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CONSTITUTIONAL LAW - DUE PROCESS LIMITATIONS ON STATUTES REGULATING EXTRASTATE CONTRACTS

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CONSTITUTIONAL LAW — DUE PROCESS LIMITATIONS ON STATUTES REGULATING EXTRASTATE CONTRACTS — Plaintiffs, reciprocal insurance associations which insure against fire and related risks, and whose attorneys-in-fact are located in Illinois, brought a declaratory judgment action in New York state courts for a determination of the applicability to them of the New York law [1] requiring that such co-operative insurance associations obtain a license, or be prohibited from doing "any act which effects, aids or promotes the doing of an insurance business" in New York. As a condition of the license, submission to the New York regulations [2] is required. The activities of the associations within the state of New York include investigation by engineers of the insurance risk, examination of extent of losses, and encouragement as to reduction of fire hazards, in addition to reservation in the contract of the right to go into New York to rebuild or repair damaged property. *Held*, the object of this activity was not the signing of a contract or a check (which took place in Illinois), but the protection of property permanently located in New York, which gave to New York the requisite "degree of interest" for regulation; and the above enumerated contacts between the insurer and the property within the state were sufficient to warrant regarding the reciprocals as "doing business in New York," and therefore subject to regulation by that state. The regulations themselves were held to be within the scope of the state's power, even though they had some effect on business activities of the associations carried on outside the state. They

[1] N. Y. Consol. Laws (McKinney, 1940), "Insurance Law," §§ 422, 410 (2).

[2] These regulations include, inter alia, the following: powers of attorney, contract, and system of accounting must be in specified form; advisory committees of the subscribers must have ultimate power in management affairs; stipulated operating reserves must be provided for; new agreements may be made only with subscribers having net assets exceeding $10,000; and an office must be maintained in New York, and policies must be countersigned by a resident New York agent. N. Y. Consol. Laws (McKinney, 1940), "Insurance Law," §§ 130, 168(2), 401(1), 412(1), 413(2), 415(1), 417(1), 418(1) (3), 420, 421, and 422(1).

did not deny "due process of law" and "equal protection of the law." *Hoopeston Canning Co. v. Pink*, 318 U. S. 313, 63 S. Ct. 602 (1943).

In 1869 Justice Field stated in the case of *Paul v. Virginia* [3] that, "Issuing a policy of insurance is not a transaction of commerce." Upon that precedent has been built a considerable line of authority which, even today, is recognized as "the law." [4] However, it has been observed by writers on the subject, that, in view of the present trend of Supreme Court decisions interpreting the commerce clause of the Constitution, the day is not far off when the commerce clause will include the issuance of insurance and other personal contracts across state borders.[5] The exclusion of insurance contracts from federal regulation has left a wide field for state control of the insurance business, which has led to considerable confusion in the field of conflict of laws.[6] A line of cases founded upon *Allgeyer v. Louisiana* [7] establishes that the due process clause denies to a state any power to restrict or control the obligations of contracts executed and to be performed without the state as an attempt to exercise power over a subject matter not within its constitutional jurisdiction; [8] and that the obligations of such in-

[3] 8 Wall. (75 U. S.) 168 at 183 (1868).

[4] Philadelphia Fire Assn. v. New York, 119 U. S. 110, 7 S. Ct. 108 (1886); Hooper v. California, 155 U. S. 648, 15 S. Ct. 207 (1895); Nutting v. Massachusetts, 183 U. S. 553, 22 S. Ct. 238 (1902); New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167 (1913); Bothwell v. Buckbee, Mears Co., 275 U. S. 274, 48 S. Ct. 124 (1927).

The decision in German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612 (1914), settled the right of a state legislature to regulate the conduct by corporations, domestic and foreign, of insurance as a business affected with a public interest.

[5] This is the conclusion reached by Sigmund Timberg, "Insurance and Interstate Commerce," 50 YALE L. J. 959 at 1016 (1941). A broad interpretation of "commerce" as "traffic," as suggested by Edwin S. Corwin, "Congress's Power to Prohibit Commerce; A Crucial Constitutional Issue," 18 CORN. L. Q. 477 at 503 (1933), would bring the insurance industry within federal control.

[6] See Lorenzen, "Developments in the Conflict of Laws, 1902-1942," 40 MICH. L. REV. 781 at 792-793 (1942).

