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Constitutional Law -- North Carolina Unemployment Compensation

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In an attempt to distinguish its position from that adopted in the recent New York case⁹ the majority stated that no application was made there for a reconsideration of the constitutional question involved in the *Adkins* case. The sole question ruled on by the Court in the New York case was whether the case was distinguishable from the *Adkins* case.¹⁰

If the Court had so desired, it could have avoided the effect of the technical holding in the New York case and reconsidered the fundamental constitutionality of minimum wages. This question was presented the Court in October, 1936 in a petition to rehear the New York case. The Court, however, denied the rehearing.¹¹

In a powerful dissent apparently aimed at the entire New Deal Administration and criticising the majority for their change of policy, Justice Sutherland declared the "judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. . . . If the Constitution . . . stands in the way of desirable legislation, the blame must rest on the instrument and not upon the Court for enforcing it according to its terms. The remedy in that situation . . . is to amend the Constitution."¹² In the judgment of the minority, minimum wage legislation cannot be a reasonable exercise of the state's police power.

In upholding the Washington law, much emphasis was placed on the point that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence," thus necessitating legislative protection.¹³ Although this case represents a reversal by the Court on the fundamental issue, there still remains open the question of constitutionality of a general minimum wage law applicable both to men and women.

O. W. CLAYTON, JR.

Constitutional Law—North Carolina Unemployment Compensation.

In September, 1935, the Alabama Unemployment Compensation Law was enacted, and later amended in April, 1936.¹ This Act pro-

⁹ *Morehead v. People of New York*, 298 U. S. 587, 56 Sup. Ct. 918, 80 L. ed. 1347 (1936).

¹⁰ *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1922), cited *supra* note 4.

¹¹ *Morehead v. People of New York*, 57 Sup. Ct. 4, 81 L. ed. Ad. Op. 65 (1936).

¹² *West Coast Hotel Co. v. Parrish*, 57 Sup. Ct. 578, 587, 81 L. ed. Ad. Op. 455, 465.

¹³ 57 Sup. Ct. 578, 583, 81 L. ed. Ad. Op. 455, 460. This same argument as to woman's physical structure has been advanced to uphold other laws regulating their employment. *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. ed. 551 (1908).

¹ GEN. ACTS ALA. 1935, p. 950; GEN. ACTS ALA. 1936, Ex. Sess., pp. 176, 225, 228.

vides that employers of eight or more employees must pay approximately two-thirds of the contributions to be paid by employers and employees out of payrolls to a general fund for benefits to unemployed. Two actions were instituted by employers to obtain injunctions against the collection of these contributions. The Act was assailed as unconstitutional both under the equal protection and due process clauses of the Fourteenth Amendment and under the Alabama Constitution. A three-judge Federal District Court held the Act unconstitutional. The Court found that arbitrarily classifying only employers having eight or more employees as within the Act was a denial of due process and equal protection of the law; and that the requirement that employers pay about two-thirds of the contributions to the general fund for the benefit of the unemployed with no direct benefit to themselves violated the provisions of the Alabama Constitution.² In a five-four decision this has been reversed by the United States Supreme Court.^{2a}

The Federal Social Security Act³ makes provisions for unemployment compensation, but leaves its actual operation and the numerous details connected therewith to the states under their own laws.⁴ The North Carolina Legislature at a special session enacted the North Carolina Unemployment Compensation Law in December, 1936.⁵ Like the Alabama Act the law only applies to employers of eight or more⁶, and certain types of employment are excluded from the Act.⁷ Employers pay contributions in relation to their payrolls,⁸ which go into a

² *Gulf States Paper Corp. v. Carmichael*; *Southern Coal and Coke Co. v. Same*, 17 F. Supp. 225 (M. D. Ala. 1936). The Supreme Court of Alabama has held the Act constitutional. *Beeland Wholesale Co. v. Kaufman*, 174 So. 516 (Ala. 1937). This is a final adjudication upon the latter ground relied upon by the federal district court in the principal case. Similar statutes in other states have been held constitutional. *Gillum v. Johnson*, 62 P. (2d) 1037 (Cal. 1936); *Howes Brothers Co. v. Massachusetts U. C. Comm.* 5 N. E. (2d) 720 (Mass. 1936); *W. H. H. Chamberlin, Inc. v. Andrews*; *E. C. Stearns and Co. v. Same*; *Associated Industries of N. Y. State, Inc. v. Department of Labor of N. Y.*, 271 N. Y. 1, 2 N. E. (2d) 22 (1936), *aff'd without opinion by an equally divided court, Mr. Justice Stone not participating*, 57 Sup. Ct. 122 (1936).

