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In *New York Life Insurance Co. v. Dodge* (1918) 246 U. S. 357 and *New York Life Insurance Co. v. Head* (1914) 234 U. S. 149 there was the same holding when the Missouri courts attempted to apply a nonforfeiture statute in spite of the fact that the loans under which the insurer claimed forfeiture were made in New York. See *Comment*, 19 St. Louis Law Rev. 348. Although the above mentioned cases all involve insurance policies there is no apparent reason why the principle announced cannot be applied to the problem as a whole. The general application of such a principle would be in accord with Cordozo's statement that "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained." *Loucks v. Standard Oil Co. of New York* (1918) 224 N. Y. 99, at 113, 120 N. E. 198, at 202. This treatment of the problem might also bring about the desired result that the rights of parties would be the same in every jurisdiction, and the result of an action would not depend upon the forum in which it is brought. See Beach, *Uniform Enforcement of Vested Rights*, (1918) 27 Yale L. J. 656. Had due weight been attached to these considerations the principal case might easily have been decided otherwise.

W. C. S. '35.

CONSTITUTIONAL LAW—DUE PROCESS—CONTRACTS WITH GOVERNMENT AS PROPERTY.—Plaintiff brought an action in a Federal District Court as beneficiary of an insurance policy issued by the United States Government pursuant to the War Risk Insurance Act of 1917, c. 105, art. 4, secs. 400-405 (40 Stat. 409). The United States demurred to the petition on the ground that the court had no jurisdiction, contending that the consent of the United States to be sued on the policy, expressly granted in the above Act, had been withdrawn by an Act of 1933, c. 3, (48 Stat. 8), commonly called the Economy Act (38 U. S. C. secs. 701 et seq.), purporting to repeal "all laws granting or pertaining to yearly renewable term insurance . . ." (Ibid. sec. 717). The plaintiff claimed that this Act deprived him of property without due process of law under the Fifth Amendment to the United States Constitution. The District court sustained the demurrer. On writ of certiorari to the Supreme Court of the United States;—*Held: Reversed*. War Risk Insurance policies are valid contracts with the United States, and as such create vested rights, and are property within the meaning of the Fifth Amendment. The due process clause prohibits the United States from annulling them. But the rule that the United States may not be sued without its consent is all-embracing. This consent creates a revocable privilege, and its withdrawal would not necessarily imply a repudiation of the contractual obligation, since Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal, so long as the obligation is recognized. However, the language of the Economy Act, and other collateral evidence, clearly shows that Congress intended to destroy the right, and not merely the remedy, hence the Act is unconstitutional for the reason alleged. *Lynch v. U. S.* (1934) 292 U. S. 571.

A valid contract with the United States, enforceable only at the discretion of Congress, is nevertheless a vested right and constitutes property within

the "due process" clause of the Fifth Amendment to the United States Constitution. What is a legal right? Can it exist without a remedy?

In the Roman law every legal right was a composite of three indispensable elements; 1) legal capacity in the subject by whom it was exercised, 2) legal control over the subject with reference to which it was exercised, and 3) a legal authority involved in the sanction, or remedy, by which its validity was insured. Morey, *Outlines of Roman Law* (1913) p. 224. The Roman law did not confuse the idea of contract with the idea of the obligation resulting therefrom. The "contractus" itself was not the "right"; it was the transaction by which a right and a duty were legally established. *Op. cit.* p. 352. The legal existence of a right depended upon its protection by the State; and if the right itself was not protected from invasion, or if there was no means of redress in case of infringement, it had properly no legal character or significance. *Op. cit.* p. 387. See Declareuil, *Rome the Law-Giver* (1926) p. 191; Sandar, *Institutes of Justinian* (1876) pp. 396, 398, 403; MacKelday, *Roman Law* (1883) Div. I, arts. 10-14, pp. 4-5. It is clear from the above authorities that in the Roman law there was no such "rara avis" as a legal right without a legal remedy.

