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ties might be controlling were it not for the fact that the money here alleged to be held under a trust was already the subject of an express trust before these checks were issued. It would seem that if the original trust money "had a string tied to it or an invisible legal fence about it, setting it apart from the general funds of the bank,"²⁴ it would take something more than a mere shifting of credits and exchange of checks between commercial and trust departments to sever the string or destroy the fence. The problem is not whether the bank got the money, but whether it got rid of it.²⁵

JOEL B. ADAMS.

Conflict of Laws—Insurance—Validity of Statutes Localizing Insurance Contracts.

The decision of the Supreme Court of the United States in the case of *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*¹ thwarted an attempt of the State of Mississippi to draw within the dominion of its local laws, by statutory enactment,² "all contracts of insurance on property, lives, or interests in" Mississippi. The device employed was a legislative declaration that all such contracts "shall be deemed to be made therein."

North Carolina is one of the few jurisdictions which have attempted in this way to "eliminate" the conflict of law between states,³ and the

²⁴ *First Nat. Bank v. Hood*, 204 N. C. 351, 353, 168 S. E. 528, 529 (1933).

²⁵ In the case of *Cocke v. Hood*, 205 N. C. 832, 170 S. E. 637 (1933), the court experienced no difficulty in giving these same trustees a preferential claim for the \$4,072.66 uninvested cash balance to the credit of the "Mortgage Pool Account." This was a byproduct of the same bookkeeping transaction. But cf. *Edisto Nat. Bank v. Bryant*, 72 F. (2d) 917 (C. C. A. 4th, 1934) (Funds on deposit before bank appointed co-executor held not to create trust in hands of receiver upon bank's subsequent insolvency).

¹ 54 Sup. Ct. 634 (U. S. 1934).

² MISS. CODE ANN. (1930) §5131.

³ N. C. CODE ANN. (Michie, 1931) §6287. For cases in which this section has been applied or referred to, but not discussed, see *Fountain & Herrington v. Mutual Life Ins. Co.*, 55 Fed. (2d) 120 (C. C. A. 4th, 1932); *Horton v. Insurance Co.*, 122 N. C. 498, 29 S. E. 944, (1898); *Blackwell v. Life Ass'n.*, 141 N. C. 117, 53 S. E. 833 (1906); *Williams v. Life Ass'n.*, 145 N. C. 128, 58 S. E. 802 (1907); *Williams v. Order of Heptasophs*, 172 N. C. 787, 90 S. E. 888 (1916); *Wilson v. Order of Heptasophs*, 174 N. C. 628, 94 S. E. 443 (1917).

The above section also contains a provision that "all contracts of insurance the applications for which are taken within the state shall be deemed to have been made within this state and are subject to the laws thereof." This language will be found substantially duplicated in ALA. CODE (Michie, 1928) §8375. While this provision is not specifically dealt with in the text discussion, it is believed that the reasoning of the discussion adequately covers it.

Massachusetts at one time had a provision substantially like that of Mississippi. (Acts 1894 c. 522, §3). It was construed in *Stone v. Old Colony St. Ry. Co.*, 212 Mass. 459, 99 N. E. 218 (1912) as not intended to regulate or prohibit contracts of insurance made outside Massachusetts. The present Massachu-

decision raises the very practical question as to how far such attempts, as made, can be held effective without violating the due process clause of the Fourteenth Amendment, and whether any such attempts which do not conform to the Supreme Court's rules of conflict of laws can be successful.

It is to be noted that this problem is quite distinct from that concerning the power of the states in respect to the conditions which they may impose upon foreign insurance companies seeking to do business within their borders,⁴ or that as to what constitutes doing business within a state.⁵ Neither is this type of statute inherently within that class of unconstitutional enactments which attempt directly, or in effect, to forbid or penalize the making of contracts outside the state, to be performed outside the state, upon property or lives within the state.⁶ Rather is our problem concerned with the question—to what extent can a state retain control over contracts of insurance, wherever made and wherever to be performed, covering property, lives, or interests located within its borders, by legislating that such contracts shall be governed by its domestic laws?⁷

The Mississippi statute was a recognition of the existing general rule of conflict of laws laid down by the courts that the validity and construction of a contract of insurance are to be determined by the (domestic) law of the place where the contract is made;⁸ and Missis-

setts statute, (MASS. LAWS ANN. (Michie, 1933) c. 175, §3) is construed in 2 Op. A. G. 471 as follows: "If this section means more than that the legality and construction of a contract made outside the state shall be governed by Massachusetts law, and attempts to take away a man's right to contract outside the state, it is unconstitutional."

TEX. REV. CIV. CODE. (Vernon, 1925) art. 5054 provides that "any contract of insurance payable to any citizen or inhabitant of this state by any insurance company or corporation doing business within this state shall be held to be a contract made and entered into under and by virtue of the laws of this state relating to insurance," etc. Although designed to be a condition upon doing business in Texas, it was held in *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 45 Sup. Ct. 129, 69 L. ed. 342 (1924) that it could not be "constitutionally" applied to a Tennessee contract.