[7] 165 U. S. 578, 17 S. Ct. 427 (1896); New York Life Ins. Co. v. Head, 234 U. S. 149, 34 S. Ct. 879 (1913); New York Life Ins. Co. v. Dodge, 246 U. S. 357, 38 S. Ct. 337 (1918); St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 43 S. Ct. 125 (1922); Home Ins. Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338 (1930); Compania General de Tabacos v. Collector, 275 U. S. 87, 48 S. Ct. 100 (1927). But cf. Palmetto Fire Ins. Co. v. Conn, 272 U. S. 295, 47 S. Ct. 88 (1926), where the Court held that a statute may constitutionally be applied to an insurance contract made outside the state, insuring the future purchasers of automobiles from a particular sales company against loss from fire and theft where the sales are made within the state.

[8] It is indicated by these cases that the mere presence within the state of the subject matter of the contract does not give that state power to regulate the contract itself. However, such impotence to regulate is not because of lack of jurisdiction over the subject matter, but because of constitutional barriers to such jurisdiction. These barriers are the full faith and credit and the due process clauses of the Constitution, which have been interpreted to require that the *lex situs* give way to the law of "some other" state, ordinarily *lex contractus*.

terstate insurance contracts are fixed by the law of the place of contracting.[9] This conceptualistic philosophy, which excluded regulation of insurance contracts by other than the contracting state, was stated in *New York Life Ins. Co. v. Head,*[10] and again in the case of *New York Life Ins. Co. v. Dodge;* [11] but to this latter opinion Justice Brandeis dissented [12] and strongly urged that if the subject matter of the statute is within the reasonable scope of regulation, if the end is legitimate, and if the means are appropriate to that end, then the act should be sustained. In 1940 the Court adopted this test of constitutionality in the case of *Osborn v. Ozlin,*[13] upholding a Virginia statute requiring insurance contracts to be made through Virginia agents, who should be paid at least one-half of the commission. The Court found the requisite governmental interest in the presence of the protected risk within its boundaries.[14] The Court indi-

[9] CONFLICT OF LAWS RESTATEMENT, § 332 (1934), and 2 BEALE, CONFLICT OF LAWS, § 332.4, p. 1090 (1935), state that the law of the place where the contract is entered into, whether to be performed there or elsewhere, is the law which governs; STUMBERG, CONFLICT OF LAWS 207 (1937), favors the rule that the place of performance governs the essential validity of the contract.

See also, Carnahan, "The Delivery of a Life Insurance Policy: Function and Scope of the Delivery Concept for Conflict of Laws Purposes," 26 MINN. L. REV. 50 (1941). This article states (p. 51) that the place of contracting "is that place in which was performed the last necessary act in order to constitute a binding agreement and that place will usually be the place of acceptance of the offer; in insurance cases acceptance of the offer will be manifested by 'delivery' of the policy." And at 55: "the cases all declare that delivery is one of the few possible dominant contacts indicating the appropriate law to govern relationships represented by a policy of life insurance."

[10] 234 U. S. 149, 34 S. Ct. 879 (1914), holding the nonforfeiture provisions of Mo. Rev. Stat. (1899), §§ 7897-7900, to be inapplicable to invalidate a policy loan agreement made in New York between a life insurance company of that state and the beneficiary, who was a resident of New Mexico. The settlement was effected in New York in accordance with such agreement, comformably to the New York laws, although the original contract was made in Missouri, which had exacted as a condition of the license granted to the insurance company to do business in the state that such company should be subject to the laws of the state as if it were a domestic corporation.

[11] 246 U. S. 357, 38 S. Ct. 337 (1918). This view was followed in: Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 45 S. Ct. 129 (1924); and Home Ins. Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338 (1930). In the Dick case the Court pointed out that the obligations of an insurance contract lawfully made in another state may not be enlarged upon under the laws of the forum merely because one of the parties is a citizen thereof and the action is being brought in the state.

[12] "There is no constitutional limitation by virtue of which a statute enacted by a State in the exercise of the police power is necessarily void, if, in its operation, contracts made in another State may be affected." 246 U. S. at 382.

[13] 310 U. S. 53, 60 S. Ct. 758 (1940).

