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NOTES AND COMMENTS

Automobiles—Determination of Family Membership Under the Family Purpose Doctrine.

A grandson was driving the defendant's family automobile when the plaintiff's intestate was killed through the negligent operation of the car. The trial court refused to submit to the jury an issue as to the grandson's membership in the defendant's family. *Held*, judgment for plaintiff reversed. The facts tend to show that the driver was not a member of the defendant's family within the meaning of the family purpose doctrine, and the issue should have been submitted to the jury under "proper instructions". While the instant case leaves in some doubt whether "proper instructions" would be a

directed verdict in favor of the defendant, this is at least a permissible interpretation of the court's opinion. Thus there is presented the question of what persons are members of an automobile owner's family within the purview of the family purpose doctrine.¹

This doctrine is applicable in various situations. Where a husband maintains a car for the pleasure and convenience of his wife and himself, he is answerable for the negligent operation of the vehicle by his wife.² Similarly, when the member of the family using the car is a dependent son, a minor residing with his father, a judgment against the father is proper under the doctrine.³ If the driver is a stepdaughter, toward whom the owner stands *in loco parentis*, the result is the same.⁴ On the other hand, a twenty-four year old son who works for his father for small wages, in addition to his board and room, is not a member of the family within the meaning of the doctrine, and his father is entitled to a peremptory instruction in his favor.⁵ Likewise, an adult daughter, a school teacher paying for her board and room with her parents, is not regarded as a member of the family.⁶ A statute establishing a presumption of consent when the family car is driven by an immediate member of the family is not operative as to a nephew who is employed by his uncle and pays for his board and room.⁷ It has been held, nevertheless, that a married man, twenty-five years old, who had failed in his own business and was then employed by his father for twenty dollars a week, as well as his board and room, is sufficiently dependent upon his father for liability to attach to the latter.⁸

The dominant consideration throughout the reported cases in determining the existence of the required family relationship is the degree of dependence of the tort-feasor upon the family head for support.⁹ Age and emancipation are not considered decisive of the status of a person as a member of a family.¹⁰ And further, the mere fact that the negligent driver resides with the car owner is not enough

¹ *McGee v. Crawford*, 205 N. C. 318, 171 S. E. 326 (1933).

² *Hutchins v. Haffner*, 63 Colo. 356, 167 Pac. 966 (1917).

³ *Allen v. Garabaldi*, 187 N. C. 799, 123 S. E. 66 (1924).

⁴ *Jones v. Cook*, 90 W. Va. 710, 111 S. E. 828 (1922).

⁵ *Bradley v. Schmidt*, 223 Ky. 784, 4 S. W. (2d) 703 (1928).

⁶ *Scott v. Greene*, 242 Ill. App. 405 (1926).

⁷ *Rogers v. Kuhnreich*, 247 Mich. 204, 225 N. W. 622 (1929).

⁸ *Watson v. Burley*, 105 W. Va. 416, 143 S. E. 95 (1928).

⁹ *Johnston v. Hare*, 30 Ariz. 265, 246 Pac. 546 (1926); *Jones v. Golick*, 46 Nev. 10, 206 Pac. 679 (1922); *Cole v. Wright*, 18 S. W. (2d) 242 (Tex. Civ. App. 1929).

¹⁰ *Watson v. Burley*, *supra* note 8.

to establish the relationship.¹¹ It should be noted that in the cases which hold the owner liable, the driver of the automobile is usually related to him by blood or marriage.¹² In brief, since the occasion for the development of the doctrine was the financial irresponsibility of the individual dependent family member,¹³ the degree of dependence upon the family head represents the most appropriate and conclusive test of the family relationship.

The holding in the principal case appears to be in accordance with the general trend of judicial opinion. The boy came to the home of his grandfather at the age of seventeen, just two years before the mishap, under an express agreement by which he was to clerk in his grandfather's store for a small salary, in addition to his board and lodging. Because an exchange of mutually gratuitous services is characteristic of the family relationship, the court emphasizes this factor as a test, and in this respect the opinion is perhaps unique among the family automobile cases. Although the holding is justified in the light of the earlier decisions, it is possible that due regard for the interest of the injured party would warrant an extension of the family purpose doctrine to this and similar situations.

ERVID ERIC ERICSON.

Banks and Banking—Collection Items 'as Preferences.

In the December, 1933, issue of the NORTH CAROLINA LAW REVIEW there was an inadvertent omission of a citation to the North Carolina statute in footnote 11 of an article which appeared under the heading, "Banks and Banking." Through such omission some persons may erroneously have been led to believe that there was no statute in this state allowing preferences with reference to collection items caught in banks which subsequently become insolvent. This statute may be found in N. C. CODE ANN. (Michie, 1931) §218 (c), subsection 14. It has been discussed at length in this review on two occasions: 6 N. C. LAW REVIEW 175-176; 8 N. C. LAW REVIEW 55, at 59 ff.

HARRY W. MCGALLIARD.

¹¹ Jones v. Golick, *supra* note 9.

¹² Mogle v. Scott & Co., 144 Minn. 173, 174 N. W. 832 (1919) (no recovery for employee's use of car); Reich v. Cone, 180 N. C. 267, 104 S. E. 530 (1920) (no liability for butler's driving); Keller v. Federal Bob Brannon Truck Co., 151 Tenn. 427, 269 S. W. 914 (1925) (doctrine not applicable to corporations). *Contra*: Smart v. Bissonette, 106 Conn. 447, 138 Atl. 365 (1927) (priest's housekeeper held to be member of his family).

¹³ Lattin, *Vicarious Liability and the Family Automobile* (1928) 26 MICH. L. REV. 846; McCall, *The Family Automobile* (1930) 8 N. C. L. REV. 256.

Conditional Sales—Repossession by Seller.

Two recent North Carolina cases involved the retaking of automobiles sold under conditional sales contracts which reserved to the seller the right to enter upon the premises where the property might be located and remove same upon default of the buyer. In both cases it was held that possession must be taken under circumstances which do not involve a civil trespass.¹

In all conditional sales of personal property the title remains in the vendor.² It is not necessary that this retention of title be expressly stated in the contract. Such reservation may be implied from its conditions.³ Upon default of the buyer the title and the right to possession immediately unite in the seller.⁴

Conditional sales contracts usually contain a stipulation giving the seller the right to retake the chattel without legal process in case of buyer's failure to make payments as agreed. But even though such right of retaking has not been specifically reserved, a majority of the courts will allow the vendor to retake the property without resorting to legal action.⁵ In order to effectuate the retaking, such contracts ordinarily provide for the seller's entry upon the premises where the property may be located and his removal of the same without being subject to liability for trespass. Even though the contract does not so provide, the seller has an implied license to enter the premises of the vendee in order to remove the property.⁶ In spite of such provisions, however, the vendor may incur liability in repossessing.

The extent of the vendor's liability in exercising his right of repossession upon default of the buyer may best be illustrated by the following actual case situations. Where the seller sat in the automobile with the buyer and did not retake the car until the buyer

¹Freeman v. General Motors Acceptance Corp., 205 N. C. 257, 171 S. E. 63 (1933); Narron v. Holleman Chevrolet Co., 205 N. C. 307, 171 S. E. 93 (1933).

²Edson & Co. v. Hudson Motor Car Co., 132 Misc. 223, 228 N. Y. S. 582 (1928); Frick v. Hilliard, 95 N. C. 117 (1886); Lundberg v. Kitsap County Bank, 79 Wash. 75, 139 P. 769 (1914).

³Walters v. Americus Jewelry Co., 114 Ga. 564, 40 S. E. 803 (1902); Pease v. Teller Corp., 22 Idaho 807, 128 Pac. 981 (1913); McManus v. Walters, 62 Kan. 128, 61 Pac. 686 (1900).

⁴Lee v. Nat'l. Furniture Stores, 163 S. C. 204, 161 S. E. 450 (1932).

⁵Deere Plow Co. v. City Hardware Co., 175 Ala. 512, 57 So. 821 (1912); Blackford v. Neaves, 23 Ariz. 501, 205 Pac. 587 (1922); Jones v. Williams, 40 Ga. App. 819, 151 S. E. 695 (1930).

⁶Wilmerding v. Rhodes Haverty Furniture Co., 122 Ga. 312, 50 S. E. 100 (1905); Heath v. Randall, 4 Cush. 195 (Mass. 1894); Wash. v. Taylor, 39 Md. 592 (1874).

finally left, he was subject to no liability;⁷ but it was held otherwise where the seller removed the buyer from the car.⁸ Where the repossessed automobile was parked in front of the buyer's home, the seller was immune from liability for removing it;⁹ but to the contrary where he broke open the buyer's garage in order to remove the car.¹⁰ Where the buyer sat upon the stove in order to prevent its recaption, the seller suffered no liability in lifting her from it;¹¹ but where the purchaser sat upon the sewing machine in order to prevent its removal, the vendor became liable for tipping the machine so as to cause the buyer to slide off and suffer injury.¹² In a case where the purchaser was pregnant and in ill health and the seller removed all the furniture from the house, thus aggravating her illness, the seller suffered no liability;¹³ but where the seller broke into the house in the buyer's absence, he was held liable in an action for damages.¹⁴ Where the purchaser from the vendee had notice of the conditional sale of the safe, the vendor was held free from liability in repossessing the safe from this third person;¹⁵ but it was held otherwise where the third person was a bona fide purchaser for value.¹⁶

Although no definitely crystallized set of rules can be formulated which will enumerate with precision the rights of the seller in regaining possession of the property upon the buyer's default, it seems that the following conclusions may be drawn: (1) Title and right to possession being in the vendor, he cannot be liable for wrongful conversion in retaking the property.¹⁷ (2) The seller is immune from liability for trespass where the possession is regained peaceably. (3) A majority of the courts allow no force to be exercised in the retaking. The minority will allow the exercise of that amount of

⁷ *Driver v. State*, 116 Neb. 666, 218 N. W. 588 (1928).

⁸ *Roberts v. Speck*, 169 Wash. 613, 14 Pac. (2d) 33 (1932).

⁹ *State v. Stinnett*, 203 N. C. 829, 167 S. E. 63 (1933).

¹⁰ *Dominick v. Rea*, 226 Mich. 594, 198 N. W. 184 (1924).

¹¹ *Biggs v. Seufferlein*, 164 Iowa 241, 145 N. W. 507 (1914).

¹² *Singer Sewing Machine Co. v. Phipps*, 49 Ind. App. 116, 94 N. E. 793 (1911).

¹³ *Flaherty v. Ginsberg*, 135 Iowa 743, 110 N. W. 1050 (1907).

¹⁴ *Van Wren v. Flynn*, 34 La. Ann. 1158 (1882).

¹⁵ *Sunel v. Riggs*, 93 Wash. 350, 160 Pac. 950 (1916) (The notice may be either actual or constructive, i.e., by registration).

¹⁶ *Mathewson v. Brigman Motors Co.*, 23 Ga. App. 304, 98 S. E. 98 (1919).

¹⁷ *Cf. Walker v. Ayers*, 169 S. E. 784 (Ga. App. 1933) (Buyer on a conditional sale contract refused to pay installments until the radio repaired. Seller retook for purpose of repairing and refused to return. *Held*, buyer did not forfeit right to possession by "default" under such circumstances, and seller guilty of conversion).

force reasonably necessary, the seller being responsible in assault and battery for any excessive force.

