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Insurance - Constitutional and Statutory Provisions - Direct Actions against Insurance Companies

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past activity in a disloyal group bears a reasonable relationship to present fitness for public office. If the court finds the relationship reasonable, past loyalty oath statutes are valid as merely setting a standard. But if no reasonable relationship is found, depriving a man of public office for past activity in disloyal groups is punishment, and renders the statutes void as *ex post facto* laws and bills of attainder.

ROBERT M. FAIR

INSURANCE — CONSTITUTIONAL AND STATUTORY PROVISIONS — DIRECT ACTIONS AGAINST INSURANCE COMPANIES. — *A*, a resident of Texas, was injured in an automobile accident in Louisiana through the negligence of *B*, also a resident of Texas. *A* brought suit directly against *B's* insurance company, a Swiss corporation which had entered the insurance contract with *B* in Texas. In similar situations Texas permits no direct action against an insurance company, but a Louisiana statute allows a direct action if the accident occurs in Louisiana, even though the policy may contain a provision forbidding such action.[1] The court *held* that the Louisiana statute could not be applied to contracts consummated outside the state, without giving it extra-territorial effect and depriving the insurer of its property without due process of law. *Mayo v. Zurich General Accident & Liability Ins. Co.*, 106 F. Supp. 579 (W.D. La. 1952).

Statutory attempts to deal with the problem of compensation for automobile accident victims have taken three main forms: (1) the enactment of "Financial Responsibility Acts;"[2] (2) compulsory insurance requirements;[3] and (3) statutes permitting direct actions against insurers.[4] The

1. La. Acts 1950, No. 541. "No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment . . . against the insured for which the insurer is liable . . . shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained . . . against the insurer. The injured person . . . shall have a right of direct action against the insurer . . . in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer. . . . This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. . . ."

2. Such laws usually contain provisions: (1) Requiring proof of financial responsibility following a conviction of violation of certain motor vehicle laws. (2) Requiring proof of financial responsibility following non-payment of a motor vehicle accident judgment. (3) Suspending the right to operate a motor vehicle until satisfaction of such judgment. Braun, *The Financial Responsibility Law*, 3 Law & Contemp. Prob. 505 (1936).

3. Massachusetts, first in this field provided in 1925, that no motor vehicle or trailer could be registered unless an insurance company authorized to do business in the state certified that a liability insurance policy had been issued covering the vehicle in question. Braun, *supra* note 2, at 537. While compulsory insurance for all vehicles is a rarity, many states require it for common carriers. N.D. Rev. Code §49-1833 (1943). The Statute expressly forbids joinder of the insurer in the action so as to expose the fact of insurance to the jury. However, James v. Young, 77 N.D. 451, 43 N.W.2d 692, allowed such joinder under other statutes; *cf.* N.D. Rev. Code §28-0206 and §28-0703 (1943).

4. What Louisiana did by legislation other states have done by judicial interpertation. Kansas treats an automobile liability policy as a third party beneficiary contract creating a direct right against the insurer where the insured is a motor carrier;

remedy of a direct action against the insurer where the insured proves insolvent or bankrupt has been provided in many states.[5] The hardship to the injured party is manifest in the situation which occurs when, after a judgement against the negligent party has been returned unsatisfied because of his insolvency, the injured party is left without redress because the insurance policy provides for payment to the insured only after the insured has paid the claim.[6] Statutes allowing a direct action against the insurance company in the absence of the insured's insolvency or bankruptcy are more rare, and their application and effect has created many unusual problems.

Louisiana first enacted a direct action statute in 1930, but by its terms that statute was applicable only to contracts made within the state.[7] That such a statute is constitutional has been definitely settled.[8] In 1950, however, Louisiana amended its statute in an attempt to extend its force to all contracts of insurance, regardless of where they were entered, so long as the accident occurred in Louisiana.[9] The instant case reiterates the decision of at least one previous case that insofar as the statute attempts to govern contracts made in other jurisdictions it is unconstitutional.[10]

The problem of adjudicating foreign contracts where the laws of the states are in conflict is always a perplexing one, especially where the subject involved is one as controversial as the right of direct action against an insurance company. Most of the cases involving the direct action statute have been instances where the suit was brought on Louisiana insurance contracts in jurisdictions forbidding direct actions against insurers. The primary question involved in these cases has been whether the Louisiana statute was to be considered procedural or substantive by the forum, since if considered substantive in character the statute should be applied by the forum while if considered procedural it would not be applicable.[11] Recent decisions by the Louisiana

