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Administrative Control of Insurance in Kentucky

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constitute one of the many matters to be considered by the court in determining whether the amount which is to be paid in the future should be changed.

In a few jurisdictions the courts have held that installments of alimony which are past-due and payable are not assignable.²⁰ In these jurisdictions "a wife's claim for alimony is considered as a purely personal right, and not in any sense a property right—a right in its nature not susceptible of either assignment or enjoyment by her in anticipation",²¹ and "the court has full control of the subject of alimony after a decree awarding it, and the parties are not at liberty to contract away the right of the court in the exercise of its statutory prerogative to control and regulate the payment of alimony after judgment of divorce".²² Under these decisions, the wife does not have a vested interest in the alimony until it is paid over to her and since the alimony that should be awarded in such cases is a matter which concerns the parties, the children, and in some degree, the public, these interests would be placed in constant jeopardy if the wife could, at her pleasure, assign such decree. It is true in all jurisdictions that the husband can go into court and upon showing that the amount which he is paying is in excess of the amount necessary to satisfy the wife's needs, or that the financial position of the husband has been changed or altered so that the amount which he is paying is unjust and unreasonable, have the future installments modified; therefore it seems that this would provide sufficient supervision by the court to protect the interests of the parties and especially those of the husband.

In conclusion, it is submitted that the courts have reached the proper result in decreeing that future installments of alimony are non-assignable; the better rule relating to the lump sum award or settlement would be to permit the wife to make an assignment thereof if she so desired, and the majority rule, holding that past-due installments can be assigned, should be followed in all jurisdictions.

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ADMINISTRATIVE CONTROL OF INSURANCE IN KENTUCKY

Regulation of business by governmental agencies is an accepted fact in the United States today. Administrative boards, both state and federal, are at present engaged in the regulation of all sorts and types of business enterprise. It has long ceased to be a question of whether there is a right to exercise this form of control; it is rather, how far may the government go in its regulation, and what form may this regulation take? There are several factors which have given rise to this new type of control, namely, the lack of time and technique of

²⁰ *Greenburg v. Greenburg*, 99 N. J. Eq. 461, 133 Atl. 768 (1926); *Fournier v. Clutton*, 146 Mich. 298, 109 N. W. 425 (1906); *Welles v. Brown*, 226 Mich. 657, 198 N. W. 180 (1924); *Duss v. Duss*, 92 Fla. 1081, 111 So. 382 (1926).

²¹ *Supra*, n. 20.

²² *Supra*, n. 20.

legislative bodies; the necessity for expert knowledge, which can be better obtained by administrative bodies; and the great increase in the number of services afforded the people by the government, which have rendered it impracticable, if not impossible, for the legislatures and the courts to properly handle them.¹

One of the types of private enterprise subject to administrative regulation in Kentucky is the business of insurance. This form of control over insurance was first exercised in Kentucky in 1893, when the Insurance Department, headed by a Commissioner, was created.² As then established it was a branch of the auditing department of the state, with only partial control over insurance matters. Since that time it has undergone a series of changes until, in 1936, it assumed its present form. At that time the Division of Insurance, headed by a Director,³ was established as a part of the Department of Business Regulation and given complete control of insurance matters.⁴ Certain phases of this control are herein considered.

THE ISSUANCE AND REVOCATION OF LICENSES

1. LICENSE TO DO BUSINESS.

Every company must obtain a certificate from the Director before it can do business in the state.⁵ The obtaining of this certificate is not a mere procedure of application and issuance, as a matter of right. The Director must be satisfied "by such examination and evidence as he sees fit to make and require" that the company is otherwise duly qualified under the laws of Kentucky to do business, and that it has the required amount of capital or premiums invested in the proper manner.⁶ His control over the organization and investment of the company does not cease here. He is empowered to call for a detailed yearly statement from the company as to its condition;⁷ he is required to visit each domestic company at least once every four years and thoroughly inspect and examine its affairs;⁸ and he may examine a domestic company when he deems it prudent, or upon the complaint

¹ "Such means of control attain a degree of efficiency in administration, generality of treatment and at the same time an individualism of the application of rules, unobtainable through inflexible legislative directions." Becker, *The Administrative Control of Insurance in Wisconsin*, 4 Wis. L. R. 129.

² Ky. Statutes (Carroll 1936 ed.) sec. 774. All statutory references throughout this note are to Carroll's 1936 edition.

³ The terms Commissioner and Director will be used interchangeably in this note.

⁴ Ky. Statutes, sec. 4618-119: "The division of insurance headed by a director, under the supervision of the Commissioner of Business Regulation, shall have and exercise all functions vested in the Department of Insurance under . . . , and elsewhere in the statutes."

⁵ Ky. Statutes, secs. 621, 634.