J. CARLYLE RUTLEDGE.

Constitutional Law—Due Process and Equal Protection in Respect to Hours of Employment Statutes.

In *State v. Harvey*¹ a statute prohibiting the employment of men in mercantile establishments more than eight hours a day and forty-eight hours a week² was held void as repugnant to the Fourteenth Amendment to the Federal Constitution and to the Constitution of New Mexico³ in that it: (1) deprived the employer and employee of liberty (to contract) without due process of law; and, (2) denied the equal protection of the laws.

As industry in the United States advanced it became apparent that employer and employee did not occupy positions of equality and that the relationship was subject to great abuses by the employer. To remedy this a great many regulatory statutes have been enacted.⁴ One class of regulatory statutes limited directly the hours of employment of certain classes of employees in specified industries. The employers, as was to be expected, tried to protect their dominant position as a constitutional right and contended that such regulations were invalid under either or both of the provisions above set out. The results of these tests can best be observed by dividing the cases into the following five classes.

I. *Children Employees.* Statutes regulating the hours that children may be employed are in force in every state and in every case the regulation has been held valid.⁵ Indeed, it seems hard to believe

¹ 25 P. (2d) 204 (N. M. 1933).

² N. M. LAWS 1933, c. 149.

³ ART. 2, §18.

⁴ For example: *McLean v. State of Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. ed. 315 (1908) (Holding valid a statute requiring coal to be measured for payment of wages before screening); *Erie R. Co. v. Williams*, 233 U. S. 686, 34 Sup. Ct. 761, 58 L. ed. 1155 (1914) (Upholding a statute requiring payment of wages at specified periods and in cash); *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 42 Sup. Ct. 615, 66 L. ed. 1044 (1922) (Statute requiring employer to issue a service letter to employee leaving his service held valid); *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1923) commented upon (1923) 71 U. OF PA. L. REV. 360 and (1923) 9 VA. L. REV. 639 (Holding invalid a statute providing for a minimum wage for women employees in the District of Columbia).

⁵ *Sturges & Burns Mfg. Co. v. Beauchamp*, 231 U. S. 320, 34 Sup. Ct. 60, 58 L. ed. 245 (1913); *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229 (1909).

that there were ever any *bona fide* contentions of invalidity, since children never have been *sui juris*.

II. *Female Employees*. A thorough search of the records disclosed but three cases in which statutes limiting the hours of employment of women have been held invalid and all of these have since been overruled.⁶ In all of the six cases in which it has considered such statutes, the Supreme Court of the United States has upheld the regulation.⁷ The same result has been reached in all the later cases in the state courts in respect to validity under the state constitutions.⁸ In addition to holding that such regulation does not deprive the parties of liberty so as to be repugnant to the respective "due process" clauses, most of the cases specifically hold the fact that the provisions apply to some industries and not to others closely related not to be a denial of equal protection.⁹ Thus it appears to be well established that the hours a woman may be employed can be regulated.

⁶ *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454. (1895) (holding invalid a statute limiting employment of women to eight hours a day and forty-eight hours a week) overruled by *W. C. Ritchie Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695 (1910) (upholding a ten-hour day); *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362 (1894) (The statute here applied to all employees and the court in ruling it invalid made no distinction between males and females) overruled by *Wenham v. State*, 65 Neb. 394, 91 N. W. 421 (1902) (a ten-hour day for women held valid); *People v. Williams*, 189 N. Y. 131, 81 N. E. 778 (1907) (held invalid a statute prohibiting women from working between 9 P. M. and 6 A. M.) overruled by *Radice v. People of New York*, 234 N. Y. 518, 138 N. E. 429 (1923) *aff'd*, 264 U. S. 292, 44 Sup. Ct. 325, 68 L. ed. 690 (1923) commented upon (1924) 13 CALIF. L. REV. 82 and (1924) 19 ILL. L. REV. 100 (holding valid a statute prohibiting women from working between 10 P. M. and 6 A. M.).

⁷ *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. ed. 551 (1907) (ten-hour day); *Riley v. Massachusetts*, 232 U. S. 671, 34 Sup. Ct. 469, 58 L. ed. 788 (1914) (ten-hour day, fifty-six-hour week); *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. ed. 628 (1915) (eight-hour day, forty-eight-hour week); *Bosley v. McLaughlin*, 236 U. S. 385, 35 Sup. Ct. 345, 59 L. ed. 632 (1915) (eight-hour day, forty-eight-hour week); *Dominion Hotel v. Arizona*, 249 U. S. 273, 39 Sup. Ct. 273, 63 L. ed. 597 (1919) (eight-hour day); *Radice v. People of New York*, *supra* note 6.

⁸ *Withy v. Bloem*, 163 Mich. 419, 128 N. W. 913 (1910) (nine-hour day); *State v. Ehr*, 57 N. D. 310, 221 N. W. 883 (1928) commented upon (1929) 2 DAK. L. REV. 399 (eight and a half-hour day and forty-eight-hour week); *State v. Collins*, 47 S. D. 325, 198 N. W. 557 (1924) (ten-hour day, fifty-four-hour week); *State v. Somerville*, 67 Wash. 638, 122 Pac. 324 (1912) (eight-hour day).

⁹ For example: *Miller v. Wilson*, *supra* note 7 (Regulation applies to employment in mercantile establishments and hotels but not to lodging and boarding houses and offices); *Radice v. People of New York*, *supra* note 6 (applies to employees in restaurants who serve as waitresses, cooks, etc., but not to entertainers or cloakroom attendants in such restaurants, nor to employees in hotels and restaurants operated solely for the benefit of employees); *State v. Somerville*, *supra* note 8 (applies to mercantile and mechanical establishments, laundries and hotels but not to harvesting, packing, canning or drying and fruit

III. *Male Employees on Public Works.* The early statutes limiting the number of hours a contractor on a state job could require his employees to work were held invalid.¹⁰ The Supreme Court, however, held that the government has the right to prescribe the terms upon which work can be done for it, and that the exercise of that right does not violate the Fourteenth Amendment.¹¹ It is now settled that such regulations are valid,¹² and such statutes are in force in most of the states. One state limits the hours to thirty a week.¹³

IV. *Male Employees in Dangerous Occupations.* The constitutions of several of the western states specifically empowered the legislatures to enact statutes limiting the hours of employment in mines, smelters, reduction plants and similar industries.¹⁴ About a dozen states have such statutes in force.¹⁵ In the first test case, the Utah Court held the statute valid¹⁶ and this decision was affirmed by the Supreme Court of the United States.¹⁷ With one exception¹⁸ this result has been unanimously followed and at the present the validity of such statutes is unquestioned.¹⁹

V. *Male Employees in Non-Dangerous Occupations.* In respect to statutes of this category some five cases have been found which deny validity. The first, decided in 1892, held invalid a statute limiting to eight hours a day the employment of "all classes of mechanics, servants and laborers."²⁰ The second is the oft-cited case of *Loch-* or vegetable or canning fish or shellfish, a large part of Washington industries).

¹⁰ *Ex parte* Kubach, 85 Cal. 274, 24 Pac. 737 (1890); *People v. Orange County Road Const. Co.*, 175 N. Y. 84, 67 N. E. 129 (1903).

¹¹ *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148 (1903) (eight-hour day).

¹² *Byars v. State*, 2 Okla. Cr. 481, 102 Pac. 804 (1909) (eight-hour day); *Ex parte* Steiner, 68 Ore. 218, 137 Pac. 204 (1913) (eight-hour day).

¹³ UTAH LAWS 1933, c. 39.

¹⁴ For example: IDAHO CONSTITUTION (1890) ART. 13, §2.

¹⁵ For example: CAL. GEN. LAWS (Deering, 1931) §4933; MO. REV. STAT. (1929) §13206.

¹⁶ *Holden v. Hardy*, 14 Utah 71, 46 Pac. 756 (1896) (eight-hour day).

¹⁷ *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780 (1898).

¹⁸ *In re* Morgan, 26 Colo. 415, 58 Pac. 1071 (1899) (The court granted that the statute was valid under the "due process" and "equal protection" clauses but held that it violated the provision of the state constitution guarantying to all persons that right of acquiring and holding property. Immediately thereafter the people of Colorado amended their constitution to empower specifically the legislature to enact such a statute (COLO. CONST. ART. V, §25A) and it does not appear that the subsequent statute has ever been questioned.

¹⁹ *Ex parte* Martin, 157 Cal. 51, 106 Pac. 235 (1909); *State v. Livingston Concrete Bldg. Co.*, 34 Mont. 570, 87 Pac. 980 (1906); *In re* Boyce, 27 Nev. 299, 75 Pac. 1 (1904).

²⁰ *Low v. Rees Printing Co.*, *supra* note 6.

ner v. People of New York,²¹ in which the United States Supreme Court, in 1905, by a 5-4 decision, held invalid a statute limiting employment in bakeries to ten hours a day. The remaining three cases involved respectively, a limitation of employment in bakeries to six days a week,²² an eight-hour day for stationery firemen,²³ and a nine-hour day for baggage-men, station laborers and crossing watchmen.²⁴ All three decisions were based directly upon the decision in the *Lochner* case.

On the other hand, as early as 1902, the Supreme Court of Rhode Island held valid a ten hour day for employees of street car companies,²⁵ but the value of this case as a precedent was, of course, overcome by the decision in *Lochner v. People of New York*. In 1912, however, the Court of Mississippi specifically adopted the minority view in the *Lochner* case and upheld a statute providing for a ten-hour day "in manufacturing and repairing establishments."²⁶ A like result was reached as to statute limiting employment in laundries to eleven hours a day.²⁷ Then, in 1917, in the leading case, *Bunting v. Oregon*,²⁸ the Supreme Court, in a 5-3 decision, held valid a statute limiting to ten hours a day employment in mills, factories and manufacturing establishments. It further ruled specifically that even though the analogous employment in stores, offices, construction work and the like was not included, there was no denial of equal protection.

Even though *Lochner v. People of New York* was not mentioned in the decision in the *Bunting* case, since it can hardly be said that there is any fundamental difference between employment in a mill and employment in a bakery, the net result seems to be that the *Lochner* case is overruled *sub silentio*. It follows that the decisions based directly upon the decision in the *Lochner* case are likewise overruled. This leaves standing intact only the old case of 1892 holding such regulations invalid. In what appears to be the only case involving this point decided since *Bunting v. Oregon*, a nine-hour day, fifty-four-hour week for drug clerk was upheld.²⁹

²¹ 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937 (1905).

²² *State v. Miksicsek*, 225 Mo. 561, 125 S. W. 507 (1910).

²³ *State v. Barba*, 132 La. 768, 61 So. 784 (1913).

²⁴ *Comm. v. Boston & M. R. Co.*, 222 Mass. 206, 110 N. E. 264 (1915).

²⁵ *In re Ten Hour Law*, 24 R. I. 603, 54 Atl. 602 (1902).

²⁶ *State v. J. J. Newman Lumber Co.*, 102 Miss. 802, 59 So. 923 (1912).