[14] "She [the state of Virginia] merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed." 310 U. S. at 62. "For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she has done is very different from the imposition of conditions upon appellant's privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests." Id. 65. The opinion also stated: "In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business. . . ." Id. 66.

cated that if the extraterritorial effect of the regulation (the increased cost of insurance) had a reasonable connection with Virginia's interest in the local insurance risk, the Court would not interfere.[15] In the principal case the Court specifically examined the points of contact between the insurer and the property in the state,[16] and concluded that where the insured interest is in the state and there are many points of contact it is plainly within the state's power to legislate with respect to extrastate contracts. The regulations which the New York laws in question place upon the insurers in the principal case are imposed under the state's power to license foreign co-operative insurance associations to "do business" in the state of New York; and by such means a state is able to exercise rather extensive control over the methods of transacting business and even over the terms and provisions of the extrastate contract itself.[17] No very considerable contact is required to warrant a holding that a foreign insurance company is doing business within the state. It has been held that where there are outstanding policies within the state on which it collects premiums and adjusts losses, and where the company has, and exercises, the right to send a physician into the state for the purpose of investigating the loss, the company is doing business therein—at least to an extent that will support service of process and give the court jurisdiction over the foreign corporation.[18] It has been held that a state may constitutionally decline to enforce in its courts a contract insuring the life of one of

[15] This doctrine of "reasonable interest" in the subject matter of contract was adopted by the Court in Alaska Packers Assn. v. Industrial Accident Commission, 294 U. S. 532, 55 S. Ct. 518 (1934), cited in principal case, in which the Court upheld the constitutionality of the application of a California workmen's compensation statute to a contract executed in California where the injury occurred in Alaska, and the parties had agreed in the contract that Alaska laws would be binding.

[16] 63 S. Ct. at 605. This same analysis of the subject by examining points of contact had been used by the Court in the cases of Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634 (1933); and in Home Ins. Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338 (1930), but it was concluded that the contacts of the forum state had "but slight connection with the substance of the contract obligations," and the statutes were held unconstitutional as applied to these extrastate contracts.

[17] Osborn v. Ozlin, 310 U. S. 53, 60 S. Ct. 758 (1940), statute upheld which required presence of resident agent, payment to him of at least one-half of the usual commission, and countersigning of all local contracts by such agent; National Union Fire Co. v. Wanberg, 260 U. S. 71, 43 S. Ct. 32 (1922), statute upheld which provided that all insurance companies engaged in insuring against loss by hail in North Dakota should be bound under the contract 24 hours after taking of application therefor by company's local agent (even though acceptance took place outside state), unless such application was rejected by telegram to applicant within that time. It has also been held that a state may refuse to enforce an extrastate contract which, though valid where made, was obtained in violation of requirement for "doing business" in the forum state. Bothwell v. Buckbee, Mears Co., 275 U. S. 274, 48 S. Ct. 124 (1927). A state may also levy a tax in respect to an extrastate contract on a company authorized to do business within its borders. Compania General de Tabacos v. Collector, 275 U. S. 87, 48 S. Ct. 100 (1927). Solicitation within its borders may also be prohibited by a state even though it contemplates a contract to be entered into outside. Nutting v. Massachusetts, 183 U. S. 553, 22 S. Ct. 238 (1902).

[18] Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 S. Ct. 445 (1909).

its citizens because of provisions therein which it deems contrary to its public policy, even though such contract was made in another state and is valid where made; [19] but a statute allowing a penalty and attorney's fees against an insurance company was held unconstitutional when applied to a contract made in another jurisdiction.[20] Thus the principle of the *Allgeyer* case, that some *one* state possesses the power to regulate insurance contracts by statute, seems to have been rejected to a substantial degree in the most recent decisions of the Supreme Court. The Court now looks for "point of contact" and "legitimate governmental interest" in determining whether a statute may be constitutionally applied to an extrastate contract.[21]

[19] Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023 (1940). An insurance contract had been entered into in New York; premiums had been paid and beneficial interests had been assigned in Texas; Texas law required that beneficiaries must have an insurable interest in order to enforce collection of an insurance policy, New York law requiring no such insurable interest; the Court held that Texas law was applicable, thereby indicating that the forum state will be allowed to determine whether the law of some other state is applicable to the contract and to refuse recognition to foreign laws on the ground of public policy if it is found that the forum state has a legitimate interest in the subject mater of the contract.

[20] Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 45 S. Ct. 129 (1924). The freedom from penalty and fee was deemed a part of the foreign contract and its effect on the public policy of Texas was not considered.

[21] This doctrine precludes the application of the full faith and credit clause, which would require a state to enforce the law of another state, thus leading to uniformity in the treatment of insurance contracts. Pink v. A. A. A. Highway Express, 314 U. S. 716, 62 S. Ct. 241 (1941); Pacific Employers Ins. Co. v. Industrial Accident Comm., 306 U. S. 493, 59 S. Ct. 629 (1939).