⁶ Ky. Statutes, secs. 621, 624, 752.

⁷ Ky. Statutes, secs. 651, 666, 691.

⁸ Ky. Statutes, sec. 752.

of five or more interested parties, and a foreign company "whenever he deems it prudent for the protection of the policy holders of this Commonwealth."⁹ For the purpose of such examination, the Director is given free access to all books and papers of the company, or its agents, and power to compel attendance of directors, officers, agents and other interested parties as witnesses.¹⁰ If, after such examination, the Director "is of the opinion" that the company is in an unsound condition, or has failed to comply with the laws of the state, he may revoke the license of that company.¹¹

The authority of the Director to make these examinations before issuing or revoking licenses has been upheld under the police power of the state.¹² He cannot, however, exercise the powers granted him arbitrarily or capriciously.¹³ He is bound strictly by the statutes and his action can be enjoined when he acts outside his statutory authority, or when he uses that authority arbitrarily.

From the very nature of his tasks it is necessary that the Director have, and he is clothed by the statutes with, considerable discretion. This discretion, however, is not without limits. It has been pointed out above that he cannot act arbitrarily, or without statutory authority,

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Bell, Insurance Commissioner of Kentucky, v. Louisville Board of Underwriters*, 146 Ky. 841, 143 S. W. 388 (1912). The court construed Ky. Statutes, sec. 752, as giving the Commissioner the power to examine a company, without complaint, in the following situations: (a) if he believes it is violating the law, (b) if he believes it to be in unsound condition, (c) whenever he deems it prudent for the protection of the policy holders. This decision, however, is not to be construed as affecting the power of the Commissioner to examine a domestic company once every four years, as required by statute, or to examine any company upon complaint of five interested parties.

It is to be noted that the examining power was upheld in this case although it was being used to discover whether or not the defendant board was setting exorbitant rates, a matter over which the Insurance Commissioner had no control in 1912. See Ky. Statutes, sec. 4618-37, which transferred this power from the Auditor to the Commissioner.

¹² Ky. Statutes, sec. 753. It is to be noted that the statute, as it concerns foreign companies, reads "upon examination, *or other evidence.*" (Italics ours.)

¹³ In *Mutual Life Insurance Co. of N. Y. v. Prewitt, Insurance Commissioner*, 127 Ky. 399, 105 S. W. 463 (1907), the Commissioner contended that his action was final and could not be reviewed. The court said: "The Insurance Commissioner is a creature of the statute. He has no authority except that which the statute confers upon him. In the state of case in which the statute authorizes him to revoke a license, his discretion, unless exercised arbitrarily, cannot be controlled by injunction; but where he undertakes to act in a state of case in which the statute gives him no authority to act, he may be controlled by injunction . . . It is the province of the courts to construe the statute, and determine the scope of his authority."

Although revocation of a license is the subject of this case, it is authority for limitation upon all powers of the Commissioner.

but it is only from looking at the decisions that the actual bounds of his discretion may be ascertained.

In *National Benefit Association v. Clay, Insurance Commissioner*,¹⁴ the company, a foreign corporation, sued for a mandamus to compel the Commissioner to issue it a certificate to do business. No reason was assigned by the Commissioner for refusing the certificate, but it appeared from his brief that he was of the opinion that "its charter does not conform to the laws of this State, and the provisions of its charter are inconsistent with the laws of this State." The court showed some disposition to rely upon the decision of the Commissioner, but, as no reasons for his determination appeared, it was forced to look to the statutes and determine the matter for itself. It ordered the mandamus to issue, saying that the company had complied with all of the statutory requirements, that it was in a sound condition, there was nothing in its charter or by-laws or method of doing business which was obnoxious to the laws of Kentucky, and, therefore, the Commissioner must issue the certificate.

The Commissioner was also overruled in *Mutual Life Insurance Company of N. Y. v. Prewitt, Insurance Commissioner*.¹⁵ He had revoked the company's license because it had discharged its state manager by reason of his candidacy for trustee on a ticket in opposition to that supported by the trustees in office, and had used part of its funds in soliciting support for the candidates of the trustees in office, the amount spent not affecting its solvency. The Commissioner's only contention was that by this conduct the company had "failed to comply with the law", and he was, therefore, authorized to revoke its license. The court said that the statute¹⁶ authorizing the Commissioner to revoke a license where a company had "failed to comply with the law" did not authorize a revocation unless the company had violated some statute regulating insurance companies, and as no such violation was disclosed by the record the license should be reinstated. Here again the Commissioner failed to give the reasons for his opinion, and the court was obliged to decide the question merely from the statutes and the evidence before it.