²⁷ *Ex parte Wong Wing*, 167 Cal. 109, 138 Pac. 695 (1914).

²⁸ 243 U. S. 426, 37 Sup. Ct. 435, 61 L. ed. 830 (1917).

²⁹ *Ex parte Twig*, 188 Cal. 261, 204 Pac. 1082 (1922).

The provisions of the Fourteenth Amendment and many state constitutions that no person shall be deprived of "life, liberty, or property without due process of law" does not prohibit the legislature from enacting all laws reasonably necessary to protect the health, morals, safety and general welfare of the citizens under the state's police power.³⁰ More concisely, regulation within the police power is due process.

In testing the validity of hours-of-employment statutes the question seems always to have been narrowed to whether or not the regulation as a health measure ("morals, safety and general welfare" seem never to have been considered as having any application) was reasonable or arbitrary.³¹ Since the determination of what is reasonable or arbitrary must be, in all cases, purely a matter of opinion, it would seem that the justices should not substitute their own social and economic beliefs for those of the people, as expressed through their representatives in the legislature. This viewpoint has been adopted in a great many cases.³²

The principle admitting of regulation being established, on what grounds can a court say as a matter of law, that the eight-hour day for male employees of mercantile establishments involved in the instant case is less reasonably a health measure than an eight-hour day in smelters,³³ a ten-hour day in mills,³⁴ or an eight-hour day for women in hotels, telephone exchanges and mercantile establishments?³⁵

Furthermore, in light of the cases reviewed, the contention that the regulation denies the equal protection of the law is without merit. The regulation to be valid must apply equally merely to all members of the class named in the statute.³⁶ Of course, the classification must not be arbitrary.³⁷ Classifications based on the difference between

³⁰ *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923 (1884); *Hiller v. State*, 124 Md. 385, 92 Atl. 842 (1914).

³¹ For example: *Lochner v. People of New York*, *supra* note 21; *Muller v. Oregon*, *supra* note 7.

³² *Bunting v. Oregon*, *supra* note 28; *State v. J. J. Newman Lumber Co.*, *supra* note 26.

³³ *Supra*, notes 16, 17, and 19.

³⁴ *Supra*, notes 26 and 28.

³⁵ *Supra*, notes 7 and 8.

³⁶ *Radice v. People of New York*, *supra* note 6.

³⁷ See *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 92, 21 Sup. Ct. 43, 45 L. ed. 102 (1900).

employees in hotels and employees in lodging houses,³⁸ between student nurses and graduate nurses,³⁹ between waitresses and cloak-room attendants,⁴⁰ and between employees in mills and employees in construction work⁴¹ have been held valid. Clearly, the establishment as a class for regulation of the employees of mercantile establishments is at least equally within the police power, even though such analogous employments as clerking in banks and offices are not regulated.

There being in the Constitution no provision specifically forbidding the regulation of the hours of employment, it would seem that the expression of opinion by the legislature as to the reasonableness of the enactment should prevail. In the instant case, however, the Court used the Fourteenth Amendment to advance the personal social and economic philosophy of its members in opposition to the prevailing social and economic philosophy in this country and in New Mexico in respect to the hours of labor.⁴² Such use of the Fourteenth Amendment does not come within its true purpose and has done much to build up opposition to judicial review of legislation.

IRVIN E. ERB.

Constitutional Law—Right to Counsel in Civil Actions.

The plaintiff brought suit in a federal court to quiet title to Indian lands. The defendant set up a prior determination of the county court as a conclusive adjudication of his status as an heir. The plaintiff thereupon produced evidence showing that the county court had denied her request to be heard through counsel of her own choice, except by permission of, and in subordination to, counsel appointed by the court who persistently hindered and opposed her own representative. *Held*: The plaintiff was denied due process of law

³⁸ *Miller v. Wilson*, *supra* note 7.

³⁹ *Bosley v. McLaughlin*, *supra* note 7.

⁴⁰ *Radice v. People of New York*, *supra* note 6.

⁴¹ *Bunting v. Oregon*, *supra* note 28.

⁴² The prevailing attitude as to the general desirability of the shortening of the hours of labor is clearly manifested by the provisions with respect to labor in the National Industrial Recovery Act [48 Stat. 198 (1933), 15 U. S. C. A. SUPP. §707 (1933)]. Even though it might be said that shorter days for labor generally are not reasonably necessary to protect the health of the laborers concerned, still the regulation may be valid as necessary to protect the health of the general public, in that shorter hours spread employment and thereby permit men now unemployed to raise their families from the mere subsistence level afforded by the relief agencies to a more healthful standard of living.

in the county court, hence its judgment was not entitled to full recognition in the federal court.¹

In England it has always been one's right to have full assistance of counsel in civil actions. In criminal prosecutions, however, this was not true except as to misdemeanors.² In the United States arbitrary action of state courts in depriving one of what is rightfully his is prohibited by the "due process of law" clause of the Fourteenth Amendment of the Federal Constitution. Courts take the position that the intent and application of this provision ought not to be defined with complete finality but, rather, "by the gradual process of inclusion and exclusion, as the cases presented for decision require."³ In criminal actions in the state courts it has always been held that adequate and effective representation by counsel, unless waived, is an integral part of due process.⁴ By analogy, the same rule should apply with equal force to civil suits.⁵

Adequate notice and hearing have long been recognized as elements of due process.⁶ Hearing is interpreted to mean through counsel, if desired.⁷ The implication seems clear that one is entitled to counsel of his own selection, a view recently expressed by the Supreme Court in the much publicised *Scottsboro case*:⁸ "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of hearing, and therefore due process in the constitutional sense."

While the particular problem of the instant case seems never to have arisen before in the United States, the court's solution appears amply justified as being within the scope and purpose of the Fourteenth Amendment and therefore is not open to the charge of being

¹ *Roberts v. Anderson*, 66 F. (2d) 874 (C. C. A. 10th, 1933).

² 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th. ed. 1927) 698. Prior to 1688 one accused of a felony was denied aid of counsel. After the revolution of that year the rule was abolished as to treason, but was otherwise steadily adhered to until 1836, when by act of Parliament the full right was granted in respect to felonies generally.

³ See *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. ed. 616 (1877).

⁴ *Batchelor v. State*, 189 Ind. 69, 125 N. E. 773 (1920); *Comm. v. O'Keefe*, 298 Pa. 169, 148 Atl. 73 (1929); note (1889) 2 L. R. A. 655.

⁵ The guaranties of the Fourteenth Amendment comprehend both civil and criminal actions alike.

⁶ *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14 53 L. ed. 97 (1908); *State v. North*, 304 Mo. 607, 264 S. W. 678 (1924); MCGEEHEE, DUE PROCESS OF LAW (2d ed. 1906) 73-84.

⁷ *Cooke v. U. S.*, 267 U. S. 517, 45, Sup. Ct. 390, 69 L. ed. 767 (1925).

⁸ *Powell v. Alabama*, 287 U. S. 45, 69, 53 Sup. Ct. 55, 77 L. ed. 158 (1932).

an unwarranted or undesirable extension of power of federal over state courts.⁹

WILSON BARBER.

Insurance—Health and Accident Policies— Total Disability Clause.

The insured was adjudicated insane on May 21, 1932. Shortly afterwards his committee began an action to recover payments from Oct. 1, 1930 under a clause in a health and accident policy, providing for certain benefits upon proof that the insured "has become physically and incurably disabled by bodily injury . . . or disease, so that he is and will be thereby permanently, continuously and wholly prevented from engaging not only in his own occupation, but also in any and every other occupation whatsoever, and from performing work of any kind for compensation of any kind whatsoever." The insured has, apparently, continued in his position as clerk of court up to the time the action was commenced. *Held*, reversing a judgment directing a verdict for the defendant, that the question of insured's total disability was for the jury.¹

The familiar principle that an insurance policy is construed in a light most favorable to the insured² is nowhere more apparent than in cases involving the so-called "total disability" clause of health and accident policies. Such provisions are always given a most liberal interpretation;³ and the courts have not been hesitant in declaring that the purpose of this type of insurance is to provide for payments

⁹ U. S. v. Cruikshank, 92 U. S. 542, 23 L. ed. 588 (1875). As a general rule, federal courts will interfere with state action on the ground that it is repugnant to the "due process" clause only where fundamental rights have been denied.

¹ Caldwell v. Volunteer State Life Insurance Co., 170 S. E. 349 (S. C., 1933).

² Thompson v. Phoenix Insurance Co., 136 U. S. 287, 34 L. ed. 408 (1889). The reason most commonly given for this rule is the fact that the policy is written by the company, and the insured has practically no choice in the phraseology employed. In this connection, however, it is interesting to note that, in some jurisdictions, the policy is construed in favor of the insured even though it be in the form required by statute. *Smith v. National Fire Insurance Co. of Hartford, Conn.*, 175 N. C. 314, 95 S. E. 562 (1918). *Contra: Buccola v. National Fire Insurance Co. of Hartford, Conn.*, 18 La. App. 353, 137 So. 346 (1931).

³ But see *Saveland v. Fidelity & Casualty Co.*, 67 Wis. 174, 30 N. W. 237, 239 (1886) ("But there is no law to prevent the parties from making their own contract. The plaintiff consented to and made this one. He cannot repudiate or alter its conditions in the day of his calamity. The courts are powerless to make a new contract for him; or to strike out some words from the contract he made for himself and insert others, and thus enlarge the risk, in order to meet the expectation of the plaintiff in obtaining the policy").

upon the occurrence of some contingent event, and that they will not suffer the policy to become a virtual sham through its description of that event, if such a result may reasonably be avoided.⁴

The strictness, or liberality, with which such terms as "totally disabled" "wholly prevented" from performing each and every duty pertaining to his occupation,"⁵ and the like are construed will depend to some extent upon the jurisdiction in which the case arises. It is probable, however, that no court would require a condition of absolute helplessness as prerequisite to a recovery on the policy. The insured's ability to perform a few trivial and inconsequential acts in connection with the business in which he is insured will not prejudice his rights.⁷ By what appears to be the great weight of authority, it will suffice if his condition be such that he is no longer capable of doing the substantial and material acts necessary to the conduct of such business.⁸ Nor does the fact that the insured is physically able to

⁴ *United States Fidelity & Guaranty Co. v. McCarthy*, 50 F. (2d) 2 (C. C. A. 8th, 1931); *Mutual Benefit Ass'n v. Nancarrow*, 18 Colo. App. 274, 71 Pac. 423 (1903); *Hooper v. Accidental Death Insurance Co.*, 5 Hurl. & N. 546 (1860).

⁵ The word "prevented," one often used in these policies, has been declared by some courts to be synonymous with "hindered." *Booth v. United States Fidelity & Guaranty Co.*, 3 N. J. Misc. 735, 130 Atl. 131 (1925); *Fidelity & Casualty Co. v. Joiner*, 178 S. W. 806 (Tex. Civ. App., 1915). However, as the words are commonly used, there would seem to be a difference in their meanings. The former suggests that performance has been defeated, while the latter suggests that it has been handicapped.