The sections of the Federal Social Security Act dealing with unemployment compensation have been held constitutional in *Chas. C. Steward Machine Co. v. Davis*, 57 Sup. Ct. 883 (1937), *affirming* 89 F. (2d) 207 (C. C. A. 5th, 1937). The Federal Act is not considered in this note.

^{2a} *Carmichael v. Southern Coal and Coke Co.*; *Carmichael v. Gulf States Paper Corp.*, 57 Sup. Ct. 868 (1937).

³ 49 Stat. 620 (1935), 42 U. S. C. A. §§301-1305 (Supp. 1936).

⁴ The provisions of the 90 per cent credit device make it highly desirable for states to enact laws in conformity with the Federal Act. 49 Stat. 639 (1935), 42 U. S. C. A. §1102 (Supp. 1936).

⁵ P. L. N. C. Ex. Sess. 1936, c. 1. See p. 377, *supra*.

⁶ *Id.* §19(f) 1.

⁷ Employment by the Federal Government, State, or any of its political subdivisions; employment as agricultural labor; as domestic servants; employment in navigation; family employment; and employment by religious, charitable, scientific, literary, or educational organizations. P. L. N. C. Ex. Sess. 1936, c. 1, §19(g)7.

⁸ 0.9 per cent, 1936; 1.8 per cent, 1937; 2.7 per cent, 1938 and thereafter. P. L. N. C. Ex. Sess. 1936, c. 1, §7(b).

pooled fund.⁹ No contributions are required of employees.¹⁰ Benefits do not become payable until January 1, 1938.¹¹

Like the Alabama Act the North Carolina Act will stand the test of constitutionality. Under its police power a state may levy taxes for the general welfare. "An ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use."¹² The contributions may well be considered "not a penalty but an industrial cost charged to those who control the profits of industry, who can adjust it, absorb it, and pass it on in increased prices to the consuming public which ultimately benefits and ultimately pays for it."¹³ Cases arising under the Workmen's Compensation Laws furnish a close analogy.¹⁴ The inevitable injuries incident to the operation of industry are a matter of great public concern, and the public should bear the cost.¹⁵ Both the Workmen's and Unemployment Compensation Laws impose liability on the employer regardless of any wrongful act on his part—one for compensation for injuries and death suffered in the course of employment; the other for injuries suffered from the lack of employment. They both impose new liabilities, shift a risk to business, look primarily to the protection of the wage-earner, and apply only to employers employing a certain number of persons.¹⁶

⁹ Separate employer accounts are maintained for each employer for bookkeeping purposes only. P. L. N. C. Ex. Sess. 1936, c. 1, §7(c)1. No provision is made for merit rating, that is, assessing employers according to their unemployment records, but the Act appoints a commission to study and report to the 1939 Legislature on the advisability of merit rating and/or an employer reserve system. *Id.* §7(c)3.

¹⁰ The Act does not mention employee contributions, but does expressly provide that the employers' contributions shall not be deducted in whole or in part from the wages of employees. P. L. N. C. Ex. Sess. 1936, c. 1, §7(a)1.

¹¹ P. L. N. C. Ex. Sess. 1936, c. 1, §3(a).

¹² *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 31 Sup. Ct. 186, 187, 55 L. ed. 112, 116 (1911); *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923 (1885); *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. ed. 1085 (1905); *Offield v. New York, N. H. and H. R. R.*, 203 U. S. 372, 27 Sup. Ct. 72, 51 L. ed. 231 (1906); *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499 (1907); *Nicchia v. New York*, 254 U. S. 228, 41 Sup. Ct. 103, 65 L. ed. 235 (1920); *McGlone v. Womack*, 129 Ky. 274, 111 S. W. 688 (1908).

¹³ Epstein and Crary, *Constitutional Aspects of the State Unemployment Insurance Law* (1936) 8 N. Y. STATE BAR ASS'N BULLETIN 215, 220.