These are the only statutes of the type under consideration which the writer has found without an exhaustive search.

⁴ *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. ed. 297 (1895) (Leading Case).

⁵ See, for example, on this problem, Isaacs, *An Analysis of Doing Business* (1925) 25 COL. L. REV. 1018; Note (1927) 5 N. C. L. R. 159.

⁶ *Allgeyer v. Louisiana*, 165 U. S. 580, 17 Sup. Ct. 427, 41 L. ed. 832 (1897) (Leading Case); Note (1919) 1 A. L. R. 1665.

⁷ Other aspects of the principal case are discussed in (1934) 34 COL. L. REV. 951, and (1934) 82 U. OF PA. L. REV. 863.

For a discussion of an important related problem, see Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law* (1931) 15 MINN. L. REV. 161.

⁸ COOLEY, BRIEFS ON INSURANCE (2nd. ed. 1927-8 & Supp. 1932) 849; Notes (1902) 63 L. R. A. 833; (1909) 19 ANN. CAS. 30.

issippi was declared to be the place of making in those cases where the insured interest was located therein, regardless of other facts in the case.

Now, assuming that the Supreme Court is committed to the "place of making" rule⁹ (which it unquestionably applied in the principal case), to what extent will it permit a state legislature to determine the place of making? Here, the plaintiff, a Mississippi corporation, applied through its office in Memphis, Tenn., to the Memphis agency of the defendant, a Connecticut insurance company, for a fidelity bond, to cover pecuniary loss sustained by the plaintiff through the fraud, dishonesty, or willful misapplications by employees (to be designated) "in any position, anywhere." The bond was delivered to the plaintiff's Memphis office through the defendant's agency in that city. The defalcations for which the plaintiff sought indemnity occurred in Mississippi. The Mississippi Supreme Court held that, when the employee removed to Mississippi and there defaulted, the interest insured was in Mississippi and the contract became a Mississippi contract under the statute, "even though it contained all the elements necessary to make it a Tennessee contract"; hence a fifteen-months limitation clause in the bond, although valid by Tennessee law, was held unenforceable by application of Mississippi law. In reversing the Mississippi court's decision, the Supreme Court of the United States remarked that a state "may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations." Further, "a legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment." Thus, it seems clear that the Court will not permit a legislature to announce that a contract is made in one state when such an announcement appeals to the Court as being contrary to fact, but will at least require that the state have more than "a slight connection with the substance of the contract obligations."

⁹ The Supreme Court has, at one time or another, enunciated all three of the accepted rules as to the law governing contracts, *viz.*, the "place of making" rule, the "place of performance" rule, and the "intention" rule. On latter two, see, for example, *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. ed. 104 (1882); *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788 (1889); *London Assurance v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. ed. 113 (1897); *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. ed. 788 (1904).

It is interesting to note that the place of making a contract is not always so easily determined as the existence of a general rule applying that test would seem to imply. In the first place, when courts refer to the place of making a contract, they must be taken to mean "contract" in the sense of the factual agreement, as distinguished from the use of the word to denote the legal consequences which may attach to that factual agreement, else their statements that the "validity of a contract is determined by the law of the place of making" would be rendered meaningless, the very definition¹⁰ of the word, as used in the latter sense, assuming validity. If, then, the place of making refers to the factual agreement, where is a contract made when the offeror is in one state and the offeree in another? Obviously, the question must be answered arbitrarily, not logically, as the courts have done; but, by the very reason for an arbitrary solution, courts have come to widely divergent conclusions.¹¹ It is submitted that, except in those cases where all the acts and manifestations necessary to make up a factual agreement clearly took place within one state, the legislative rule that a contract of insurance should be deemed made in the state in which the insured interest is located establishes a no more arbitrary "connection" between that state and the "substance of the contract obligations" than some which the courts have laid down. However that may be, it seems obvious from the language of the decision in the principal case that the judicial rules are to predominate, and that any legislative rule which destroys or affects the interests which are deemed to have vested at the place of, and at the time of, making (under the judicial rules) will be held to deprive parties of due process of law.

To return to our original inquiry, then, it seems clear, at the outset, that the device of enacting that a contract shall be deemed to have been "made" in a given jurisdiction is a futile one, for, as pointed out above, unless the statute embodies, and conforms to, the judicial rule, the latter rule will predominate; and such a statute could serve little purpose, unless to guide an oscillating state judiciary which found itself torn between the divergent lines of authority on such problems.

It seems equally clear that, unless such statutes were made uniform throughout the country, they would be of no great benefit anyway. If, for example, a contract of insurance should come within the statute of one state and thus be subject to its laws, and, for different reasons, come also within the statute of another state and be subject to its laws,

¹⁰ RESTATEMENT, CONTRACTS (1932) §1.