⁶ When the policy, as in the principal case, provides that the insurance is against total disability in any occupation, and not the insured's own occupation, some courts have held that it is sufficient if the insured be totally disabled from performing the duties pertaining to his own occupation. *National Life & Accident Insurance Co. v. O'Brien's Ex'x*, 155 Ky. 498, 159 S. W. 1134 (1913); *McCutchen v. Pacific Mutual Life Insurance Co.*, 153 S. C. 401, 151 S. E. 67 (1929) criticised (1930) 4 *Tul. L. Rev.* 657. The majority, however, have recognized a distinction, and hold that "any" occupation means, not merely that in which the insured is engaged, but also such occupations for which he is fitted by nature, experience, or training. *Industrial Mutual Indemnity Co. v. Hawkins*, 94 Ark. 417, 127 S. W. 457 (1910); *Patten v. Jefferson Standard Life Insurance Co.*, 30 Ga. App. 245, 117 S. E. 772 (1923); *Buckner v. Jefferson Standard Life Insurance Co.*, 172 N. C. 762, 90 S. E. 897 (1916). It has been held that, under a policy insuring against total disability "from performing each and every duty pertaining to his (insured's) occupation," the insurance company was not entitled to set off amounts earned by the insured in other occupations during his period of disability. *Fidelity & Casualty Co. of New York v. Bynum*, 221 Ky. 450, 298 S. W. 1080 (1927).

⁷ *Davis v. Midland Casualty Co.*, 190 Ill. App. 338 (1914); *Thayer v. Standard Life & Accident Insurance Co.*, 68 N. H. 577, 41 Atl. 182 (1896); *Smith v. The Equitable Life Assurance Society of The United States*, 205 N. C. 387, 171 S. E. 346 (1933); 6 COOLEY, BRIEFS ON INSURANCE (2 ed. 1928) 5538; VANCE, INSURANCE (2 ed. 1930) §272.

⁸ *Metropolitan Life Insurance Co. v. Bovello*, 56 App. D. C. 275, 12 F. (2d) 810 (1926); *Young v. Travelers' Insurance Co.*, 80 Me. 244, 13 Atl. 896 (1888)

continue his labors, *per se*, preclude a recovery, provided his condition is such that reasonable care and prudence require that he desist in order to effect a speedy cure;⁹ although it has been held that, should he continue in his occupation under these circumstances, he is not entitled to the stipulated payments.¹⁰ These rules are vague and indefinite, and they are, perhaps, open to criticism on the grounds that they furnish no adequate test with which to determine a doubtful claim without resort to litigation; nevertheless, insurance companies evidently have been unable, or unwilling, to employ a more definite phraseology, as policies embodying provisions similar to that in the principal case are constantly being written, despite the fact that so many of them find their way into the courts.

There are many decisions which take cognizance of the fact that these policies, by their own words, insure not primarily against the loss of income, but against the loss of ability to work.¹¹ Thus, the magnanimous employer who continues the employee's salary during his period of disability will not absolve the insurer from liability. Considered in this light, the decision of the principal case would seem justifiable. A man who has become the victim of some mental disorder might easily continue, nominally, to hold a position when, in fact, his services are worthless. The court hinted that such was the

(a leading case); *Misskelley v. Home Life Insurance Co.*, 205 N. C. 496 (1933). *Contra*: *Lyon v. The Railway Passenger Assurance Co.*, 46 Iowa 631 (1877); *cf. Fidelity & Casualty Co. v. Getzendanner*, 93 Tex. 487, 56 S. W. 326 (1900).

⁹ *Sherman v. Continental Casualty Co.*, 103 Cal. App. 518, 284 Pac. 946 (1930); *Hohen v. Interstate Casualty Co. of New York*, 115 Mich. 79, 72 N. W. 1105 (1897); *Lobdill v. Laboring Men's Mutual Aid Ass'n of Chatfield, Minn.*, 69 Minn. 14, 71 N. W. 696 (1897) (a leading case).

¹⁰ *Cato v. Aetna Life Insurance Co.*, 164 Ga. 392, 138 S. E. 787 (1927). In a number of these cases the insured has made an effort to continue his labors, but has been allowed to recover on the policy. An honest, though unsuccessful, effort to work should not relieve the insurer from liability, but may be considered as evidence that the insured was not disabled. *Travelers' Insurance Co. v. Plaster*, 210 Ala. 607, 98 So. 909 (1924); *Sherman v. Continental Casualty Co.*, *supra* note 9; *Jones v. Fidelity & Casualty Co. of New York*, 166 Minn. 100, 207 N. W. 179 (1926); *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903 (1921).

¹¹ *Bachman v. Travelers' Insurance Co.*, 78 N. H. 100, 97 Atl. 223, 227 (1916) (The insured received a blow on the head which seriously affected his mentality; however, during part of the time for which payments are claimed, he was able to obtain a few orders and earn \$830.00 in the course of two months. The court said: "The contract is not one of indemnity against loss of income. It insures against loss of capacity to work. The issue is not whether money has been received, but whether work has been done, or could have been done"); *cf. Great Southern Life Insurance Co. v. Johnson*, 25 S. W. (2d) 1093 (Tex. Comm. of App., 1930) (The insured continued to manage his business, but with such inefficiency that he went bankrupt).

situation. In reply to the defendant's contention that, should judgment be rendered for the plaintiff, some sixty deeds would be rendered ineffectual, it remarked that "the uncontradicted evidence is that the deeds were prepared by the clerk's deputy, who directed Caldwell when and where to sign." Possibly this may be taken as an indication that the insured was in such a state of mental decline as to be no longer capable of performing his duties¹² and that his pay was a gratuity.

J. B. ADAMS.

Insurance—Recent Trends In Group Insurance.

With the end of the World War many employers throughout the United States, actuated by paternalistic altruism or by a desire to make employment more secure with a greater efficiency on the part of the employees, began to buy group insurance. In some cases the employer pays the entire cost of such insurance, while in others the cost is shared by the insured employees.

These policies cover all or part of those working for the subscribing employer and under them, employees, without individual selection, can be insured at a very low cost. The insurance companies assume these risks without requiring a prior medical examination, since they can regulate the minimum number of employees to be covered by the policy, and since experience has shown the average length of life in such groups to be normal.

While in the ordinary contract of insurance there are but three interested parties—the insurer, the insured, and the beneficiary, group insurance contracts concern four—the insurer, the employer who holds the master policy, the insured employee who holds a certificate evidencing his right under the master policy, and the beneficiary. It is only recently, with the great increase in litigation on such policies, that the complex nature of the contract became evident. The first statute regulating this new branch of the insurance business was enacted in New York,¹ and similar statutes more or less copied from

¹² Cf. *Thigpen v. Jefferson Standard Life Insurance Co.*, 204 N. C. 551, 556, 168 S. E. 845 (1933) (where there was some evidence that insured was incapable of performing his duties as court crier, the court said: "Nevertheless, it is beyond question that the services of the court crier were satisfactory to the public authorities, because they actually paid his monthly stipend of \$40.00. The law is designed to be a practical science, and it would seem manifest that a plain, every-day fact, uncontroverted and established, ought not to be overthrown by the vagaries of opinion or by scientific speculation").

¹ N. Y. Ins. Laws (1918) §101a. This statute provides among other things that group insurance cover not less than fifty persons and be based upon some plan that will avoid individual selection. When premiums are paid by

this one now appear in some twenty states.²

In construing group insurance contracts the general tendency seems to have been to apply the rules of ordinary insurance and of contracts without much appreciation of the special nature of these policies. By pursuing this course, it has been held: that the main contract is between the employer and the insurer and that the insured employee acquires his rights as a third party beneficiary³; that the individual certificates are subordinated to the master policy even when the statute declares that the policy, certificates, and the application together constitute the contract⁴; that the insurer owes no duty to notify the insured employee of the termination of the policy⁵; that the employer is not the agent of the insurance company to waive conditions in the policy,⁶ nor to receive notice of claims for the insurer,⁷ nor to solicit the insurance within the meaning of statutes

employer and employee jointly, seventy-five percent of the employees must be covered. Moreover, such policies may be extended to units of the National Guard or Naval Militia of any state, state troopers or police, members of any labor union, debtors or buyers on installment from the same institution, and any World War veteran's society.

Policies must contain the following provisions: that the policy will become incontestable two years after the date of issuance; that the policy, individual certificates, and applications constitute the whole contract; that in absence of fraud all statements are to be taken as representations and not warranties; that no statement can be used in defense to a claim unless made in a written application; that there is to be an equitable adjustment of premiums or insurance payable in event the employee's age has been misstated; that individual certificates are to be delivered to the employer, to be delivered in turn to the insured employees; that an individual policy will be issued to any employee upon the termination of his employment; that new employees may constantly be added to the list of insured.

Also, no such policy or the proceeds therefrom are liable to garnishment or attachment, before or after payment, to pay any debt of the employee or beneficiary.

²For example: N. C. CODE ANN. (Michie, 1931) §6466 (a)-§6466 (b); PA. STAT. ANN. (Purdon, 1930) title 40 §§531-534.

³*Carruth v. Aetna L. Ins. Co.*, 157 Ga. 608, 122 S. E. 226 (1924); *Metropolitan L. Ins. Co. v. Lewis*, 142 So. 721 (La. App. 1932); *Magee v. Equitable L. Assur. Soc.*, 62 N. D. 614, 244 N. W. 518 (1932); see *Davis v. Metropolitan Ins. Co.*, 161 Tenn. 655, 32 S. W. (2d) 1034 (1931) ("The courts which have considered these group-policy contracts have held that the contracting parties were primarily the employer and the company. The policy is applied for by the employer and issued to the employer, and the insuring company has no direct contractual relations with the several individual employees. It is the employer who pays the premiums to the company, and there is no liability therefor to the company on the part of the individual employees. The rights which the employees acquire are incidental merely").

⁴*Seavers v. Metropolitan L. Assur. Soc.*, 132 Misc. 719, 230 N. Y. S. 366 (1928).

⁵*Beecey v. Travelers Ins. Co.*, 267 Mass. 135, 166 N. E. 571 (1929); *Magee v. Equitable L. Assur. Soc.*, *supra* note 3.

⁶*Duval v. Metropolitan L. Ins. Co.*, 82 N. H. 543, 136 Atl. 400 (1927).

⁷*Ammons v. Assurance Soc.*, 205 N. C. 23 (1933).

making the solicitor an agent of the insurer.⁸ Further, as to the relation between the employer and employee, most courts hold that the employer's acts relating to the insurance are gratuitous⁹; that the employer is under no duty on his own initiative to advise the insured employee concerning the terms of the policy¹⁰; and that the insured employee cannot include his lost rights in a group policy among his damages in an action to recover for wrongful discharge.¹¹

There is, however, a minority group which displays a tendency to overthrow these orthodox tenets and to adjust the law so as to give to group insurance the maximum social usefulness while still keeping it within proper bounds. Pursuit of this policy has evinced a tendency to hold that the relationship between the insured employee and the insurer is stronger than that of a third party beneficiary and that the insurance, in so far as paid for by the employer, is not a mere gratuity but a contract right supported by the consideration of a presumed increase in the employee's interest in his work and of a decreased turnover in labor.¹² In addition, it has been recognized that the employee has a right to receive notice from the insurer concerning termination or changes in the policy.¹³ One case holds that

⁸ Conn. Gen. L. Ins. Co. v. Speer, 185 Ark. 615, 48 S. W. (2d) 553 (1932); Davis v. Metropolitan Ins. Co., 161 Tenn. 655, 32 S. W. (2d) 1034 (1931).

