Foreign Corporations—Fees to be Collected by Secretary of State.

Chapter 37 of the Laws of 1915 held not to be repealed.

Foreign corporations filing copies of their articles of incorporation with the Secretary of State, as provided for by Section 6651 of the Revised Codes of 1921, must pay the filing fees provided for in Section 145 of the Revised Codes of 1921, applying to foreign corporations, except such fees as are based upon the amount of the capital stock of such foreign corporations, and as to this they must pay the fees provided for in Chapter 37 of the Laws of 1915.

C. T. Stewart, Esq.,
Secretary of State,
Helena, Montana.

My dear Mr. Stewart:

You have requested my opinion relative to the proper fee to be charged to foreign corporations filing articles of incorporation and statements under Section 4413 et seq., Revised Codes of 1907, as amended by Chapter 264 of the Laws of 1921. (Section 6651, Revised Codes of 1921.)

These fees were fixed by Section 165, Revised Codes of 1907, as amended by Chapter 91, Laws of 1921 and were based upon the capital stock of the foreign corporations tendering the articles or statements.

However, the Supreme Court of this State, in the recent cases of J. I. Case Threshing Machine Co. v. C. T. Stewart, as Secretary of State, 60 Mont. 380, 199 Pac. 909, and General Electric Co. v. Stewart, 60 Mont. 387, 199 Pac. 911, has held that a fee based upon the entire capital stock of a foreign corporation doing business in this State is invalid as conflicting with the United States Constitution. The court says in the former case, page 386:

> "Whatever difference of opinion may have existed heretofore respecting the power of a state to exact an excise tax as a condition precedent to the right of a foreign corporation to do business therein, further discussion of the subject must now be deemed foreclosed. A statute which imposes the tax upon the total capital stock when only a portion thereof is

represented by the property and business of the corporation in the state imposing taxes is invalid. If the corporation is engaged in interstate commerce in whole or in part, such a statute contravenes the commerce clause of the federal Constitution; and such a statute is violative of the due process clause of the Fourteenth Amendment, whether the corporation is engaged in interstate or intrastate commerce."

This conclusion was based upon the holding of the United States Supreme Court in the case of Locomobile Co. v. Massachusetts, 246 U. S. 146.

Chapter 91 of the 1921 Laws is the same as Section 165, Revised Codes of 1907, in so far as it attempts to fix a fee based upon the entire capital stock of a foreign corporation doing business in this State, and is subject to the same constitutional objection as Section 165, and the fees provided for in Section 165, above, as amended, and based upon the capital stock of corporations, so far as they apply to foreign corporations, are no longer collectable by your office.

The court, in the J. I. Case Threshing Machine Co. case, above, further says:

"A statute may escape condemnation if it imposes the tax only upon the proportion of the total capital stock represented by the property and business in the state imposing the tax, or if it provides a reasonable maximum charge to be imposed without reference to the total capital stock."

This was exactly what Chapter 37 of the Laws of 1915 attempted to do with reference to foreign corporations, and the court, in the case already quoted from above, said:

"In 1915 our legislature supplanted section 165 so far as it prescribes the fees for filing a certified copy of the charter or articles of incorporation of a foreign corporation entering this state to conduct business, but it did not make any change in the schedule of fees to be charged for filing a certificate of increase of capital stock. (Chapter 37, Laws 1915.) This new legislation met the objections lodged against the Kansas statute in the Western Union Telegraph Company Case by imposing the fee only upon the proportion of the foreign corporation's capital stock represented by its property and business in this state, as opposed to the plan adopted in section 165, which imposes the fee upon the entire capital stock wherever held or employed and without reference to the amount of capital used or business transacted in this state. But Chapter 37 has no application to the case now before us."

But in amending Section 165 by Chapter 91 of the Laws of 1921, the Legislature included a repeal of Chapter 37 of the Laws of 1915, both in the title and in the body of the law. Thus the question now presented is whether, since the provisions of Chapter 91 relating to fees based upon the entire capital stock of foreign corporations

are unconstitutional, the repeal of Chapter 37 of the Laws of 1915 falls with the Act so as to leave Chapter 37 in force.

The rule as to the effect of a repeal contained in an invalid law upon the law attempted to be repealed thereby is stated in 25 R. C. L., page 913, as follows:

> "Where a repeal of a prior law is inserted in an act in order to secure the unobstructed operation of the act, and the repealing law is itself held to be void, the provisions for the repeal of the prior law will fall with it, and will not be operative in the repeal of the prior law, unless the language of the repealing clause is such as to leave no doubt as to its intention to repeal a former law, in any event. Where, however, it is not clear that the legislature, by a repealing clause attached to an unconstitutional act, intended to repeal a former statute upon the same subject, except on the supposition that the new act would take the place of the former one, the repealing clause falls with the act of which it is a part."

