BOOK REVIEWS

CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS. By Charles Wendell Carnahan. Chicago: Callaghan and Company, 1942. Pp. xvii, 760. $12.00.

There have been important volumes in the past, dealing with the subject of Conflict of Laws, by Professors Beale, Stumberg, and others, including the recent revised case book by Professors Cheatham, Dowling, Goodrich, and Griswold, as well as articles of great significance by Professor W. W. Cook. However, notwithstanding the growth of the life insurance business to gigantic proportions dominated by companies operating on a nationwide basis, scant attention has heretofore been given to the subject of Conflict of Laws as it pertains to life insurance, most text writers devoting merely one or two pages to this important branch of the subject. The Restatement of Conflict of Laws for example furnishes three sections—about one and one-half pages—to life insurance matters. Professor Carnahan's book on the Conflict of Laws and Life Insurance is the first and only volume, within the knowledge of this reviewer, dealing exclusively with the applicability of Conflict of Laws to life insurance questions. Segregation of this important portion of the field of conflicts in one book, 760 pages in length, is a valuable contribution both to the subject of Conflict of Laws and especially to life insurance legal literature.

Since the development of Conflict of Laws as an independent title in the classifications of general jurisprudence has taken place comparatively recently, its principles as applied to the subject of contracts generally have been ambiguous and troublesome, and its doctrines marked by indefiniteness. Frequently the basis itself for the choice of one law rather than another is obscure or difficult to determine. In addition to this, further complications arise by reason of the highly specialized character of life insurance problems themselves and consequently slight basis for solution is provided by way of analogy to general contract cases disposed of under principles of Conflict of Laws.

Professor Carnahan, finding it difficult to lay down rules as to life insurance, approached the problem by subdividing his book carefully so as to subject very narrow issues, in the various cases involving life insurance problems, to scrutiny in the light of basic principles of Conflict of Laws. Accordingly, the first three chapters deal with certain general principles which run throughout the entire book. The next seven chapters are concerned with the manner in which the courts have applied these general principles in the solution of Conflict of Laws questions affecting individual life insurance problems. The final chapter sets forth the author's conclusions.

Chapter one deals with various factors affecting life insurance problems in the conflict of laws. A brief survey is made of the insurance background, showing the growth of the business, its economic importance, and the development of interstate and international characteristics. Then the author discusses the legal background, or the system of principles of con-

flict of laws which permits a variety of choices as to governing rules of law. While the familiar basic rules in conflict of laws for the interpretation of contracts—namely, the place of making, the place of performance, and the intention of the parties—are elementary, and the place of making an insurance contract generally being the place of delivery of the policy to the applicant, the difficulty arises over interpretation of the term "delivery" which is frequently used in different senses. However, for most purposes the overwhelming majority of conflict of laws cases which follow the "place of making" rule hold that the last necessary act to make a binding insurance contract occurred at the place of physical receipt of the policy by the applicant.

Pre-eminently important in conflict of laws cases involving life insurance contracts are the constitutional limitations of the due process clause of the Fourteenth Amendment, and the full faith and credit clause of Article IV in its application to state statutes. Although historical research has shown that it was within the contemplation of the Constitutional Convention that Article IV, Section 1, not only included public acts but was also intended to be self-executing, it was not until 1932 that the Supreme Court in *Bradford Electric Light Co. v. Clapper*,[1] squarely held that the full faith and credit clause did extend to state statutes and that the clause was self-executing. The full faith and credit clause is available only when the sister state rule is based upon a statute, and it is therefore narrower than the due process clause which appears available to review a state decision whether the forum's rule is based upon common law or statute and whether the sister state rule be common law or statutory. The first chapter of the book reveals that problems of full faith to statutes and of the due process clause have not yet been fully worked out by the Supreme Court. Professor Carnahan has found eight important Supreme Court cases since 1932 from which outlines of the scope of the full faith and credit clause, as applied to state statutes, may be discerned. Four of these were concerned with Workmen's Compensation Laws and one—*John Hancock Mutual Life Insurance Co. v. Yates*[2] involved a life insurance contract.

Although the full faith and credit clause has been applied to compel the courts of the forum to adopt the rules of a sister state when the latter have been embodied in statutes, it does not necessarily follow that the courts of the forum must apply those rules. Familiar exceptions are those where the foreign law was not pleaded or where the forum misconstrued the statute.

In the *Yates* case the rules of the forum and of the sister state were each partly statutory. In the *Bradford* case the rules of each state were statutory and the forum was required to apply the sister-state rule. However, in other cases, such as *Alaska Packers Ass'n v. Industrial Accident Comm.*[3] and *Pacific Employers Ins. Co. v. Industrial Accident Comm.*[4] the

1. (1932) 286 U. S. 145.
2. (1936) 299 U. S. 178.
3. (1935) 294 U. S. 532.
4. (1939) 306 U. S. 493.

rules of each state were statutory and yet the forum was not compelled to adopt the sister-state rule. The cases show that no mechanical test has yet been laid down.

