

604.

DISAPPROVAL, BONDS OF FAIRPORT EXEMPTED VILLAGE SCHOOL DISTRICT, LAKE COUNTY, \$78,750.00.

COLUMBUS, OHIO, July 24, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

605.

APPROVAL, RESERVOIR LAND LEASE, TO THE MERCER REALTY COMPANY, DOCK-LANDING, BOAT-HOUSE AND BATHING BEACH AT LAKE ST. MARYS, \$2,100.00.

COLUMBUS, OHIO, July 25, 1923.

Department of Highways and Public Works, Division of Public Works, Columbus, Ohio.

GENTLEMEN:—I have your letter of July 21, 1923, in which you enclose the following lease, in triplicate, for my approval:

| Reservoir Land Lease | Valuation |
|---|------------|
| To The Mercer Realty Company, Docklanding, Boat-house and Bathing Beach at Lake St. Marys----- | \$2,100.00 |

I have carefully examined said lease, find it correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
C. C. CRABBE,
Attorney General.

606.

LIFE INSURANCE AGENTS-SUPERINTENDENT OF INSURANCE MAY HAVE DISCRETION TO PASS UPON QUALIFICATIONS OF APPLICANTS FOR LICENSE AS AGENTS, FOR FOREIGN LIFE INSURANCE COMPANIES—MUST REFUSE LICENSE TO NON-RESIDENT IF HE IS RESIDENT OF STATE THAT REFUSES TO LICENSE AGENTS RESIDING IN THIS STATE.

COLUMBUS, OHIO, July 25, 1923.

SYLLABUS:

The qualifications for license as an insurance agent prescribed in sections 644 to 644-4 G. C. do not apply to the licensing of agents of life insurance companies.

The Superintendent of insurance of Ohio is required to see that the laws relating to insurance are duly executed and enforced. As a proper means to this end, he may have authority to exercise a reasonable discretion in passing upon the qualifications of those applying for licenses as life insurance agents, for foreign life insurance companies, transacting business in Ohio.

He may not reject a non-resident applicant as agent of a foreign life insurance company by reason of non-residence alone, unless the applicant is a resident of a state that refuses licenses to residents of this state.

HON. HARRY L. CONN, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent letter relative to license for insurance agents and brokers, especially referring to life insurance, as follows:

“This department has made rulings regarding licenses from time to time in accordance with the opinion of your predecessor, dated November 8, 1922, where sections 644 and 644-5, inclusive, were under consideration.

The department has refused to give any person residing outside the state an agent's license but has and will license such as brokers.

The contention now is made that these licensing sections do not apply to life insurance because of the provisions of 644-5.

Will you kindly advise your view of this?”

You mention the opinion of my predecessor, dated November 8, 1922, wherein section 644 to 644-5, General Code, inclusive, were under consideration.

We have given very careful consideration to the sections mentioned, and others, as well as to the opinion of my predecessor, and we are inclined to adhere to the former ruling of this department as expressed in this opinion, relative to the classes of insurance therein mentioned.

However, the second sentence in said opinion distinctly states that what is said therein should be understood as applying solely to fire and marine insurance.

Yet, nevertheless, we think the theory that has permeated the legislation of Ohio and the consideration of our courts has been to regulate the insurance business in Ohio by confining the activities in the insurance field to recognized and licensed agents, solicitors and brokers. Many reasons might be urged why this should be so, as a matter of proper regulation. Not the least of which is that there may be some one on whom service of process may be made in the event that it becomes necessary to enforce an insurance contract by the insured. Not only this, but we also feel that the regularly licensed insurance agents, solicitors and brokers are entitled to protection which the law recognizes and aims to give to those who are making their livelihood in this avocation, and we would be inclined to extend the holding of the opinion mentioned to the business of life insurance were it not for the provisions expressly contained in section 644-5, General Code, as follows:

"Nothing in this act shall be construed as modifying or repealing the provisions of section 654-1 and section 5438 of the General Code, nor shall the provisions hereof apply to insurance companies other than companies organized or admitted for the purposes provided in subdivision 1 of section 9510 of the General Code, nor shall it apply to mutual protective associations nor to companies operating on the mutual or assessment plan, organized under the laws of Ohio."

Upon a very careful consideration of this matter, and especially of the expressed exception contained in the above section, we conclude that the former ruling of this department, under date of November 8, 1922, was not intended to be and is not applicable to the business of life insurance under our law.

However, notwithstanding the fact that the above mentioned act was confined in its operation to fire and marine insurance, yet we are constrained to believe that it was not the intention of the legislature to leave unregulated the great field of life insurance, its companies and its agents.

Section 617, General Code of Ohio, provides, "The Superintendent of Insurance shall see that the laws relating to insurance are duly executed and enforced."

Domestic life insurance companies are required to certify to the Superintendent of Insurance of this State the names and addresses of their agents, as follows:

"Every insurance company organized under the laws of this state and transacting the business of life insurance, or the business of casualty insurance, shall certify under the hand of one of its principal officers or of its duly authorized officer or agent, to the superintendent of insurance of this state, the names and addresses of the persons authorized by it, as its agents, to solicit or place insurance. The authority of such agent shall continue until cancelled by the company by like certificate filed with the superintendent of insurance, unless the authority of the agent shall be revoked by the superintendent of insurance.