¹¹ See collection of cases in Notes (1902) 63 L. R. A. 833; (1909) 23 L. R. A. (N. S.) 968; (1914) 52 L. R. A. (N. S.) 275; (1909) 19 Ann. Cas. 30.

the problem has been rendered no less complex by the enactment of the two statutes.

The language of the decision already quoted would seem to suggest one loophole, that is, that if the "relative importance of the interests of the forum as contrasted with those created at the place of the contract" were sufficient outstanding, the Court would more readily permit the assertion of dominion over the contract. But when we note that, in the principal case, one party was a citizen of Mississippi, the insured interest was located therein,¹² and payment (performance) was to be made therein, there seems to be little object in legislating over the few cases which would present any state with a stronger claim than Mississippi had here against the state in which the contract was made. Of course, there might not always be such a clear case as here for determining the place of making, but, as already brought out, the Court displays no inclination to relinquish the determination of that point according to its own rules.

Again, the Court recognizes that "cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner," and concedes that "ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws." In other words, a state's public policy is even more sacred than the enforcement of the vested rights of the parties to a contract made outside its borders.¹³ But, while that basis might justify a state in not enforcing certain contracts elsewhere made, it would not prevent the enforcement of those contracts elsewhere according to the laws of the jurisdiction in which they were made—(again, as determined by judicial rules), and thus offers no—or, at best, only a flimsy—solution to the problem in hand.

Nor does resort to the various judicial rules on conflict of laws¹⁴ seem to offer any assistance. The discussion thus far has illustrated

¹² It appears that the defaulting employee was in Mississippi at the time of his defalcations, but presumably not at the time the contract was made. The Court disregards this point.

The question naturally follows as to the construction which would be placed upon such statutes, were they to be held valid. If construed to mean contracts of insurance covering property, lives, or interests within the state *at the time the contract was made*, the apparent purpose behind the statute—to assert the state's police power over contracts of insurance covering interests located within the state—would be defeated as to movable interests coming into the state already insured. If construed to mean contracts of insurance covering property, lives, or interests within the state *at the time the alleged cause of action arose*, then the law governing the contract would change (at least potentially) each time a movable insured interest crossed a state line, with the resultant instability.

¹³ A generally asserted principle. See, for example, COOLEY, BRIEFS ON INSURANCE (2nd. ed. 1927-28) 855, and authorities there cited.

¹⁴ Note 9 *supra*.

the difficulty, even if it is assumed that the Court is committed to one rule. The "place of performance" rule offers an even more attenuated "connection with the substance of the contract obligations" in view of the Court's summary dismissal of the proposition that payment—the usual performance of insurance contracts—was to take place in Mississippi. And, while courts have sometimes respected the manifested intention of the parties as to what law should govern their contract, any statutory enactment requiring them to stipulate that the laws of the jurisdiction in which the insured interest was located should govern would undoubtedly come within the prohibitions of *Allgeyer v. Louisiana*.¹⁵

D. W. MARKHAM.

Constitutional Law—Interstate Transportation of Intoxicating Liquors.

A recent Georgia case involving the confiscation of an interstate shipment of beer emphasizes the renewed importance of the problem of interstate liquor traffic.¹ It was early established that a state in the exercise of its police power could close saloons and prohibit the manufacture and sale of intoxicating liquors,² but a state could not prohibit carriers from bringing liquors into the state without interfering with interstate commerce.³ Thereupon the open saloons gave way to the shops of local agents which, under the protection of the Commerce Clause, were able to operate without state interference so long as sales were made in the original package.⁴ Congress then passed the Wilson Act,⁵ which the prohibitionists thought would put an end to the seeming evasions of the state laws. This act was held valid,⁶ but it was interpreted quite literally, in *Rhodes v. Iowa*,⁷ to mean that the state laws could take effect upon liquor shipped into the state only after arrival and delivery to the consignee. Thus while the consignee might be prohibited from selling it, he was free to have it shipped in for his

¹⁵ 165 U. S. 580, 17 Sup. Ct. 427, 41 L. ed. 832 (1897), cited note 6, *supra*.

A statute so worded as to clearly indicate that it was an assertion of the state's power over persons and property within its borders might present a stronger case for validity. However, the localization of an insurable interest within a certain state does not, logically, require the localization of contracts concerning that interest within the same state.

¹ *Ryman v. Legg*, 176 S. E. 403 (Ga. 1934).

² *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205 (1887).

³ *Bowman v. Chicago & N. W. Ry.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. ed. 700 (1888).

⁴ *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128 (1890).

⁵ 26 STAT. 313 (1890), 27 U. S. C. A. §121 (1934 Supp.).

⁶ *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572 (1891).

⁷ 170 U. S. 412, 18 Sup. Ct. 664, 42 L. ed. 1088 (1898).