Many now famous cases, too numerous to mention here, which bear upon due process problems, are discussed by the author in tracing in most interesting fashion the development of the use of the due process clause.

However, the conception of "governmental interest" runs through all the due process and full faith and credit cases. By this test the forum, whether its own rule is based upon statute or common law, will be required to apply the foreign statutory rule only when the sister state had such sufficient governmental interest that the case should be controlled by its statute. The test of such governmental interest has not been clearly defined, but at present seems to be synonymous with reasonableness.

In order to afford the reader a better understanding of how the courts have dealt with various life insurance problems in conflict of laws cases, Professor Carnahan has taken infinite pains to familiarize the reader with the constituent parts of the life insurance contract. All of chapter two is devoted to this subject. His very able analysis, supported by an abundance of the most recent authorities, is, in itself, a contribution of considerable merit to legal writings on the life insurance contract. In this chapter he considers every phase of the contract from the application itself, and various provisions found in policies, to supplement riders that are frequently attached to the policies. Statutory regulations and requirements of the several states are set forth in such detail as to make this a reference work of real value to those interested in life insurance law. Here consideration is also given to fraternal associations, their constitutions and by-laws, and the certificates issued by them, and the five United States Supreme Court cases which bear upon the degree of constitutional compulsion affecting state courts in their choice of laws applicable to fraternal certificates, are analyzed in detail.

It is recognized, of course, that a majority of the courts employ the rule of the place of making in determining the validity of contracts in conflict of laws cases, as opposed to the place of performance, and of the intention of the parties. However, the factor of the place of making may also be important in application of the other two rules, and hence its importance is extended to all three basic choice-of-laws principles governing contracts. The overwhelming majority of conflict of laws cases which follow the place of making rule hold that the last act necessary to make a binding contract of life insurance occurred at the place of physical receipt of the policy by the applicant. One of the notable exceptions, of course, is found in those cases in which the premium was paid in advance with the application and a binding receipt taken. Since different connotations are given by various courts to the term "delivery," the author devotes chapter three of the book to a consideration of the delivery concept and its scope. Affecting the delivery concept are the manner of payment of premiums, delivery of the policy by mail, delivery while the applicant is in good health, acceptance of the policy by the applicant, etc., all of which are dealt with in such fashion

as to show that the courts adopt one or another connotation of delivery which will connect the policy with the law of the state where the applicant resided and manually received the policy. This chapter contains a particularly valuable discussion of the various kinds of "binder receipts" and their effects. The author shrewdly observes that binding receipts are not used by the companies for the purpose of governing the choice-of-laws, but for the purpose of insuring prompt payment of the premium and of placing the insurance in effect at the earliest possible moment—a result of great benefit to both the applicant and the insurer.

The development of principles of warranties and representations in insurance law—from their introduction for the purpose of protecting underwriters, through the intermediate stage where, by over-reaching their legitimate object, unjustified advantages were given the insurers, down to the reaction that set in resulting in a judicial re-examination of the principles and the enactment of regulatory legislation—is outlined in chapter four. The statutes in effect in the various states dealing with warranties and representations in applications for life insurance are classified according to seven types, with an eighth division embracing miscellaneous statutes of ten states having some bearing on the problem.

Problems of representations and warranties have been a fertile field for litigation. There is a lack of uniformity among current statutes, and inconsistent rules have been stated by the courts which have frequently made use of whichever principle would sustain recovery against the insurer. The author points out, however, that such inconsistency exists only when a premise is taken that all conflict of laws questions should be decided upon one single rule, but the inconsistency ceases when it is recognized that courts employ various rules to solve entirely different problems, and that the peculiar problems raised by various principles operating in different states to govern warranties and representations have called for modification of generally accepted techniques in conflict of laws cases. Application of conflict of laws rules in general to problems raised by representations and warranties is considered and then attention is given to application of the rules to specific problems such as the requirement that a copy of the application be attached to the policy, misstatement of age, health misrepresentations in the application, the sound health clause, and others. The author concludes that most courts in misrepresentation cases have explained their conflict of laws decisions in terms of the rule of the place of making the contract, the net effect of the decisions being the application of the law of the insured's residence at the time he applied for the policy, especially when it is more favorable to him.