The superintendent of insurance shall record the names and addresses so certified in such manner that duly authorized agents and their respective companies may conveniently be inspected.

No person shall act as agent for such company in soliciting or placing insurance, unless the unrevoked certificate of his authority is so filed with the superintendent of insurance.

Upon conviction of any such insurance agent, for the violation of any insurance law of this state, the superintendent of insurance may revoke the authority of such agent for not more than one year, and cancel his name on the records of the superintendent of insurance, and notify the agent and his company or companies of such revocation; and thereafter, such agent shall not act as an insurance agent or transact any insurance business for or on behalf of any insurance company until new certificate or certificates of his authority, by the company or companies thereafter appointing him, shall be duly filed with and approved by the superintendent of insurance.

No other license or evidence of authority of such insurance agent shall be required, and there shall be no fee or other expense in connection with such certificates of authority."

It will be observed the above section does not expressly provide for a license to issue to the agent of a domestic life insurance company in the first instance. We think there is only implied authority therein at most for the superintendent of insurance to pass upon the suitability or qualifications of the agent of a domestic company, whether the agent be a resident or non-resident, when it provides "no person shall act as agent for such company in soliciting or placing insurance unless the unrevoked certificate of his authority is so filed with the superintendent of insurance."

A later provision in the same section, it will be noted, provides that "upon conviction of any such insurance agent, for the violation of any insurance law of this state", the superintendent may revoke the authority of such agent for one year and cancel his name off his records and notify the company thereof; whereupon he shall transact no business for any insurance company until a new certificate of authority may be issued him.

Foreign life insurance companies, organized by Congress or in any other state, are governed by section 9365, General Code of Ohio, as follows:

"No company organized by act of congress, or under the laws of any other state of the United States, shall transact any business of insurance defined in section ninety-three hundred and eight-five, on the capital stock or mutual plan, in this state, until it procures from the superintendent of insurance a certificate of authority so to do; nor shall any person or corporation, directly or indirectly act as agent in this state for such a company, either in procuring applications for insurance, taking risks, or in any manner transacting the business of insurance, until such person or corporation procures from the superintendent of insurance a license so to do, in which he shall state that the company has complied with all requirements of the laws of this state applicable to it, and deposits a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent is established; for which filing the recorder may charge ten cents."

Also, section 9379 provides:

"All licenses granted by the superintendent of insurance in pursuance of this chapter shall continue in force, unless suspended or revoked, until the first day of April next after the date of their issue."

It will be observed that section 645, General Code, provides as follows:

"The superintendent of insurance shall issue no license to any person as agent of an insurance company if such person is a resident of a state which by its laws, prohibits residents of this state from acting as agents of insurance companies in such state, and if the superintendent is satisfied that any person holding a license as such agent is a resident of such state, he shall revoke such license."

This section clearly recognizes, by inference at least, that nonresidents may be licensed in the State of Ohio. The provision mentioned therein would be out of place and serve no purpose whatever, unless Ohio admits nonresident agents to solicit insurance within the state.

If it were the intention to prohibit a nonresident from soliciting any class of insurance within our state, the superintendent of insurance of Ohio, in obedience to that provision, would be compelled to decline a license to all non-residents. But, under this provision, he is only required to deny licenses to non-residents if they live in a state which refuses a license to a resident of this state.

The purpose of retaliatory enactments of this character is to secure equality of treatment of insurance companies or their agents of one state when transacting business in another state. It is the intention of this statute to interfere as little as possible with state comity, in fact, only sufficient to secure equal rights to companies and their agents.

A case of some interest, by analogy, bearing upon this subject is that of *State ex rel. v. Reimund, Superintendent of Insurance*, being an Ohio case, 13, N. E. 30; 45 O. S. 214.

It may be contended that the above section, 645 G. C., was repealed by implication, upon the passage of sections 644 to 644-5, inclusive, commonly known as the "Agents' Licensing Act", since it is a later enacted statute. The opinion of my predecessor, of date November 8, 1922, we think, rightfully held that that act only applied to fire and marine insurance business. It is quite significant that section 645 G. C. was not repealed or amended. If, therefore, sections 644 to 644-5 G. C. do not apply to companies other than fire and marine, and the provisions of section 645 G. C. are by implication repealed as to the classes of insurance therein mentioned (fire and marine only), then it follows that this section, not being repealed or modified, would stand in full force and effect as to the classes of insurance not otherwise provided for in the later act. This failure to repeal this section allows it to remain applicable to the classes of insurance other than fire and marine, which includes, among such others, that of life insurance.

The duty imposed upon the superintendent of insurance by section 617, General Code of Ohio, to "see that the laws relating to insurance are duly executed and enforced," must of necessity contemplate the exercise of some reasonable discretion growing out of the police power of the state to properly regulate this great important commercial activity.