⁹ Myerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94 (1927) (held that although the insured could sue the employer for wrongful cancellation of the insurance contract upon the theory of a gratuitous agency, the beneficiary could not because of the want of consideration); Kowalski v. Aetna L. Ins. Co., 266 Mass. 255, 165 N. E. 476 (1929).

¹⁰ Kowalski v. Aetna L. Ins. Co., *supra* note 9.

¹¹ Gary v. Central Ga. Ry. Co., 37 Ga. App. 744, 141 S. E. 814 (1928).

¹² Thompson v. Pacific Mills, 141 S. C. 303, 139 S. E. 619 (1927); see Carruth v. Aetna L. Ins. Co., 157 Ga. 608, 122 S. E. 226 (1924) (certificate stated that the employer was not acting philanthropically but expected cooperation in return for the insurance. Thus the consideration that implicitly accrues to the employer in every policy of group insurance was expressly admitted here).

In Metropolitan L. Ins. Co. v. Brown, 300 S. W. 599 (Ky., 1927), a clause in the certificate and not in the policy prohibiting assignment of the insurance was held reasonable because of the employer's interest in inducing continued employment.

¹³ Dees v. Travelers Ins. Co., 204 N. C. 214, 167 S. E. 797 (1933) (Recovery allowed under a policy of group insurance which provided that liability was to cease with termination of employment, although the business had gone into the hands of a receiver and the policy had lapsed. The court comments on the insured employee's ignorance of this change of employers and also the lack of notice by the insurance company. The refusal to hold as a matter of law that employment had terminated under the first employer seems to be a frank recognition of the equities of the situation).

In Johnson v. Inter Ocean Casualty Co., 164 S. E. 411 (W. Va., 1932) the court held that the insured employee was not affected by any change in the policy unless he had notice thereof. Although this holding could be based

payment to the employer is payment to the insurance company, and seems to allow the employer to waive certain provisions in the policy.¹⁴

In light of this minority view primarily concerned with the peculiar nature of group insurance, there is still hope for the development of law treating these contracts as *sui generis*. In furtherance of this highly desirable trend it is suggested that:

(1) The insurance, in so far as paid for by the employer, be not considered as a mere gratuity from the employer but as an actual part of the employment contract.

(2) The employer, as part of the employment contract, be held to owe to the employee and the beneficiary the duty of good faith and due care in attending to the policy.

(3) Loss of interest in such policy be considered a naturally contemplated damage caused by a wrongful discharge.

(4) If the employer be allowed to reserve the right to terminate the insurance at will and without notice to the employee, although such reservation might be deemed invalid because unconscionable and against public policy, the employee, in any event, should be entitled to know that this right is reserved.

(5) Most important of all, a direct contractual relationship between the insurer and the insured employee be recognized, and the insurer held to all the duties owed to the insured in an ordinary policy, especially that of notifying the insured before terminating liability. Consideration for these direct obligations on the part of the insurer where the employer pays all of the premiums may be found in the consideration passing from the employee to the employer and thence in monetary form to the insurer. The same result might be reached on the theory of equitable estoppel.

(6) Because of the insurer's superior knowledge of the provisions contained in the master policy and of the impracticability of the employee's becoming thoroughly acquainted therewith, the strict rule of written contracts be modified to avoid subjecting the insured employee to stipulations of which he knows nothing.

(7) The employer, because of his position as the sole intermediary, be deemed the agent of the insurer to collect premiums, upon the theory that the insured has his vested interest as a beneficiary, the court in commenting upon the fact that the insured paid his part of the premium without notice of the change, seems to favor the idea of an equitable estoppel.

¹⁴ All States L. Ins. Co. v. Tillman, 146 So. 393 (Ala. 1933).

receive claims, inform insured of provisions of the master policy, and to waive certain terms therein such as the termination of liability upon cessation of employment when the insured resumes work after a short lay-off.¹⁵

W. VASS SHEPHERD.

Libel and Slander—Absolute Privilege— Executive Proceedings.

The defendant was a Lieutenant Commander in the United States Navy. As Senior Medical Officer of a naval station, he wrote a report to his captain concerning the qualifications of Commander X in which he was alleged to have said that X's wife was a drug addict. The defendant demurred to the wife's complaint. The facts showed that the statements complained of were (1) authorized by law, (2) germane to the subject matter involved in the communication, and (3) made in pursuance of duty. *Held*: They were absolutely privileged.¹

It has been long recognized in the law of defamation that there are occasions upon which statements made are absolutely privileged. This doctrine was created to give immunity to the utterances of public officials while in the performance of judicial or legislative duties.² Under the doctrine officials have been held to be exempt from liability for their communications even where these have been libelous *per se*, false, and malicious.³

In spite of the obvious danger of an undue extension of the doctrine of absolute privilege, the case of *Spaulding v. Vilas*⁴ applied it so as to include the heads of executive departments of the government, thus establishing a precedent that tends to protect all high governmental officials.⁵ Under an application of this rule the following communications have been held absolutely privileged: A letter from the head of the Record and Pension Department to the President;⁶

¹⁵ Legislation declaring the employer to be the agent of the insurance company for such purposes would be the quickest method of achieving such a beneficial end. This should not increase the cost of insurance much, if any. Even so, cheapness of insurance should not be made to depend upon unconscionable devices for avoiding a liability already contracted for.

¹ *Miles v. McGrath*, 4 Fed. Supp. 603 (D. C. Md. 1933).

² *Gattis v. Kilgo*, 140 N. C. 106, 52 S. E. 307 (1905).

³ *Bradley v. Fisher*, 3 Wall. 335, 20 L. ed. 646 (1872).

⁴ 161 U. S. 483, 16 Sup. Ct. 631, 40 L. ed. 780 (1895).

⁵ *DeArnaud v. Ainsworth*, 24 App. D. C. 167, 5 L. R. A. (N. S.) 163 (1904); *Farr v. Valentine*, 38 App. D. C. 413, Ann. Cas. 1913, 821 (1912).

⁶ *DeArnaud v. Ainsworth*, *supra* note 5.

a report by the Commissioner of Indian affairs to the Secretary of Interior;⁷ a report from the Secretary of Treasury to the President;⁸ a report from the head of a veteran hospital to the Veterans' Bureau;⁹ and a letter from a State Superintendent of Public Instruction to a county superintendent.¹⁰ It is to be noted that each of these communications was either by or to the head of some governmental department.

In the English cases which apply the doctrine, one may find statements to the effect that any communication in the nature of an act of state is absolutely privileged.¹¹ A liberal interpretation of the decisions leads to the conclusion that in England the rule extends to the lesser public officers.¹² It has certainly been advanced as far as it has in this country.¹³

Reasons of policy protect certain types of official communications from disclosure to the public and from use as evidence.¹⁴ The extent of this testimonial privilege is not clearly defined, but it has been invoked in England to protect officers of state from liability for libelous utterances.¹⁵ Because it would tend to prohibit the disclosure of matters of which the public has a right to know, any extension of this rule is to be discouraged.

The instant decision fails to note one possible ground in support of its result. It has been suggested that communications of military and naval officers acting within the scope of their duty are absolutely privileged,¹⁶ because the civil courts will not take cognizance of military or naval affairs.¹⁷ This proposition has been applied in England;¹⁸ but in this country, it was condemned by the only decision which gave it direct consideration.¹⁹

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⁷ *Farr v. Valentine*, *supra* note 5.

⁸ *Mellon v. Brewer*, 18 F. (2d) 168 (App. D. C. 1927).

⁹ *Donner v. Francis*, 255 Ill. App. 409 (1930).

¹⁰ *DeBolt v. McBrien*, 96 Neb. 237, 147 N. W. 462 (1914).

¹¹ *Issacs & Sons, Ltd. v. Cook*, (1925) 2 K. B. 391, 397 (quoting with approval from *ERASER, LIBEL & SLANDER* (6th ed. 1925) 196).

¹² *Chatterton v. Secretary of State for India*, (1895) 2 Q. B. 189; *Issacs & Sons, Ltd. v. Cook*, *supra* note 11.

¹³ *Chatterton v. Secretary of State for India*, *supra* note 12.

¹⁴ *Boske v. Comingore*, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. ed. 846 (1898); *WIGMORE, EVIDENCE* (2d ed. 1923) §2378.

¹⁵ *Hennessey v. Wright*, 21 Q. B. D. 509 (1888); *Hughes v. Vargas*, 9 T. L. R. 551 (1893).

¹⁶ *DeArnaud v. Ainsworth*, *supra* note 5.

¹⁷ *NEWELL, LIBEL & SLANDER* (4th ed. 1924) §385.

¹⁸ *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94 (1869); *Dawkins v. Lord Rokeby* L. R. 7 H. L. 744 (1875).

¹⁹ *Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384 (1880).

Municipal Corporations—Liability for Negligence in Maintenance of Jail.

The plaintiff was arrested with a male companion and incarcerated in the town jail, a filthy, one-room structure, without separate toilet facilities for men and women. She sues the city to recover for the more or less permanent injury to her health occasioned by such incarceration. *Held*, no recovery.¹

Cities are generally held to be free from liability in cases of intentional wrongdoing,² but subject to it for the maintenance of nuisances;³ so the problem raised by the case is limited to municipal liability for negligence.

The general rule followed is that cities are liable for the negligence of their agents when they act in their private capacity, but are not when they perform a governmental function.⁴ This may, of course, be varied by statute as in North Carolina where it is held that a prisoner may recover under the Code⁵ for injuries suffered from exposure to severe cold.⁶ Three rules have been formulated to determine this distinction between a private and a governmental act: (1) If the act resembles those done by private corporations, it is private. Thus, a city owning an assembly hall and charging non-residents more than residents for its use is acting like any private corporation.⁷ (2) If the city, as a municipality, derives any special benefit from the act, it is private. Consequently, maintaining a park is a governmental function,⁸ but operating bath houses at a profit is a private act.⁹ (3) If the act promotes public health, safety, education, or the care of the poor, it is governmental. So a city was held not liable for negligence in maintaining a summer camp, even though fees were charged the campers.¹⁰ However, none of these has proved

¹ *Franklin v. Town of Richlands*, 170 S. E. 718 (Va. 1933).

² *Ansboro v. Wallace*, 100 N. J. L. 391, 126 Atl. 426 (1924).

³ *Sandlin v. City of Wilmington*, 185 N. C. 257, 116 S. E. 733 (1923) (To maintain a nuisance by allowing pipes to become so clogged up that sewerage was forced into the street in front of plaintiff's house held to be a confiscation of property).

⁴ *Scott v. City of Indianapolis*, 75 Ind. App. 387, 130 N. E. 658 (1921).

⁵ N. C. CODE ANN (Michie, 1931) §1346 (The sheriff or jailer shall clean every room each day and furnish the prisoner with plenty of water . . . and fuel).

⁶ *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695 (1892).

⁷ *Chafor v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670 (1917).

⁸ *Norman v. City of Chariton*, 201 Iowa 134, 201 N. W. 279 (1920).