The rights of beneficiaries, including questions of insurable interest, change of beneficiary, assignment of the policy and related matters are treated in the fifth chapter along with relevant constitutional law factors, while the succeeding chapter deals with the question of assignment of life insurance policies and the rights created thereby. It is indicated that the courts have not consistently followed a single rule in regard to assignment problems but, on the contrary, have applied all of the available conflict of

laws rules in such cases. Consequently, in order to prevent a loss of perspective of the entire field, Professor Carnahan has presented in one section a résumé of the rules applied by the courts in assignment cases in addition to his regular closing section setting forth conclusions—a feature that is repeated near the end of each chapter in the book.

The two chapters headed "Non-Forfeiture Provisions," in addition to dealing with the rules pertaining to cash surrender values, extended insurance and paid-up insurance are also concerned with such matters as payment of premiums, necessity of notice by the insurer, policy loans, reinstatement, abandonment, rescission, surrender and substitution of contracts —all pertaining to the financial relationship between the insured and the insurer.

To insure that all phases of the interrelationship between life insurance law and conflict of laws be covered, Professor Carnahan has included chapters dealing with the manner of the insured's death, such as presumption of death arising from unexplained absence, death by legal execution, and suicide of the insured, as well as other factors affecting suit, such as limitation of actions, the incontestability clause and statutory penalties and attorney's fees imposed upon insurers.

With three choices available under Conflict of Laws principles for selection of a law governing a contract, it is not surprising that there should be some apparent inconsistencies. However, as pointed out in the concluding chapter, it is generally agreed that none of the three should be used to select the law of a state which does not have some very substantial contact with the transaction. Unusual attempts by a court to obtain control over insurance contracts through so-called procedural statutes will receive a severe check under the rule of the *Yates* case. While the large number of decisions adverse to the companies would suggest that a court will apply whichever of the three possible rules points to a law most favorable to the insured, this conclusion is not actually borne out by the cases. Analysis which breaks up into smaller categories various phases of the problems considered, reveals that within the limits of narrow problems, the courts are in substantial agreement regarding the choice-of-laws rule to be applied. Furthermore, developments in the last twenty-five years, resulting from a series of decisions by the United States Supreme Court, show that constitutional limitations have been placed upon the permissible sphere of state selection of Conflict of Laws rules. As stated by the author, "Emphasis is being placed by that court upon the definition of governmental interests which may prohibit or require the application of rules of a particular state to govern various issues in areas formerly considered strictly within the realm of state choice-of-laws principles. Judging from recent decisions, there is reason to believe that this process will be accelerated and that some of the uncertainties which now exist in conflict of laws will become clarified. Various clauses of the Constitution are available for this purpose and have been used. The interstate commerce clause (although not yet used in insurance cases), the obligation of contracts clause, and the privileges and immunities clause may be mentioned as potential sources of review, and some of them have frequently constituted the bases of decisions."

Professor Carnahan has demonstrated a familiarity with life insurance problems not ordinarily found in one not connected with a life insurance company. In each subdivision of the book he has examined the cases involving these problems in the light of principles underlying Conflict of Laws. While the unrelated array of cases seem to announce a mass of inconsistent rules and principles, nevertheless the approach used by Professor Carnahan —of directing attention to the treatment of one phase of one section of the whole field of conflict of laws—shows that within these narrow limits substantial agreement among the courts may be found.

The complexities of the subject itself are such that at best it is difficult to keep clearly in mind what one is reading. Professor Carnahan has, however, rendered great assistance to the reader by pausing at convenient intervals to recapitulate in various subdivisions which are found near the close of each chapter.

The policies and contracts of more than a hundred life insurance companies were studied and analyzed by Professor Carnahan in connection with this book. Since the terminology he uses is that of the business itself, the volume should be greatly appreciated by those in the life insurance business. It is copiously annotated and contains a vast store of references to other books, and to cases, statutes and law review articles. This work should be of great value to lawyers and should be a welcome addition to the libraries of all those who are concerned with Conflict of Laws and related problems arising in connection with the life insurance business.

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THE DUAL STATE. A CONTRIBUTION TO THE THEORY OF DICTATORSHIP. By Ernst Fraenkel. Translated from the German by E. A. Shils, in collaboration with Edith Lowenstein and Klaus Knorr. Oxford University Press, New York. Pp. xvi, 208, with appendix and notes. $3.00.

The author has made a most valuable contribution to the legal and political analysis of the Third Reich. The book covers the period from 1933 to 1938, when the author was still practicing law as an attorney at the Berlin Court of Appeals, and presents an excellent study of first-hand legal material for this period. However, since the material is limited to the first five years of National Socialism, the conclusions reached by the author are necessarily limited, so far as their present-day validity is concerned.

Within a system commonly considered the highest development of centralized government, the author distinguishes two "states" or rather spheres of government, the Normative and Prerogative States. The former is defined as "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies." The Prerogative State is "that governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees." (P. xiii.) Both exist simul-

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