The Commissioner refused to issue a license to write automobile insurance in *Allin, Insurance Commissioner, v. American Indemnity Company*,¹⁷ because the company, a foreign corporation, was authorized by its charter to write both automobile and fire insurance, which practice was prohibited by a Kentucky statute.¹⁸ The court overruled the

¹⁴ 162 Ky. 409, 172 S. W. 922 (1915). The court further held that the fact that the charter of a foreign corporation gave it more powers than those allowed a similar domestic corporation is not a violation of the Kentucky Constitution, sec. 202, which forbids foreign corporations to engage in business in Kentucky under more favorable conditions than domestic corporations.

¹⁵ 127 Ky. 399, 105 S. W. 463 (1907).

¹⁶ Ky. Statutes, sec. 753.

¹⁷ 246 Ky. 396, 55 S. W. (2d) 44 (1932).

¹⁸ Ky. Statutes, sec. 687.

Commissioner's contention that this amounted to a non-compliance with the laws of the state, and said that the statute in question did not apply when the license sought was for the purpose of writing only one form of insurance.

From these decisions it is possible to obtain a view of the judicial control of the Commissioner's discretion is the issuing and revoking of licenses to do business. They seem to show, not only that he is held strictly to the statutes, but also that his discretion in their application is subject to close scrutiny by the courts.

2. LICENSING OF AGENTS.

By the statutes,¹⁹ the Commissioner is empowered to issue, suspend and revoke agent's licenses. It was settled in 1905, in *Commonwealth v. Gregory*,²⁰ that no license is required for agents of domestic companies. Discussion on this point, therefore, will concern only the agents of foreign companies.

There are separate statutes controlling life insurance agents, but the form and procedure required in the regulation of all agents is substantially the same.²¹ Before a license is issued, the applicant must fill out certain forms and provide such information concerning himself, as the Commissioner shall require.²² Then, upon being reasonably satisfied that the applicant is a trustworthy and properly qualified person, the Commissioner is required to issue the license. Should he refuse, the applicant may appeal from his decision to the Franklin Circuit Court, with further appeal, if desired, "as in other civil cases." As an incident to examination of the applicants, the Commissioner has been given discretion to prescribe the questions contained in the forms, and to alter the contents of the forms from time to time as he sees fit.²³

The grounds upon which the Commissioner may suspend and revoke an agent's license are enumerated in the statutes,²⁴ which also prescribe the procedure to be followed. Written notice must be given to the agent and his company, and full opportunity for a hearing afforded. The form of appeal is the same as that provided in the cases of refusal to grant a license.

All of the cases found dealing with granting and revoking of agent's

¹⁹ Ky. Statutes, secs. 634, 659-1, 659-2, 659-6, 694, 762a-14b, 762a-14d, 762a-14e.

²⁰ 121 Ky. 256, 89 S. W. 168 (1905). It was held that, as the statutes of the State could be construed not to require a license for agents of domestic companies, and as no license had been required for them by the officers of the State since the passage of the said statutes, no license was required.

²¹ *Ibid.*

²² Ky. Statutes, secs. 659-2, 762a-14b.

²³ Ky. Statutes, sec. 762a-14c. For a recent case upholding a similar delegation of power to an administrative official, see *U. S. v. Tishman*, 99 F. (2d) 951 (1931).

²⁴ Ky. Statutes, secs. 659-6, 762a-14d.

licenses have as their main issue the question of rebating.²⁵ In *Lyman v. Ramey, Insurance Commissioner*,²⁶ the applicant was secretary and only employee of an unincorporated, non-profit association. He sought a license to write bonds and indemnity insurance for members of the association, the commissions to be turned over to the association and used to pay his salary and the expenses of his office. The Commissioner refused to issue the license on the ground that this arrangement would result in a rebate to the association members. The court upheld his contention, saying that the applicant could have acted himself as agent, but could not act as an agent and employee of the association at the same time.

The question arose again in *Rogers v. Ramey, Insurance Commissioner*.²⁷ The applicant, an employee of a corporation which was authorized by its charter to "act as agent for persons and corporations in any and all matters which can be solicited, negotiated, operated and carried on by an agent or trustee," applied for a license to write insurance, the commissions to be turned over to the corporation. The Commissioner again refused to issue the license on the ground that the arrangement would result in rebating. The court, however, overruled the Commissioner and ordered the license to issue, saying that this really amounted to the corporation being the agent, which it was authorized to be by its charter.²⁸ The provision in the charter took the case out of the rule in the *Lyman* case.