⁹ *Burton v. Salt Lake City*, 253 Pac. 443 (Utah 1927).

¹⁰ *Kellar v. City of Los Angeles*, 179 Cal. 605, 178 Pac. 505 (1919).

satisfactory, and there is very little agreement among the cases in classifying particular acts.¹¹

Because of the impracticability of utilizing so nice a distinction, if by any other rule justice can be effected, it seems advisable to adopt that rule. The basis of the present rule is that a sovereign state may not be sued without its consent and that in performing a governmental function a city acts for and as a part of the state. This immunity may properly be carried over to counties which are really local administrative agencies of the state.¹² But the nature of cities is more nearly that of private corporations. They exist under powers granted by and not as a part of the central government. This distinction between cities and counties is made apparent by the fact that, in the recent trend toward centralization, in many instances the counties have been made merely "administrative units"¹³ while the cities have had their powers left intact.

As cities are essentially public service corporations, there seems little reason for overriding the doctrine, that he who does wrong must bear the loss, in favor of the legal anomaly that the loss must remain where it falls. Furthermore, it is to the interest of the public that cities be made liable, and particularly so in the case of injuries from the condition of jails, as a means of enforcing upon them at least some standard of decency.¹⁴ In sixteen states, the central authority has no supervision or control whatever over the local penal institutions, and in many of the others, the power is entirely advisory.¹⁵ The State Board of Charities and Public Welfare of North Carolina has two employes a part of whose work is to inspect these jails, but they are able to do so only at very infrequent intervals. On the basis

¹¹ Typical of the confusion are *Rose v. Gypsum*, 104 Kans. 412, 179 Pac. 348 (1919) (Building of streets is not, but maintaining them is a governmental function and *Hanrahan v. City of Chicago*, 289 Ill. 400, 124 N. E. 547 (1919) (Building of streets is, but maintaining them is not, a governmental function). South Carolina has abandoned the distinction entirely because of the confusion that it produces and holds that cities are never liable for negligence. *Irvine v. Town of Greenwood*, 89 S. C. 511, 72 S. E. 228 (1911).

¹² *Larsen v. Yuma County*, 26 Ariz. 367, 225 Pac. 1115 (1924).

¹³ N. C. CODE ANN. (Michie, supp. 1933) §5780 (5) (The State School Commission is directed to use the counties as "administrative units").

¹⁴ *Shields v. City of Durham*, 118 N. C. 450, 24 S. E. 794 (1896) (Furches, J. "Here it is in evidence that there is no committee in Durham charged with the duty of examining and looking after the town prison, and that the commissioners had not done so since 1888. The law will not tolerate such gross negligence as this, without holding them responsible").

¹⁵ Louis N. Robinson, *The Relation of Jails to County and State* (1930) 26 J. CRIM. L. 396, at 409.

of their reports, the Board makes recommendations to the Governor. As a result of the lack of supervision, conditions in some states become at times unspeakably horrible.¹⁶

It is submitted that neither in theory nor as good policy can the present rule be supported and that in the principal case the Virginia court followed a super-refinement of the law, rather than manifest justice.

PETER HAIRSTON.

Partnership—Suretyship—Rights of Third Party Who Enters into Secret Agreement with One Partner.

Plaintiff and partner, engaged in selling tobacco as commission agents of defendant, guaranteed payment of purchasers' accounts and made a deposit to cover same. Each partner expressly agreed to be bound by the acts of the other. Plaintiff's partner, wishing to sell to a certain purchaser and knowing that plaintiff did not, induced defendant to conceal the transaction from the plaintiff. The purchaser subsequently defaulted, the partner having misappropriated the goods.¹ *Held*, in an action to recover the guaranty deposit, defendant's counterclaim for the unpaid price was valid because there was not proof of such fraud as to release the plaintiff.²

Investigation discloses no case similar on its facts to the principal one. The general rule as regards the effect of concealment upon the surety's liability is that if the creditor knows or has good reason to believe that the surety is being deceived or misled, or that he is in ignorance of material facts, of which the creditor has knowledge, the creditor is under a duty to disclose the facts to the surety, and if he does not, the surety may avoid the contract.³ This rule leaves some doubt as to what constitutes a material fact, the concealment of

¹⁶ *McConnell v. Floyd County*, 137 S. E. 919 (Ga. 1927) (The plaintiff was confined to a small cage in which there was not sufficient room for the prisoners to sleep nor sufficient ventilation, and which was not only filthy but also overrun with varmints. The food was not nourishing and was unpalatable, often consisting only of "sourbelly").

¹ The partner received the goods from the buyer's warehouse in some fashion not appearing in the case.

² *Woo King-Hsun v. Pemberton & Penn*, 66 F. (2d) 811 (C. C. A. 9th, 1933).

³ *Bank of Monroe v. Anderson Bros. Mining & R. Co.*, 65 Iowa 692, 22 N. W. 929 (1885); *Barnes v. Century Savings Bank*, 149 Iowa 367, 128 N. W. 541 (1910); *Province Security Corp. v. Maryland Casualty Co.*, 269 Mass. 75, 168 N. E. 252 (1929).

which will discharge the surety. Some courts have held the facts concealed to be material if they were such that knowledge of them might have caused the surety to act differently.⁴ Considerable authority seems to hold that to be material, the fact must affect the surety's liability and must bear directly upon the particular transaction to which the suretyship attaches.⁵ More recent authorities add the requirement that the withholding must actually prove to be detrimental.⁶ If this latter type of holding means that the concealment must be inherently detrimental so that the creditor should know that the withholding will be likely to prove detrimental to the surety in the ordinary course of the transaction, then there is some ground for holding lack of fraud in the principal case on the ground that the concealment of the sale by the creditor might not reasonably have been calculated to prove detrimental. However, it seems that the partner's request should have put the creditor on notice that there was a probability of affecting plaintiff's risk to his detriment. If, on the other hand, it means that the concealment of those facts is a defense if it actually results in detriment to the surety, regardless of the result reasonably to be foreseen, clearly the facts of this case would establish fraud.

Granting the materiality of the facts concealed, it would seem that the creditor in the principal case has not acted in the good faith which his relationship demands.⁷ Moreover, it has been said that the creditor's motive in concealing certain facts is immaterial;⁸ that the real fraud on the surety results from the situation in which he is placed and not from what passes in the mind of the creditor.⁹

The proposition that concealment of the sale from the plaintiff

⁴ *Barnes v. Century Savings Bank*, *supra* note 3; *Jungk v. Holbrook*, 15 Utah 193, 49 Pac. 305 (1897).

⁵ *Calloway v. Snapp*, 78 Ky. 561, 1 Ky. L. Rep. 229 (1880); *Franklin Bank v. Stevens*, 39 Me. 532 (1855) (evidence that cashier, upon whom a surety bond was taken securing prior as well as future accounts, was negligent in keeping books, was held not to be evidence of a material fact, concealment of which would release the sureties. The court intimates that concealment of previous defalcations of the cashier would constitute concealment of such fact).

⁶ *Springfield Engine & Thresher Co. v. Parke*, 3 Ind. App. 173, 29 N. E. 444 (1891); *Damon v. Empire State Surety Co.*, 161 App. Div. 875, 146 N. Y. S. 996 (1914).

⁷ *Bank of Monroe v. Anderson Bros. Mining & R. Co.*, *supra* note 2; *Damon v. Empire State Surety Co.*, *supra* note 6; *Pidcock v. Bishop*, 3 Barn. & Co. 605 (1825) (a leading case).

⁸ *Railton v. Matthews*, 10 Clarke & F. 934 (1844).

⁹ 1 BRANDT, SURETYSHIP AND GUARANTY (3d ed. 1905) §472.

was no defense to him on the counterclaim because he was in any event bound by the acts of his partner is not persuasive. The principle that a partnership is bound by the acts of either partner, in the ordinary course of business, is well settled.¹⁰ The agreement between the partners in the principal case adds nothing to that rule. Good faith, however, requires every partner to abstain from all concealments, which may be injurious to the other partner or the firm.¹¹ If, therefore, any partner is guilty of such concealment, deriving private benefit therefrom, he will be compelled to account to the partnership.¹² Any transaction so conducted is not in fact an act of the partnership, and if the third party dealing with the firm has notice of one partner's dissent, he thereby has notice that the implied agency has ceased, and the contract with the other partner is not enforceable against the dissenting partner.¹³ The plaintiff in the principal case should not be held accountable to one having notice of his dissent and acting in collusion with the fraudulent partner.¹⁴

E. D. KUYKENDALL, JR.

Practice and Procedure—New Trial—Unproved Allegation of Perjury as Grounds.

In an action for negligently setting fire to plaintiff's timber a witness testified that he saw defendant's servants set fire to a yellow-jacket's nest, the fire spreading to plaintiff's land. After trial he repudiated this testimony, and later repudiated the repudiation. On appeal a motion for new trial on ground of newly discovered evidence was filed in the Supreme Court. The case was remanded for new

¹⁰ *Wharton v. Woodburn*, 20 N. C. 647 (1839); *GILMORE, PARTNERSHIP* (1911) §84.

¹¹ *Kittelsby v. Vevelstad*, 103 Wash. 126, 173 Pac. 744 (1918).

¹² *STORY, PARTNERSHIP* (7th ed.) §172, as cited in *Kittelsby v. Vevelstad*, *supra* note 11, at 745.

¹³ *Johnston & Co. v. Dutton's Adm'r*, 27 Ala. 245 (1855); *Bank of Bell-buckle v. Mason*, 139 Tenn. 659, 202 S. W. 931 (1918). These cases involve express notice to the third party dealing with the firm. It would seem, however, that no distinction should be made where the third party is given notice of the partner's dissent by the conduct of the acting partner as in the principal case.

¹⁴ *Sladen v. Lance*, 151 N. C. 493, 66 S. E. 449 (1909) (involves the extension of credit to one partner by a third party having knowledge that such transaction was in violation of the partnership agreement. The court in holding that the partnership was not liable said, "While the plaintiffs were not, upon the evidence, guilty of that fraud which necessarily involves moral turpitude, yet their conduct was a fraud upon the right of the defendant, for the fraud in such case consists in the knowledge that the partner was violating, with their aid, a stipulation of the partnership agreement, without the consent of the other partner and against her express instructions").

trial to be awarded in the lower court if on investigation the testimony were found to be false.¹

In North Carolina two methods of taking advantage of perjury as ground for new trial exist. (1) Motion for new trial for newly discovered evidence.² This motion may be made in the Superior Court at trial term to set aside verdict, in the Supreme Court on appeal, or in the Superior Court after decision on appeal has been certified down, and before final judgment has been entered.³ The power to grant new trial on such grounds, however, is exercised with extreme caution, and the appearance of the following facts among others rigidly required: (a) That due diligence has been used in getting the evidence; (b) that the evidence is not merely cumulative; (c) that it does not tend simply to contradict or impeach a former witness; and (d) that it is such that in another trial a different result would probably be reached.⁴ Some courts, nevertheless, recognize perjury as a ground for a motion for new trial though evidence of such tends simply to contradict or impeach a witness.⁵

(2) By a direct proceeding in the nature of an equitable remedy to set aside a judgment for fraud.⁶ The rule in most jurisdictions, however, is that such action is permissible only where the fraud is extrinsic to the matter adjudicated, and that perjury, being an intrinsic fraud, is not ground for relief.⁷ The court in recognizing the power to set aside a judgment for fraud where perjury exists restricts its application, as in the former proceeding, by requiring: (a) that the party must not be guilty of laches in discovering evidence and petitioning for new trial;⁸ (b) that the perjury is so

¹Robertson v. Va. Elec. & Power Co., 205 N. C. 111, 170 S. E. 139 (1933) remanding 204 N. C. 359, 168 S. E. 415 (1933).

