175) prohibiting foreign railroads from filing suits in, or from removing lawsuits to Federal Courts from State Courts, without the consent of the opposite party, was held invalid by the Supreme Court of the United States in Herndon, Prosecuting Attorney, et al., vs. C.R.I. & P. Railway Company, 218 U.S. 135. A like case involving the same statute was filed in the Supreme Court of Missouri directed against a Circuit Judge of this State and the then Secretary of State as respondents (State ex rel. Missouri-Arkansas Railroad Company vs. Johnston, Judge, and Roach, Secretary of State, et al., 234 Mo. 338).

The precise question was involved in the Johnston case as was before the United States Supreme Court in the Herndon case. The Supreme Court of Missouri, during the period of its consideration of the Johnston case, took note of the decision by the United States Supreme Court in the Herndon case, (218 U.S. 135), and approved and commended its decision that the March 13, 1907 Act was invalid.

Said Section 6007, R.S. Mo. 1939, reads as follows:

> "If any foreign or nonresident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state, and such company, corporation, assocation or concern shall not again be authorized or permitted to do business in this state at any time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large and general circulation in the state: Provided, however, that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority."

The same Legislature, Laws of Missouri, 1907, pages 174, 175, enacted three sections amending an existing statute to prohibit foreign railroad corporations from filing suits in, or without the

consent of the opposite party, removing cases to the Federal Courts from State Courts. Section 1 of the Act is almost in the same identical language as is contained in said Section 6007.

The suit to test the Act of March 13, 1907--the statute affecting railroads--was brought by the Chicago, Rock Island and Pacific Railway Company, an Illinois corporation, in the Circuit Court of the United States for the Western District of Missouri against Herndon, Prosecuting Attorney of Clinton County, Missouri, and Swanger, Secretary of State of Missouri. The defendants filed demurrer to the bill. The Court overruled the demurrer and held the Act invalid. The appeal by the defendants to the United States Supreme Court follows:

The Supreme Court affirmed the decree of the Circuit Court enjoining the Missouri officers from enforcing said Act. The Court, in its decision, l.c. 158, 159, said:

> "As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the State of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal courts, or remove one from the state courts to the Federal courts, but little need be said. This is so because of the cases decided at this term involving contentions kindred to the one made in this case. See Western Union Tel. Co. v. Kansas, 216 U.S. 1; Pullman Co. v. Kansas, 216 U.S. 56; Ludwig v. Western Union Tel. Co., 216 U.S. 146; Southern Railway Co. v. Green, 216 U.S. 400.
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> "Applying the principles announced in those cases, it is evident that the act in controversy cannot stand in view of the provisions of the Constitution of the United States. Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy a domestic railroad company might bring an action in the Federal court, or in a proper case remove one thereto,

> without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that while the right to do local business within the State may not have been derived from the Federal Constitution, the right to report to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof.
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> "It is enough now to say that within the principles decided at this term, in the cases cited above, the act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void.* * *"

The Supreme Court of Missouri, aware of the decision by the Supreme Court of the United States l.c. 347 in the Johnston case, said:

> "Since this proceeding has been pending in this court the main question in the case has been decided by the Supreme Court of the United States. In the case of Herndon v. Chicago, R.I. & P.R.R. Co., 218 U.S. 135, it was decided that the act of the General Assembly approved March 13, 1907, above mentioned, was in conflict with the Constitution of the United States, was void and of no effect. In that decision we entirely concur. * * *"

Statutes containing the same provisions as said Section 6007 were enacted in insurance codes of other States, particularly Wisconsin and Kentucky. Such statutes were upheld by the Supreme Court of each State, respectively. These cases were appealed to the Supreme Court of the United States. In each case the State statute was held by the Supreme Court to be not in conflict with the Federal Constitution. (Doyle vs. Continental Insurance Company, 94 U.S. 535, Security Mutual Life Insurance Company vs. Prewitt, Insurance Commissioner of the State of Kentucky, 102 U.S. 246). There were, however, dissenting opinions in each of the two cases. Not until the case of Terral, Secretary of State of Arkansas vs. Burke Construction Company, 257 U.S. 529, came before the Supreme Court was there any change in the Court's views.

The Legislature of the State of Arkansas had enacted the Act of May 13, 1907, Section 1 of which reads as follows:

> "'If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation.'"

A suit was filed to test the constitutionality of the Arkansas statute. The United States District Court of Arkansas held the statute unconstitutional and the case was appealed to the Supreme Court of the United States.

The opinion briefly and directly states the question at issue, discusses the principles involved in the construction of the Arkansas Act of May 13, 1907, cites and briefly discusses the Doyle and Prewitt cases and overrules both, on the ground that the statutes construed and upheld in those cases were invalid, as being in contravention of Section 2 of Article III and Section 1 of the Fourteenth Amendment to the Constitution of the United States. The Court in the Arkansas case, in the decisive text of the opinion, l.c. 531, 532, 533, said:

> "The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the State because, while doing only a domestic business in the State, it resorts to the federal court sitting in the State.
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> "The cases in this court in which the conflict between the power of a State to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the

federal courts has been considered, cannot be reconciled. They began with Insurance Co. v. Morse, 20 Wall. 445, which was followed by Doyle v. Continental Insurance Co., 94 U.S. 535; Barron v. Burnside, 121 U.S. 186; Southern Pacific Co. v. Denton, 146 U.S. 202; Martin v. Baltimore & Ohio R.R. Co., 151 U.S. 673, 684; Barrow S.S. Co. v. Kane, 170 U.S. 100, 111; Security Mutual Life Insurance Co. v. Prewitt, 202 U.S. 246; Herndon v. Chicago, Rock Island & Pacific Ry. Co., 218 U.S. 135; Harrison v. St. Louis & San Francisco R.R. Co., 232 U.S. 318, and Wisconsin v. Philadelphia & Reading Coal & Iron Co., 241 U.S. 329.

"The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of Doyle v. Continental Insurance Co., 94 U.S. 535, and Security Mutual Life Insurance Co. v. Prewitt, 202 U.S. 246, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about

> to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is
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> Affirmed."

We believe the above cited and quoted decision of the Supreme Court of Missouri and the Supreme Court of the United States holding statutes similar to said Section 6007 invalid will determine both questions submitted to us. Upon these cases this department bases its belief that because such other statutes, having like provisions to those of said Section 6007, have been held unconstitutional, then Section 6007 is also unconstitutional and void, and that because of the invalidity of said Section 6007 the Superintendent of the Division of Insurance should not proceed under said Section, in the instant case, to revoke the license of the named foreign insurance corporation.

CONCLUSION

It is, therefore, the opinion of this department:

1) That said Section 6007, R.S. Mo. 1939, because it denies to a foreign insurance corporation the privileges guaranteed to it of invoking the judicial power of the United States and denies to it equal protection of the law under Section 2, Article III and Section 1 of the Fourteenth Amendment, respectively, of the Constitution of the United States, is unconstitutional.

2) That because said Section 6007, R.S. Mo. 1939, is, by reason of the named decisions of the Supreme Court of Missouri and the Supreme Court of the United States, to be deemed invalid and of no effect, the Superintendent of the Division of Insurance should not proceed to take action under the provisions of said Section 6007 to revoke the license of the foreign insurance corporation named to do business in this State.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General