¹⁴ *New York Central R. R. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed. 667 (1917); *Hawkins v. Bleakly*, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. ed. 678 (1917); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. ed. 685 (1917); *Arizona Copper Co. v. Hammer*, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. ed. 1058 (1919). It is interesting to note that the Supreme Court of the United States has sustained all forms of state compensation laws that have come before it. MCGOVNEY, *CASES ON CONSTITUTIONAL LAW* (1930) 766, n. 59.

¹⁵ "It is reasonable that the public should pay the whole cost of producing what it wants, and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run, and that is just." *Arizona Copper Co. v. Hammer*, 250 U. S. 400, 433, 39 Sup. Ct. 553, 561, 63 L. ed. 1058, 1072 (1919).

¹⁶ See Rice, *A Note on the Constitutionality of State Unemployment Compensation Laws* (1936) 3 LAW AND CONTEMPORARY PROBLEMS 138, 141; Legis. (1935)

However, the Unemployment Compensation Law goes further than the Workmen's Compensation Laws. The former imposes a liability where none existed before. The latter supplanted the pre-existing liability imposed by the common law, thus providing a consideration for the substituted liability.¹⁷ Still they do impose a substantial new burden by imposing liability regardless of fault.¹⁸ Under the Workmen's Compensation Laws there is a causal connection between the employment and the injury, since compensation is payable only if the injury arose out of and in the course of the employment. However, by more efficient management industry, meaning both the individual employer and all employers working as a group, could decrease unemployment to a minimum, just as more efficient management decreases injuries to a minimum.¹⁹

The Workmen's Compensation analogy is buttressed by a long line of comparable cases. The *Bank Deposit Guaranty Fund Cases*²⁰ upheld a statute which assessed every state bank a certain percentage of its average daily deposits to protect the depositors of banks which became insolvent. This was held not a violation of due process. The *Sheep Dog* cases²¹ held that a statute, which exacted contributions from all dog owners to compensate owners of sheep injured or killed by dogs, irrespective of whose particular dog had created the loss, did not violate the police power. Yet, in each of these groups of cases the parties were assessed without regard to any wrongful act on their part for the benefit of another group.

The Act does not involve denial of equal protection, because it applies only to employers employing eight or more persons, and exempts certain types of employers. The legislature has a wide discretion in selecting where the cost shall fall. The fact that it discriminates in favor of certain classes does not render its action arbitrary if the dis-

10 ST. JOHN'S L. REV. 147, 154-155; (1936) 4 GEO. WASH. L. REV. 498, 500-502; (1928) 25 GEORGETOWN L. J. 467, 469.

¹⁷ *New York Central R. R. v. White*, 243 U. S. 188, 201, 37 Sup. Ct. 247, 252, 61 L. ed. 667, 674 (1917); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 234, 37 Sup. Ct. 260, 263, 61 L. ed. 685, 694 (1917); *Jacobson, The Wisconsin Unemployment Compensation Law* (1932) 32 COL. L. REV. 420, 477; (1936) 21 MINN. L. REV. 97.

¹⁸ See Hughes, C. J., dissenting in *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 383, 55 Sup. Ct. 758, 777, 79 L. ed. 1468, 1494 (1935).

¹⁹ See Rice, *A Note on the Constitutionality of State Unemployment Compensation Laws* (1936) 3 LAW AND CONTEMPORARY PROBLEMS 138, 147-148; (1936) 4 GEO. WASH. L. REV. 498, 502-503.

²⁰ *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed. 112 (1911).

²¹ *Cole v. Hall*, 103 Ill. 30 (1882); *Mitchell v. Williams*, 27 Ind. 62 (1866); *McGlone v. Womack*, 129 Ky. 274, 111 S. W. 688 (1908); *People v. Van Horn*, 46 Mich. 183, 9 N. W. 246 (1881); *Longyear v. Buck*, 83 Mich. 236, 47 N. W. 234 (1890); *Holst v. Roe*, 39 Ohio St. 340 (1883); *Carter v. Dow*, 16 Wis. 317 (1862); *Tenny v. Lenz*, 16 Wis. 566 (1863).