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see, e.g., State Highway Commission v. American Mut. L. Ins. Co., 146 Kan. 187, 70 P.2d 20 (1937); Dunn v. Jones, 143 Kan. 218, 53 P.2d 918 (1936); Aetna Casualty & Surety Co. v. Gentry, 191 Okla. 659, 132 P.2d 326 (1942). Wisconsin allows joinder of the insurer openly in the trial court under a statute allowing joinder of all parties having an interest in the controversy. Wis. Stats. §260.11 (1949). This statute was construed to be procedural by a Minnesota court, Anderson v. State Farm Mut. Automobile Ins. Co., 222 Minn. 428, 24 N.W.2d 836 (1946), so as not to divest the insurer of his rights under the "no action" clause of the policy even though the accident occurred in Wisconsin. In another case with identical facts (accident and contract in Wisconsin, suit brought in Minnesota) Minnesota however applied Wisconsin law on the ground that the policy in question did not contain a "no action" clause which could be enforced in Minnesota. Kertson v. Johnson, 185 Minn. 591, 242 N.W. 329 (1932).

5. These statutes arose because of strict judicial enforcement of "no action" clauses requiring actual payment of the claim by the insured before he in turn could collect from the insurer and limiting the injured party's right of action to the insured only. The technical difference between a policy of liability and one of indemnity is important. The former gives rise to a cause of action as soon as the injury occurs, the latter merely indemnifies the insured *after* he has satisfied the claim. 7 Appleman Ins. L. & P. §4261 (1942).

6. N.D. Rev. Code §39-1433 (1943).

7. La. Acts 1930, No. 55.

8. Lewis v. Manufacturer's Casualty Ins. Co., 107 F. Supp. 465 (1952) (no expansion of jurisdiction of federal courts); Gager v. Teche Transfer Co., 143 So. 62 (La.App. 1932) (not an impairment of a contract); Rossville Com'l. Alcohol Corp. v. Dennis Sheen Trans. Co., 18 La. App. 725, 138 So. 183 (1931).

9. See note 1 *supra*.

10. Bayard v. Traders & General Ins. Co., 99 F. Supp. 343 (W.D. La. 1951).

11. Wells v. American Employers Ins. Co., 132 F.2d 316 (5th Cir. 1942) (in a suit originally brought in Texas the Federal court held in a 2-1 decision that the right to sue directly was procedural and Texas law governed).

courts have held the statute substantive in character,[12] although the 1930 statute had previously been held procedural by the Louisiana courts.[13] The holding that the 1930 statute was procedural caused the Mississippi court, which had at first applied the statute to local suits on Louisiana insurance contracts,[14] to reverse itself and refuse to apply the statute on the ground that the Louisiana construction of the statute as procedural should be accepted as binding.[15] A not unlikely situation may be imagined in which a court, attempting to apply a foreign action statute, might find that the courts of the foreign state have declared their statute to be substantive while a local law forbidding direct actions against insurance companies has been held procedural. The court would appear to be confronted with two diametrically opposed rules, both equally binding.[16] In such a situation, the problem whether the foreign statute is to be considered procedural or substantive would appear soluble only by application of the law of the forum, and this solution is the one generally adopted.[17]

An argument used by some courts in applying the Louisiana direct action statute even where it conflicts with local law is that the application of such a statute does not violate the public policy of the forum.[18] The possibility that another state would refuse to apply a direct action statute on the grounds of public policy would appear to be a consideration of rapidly decreasing weight, since in the light of increasing legislation requiring compulsory insurance coverage of automobile drivers it may be presumed that juries in most suits involving motor vehicle accidents proceed on the assumption that insurance is present in the case.[19] However where the law of the forum expressly provided that the insurer's interest should not be exposed to the jury, one court declared a direct action law violative of local public policy.[20]

The point of interest in the present case is to be found in the holding that Louisiana's statute could not constitutionally be applied to the insurer since the contract of insurance was entered in Texas and the rights arising under it were therefore governed by Texas law. It may be pointed out that the rule that contracts are governed by the *lex loci contractus* is simply one of three rules which have been heretofore applied by courts in making a choice of the law applicable to the construction of contracts.[21]

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12. Lewis v. Manufacturers Casualty Ins. Co., 107 F. Supp. 465 (W.D. La. 1952); Bayard v. Traders & General Ins. Co., 99 F. Supp. 343 (W.D. La. 1951); West v. Monroe Bakery, 217 La. 189, 46 So.2d 122 (1950).

13. Robbins v. Short, 165 So. 512 (La. 1936); Lowery v. Zorn, 157 So. 826 (La. 1934).

14. Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938) (Mississippi court declared the Louisiana statute to be procedural).