In *Saufley, Insurance Commissioner, v. Smith, et al.*,²⁹ Smith, a part time employee of a banker's association, applied for a license to maintain an agency just discontinued by the association as a result of the decision in the *Lyman* case, and was refused by the Commissioner on the ground that the arrangement would result in rebating, in that a sufficient number of the association members would patronize Smith to justify his taking a small salary for his part time work for the association. The court overruled the Commissioner, and ordered the license to issue. It said that the possibility that members of the association would patronize Smith was not sufficient reason to refuse

²⁵ Ky. Statutes, sec. 762a-19: "No insurance company nor any agent, in connection with placing or attempting to place insurance, shall pay, allow or give, or offer to pay, allow or give, nor shall any person receive, any rebate of premium on a policy, or any special advantage in dividends or other benefits, paid employment or contract for services, or any valuable consideration or inducement whatever, not specified in the policy, or give, sell or purchase, in connection with placing or attempting to place insurance, anything whatsoever not specified in the policy. . . ."

²⁶ 195 Ky. 223, 242 S. W. 21 (1922).

²⁷ 193 Ky. 138, 248 S. W. 254 (1923). Cf. *Saufley, Insurance Commissioner, v. Botts, et al.*, 209 Ky. 137, 272 S. W. 408 (1925).

²⁸ The Commissioner further contended that the corporation could not be an insurance agent, as the statute required him to be satisfied that the applicant was a person of good moral character, and a corporation was not a person. The court held that this statutory requirement did not prevent a corporation from being an agent.

²⁹ 209 Ky. 134, 272 S. W. 379 (1925).

the license, and even should they give him their business it would not amount to rebating.

The decisions seem to indicate that the court is unwilling to give over to the Commissioner the application of the statutes in this matter. The statutes give to the Commissioner discretion in granting, suspending and refusing licenses, but, upon the question of rebating at least, it is the court's discretion, and not that of the Commissioner, which prevails.

THE POLICY

There are no standard forms of insurance policies required in Kentucky.³⁰ The nearest approach to this form of control is found in the statute³¹ which prescribes certain provisions that must be contained "in substance" in all life insurance policies. There are several scattered statutes³² requiring minor provisions and certain other information to be included in different ones of the various types of policies, but substantial control over the form of the policy has not as yet been undertaken in Kentucky.

CONCLUSION

Kentucky has not gone as far as some of the other states in administrative control of insurance.³³ But as the Division of Insurance has developed from 1893 to the present, it has been given more and more powers and duties, and there is nothing to indicate that this trend will change.

The Director has been clothed with many powers and duties and granted a certain amount of discretion in their exercise, but the decisions as a whole seem to show that the courts have, and are, maintaining a strict control over his actions. *Reed v. General Insurance Company of America*,³⁴ a recent case, would seem to be indicative of the court's present attitude. In that case the Commissioner contended that the form of the five year annual renewal option, used by the defendant company in its policies, resulted in "unfair discrimination" and "rebating." It differed from the installment-note form of option, the form in general use, in that, instead of requiring five notes for the premiums at the beginning of the five year period, the insured could

³⁰ Standard policies are required in Massachusetts, Michigan, New Hampshire, and New York, and other states. See Vance, *Insurance*, (2nd ed.), pp. 41-44 (1930).

³¹ Ky. Statutes, sec. 659.

³² i. e., Ky. Statutes, sec. 676, which requires that the amount to be paid on policies of Assessment and Cooperative Life Companies be stated in the policy; Ky. Statutes, sec. 679, which requires the constitution and by-laws of the company and the application to be made a part of the policies of Assessment and Cooperative Life Companies; Ky. Statutes, sec. 706, which requires all Assessment and Cooperative Fire Companies to attach a copy of their by-laws to each policy.

³³ See Becker, *Administrative Control of Insurance in Wisconsin*, 4 Wis. L. R. 129 (1927).

³⁴ 265 Ky. 206, 96 S. W. (2d) 259 (1936).

wait until the beginning of each year to pay and still obtain the benefits of the reduced rates which were allowed for term insurance. Thus the insured would not have to bind himself for the subsequent premiums in any way at the beginning of the period. In overruling the Commissioner's contention, the court said:

"The fundamental error of such views is the assumption that the installment-note form of policies is the acme of term insurance, and that any other plan embodies the essential elements of "unfair discrimination", "rebating", and all other things inhibited by the statutes."

The holding and the language of the court indicate a disposition to substitute its judgment on the question of unfair practice for that of the Commissioner, a man presumably selected for the very purpose of observing, detecting and correcting insurance evils. It is probable that the attitude of the Commissioner in trying, from time to time, to force his determinations upon the court, and refusing to state his reasons therefor, is largely responsible for this strict judicial supervision. What the attitude of the court would have been had the Commissioner readily presented detailed and reasoned findings is a matter of conjecture. It has been suggested, however, that the degree of judicial respect afforded administrative determinations depends upon the readiness of administrative officials to fully state the reasons and grounds upon which they proceed.³⁵

RICHARD BUSH, JR.

³⁵ See Henderson, *Federal Trade Commission*, pp. 334-337 (1924).