crimination is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to support it.²² Only where the classification is wholly capricious or unreasonable will it be said that it denies equal protection.²³ To make the Act apply to all employers would require such a large and complicated administrative machinery as to defeat its very purpose. Exempting certain types of employers, regardless of the number employed, is a provision long familiar to legislative enactments.²⁴

Requiring employers with little or no unemployment to contribute to a fund to help those who become unemployed, and at the same rate as those employers having a great deal of unemployment, is not a valid ground for attack on the Act. There is ample authority to support the pooled fund features of the Act. The central pooling of funds has been approved in the *Workmen's Compensation* cases,²⁵ the *Head Money* cases,²⁶ the *Sheep Dog* cases,²⁷ and the *Bank Deposit Guaranty Fund Cases*.²⁸ Although individual employers may in many cases do much to stabilize employment in their industries, there are many factors over which they have little control. Today most industries are interdependent. A slack period in business in one indus-

²² *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. ed. 102 (1900); *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. ed. 872 (1902); *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. ed. 415 (1907); *Quong Wing v. Kirkendall*, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. ed. 350 (1912); *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. ed. 364 (1915); *Rast v. Van Deman and Lewis Co.*, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. ed. 679 (1916); *State Bd. of Tax Comm'rs v. Jackson*, 283 U. S. 527, 51 Sup. Ct. 540, 75 L. ed. 1248 (1931).

²³ *Bell's Gap R.R. v. Commonwealth of Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892 (1890); *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. ed. 679 (1902); *Royster Guano Co. v. Virginia*, 253 U. S. 412, 40 Sup. Ct. 560, 64 L. ed. 989 (1920); *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71, 45 Sup. Ct. 12, 69 L. ed. 169 (1924); *Louisville Gas and E. Co. v. Coleman*, 277 U. S. 32, 48 Sup. Ct. 423, 72 L. ed. 770 (1928).

²⁴ *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389 (1911); *Brushaber v. Union P. R. R.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. ed. 493 (1916); *New York Central R. R. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed. 667 (1917); *Middleton v. Texas Power and L. Co.*, 249 U. S. 152, 39 Sup. Ct. 227, 63 L. ed. 527 (1919).

²⁵ *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. ed. 685 (1917).

²⁶ These cases approved a tax on every alien entering the United States, the tax to be paid by the owner of the vessel bringing such alien. The fund so created was used for the relief of indigent aliens. *Edey v. Robertson*; *Cunard Steamship Co. v. Robertson*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. ed. 798 (1884).

²⁷ See Note 21, *supra*.

²⁸ *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed. 112 (1911). Other cases of this type are: *Cooley v. Board of Wardens*, 12 How. 299, 13 L. ed. 996 (1851) (vessels not taking a pilot on entering or leaving port required to pay half pilotage into a fund for the relief of indigent pilots and their dependents); *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 44 Sup. Ct. 169, 68 L. ed. 388 (1924) (income of railroads in excess of a fair return required to be paid into a fund to aid other roads in need of funds); *State v. Cassidy*, 22 Minn. 312 (1875) (tax on saloon-keepers to create a fund for the establishment and maintenance of an institution for inebriates).

try, which may or may not be seasonable, affects other industries, often causing greater unemployment in these than in the one directly affected. These interlocking forces make it only just to place the burden indiscriminately on industry as a whole. The pooling of funds would seem to be the most feasible method for making unemployment compensation effective.

One of the most formidable obstacles to the Act, according to the dissenting opinion of Mr. Justice Sutherland, is *Railroad Retirement Board v. Alton R. R.*,²⁹ which declared the Railroad Retirement Act³⁰ unconstitutional. This Act treated all employers as a single employer, requiring those with a small amount of superannuation to contribute the same percentage of their payrolls to a common pension fund as did those with a greater amount.³¹ The Supreme Court found that this was not consistent with due process. However, this Act is distinguishable from the Unemployment Compensation Act. It contained certain retroactive provisions which are not present in the latter Act which is wholly prospective in its nature. For example, some, but not all, railroads had employees over the retirement age fixed by the Act, and those carriers who had no such employees were thus forced to contribute immediately to pensions for the employees of others.³² Also, there is a fundamental difference between pensions and unemployment compensation: The pension payments were to be based upon ages, wages, and length of service, all possible of determination with mathematical exactness so that the proportionate share of each carrier might have been fixed. On the other hand, unemployment, being due to a combination of causes, does not lend itself to mathematical exactness. It is a problem of industry as a whole. In contrast, superannuation can be attributed to individual carriers. Also, the Court found that pensions did not reasonably tend to improve interstate commerce, while the Unemployment Compensation Act is enacted under the police power of the State.³³