In the case of *Commonwealth of Pennsylvania vs. Brooman*, reported in 25 L. R. A. at page 254, the Court says:

"In view of the magnitude and the nature of the insurance business, it is apparent that the public is largely interested in all that relates to it. The security of policy holders requires, first, permanency in the custodian of the funds gathered from them, and on which their indemnity in case of loss depends; second, an honest and competent administration of these funds; third, restraint against the division of the profits of the business whenever such division would injuriously affect the security of policy holders. How are these safeguards to be obtained? There is but one way in which they can be obtained and that is by means of general laws regulating the insurance business.

* * * * *

"In the next place, it is important to consider what may be described as the trend of modern legislation on this subject. The states of the Union have severally entered upon legislation regulating insurance. In each an insurance department of the state government has been organized.

A general supervision and control of insurance companies has been assumed by the states, and exercised through the insurance department."

In the case of *Doyle v. Continental Insurance Co. of New York*, the Supreme Court of the United States, in 94 U. S., 535 stated the general rule thus:

"A state has the right to impose conditions not in conflict with the Constitution of the United States on the doing of insurance business within its territory by an insurance company chartered by another state, or to exclude it altogether."

In the case of the *Eagle Insurance Company of Cincinnati v. The State of Ohio*, ex rel. W. H. Kinder, Superintendent of Insurance of Ohio, which case was finally concluded in the Supreme Court of the United States, Mr. Justice White, in a very carefully prepared opinion, decided that the state, in the exercise of police power, may properly regulate the insurance business.

In the case of *Vorys, Superintendent of Insurance of Ohio, v. The State*, ex rel. Connell, reported in 67 O. S., 15, the syllabus reads as follows:

"It is within the discretion of the superintendent of insurance to refuse a license as agent of a foreign life insurance company to one who, in violation of the statute, has, without first obtaining such license, solicited applications for insurance in such company, and, as a part of such solicitation, has offered a rebate of a portion of the regular premium."

On page 19 the Court says:

"The principles of construction here called in question are not distinguishable from those which were considered in *State ex rel. Insurance Company v. Moore*, 42 Ohio St. 103. The judgment there rendered follows the third proposition of the syllabus:

"When such officer (the superintendent of insurance), in determining upon the performance of a public duty, is called upon to use official judgment and discretion, his exercise of them, in the absence of fraud, bad faith and abuse of discretion, will not be controlled or directed by mandamus."

"In the present case, the superintendent insists that in refusing to issue to the relator a license and certificate of authority, he was exercising the discretion which was there held to be vested in him, and so exercising it, as was required by his duty to see that there is an observance of the insurance laws of the state. Was it within his discretion to refuse the license in view of the facts alleged in his answer, and admitted by the demurrer?"

* * * * *

On page 20, the Court, after observing section 3604 Revised Statutes, now section 9365 General Code, quotes from section 3631-7, Revised Statutes, which now, in substantially the same form, is a part of section 654-1, General Code, as follows:

"It shall be the duty of the Superintendent of Insurance, upon being satisfied that any such corporation, or agent thereof, has violated any of

the provisions of this act, to revoke the license of the company, or agent, so offending, and no license shall be granted to such company, or agent, for one year after such revocation."

And then proceeding to answer the question, "Was it within his discretion to refuse the license, in view of the facts alleged in his answer, and admitted by the demurrer?" and to decide the case, says:

"By the explicit terms of this section, it would have been the duty of the superintendent to revoke the license, if one had been issued, and he would, at the time of the application, have been without authority to grant another. His refusal being in accordance with the manifest spirit of the statute, and in furtherance of its obvious purpose, was within his discretion, if not within his imperative duty."

"There is nothing alarming in the term discretionary power. It has a legal meaning, with safe limitations. The intendment of a law which grants it, whether expressly or by implication, is that the discretionary decision shall be the outcome of examination and consideration; in other words, that it shall constitute a discharge of official duty, and not a mere expression of personal will. An arbitrary disapproval of a license, for example, determined upon without an examination of relevant facts, and expressing nothing but the mood of the officer, would not be, in contemplation of law an exercise of the power granted. It would constitute, on the contrary, a neglect and refusal to perform his official functions, and would expose him to the interference of this court by the writ of mandamus, *U. S. v. Douglass*, 19 D. C. 99, 109 *Corpus Juris* Vol. 18, p. 1138."

The qualifications prescribed for agents' license in sections 644 and 644-4 G. C. are not required of agents of life insurance companies.

While as a means to the proper regulation of the insurance business, and independently of sections 644 to 644-4 of the General Code, inclusive, there may be vested in the Superintendent of Insurance of Ohio, authority to exercise a reasonable discretion in the matter of passing upon the qualifications for, and issuing licenses to, agents of foreign life insurance companies transacting business in Ohio, yet he may not reject an applicant because of non-residence alone, unless compelled to do so by the provisions of our retaliatory statute above mentioned.

Respectfully,

C. C. CRABBE,

Attorney General.

607.

APPROVAL, BONDS. OF VILLAGE OF GROVEPORT, FRANKLIN COUNTY, OHIO, \$4,000.00. REFUNDING BONDS.

COLUMBUS, OHIO, July 25, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.