And at 36 Cyc. 1099 the rule is stated as follows:

> "So where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid, unless it shall appear that the legislature would have passed the repealing clause even if it had not provided a substitute for the act repealed."

The above rule is supported by the following cases:

People v. Mensching, 79 N. E. 884;
State v. Blend, 23 N. E. 511;
Orange Co. v. Harris, 32 Pac. 594;
People v. Dooley, 63 N. E. 815;
State v. Rice, 80 Atl. 1026;
Sutherland Const. Construction, Sec. 245;
Warren v. Mayor, 2 Gray 99;
Randolph v. Builders, etc. Co., 17 So. 721, 725;
O'Brien v. Kreuz, 30 N. W. 458;
State v. Heffner, 52 N. E. 785;
Porter v. Kingfisher County, 51 Pac. 741;
Berringer v. City of Florence, 19 S. E. 745;
Galveston Ry. Co. v. Galveston, 74 S. W. 537;
Bissett v. Pioneer Irr. Dist. (Ida.) 120 Pac. 461.

In Randolph v. Builders, etc. Co., 17 So. 725, supra, the situation was almost identical with the case here under consideration, as the title of the act in that case declared unconstitutional, as well as the body of the act, referred expressly to the laws attempted to be repealed, and provision covering the same subject-matter comprised the new act. The court there said:

"This statute having been declared void, what effect does it have, as a repealing statute, on the sections of the Code which it attempts to repeal? It has been said that, 'where a repeal of prior laws is inserted in an act, in order to secure the unobstructed operation of such act, and it is held unconstitutional, the incidental provision for the repeal of prior laws will fall with it.' Suth. St. Const. Sec. 175. There was no intention on the part of the legislature to repeal any part of the old law, except to the extent it replaced it by what was supposed to be a valid amendment. No part of it, it must be presumed, was intended to stand, except as a component part of the whole. It would, indeed, do violence to the legislative intent, to presume they intended to repeal the mechanics' lien law entirely in this state, if the legislation they were adopting, with the view of perfecting it, and making it better, failed because of constitutional infirmity. It is not denied, that it is competent for the legislature, in the same act to repeal any former act, though every other clause in the repealing act may be unconstitutional; yet, 'if the sections of the repealing act are so mutually dependent on, and connected with, each other as conditions, considerations and compensations for each other, as to warrant the belief that the legislature intended them for one law and to operate as a whole, and that if all could not be carried into effect, it would not have passed the repealing part, independently, the whole act must fall together.' Warren v. Mayor, etc., 2 Gray, 99. It was held by the Indiana court, that where it is not clear that the legislature intended to repeal the prior law, without regard to the new provisions to be substituted for it, a repealing clause in an unconstitutional statute will be effective. Especially would this be true, when, if the repeals in the act were allowed to stand, it would destroy the system of laws, as it would in this case, which the legislature was intending and attempting to perfect by amendment, and leave us without any mechanic's lien law at all."

In the case of Bissett v. Pioneer Irr. Dist., 120 Pac. 461, the Supreme Court of Idaho said:

"The intention to repeal sections 2375, 2376, and 2379 grows out of and resulted only from the purpose and intention of the Legislature to amend and replace those sections by the act of March 6, 1911. There was no intention, however, to repeal those sections of the old statute without leaving something in their place and stead, and since the attempted legislation in place and stead of sections 2375, 2376, and 2379 failed, by reason of the unconstitutional provisions therein contained, the attempt to repeal or amend the old sections failed for the same reason. This is a well-established rule of law." (Citing cases.)

Chapter 37 of the Laws of 1915 relates exclusively to the fees to be charged foreign corporations as based upon capital stock.

The portion of Section 165 (amended by Section 145 of the Revised Codes of 1921) declared unconstitutional in the J. I. Case Threshing Machine Co. Case, above, relates solely to the same subject. The repeal of Chapter 37 of the Laws of 1915 by Chapter 91 of the Laws of 1921 must be held to be an integral part of the same legislation as the provisions of Chapter 91 fixing a new basis of fees, exactly the same subject being covered by both chapters, and the provisions of Chapter 91 relating to this subject being intended to supplant and to be substituted for those of Chapter 37.

Furthermore, if the subject matter of Chapter 91 were not the same as that of Chapter 37, Chapter 91 would necessarily contain legislation on two subjects, and would fall as being in contravention of Article V, Section 23, of the Constitution of Montana.

Thus whatever view of it be taken, the result is the same, and Chapter 37 stands unrepealed.

It is, therefore, my opinion that you are authorized to collect from foreign corporations, filing in your office a copy of its articles of incorporation, as provided for by Section 6651 of the Revised Codes of 1921, the filing fees provided in Section 145 of the Revised Codes of 1921, applying to foreign corporations, except such fees as are based upon the amount of the capital stock of such foreign corporations, and that in addition to the foregoing, you may collect from such corporations the fees provided in Chapter 37 of the Laws of 1915.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.