²Pridgen v. Atlantic Coast Line Railway Co., 203 N. C. 62, 164 S. E. 325 (1932).

³Black v. Black, 111 N. C. 300, 16 S. E. 412 (1892); Allen v. Gooding, 174 N. C. 271, 93 S. E. 740 (1917); State v. Lea, 203 N. C. 316, 166 S. E. 292 (1932).

⁴Johnson v. Seaboard Airline Ry. Co., 163 N. C. 431, 79 S. E. 690 (1913); Brown v. Town of Hillsboro, 185 N. C. 368, 117 S. E. 41 (1923); McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) 676.

⁵State v. Mounkes, 91 Kan. 653, 138 Pac. 410 (1914); Bernstein v. Schneider, 72 Misc. Rep. 479, 131 N. Y. Supp. 340 (1911).

⁶Moore v. Gulley, 144 N. C. 81, 56 S. E. 681 (1907); Mottu v. Davis, 153 N. C. 160, 69 S. E. 63 (1910); McCoy v. Justice, 199 N. C. 602, 155 S. E. 452 commented upon (1931) 9 N. C. L. REV. 218.

⁷U. S. v. Throckmorton, 98 U. S. 61, 25 L. ed. 93 (1878); Robertson v. Freebury, 87 Wash. 558, 152 Pac. 5 (1915).

⁸Dyche v. Patton, 56 N. C. 332 (1857); Kinsland v. Adams, 172 N. C. 765, 90 S. E. 899 (1916).

material that on another trial the result would probably be different;⁹ (c) that the perjury is clearly proved by conviction of the witness or good reason for failure to convict,¹⁰ mere admissions by the witness and even conviction on the oath of the defeated party being insufficient.¹¹

In the principal case motion for new trial was made on grounds of newly discovered evidence. This, and a prior case in which new trial was denied as the perjury was immaterial,¹² are the only two cases in which the North Carolina court has had to consider perjury as a basis for such motion. Apparently the evidence of perjury has met all the requisites of the motion except that of proof. It is not clear from the instruction whether the Superior Court judge is to be satisfied of the perjury only on conviction of the witness or good reason for failure to convict, as would be the case in an action to set aside a judgment for fraud, or may accept weaker proof. Some intimation of the former construction possibly may be found in a reference in the instruction to the aid of the solicitor in the investigation, but this does not fully clarify the case, the status of which as authority on the degree of proof of perjury short of conviction necessary in a motion for new trial remains highly uncertain.

J. A. KLEEMEIER, JR.

Rape—Age of Consent Statutes—Civil Liability.

In an action to recover damages for statutory rape committed upon a girl fifteen years old, it was held that a plea of consent was not admissible to defeat recovery.¹ This decision is based on the view that the statute makes girls under the statutory age incapable of giving consent, so that the defendant is liable civilly as well as criminally in every case in which he consorts with one of the protected class. Until recent years, this view of civil liability was held in all jurisdictions of the United States and even today represents the overwhelming weight of authority.²

⁹ *Burgess v. Lovengood*, 56 N. C. 457 (1856); *Mottu v. Davis*, *supra* note 6, at 16, 69 S. E. at 64.

¹⁰ *Peagram v. King*, 9 N. C. 295, 605 (1822); *Dyche v. Patton*, *supra* note 8, at 33; *McCoy v. Justice*, *supra* note 6, at 608, 155 S. E. at 456.

¹¹ *Horne v. Horne*, 75 N. C. 101 (1876).

¹² *Pridgen v. Atlantic Coast Line Railway Co.*, *supra* note 2.

¹ *Parsons v. Parker*, 170 S. E. 1 (Va. 1933).

² *Gaither v. Meacham*, 214 Ala. 343, 180 So. 2 (1926); *Herman v. Turner*, 117 Kan. 733, 232 P. 864 (1925); *Watson v. Taylor*, 35 Okla. 768, 131 P. 922 (1912); *Hough v. Iderhoff*, 69 Ore. 568, 139 P. 931 (1914); *TORTS RESTATEMENT* (Am. L. Inst. 1925) §76.

Such an interpretation of consent statutes is open to criticism as being unjust when one considers that the age specified varies from as low as ten in Florida to as high as twenty-one in Tennessee.³ Thus a child of ten years will be condemned as a wanton and denied recovery in Florida while in Tennessee, a woman twice her age, who consents to sexual intercourse, will be upheld as an innocent child robbed of her virtue and will be rewarded with damages.

This rule is subject to the further criticism that under it a prostitute who fully realizes the nature of her act is permitted to recover even from a man whom she has seduced for the sole purpose of extortion. Of course, extortion by threat of criminal prosecution is possible even if there were no civil liability, but such methods are unlawful and very far, indeed, from extortion aided by the law of civil liability.

That the validity of these criticisms has gained some recognition in recent years, is shown by the statute enacted in North Dakota in 1925⁴ providing that "any female person under eighteen years of age having voluntary sexual intercourse constituting statutory rape, is guilty of fornication precluding recovery." However, this statute is entirely too strict as it would make an infant of ten incapable of recovering from a mature libertine who perpetrates her downfall.⁵

What appears to be the best rule so far promulgated, is that laid down in the New York case of *Barton v. Bee Line*,⁶ "There can be no doubt that the purpose of the legislative enactment is to protect the virtue of females and to save society from the ills of promiscuous intercourse. . . . It is one thing to say that society will protect itself

³ The following list shows how the states vary in this respect: 10 years—Fla.; 14 years—Ga., Me.; 16 years—Ala., Ark., Del., Dist. of Col., Ill., Ind., Md., Mass., Mich., N. C., N. H., N. J., N. M., Ohio, Ore., Pa., S. C., R. I., Va., Ver., W. V., Wis.; 18 years—Ariz., Cal., Col., Ida., Kan., Ky., La., Minn., Miss., Mo., Mon., Nev., N. D., N. Y., S. D., Utah, Wash., Wy.; any minor—Conn.

A peculiar type of statute is found in some states providing one age of consent for chaste girls and a lower one for unchaste girls. In Nebraska the ages are 18 years and 15 years respectively, in Oklahoma 18 years and 16 years, and in Texas 18 years and 15 years. Tennessee goes even further and provides an age limit of 21 years for chaste girls, 14 years for those moderately unchaste, and 12 years for bawds.

Another digression is found in the Iowa statute establishing the age of consent of the female at 16 years where the male is below 25 years and 17 years where he is over 25 years.

⁴ N. D. COMP. LAWS ANN. (Supp. 1925) §9578a.

⁵ *Braun v. Heidrich*, 241 N. W. 599 (N. D. 1932) (In a suit by a sixteen year old girl, the court recognized the unfairness of this strict rule and expressed its regret in having to uphold the statute.).

⁶ 265 N. Y. S. 284 (1933).

by punishing those who consort with females under the age of consent; it is another to hold that, knowing the nature of her act, such female should be rewarded for her indiscretion. . . . [Therefore, she] . . . has no cause of action against a male with whom she willingly consorts, if she knows the nature and quality of her act."

In denying the use of consent as a defense only where the girl is incapable of knowing the nature of the act, protection is afforded against promiscuous women profiting by their guilt at the expense of men no more guilty than they, while, efficiently recompensing those whose ignorance has made them puppets of more sophisticated men. This interpretation of the consent statutes seems very commendable in view of our present-day standards of equality between the sexes, and it would seem that other jurisdictions might well adopt such ruling in future litigation.

DONALD R. SEAWELL.

Taxation—Fate of the Trust as a Device to Escape Inheritance Taxes.

The death transfer tax,¹ held valid as an excise tax under both federal and state laws,² was first directed to transfers by descent or will. Avoidance of the tax by various devices has led to the later application of the tax to transfers made "in contemplation of death"; to transfers "by trust or otherwise, intended to take effect in possession or enjoyment at or after the death" of the grantor;³ and more specifically, under recent statutes,⁴ to interests such as dower or curtesy, joint tenancy⁵ or tenancy by the entirety,⁶ power of ap-

¹ *In re Davis*, 190 N. C. 358, 130 S. E. 22 (1925). ("In this country, the tax is variously called an inheritance tax, a legacy tax, a transfer tax, and a succession duty"); *cf.* *Saltonstall v. Saltonstall*, 276 U. S. 260, 48 Sup. Ct. 225, 72 L. ed. 565 (1928) (distinguishing transmission tax from succession tax).

² *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. ed. 969 (1900); *Keeney v. New York*, 222 U. S. 525, 32 Sup. Ct. 105, 56 L. ed. 299 (1911); *in re Davis*, *supra* note 1.

³ *Keeney v. New York*, *supra* note 2; *Rottschaefer, Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death* (1930) 14 MINN. L. REV. 453 and 613.

⁴ *Porter v. Commissioner*, 288 U. S. 436, 53 Sup. Ct. 951, 77 L. ed. 881 (1933) commented upon (1934) 18 MINN. L. REV. 235; 43 STAT. 304 (1924), 44 STAT. 70 (1926), 26 U. S. C. A. §1094 (1928); 46 STAT. 1516 (1931), 47 STAT. 279 (1932), 26 U. S. C. A. Supp. §1094 (1933); N. C. CODE ANN. (Michie 1931) §7880 (1); N. C. CODE ANN. (Michie, Supp. 1933) §7880 (1).

⁵ *Gwinn v. Commissioner*, 287 U. S. 224, 53 Sup. Ct. 157, 77 L. ed. 223 (1932); *cf.* (1929) 8 N. C. L. REV. 73 (inheritance tax on joint bank deposits).

⁶ *Tyler v. U. S.* 281 U. S. 497, 50 Sup. Ct. 356, 74 L. ed. 991 (1930) commented upon (1930) 44 HARV. L. REV. 130; *Bank of Springfield v. White*, 287 U. S. 577, 53 Sup. Ct. 290, 77 L. ed. 282 (1932).

pointment, estate in expectancy which is contingent, proceeds of life insurance,⁷ and to certain specific types of trusts which courts had held not included under the broad language of previous statutes. The last are trusts which, instead of placing all benefit and control of the trust completely beyond the reach of the settlor, reserve to him certain powers, interests, or both,⁸ which may be roughly classified as follows: (1) the right to manage the trust estate; (2) the right to modify the trust, as by changing the beneficiary, changing the terms of the trust instrument, or terminating the trust completely by revocation; and (3) the retention by the settlor, during his life, of some contingent or certain right to receive a part or all of the income or corpus of the trust.