The unemployment compensation laws are attempts not only to prevent so far as possible, but also to make adequate preparation for, any recurrences of economic depressions. The economic grounds for

²⁹ 295 U. S. 330, 55 Sup. Ct. 758, 79 L. ed. 1468 (1935).

³⁰ 48 Stat. 1283-1289 (1934), 45 U. S. C. A. §§201-214 (Supp. 1936).

³¹ The Court expressly distinguished *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed. 112 (1911); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. ed. 685 (1917); and *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 44 Sup. Ct. 169, 68 L. ed. 388 (1924), which would seem to indicate that the Court is not opposed to a pooling of funds when properly used.

³² In contrast, no benefits under the Unemployment Compensation Act are payable until one year after the Act has gone into effect, and the amount of benefits is based on services rendered after the enactment of the Act by persons upon whose wages contributions have been paid.

³³ P. L. N. C. Ex. Sess. 1936, c. 1, §2.

such legislation are overwhelmingly forceful. "Here we are dealing simply with the power of the Legislature to meet a growing danger and peril to a large number of our fellow citizens, and we find nothing in the act itself which is so arbitrary or unreasonable as to show that it deprives any employer of his property without due process of law or denies him the equal protection of the laws."³⁴

C. M. IVEY, JR.

Contracts—Duress—Business Compulsion

Plaintiff's policy of life insurance, with defendant company, included the customary total and permanent disability clause, with waiver of premiums after proof of disability. Plaintiff, alleging total and permanent disability, claimed the installments due him under the contract. Defendant, denying the disability, insisted on the continued payment of premiums by plaintiff in order to keep the policy in force. Plaintiff paid the premiums under protest and brought this action to recover the installments and premiums paid. A verdict in the trial court allowed plaintiff to recover the disability installments and the premiums paid under protest, with interest. The appellate court in reversing stated that money paid voluntarily under protest cannot be recovered in the absence of fraud, duress, or mistake.¹

In determining the case the court apparently disregarded an important though comparatively recent innovation in the law—the doctrine of economic compulsion² as a species of duress.

Anciently, duress in law could exist only where there were such threats as would put one in fear of injury to life, limb, or liberty—duress of person.³ Changing economic conditions brought about an expansion of the concept of duress. The doctrine of duress of goods evolved. This meant that a payment made to release one's property from an unlawful seizure or retention was made under duress.⁴ Further

³⁴ *W. H. H. Chamberlin, Inc. v. Andrews*; *E. C. Stearns and Co. v. Same*; *Associated Industries of N. Y. State, Inc. v. Department of Labor of N. Y.*, 271 N. Y. 1, 2 N. E. (2d) 22, 26 (1936).

¹ *Ignatovig v. Prudential Ins. Co. of America*, 16 F. Supp. 764 (M. D. Pa. 1935).

² The terms "economic compulsion," "business compulsion," and "moral duress" are used interchangeably by the courts.

³ ". . . it is to be known, that a man shall avoid his deed for manuas (menaces) of imprisonment, albeit he were never imprisoned: for a man shall avoid his own act for manuas in four cases, viz., 1. for fear of loose of member, 2. loose of life, 3. of mayhem, and 4. imprisonment; otherwise it is for fear of battery, which may be very slight, or for burning of his house, or taking away or destroying his goods, or the like, for there he may have satisfaction by recovery in damages." 2 Co. Inst. 483; *Baily v. Devine*, 123 Ga. 653, 51 S. E. 603 (1905).

⁴ *Lonergan v. Buford*, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. ed. 569 (1893) (oppressive refusal to deliver cattle under contract); *Cobb v. Charter*, 32 Conn. 358 (1865) (mechanic's tools were withheld depriving him of a means of support); *Du Vall v. Norris*, 119 Ga. 947, 47 S. E. 212 (1904) (money paid to police