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CONSTITUTIONAL LAW-INTERSTATE COMMERCE-STATE REGULATION OF INSURANCE

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CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE REGULATION OF INSURANCE—The California Insurance Code forbids a person to act as agent for an insurance company until a license is obtained from the commissioner, and forbids acting as agent for any non-admitted insurer in the transaction of insurance business in the state.[1] Summarily stated, the provisions for the admission of insurance companies forbid either foreign or domestic companies to do a life insurance business in California other than on a legal reserve basis, thereby excluding the company represented by appellant as its agent. Appelant was convicted for violations of both provisions of the law. He contended that these sections, as applied in his case, constituted a regulation of interstate commerce forbidden by the Constitution of the United States. *Held*, affirmed. In the absence of contrary action by Congress, the states may require all insurance agents to be licensed for the protection of the public, and may exclude foreign insurers for failing to meet reserve requirements not excessive for the protection of the local interest affected.[2] *Robertson v. California*, (U.S. 1946) 66 S. Ct. 1160.

About 1850 a system of minute state regulation of the affairs of corporations, including insurance companies, came into vogue. This grew into a series of openly retaliatory laws, especially in the insurance field.[3] A campaign was started for relief. Proposals were made for a National Incorporation Act similar to the

[1] Cal. Ins. Code (Deering, 1944) §§ 703, 1642; see also id. §§ 1560-1607, 10,818.

[2] The court refrained from basing its decision on the McCarran Act (see note 17, below) because this was a criminal proceeding and appellant's acts were committed before the passage of that act.

[3] Whitney, "Commercial Retaliation Between the States," 19 AM. L. REV. 62 (1885).

National Banking Act of 1864. The case of *Paul v. Virginia*[4] was selected to test the constitutionality of the state laws, and to secure a determination that would make the proposed legislation possible.[5] The ruling, however, went against the insurance companies on both issues involved. The court definitely decided in that case that a corporation is not a citizen, within the meaning of Article IV, Section 2 of the Constitution, and therefore not entitled to the privileges and immunities of a citizen of another state. ". . . it follows, as a matter of course, that such assent [to admission] may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely. . . ." [6] Secondly, the court held that issuing a policy of insurance was not a transaction of commerce, and therefore not free from state regulation.[7] The insurance companies then turned to the new Fourteenth Amendment for protection.[8] In 1886 it was settled that the provision in the Fourteenth Amendment which forbids a state to deny any person within its jurisdiction the equal protection of the laws applies to corporations.[9] This, along with the growth of the substantive concept of due process,[10] gave the insurance companies some measure of protection against discriminatory state legislation. The equal protection clause applies only to persons within the jurisdiction of the state. Therefore, it does not, per se, put any limits on the conditions which may be imposed for admission. Once admitted, the corporation may invoke the clause, but even this does not mean that the foreign corporation must be treated with absolute equality.[11] The total taxes paid by the foreign corporation must be substantially equal and fairly equivalent to the total paid by similar domestic corporations,[12] and, by seeking and obtaining permission to do business in the state, a corporation does not thereby become obligated to comply with any provision in the state statutes which is in conflict with the Constitution of the United States.[13] The due process clause will prevent unreasonable expulsion or the imposing of conditions which amount to the taking of property without due process of law.[14] By declaring it to be commerce, the *South-Eastern*

[4] 8 Wall. (75 U.S.) 168 (1868).

[5] Nehemkis, "Paul v. Virginia: The Need for a Re-examination," 27 GEO. L. J. 519 (1939).

[6] 8 Wall. (75 U.S.) 168 at 181 (1868).

[7] See Hooper v. California, 155 U.S. 648, 15 S. Ct. 207 (1895), followed in New York Life Insurance Co. v. Deer Lodge County, 231 U.S. 495, 34 S. Ct. 167 (1913).

[8] Ratified July, 1868.

[9] Santa Clara County v. Southern Pacific R.R. Co., 118 U.S. 394, 6 S. Ct. 1132 (1886); see also Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 YALE L. J. 371 (1938), 48 id. 171 (1938), for the history of the development of this phase of the Amendment.

[10] Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427 (1897).

[11] See Powell, "Supreme Court Condonations and Condemnations of Discriminatory State Taxation, 1922-1925," 12 VA. L. REV. 441, 546 (1926); see also notes at 49 A.L.R. 726 (1927); 71 A.L.R. 256 at 264 (1931); 77 A.L.R. 1490 (1932).

[12] Seyk, "Discriminatory Taxation of Foreign Corporations," 15 CHI-KENT L. REV. 283 (1937).

[13] Power Mfg. Co. v. Saunders, 274 U.S. 490, 47 S. Ct. 678 (1927).

[14] Western Union Tel. Co. v. Kansas, 216 U.S. 1, 30 S. Ct. 190 (1910).

Underwriter's case [15] placed insurance in the realm of the federal legislative power. The question immediately arose as to the validity of the vast system of state laws regulating insurance.[16] That decision, however, has not caused any immediate change. The McCarran Act,[17] passed shortly after the decision in the *Underwriter's* case, declared that state regulation and taxation of insurance shall remain valid, and that the silence of Congress shall not be construed to impose any barrier to the regulation and taxation of such business by the several states. The decision in the principal case showing the broad base of the states' power to regulate commerce under the police power, and the decision in the *Prudential* case,[18] decided the same day, upholding the right of Congress to consent to state regulation, indicate that the business of insurance will remain subject to state control for an indefinite time.

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[15] United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 64 S. Ct. 1162 (1944).

[16] See Justice Jackson's dissenting opinion, id. at 590; see also SAWYER, INSURANCE AS INTERSTATE COMMERCE (1945).

[17] 15 U.S.C. (Supp. 1946) §§ 1011-1015, approved March 9, 1945, 59 Stat. L. 34, c. 20 (1945).

[18] Prudential Insurance Co. v. Benjamin, (U.S. 1946) 66 S. Ct. 1142.