To transfers of interest effective before death of the grantor and irrevocable, the death transfer tax does not apply.⁹ On the other hand, obviously such tax does apply to trusts clearly testamentary under the Wills Act. Between these two extremes lies the zone of difficulty. Courts have generally held that trusts reserving to the settlor a power of revocation, a life interest, or both, are not necessarily testamentary.¹⁰ To reach such property, it has been necessary to lay aside technical trust and property considerations, and look at the practical effect of the reservations of the trust instrument, to find an intention by the settlor to retain dominion over the properties transferred, not consistent with an existing purpose to vest the absolute right to present and future enjoyment in the beneficiaries.¹¹ In determining whether the transfer by creation of the trust was one intended, in the words of the usual statute, "to take effect in possession or enjoyment at or after death" of the grantor, there appears to be a definite trend¹² away from the test of whether any "title,"

⁷ Chase National Bank v. U. S., 278 U. S. 327, 49 Sup. Ct. 126, 73 L. ed. 405 (1929); Cook v. Commissioner, 66 F. (2d) 995 (C. C. A. 3d, 1933).

⁸ For detailed discussion of these various reservations of powers, see LEE, MINIMIZING TAXES (1931) 317 ff.; ROBINSON, SAVING TAXES IN DRAFTING WILLS AND TRUSTS (1930) 140-220; Rottschaefer, *supra* note 3. Note that rapidly changing legislation in this field necessitates considering each decision in connection with the specific statute involved, and with subsequent statutory changes clearly in mind.

⁹ Shukert v. Allen, 273 U. S. 545, 47 Sup. Ct. 461, 71 L. ed. 764 (1927); Nichols v. Coolidge, 274 U. S. 531, 47 Sup. Ct. 710, 71 L. ed. 1184 (1927); Heiner v. Donnan, 285 U. S. 312, 52 Sup. Ct. 358, 76 L. ed. 772 (1932).

¹⁰ Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 526; CAREY, CASES ON TRUSTS (1931) 157 note.

¹¹ *In re Bostwick*, 160 N. Y. 489, 55 N. E. 508 (1899).

¹² Rottschaefer, *supra* note 3; Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 COL. L. REV. 1332 (discussing a possible rule based on substantiality of interest retained).

"estate," or "interest" passed at death,¹³ toward the test of whether there was any "shifting of economic benefits,"¹⁴ whether the death was a "generating source of accessions to the beneficiaries,"¹⁵ or "a source of valuable assurance passing from the dead to the living."¹⁶

The first of the three types of reservations to the settlor, that of managing the trust property, has been held not to make the property taxable.¹⁷ No valid objection to this holding is apparent, in view of the general jurisdiction of equity over administration of trusts, available to prevent the settlor-trustee from diverting the trust benefit to his own use.

Of the second type, it has been held in *Masury's Estate*¹⁸ and in *People v. Northern Trust Co.*¹⁹ that retention of a sole power of revocation does not necessarily make the trust taxable. These cases, however, are not convincing authority on this point since the former has been questioned in a subsequent case²⁰ as possibly going too far, and the latter seems to have been based, at least in part, on evidence apart from the instrument that the settlor, in creating the trust, intended to end completely and immediately any interest or control in himself. Furthermore there is direct authority in a later case, that such trusts are taxable.²¹ Where the settlor reserved power to revoke with the concurrence of the beneficiaries, the trust was held not taxable.²² A like result was reached under the Federal statute of 1919 as to a trust in which the power to revoke was reserved to the settlor jointly with the trustee,²³ but a similar trust was held taxable under a state statute.²⁴

The Revenue Act of 1924 amended the Federal statute by includ-

¹³ *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 49 Sup. Ct. 123, 74 L. ed. 410 (1929); *May v. Heiner*, 281 U. S. 238, 50 Sup. Ct. 286, 74 L. ed. 826 (1930).

¹⁴ *Saltonstall v. Saltonstall*, *supra* note 1; *Chase National Bank v. U. S.*, *supra* note 7.

¹⁵ *Commissioner v. McCormick*, 43 F. (2d) 277 (C. C. A. 7th, 1930), *rev'd* in *McCormick v. Burnet*, 283 U. S. 784, 51 Sup. Ct. 343, 75 L. ed. 1413 (1931).

¹⁶ *Porter v. Commissioner*, *supra* note 4.

¹⁷ *Reinecke v. Northern Trust Co.*, *supra* note 13; *Helvering v. Duke*, 54 Sup. Ct. 95, 78 L. ed. 87 (1933) *aff'g* 62 F. (2d) 1057 (C. C. A. 3d, 1933).

¹⁸ 159 N. Y. 532, 53 N. E. 1127 (1899).

¹⁹ 289 Ill. 475; 124 N. E. 662 (1919).

²⁰ *Matter of Keeney*, 194 N. Y. 281, 87 N. E. 428 (1909) *aff'd* *Keeney v. N. Y.*, *supra* note 2.

²¹ *State and City Bank and Trust Co. v. Doughton*, 188 N. C. 762, 125 S. E. 621 (1924).

²² *Reinecke v. Northern Trust Co.*, *supra* note 13; *McCormick v. Burnet*, *supra* note 15.

²³ *Farmers Loan & Trust Co. v. Bowers*, 29 F. (2d) 14 (C. C. A. 2d, 1928).

²⁴ *Saltonstall v. Saltonstall*, *supra* note 1.

ing a provision to reach any interest of which the decedent had at any time made a transfer, "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by decedent alone or in conjunction with any person to alter, amend, or revoke."²⁵ The recent cases of *Porter v. Commissioner*²⁶ and *Cook v. Commissioner*²⁷ held taxable under this statute trusts in which the settlor reserved power to modify, even though this power was restricted by excluding modification or alteration in his own interest or favor.

In *Porter v. Commissioner*, the court noted that "Congress has progressively expanded the bases for such taxation," and said further: "The power did not amount to an estate or interest in the property. . . . But the reservation here . . . made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred. . . . Thus was reached what it reasonably might deem a substitute for testamentary disposition. . . . There is no doubt as to the power of Congress to do so." While the case does not specifically pass upon the question, the language of the decision indicates that a trust in which the powers of revocation are jointly held will be subjected to taxation.

The third type of reservation, the retention by the settlor of some contingent or certain right to receive a part or all of the income or corpus of the trust, is of uncertain effect at present. Many courts have held that the reservation of a life interest in the settlor, even without a power of revocation in the settlor, makes the trust estate taxable.²⁸ A late case, *May v. Heiner*,²⁹ however, holds that such a trust estate is not taxable under the Federal Revenue Act of 1918,³⁰ the Court saying: "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. . . . One may freely give his property to another by absolute gift without sub-

²⁵ 43 STAT. 304 (d) (1924), 26 U. S. C. A. §1094 (d) (1928).

²⁶ *Supra* note 4.

²⁷ *Supra* note 7.

²⁸ *Matter of Keeney*, *supra* note 20; *Leaphart, Use of Trust to Escape Imposition of Federal Income and Estate Taxes* (1930) 15 CORN. L. Q. 587.

²⁹ *Supra* note 13 commented upon (1930) 44 HARV. L. REV. 131.

³⁰ 40 STAT. 1057, 1096, 1097.

jecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

Is the doctrine of *May v. Heiner* to stand? There have been intimations that possibly the taxing of such an estate might be unconstitutional.³¹ This contention seems to have been forestalled by both *McCormick v. Burnet*³² and *Burnet v. Northern Trust Company*,³³ memorandum decisions based upon *May v. Heiner*, each containing these words: "there [is] no question of the constitutional authority of Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved." Nowhere in *May v. Heiner*, does the Court refer to *Keeney v. New York*, in which it held that such a tax was constitutional under the New York statute. Rather, the Court points out the incongruity under the federal statutes of taxing a gift with reservation of life estate, while allowing an absolute gift to go free, and insists upon plain words in the statute before considering whether such estates may be constitutionally reached. The subsequent passage of revenue laws including both a gift tax³⁴ and provisions specifically reaching such trusts³⁵ makes the quoted words of *May v. Heiner* no longer applicable.

Moreover, criticism of *May v. Heiner* as opening a wide avenue to tax evasion seems amply justified by the *McCormick* case. The trust there involved provided that the income should accumulate for the life of the settlor, except that if her annual personal income should fall below a certain amount, enough of the trust income to make up the deficiency should be paid to her. On her death, the

³¹ *Reinecke v. Northern T. Co.*, *supra* note 13; (1930) 44 HARV. L. REV. 131.

³² *Supra* note 15.

³³ 283 U. S. 782, 51 Sup. Ct. 342, 75 L. ed. 1412 (1931).

³⁴ 47 STAT. 245 (1932), 26 U. S. C. A. Supp. §1136 (a) (1933); *cf.* *Burnet v. Guggenheim*, 288 U. S. 280, 53 Sup. Ct. 369, 77 L. ed. 749 (1933).

³⁵ 46 STAT. 1516 (c) (1931); 47 STAT. 279 (c) (1932), 26 U. S. C. A. Supp. §1094 (c) (1933) (including in the gross estate any property of decedent, "of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life, or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death, (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.")

income was to go to her children for life, with the principal to designated remaindermen, except that, if the children should die before the settlor, the corpus was to return to her.³⁶ It was further provided that the settlor, with the concurrence of the children-beneficiaries, could terminate the trust at any time. The Circuit Court declared that although the provisions separately might not have made the estate taxable, yet together, they indicated the settlor's intention that her death should be such a "generating source" of property rights in the beneficiaries of the trust as to make it come within the meaning of the words of the statute. The case was "dealing with a most practical problem, taxation," and the irrevocable character of the trust was not the determinative issue of the controversy, but was important only as it helped illuminate the settlor's intention. "That the settlor's death was the generating source of definite accessions to the beneficiaries cannot be denied." This decision seems logical, and nearer the actual intent of Congress as developed by later legislation, than *May v. Heiner*, by which the Supreme Court felt itself bound in reversing the Circuit Court's decision in the *McCormick* case.

From the undesirable results of the doctrine of *May v. Heiner* as so plainly developed in the *McCormick* case; from the extent to which the Supreme Court went in upholding state courts in *Keeney v. New York* and *Saltonstall v. Saltonstall*; from the language of the two memorandum decisions mentioned; and particularly from the language in *Porter v. Commissioner* the indication is that the recent amendments to the federal revenue laws and similar amendments to the state statutes will be held constitutional;³⁷ and that trust estates with either a contingent or certain interest in either corpus or income reserved to the settlor hereafter will be held taxable.

Thus, it appears that the statutes taxing transfers upon death as now written and construed, combined with the gift tax,³⁸ have narrowed toward extinction the avenues of escape from taxes upon transfers of property without consideration.

H. B. WHITMORE.

³⁶ Cf. *Helvering v. Duke*, *supra* note 17 (trust agreement reserved to the settlor the power to manage the trust, also the right to receive the corpus of the trust if the beneficiary should die before the settlor—*held*, not taxable by the Circuit Court of Appeals, affirmed by an equally divided Court, Hughes, C. J., not sitting) commented upon (1933) 33 COL. L. REV. 1455.

³⁷ Analysis of *Helvering v. Duke* and 33 COL. L. REV., *supra* note 36, seems to strengthen this probability.

³⁸ See BREWSTER, IVINS AND PHILLIPS, *THE FEDERAL GIFT TAX*, 1933.