15. MacArthur v. Maryland Casualty Co., 184 Miss. 663, 186 So. 305 (1939) (construction of a statute by the state that enacted it is binding).

16. For the possibility of such a problem arising in North Dakota in applying a Louisiana insurance policy see N.D. Rev. Code §39-1611 (Supp. 1949).

17. 3 Beale, Conflict of Laws 1601 (1935).

18. Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1930) (Louisiana statute not repugnant to Mississippi public policy; see Restatement, Conflict of Laws §612 (1934).

19. Since North Dakota now has a state Unsatisfied Judgment Fund providing compensation for injured persons where the negligent driver is uninsured, the problem seems of reduced significance. N.D. Rev. Code §39-1703 (Supp. 1949). The right of recovery has been extended to cases where the negligent party causing the injury is an unascertained "hit and run driver". N.D. Sess. L. 1951 c.258.

20. Lieberthal v. Glens Falls Indem. Co., 316 Mich. 37, 24 N.W.2d 547 (1946).

21 See 2 Beale, Conflict of Laws 1090 (1935); Goodrich, Conflict of Laws 321 (3rd ed. 1949).

A second rule enunciated is that the validity of contracts is governed by the law the parties intended to govern.[22] Under the third rule, the law of the state contemplated as the place of performance governs.[23] In the instant case it is arguable that the parties intended to be governed by the law of the state where the insured contracted liability. Application of either of the latter two rules might require a result different from that reached by this court. However, the opinion rendered appears sound on principle. The rule most generally accepted governs contracts according to the law of the place where they are entered. This rule has the additional merits of simplicity and certainty in most cases.[24]

ROBERT H. LUNDBERG

INTERNAL REVENUE — DEPRECIATION — RIGHTS OF LIFE TENANTS TO DEPRECIATE IMPROVEMENTS. — Petitioner and her husband entered into a trust agreement whereby certain real property was conveyed as a gift in trust to a daughter, subject to a life estate in themselves and the survivor. Subsequently, after the death of her husband and at the age of 73, the petitioner razed an unproductive building on the property and built a new office building so that she might profit from her life estate. The useful life of the building was 50 years and her life expectancy was then 7.26 years. Petitioner claimed a deduction for depreciation based on her life expectancy in her income tax returns. The Court of Appeals held that depreciation was to be computed over the life of the property and not over the life expectancy of the tenant for life. *Penn v. Commissioner of Internal Revenue*, 199 F.2d 210 (8th Cir. 1952).

Depreciation, a matter of legislative grace,[1] is allowed as a deduction from gross income in determining the net taxable income.[2] The allowance applies only to property used in the trade or business of the taxpayer provided he has supplied the capital which has gone into the property.[3] A de-

22. This view has been rejected by text writers. 2 Beale, Conflict of Laws 1079 (1935); Goodrich, Conflict of Laws 325 (3rd ed. 1949); and by the courts, New York Life Ins. Co. v. Cravens 178 U.S. 389 (1900); Ragsdale v. Brotherhood of Railroad Trainmen, 229 Mo. App. 545, 80 S.W.2d 272 (1934).

23. See 2 Beale, Conflict of Laws 1086 (1935); Goodrich, Conflict of Laws 324 (3rd ed., 1949).

24. See 2 Beale, Conflict of Laws 1090 (1935); see Note 16 A.L.R.2d 881, 890 (1951).

1. *See* Sunray Oil Co. v. Commissioner, 147 F.2d 962, 965 (10th Cir. 1945), *cert. denied*, 325 U.S. 861 (1945); Detroit Edison Co. v. Commissioner, 131 F.2d 619, 622 (6th Cir. 1942), *aff'd*, 319 U.S. 98 (1943) "Like all other deductions, the allowance is a matter of legislative grace."

2. Int. Rev. Code §23 (*l*): "In computing net income there shall be allowed as deductions:

(*l*) Depreciation.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income."

3. City Nat. Bank Bldg. Co. v. Helvering, 98 F.2d 216, 219 (D.C. App. 1938), "The test is, can the claimant, whatever his relationship to the property — as owner, lessee, lessor, etc., — show a depreciating capital investment? The purpose of the depreciation allowance is to permit a person whose money is invested to recover through annual deduction an amount equal to the original outlay." See Weiss v. Weiner, 279 U.S. 333 (1929) (99 year lessee not permited to depreciate lessor's property); *see* Century Electric Co., 15 T.C. 581, 585 (1950); Gladling Dry Goods Co., 2 B.T.A. 336, 338 (1925) (the important question is who made the investment to be recovered over the period of depreciation).