At an early date in the history of American jurisprudence a difference was discovered between the obligation of a contract and the remedy provided by law for its enforcement. The distinction probably originated from a remark of Ch. J. Marshall: "The distinction . . . has been taken at bar, and exists in the nature of things. Without impairing the obligation of a contract, the remedy may certainly be *modified* as the wisdom of the nation may direct." *Sturgis v. Crowninshield* (1819) 4 Wheat. 112, 200. However, state statutes which either *substantially* impair, or totally destroy the remedy of a contract, are void and unconstitutional as violative of the "impairment of the obligation of contract" clause of the United States Constitution. *Johnson v. Bond* (1847) 13 Fed. Cases 7, 374, 1 Hempst. 533; *Bruce v. Schuyler* (1847) 9 Ill. (4 Gilm.) 221; *Robinson v. Magee* (1858) 9 Cal. 81; *Planter's Bank v. Sharp* (1848) 6 How. 301; *La. ex rel. Nelson v. St. Martin's Parish* (1884) 11 U. S. 716; *Barnitz v. Beverly* (1896) 163 U. S. 118. "The obligation of contract exists generally 'in foro legis' and 'in foro conscientiae'. The constitutional prohibition as to the impairment of the obligation of contract refers clearly to the former . . . since a right without a legal remedy ceases to be a legal right; and legislation destroying the remedy would reduce a legal and moral right to a moral right only. Such a law is as unconstitutional as one affecting the (legal) right in the same manner, for 'in foro legis' the effects of both are the same." *Johnson v. Duncan* (1815) 3 Mart. (La.) 1530. The only logical conclusion is that a remedy is an inseparable attribute of a contractual right when considered under Art. I, sec. 10, of the United States Constitution. By what juristic prestidigitation does the same right lose this attribute when affected by the Fifth Amendment?

"The contracts between a Nation and an individual are binding only on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will." Hamilton,

Federalist, No. 81. Cf. *Principality of Monaco v. Miss.* (1934) 292 U. S. 313. This is certainly a true statement of the principle of governmental immunity from suit.

Unquestionably, Congress cannot be required to provide remedies against the Government upon its "contracts". And yet in the *Sinking Fund Cases* (1878) 99 U. S. 700, 718, the court said: "The United States cannot any more than the states interfere with private rights . . . and are *as much bound* by their contracts as individuals. . . . All this is indisputable." See Burdick, *Law of the Constitution* (1922) p. 413; *U. S. v. Mo. Pac. R. Co.* (1921) 256 U. S. 51. The statement is absurd upon its face. The courts, having distinguished between the right and the remedy, repeatedly confuse the concepts of the moral and the legal right. What the court meant was that the United States and the individual are *as much bound* "in foro conscientiae" only. It is obvious that the individual alone is bound "in foro legis."

Since the obligation of the United States on its contracts is only a moral obligation, the *right*, the extinction of which by Congress is now said to constitute a deprivation of property under the Fifth Amendment, is at most a possibly ill-founded expectancy that Congress will discharge the sovereign conscience. Even assuming the infallible integrity of Congress in the performance of these duties, the fact of judicial unenforceability, apart from statute, emasculates the legal obligation. The Fifth Amendment has not been construed to cast affirmative duties upon Congress in this regard.

The decision is explainable only in the light of the Court's views of sound public policy. The opinion in the principal case lends substance to the legally empty right against the sovereign in a situation where a remedy has once been afforded, in order to circumvent the logical consequence of the rule that immunity from suit is a sovereign prerogative. Thus a debit on the conscience of Congress miraculously becomes property within the meaning of the Fifth Amendment. This theory, however deliriously illogical, has a method in its madness. It represents a signal triumph of pragmatic thought over medieval doctrines and syllogistic formulae, and vindicates the cogent epigram of Justice Holmes that "a page of history is worth a volume of logic."

A. J. B., '36.

CONSTITUTIONAL LAW—CONTRACT CLAUSE—EMERGENCY—EXEMPTION OF INSURANCE BENEFITS FROM JUDICIAL PROCESS.—Defendant, beneficiary of a life insurance policy, was indebted to plaintiff on a judgment for rent. Subsequently insured died, a writ of garnishment was served on the proceeds of the policy, and was dismissed pursuant to the provisions of an Act of the Legislature of Arkansas (Act 102, Laws of 1933), passed after the service of the writ, that all moneys payable to residents as beneficiaries of life and accident insurance should be exempt from seizure under judicial process for payment of any debt by contract or otherwise. *Held*: Reversed, the law being an impairment of the obligation of contracts under Art. I, sec. 10 of the U. S. Constitution, and remanded for reinstatement of the writ. *W. B. Worthen Co. v. Thomas* (1934) 292 U. S. 426.