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Notes and Comments

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Adjoining Landowners—Lateral Support—Duty of Excavator.

Plaintiff and defendant were adjoining landowners in the city of Greensboro, North Carolina. In laying a foundation for his building defendant excavated below the foundation of plaintiff's building. Soft soil, first discovered at a depth of twelve feet, began to run out from plaintiff's land. Plaintiff's building settled and damages resulted. It was held that defendant's failure to make a soil test in order to ascertain the effect of the proposed excavation upon plaintiff's property as well as the failure to give plaintiff proper notice amounted to negligence for which defendant was liable.[1]

By the common law the owner of land in its natural state has an absolute right to have his soil remain in its natural position.[2] This right, however, does not include that of having the contiguous land remain in its natural state, but only the right to have the benefit of support. Consequently, the authorities recognize that the neighboring landowner can make excavations if artificial support is substituted to prevent the falling away of the adjoining land.[3] If the excavating owner violates this absolute right of lateral support he must respond in damages,[4] irrespective of negligence or want of skill,[5] or the distance of the excavation from the adjoining land.[6]

The natural right of lateral support does not, however, give to a landowner the right to place on his land additional weight, such as buildings and other superstructures, and then claim additional lateral support for the buildings beyond the support given his land in its natural condition, since this would deprive the adjoining owner of the

[1] S. H. Kress and Co. v. Reaves, 85 F. (2d) 915 (C. C. A. 4th, 1936), *Cert. denied*, 57 Sup. Ct. 322, 81 L. ed. No. 8 (Cum. Tab.). No statute was involved.

[2] I REEVES, REAL PROPERTY (1909) §206; I TIFFANY, REAL PROPERTY (2d ed. 1920) §345; Trowbridge v. True, 52 Conn. 190 (1884); Shultz v. Bower, 57 Minn. 493, 59 N. W. 631 (1894); Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087 (1910). However, it appears that courts have generally held that a landowner has no right of lateral support as against a municipal corporation's right to dictate the level of streets and can acquire none through the lapse of time. DILLON, MUNICIPAL CORPORATIONS (1911) §1679. See also Radcliff's Ex'rs v. Mayor of Brooklyn, 4 N. Y. 195, 203 (1850); Village of Haverstraw v. Eckerson, 192 N. Y. 54, 84 N. E. 578 (1908); N. Y. Steam Co. v. Foundation Co., 195 N. Y. 43, 87 N. E. 765 (1909).

[3] I TIFFANY, REAL PROPERTY (2d ed. 1920) §345; Rector, etc., v. Paterson Extension Ry., 66 N. J. L. 218, 49 Atl. 1030 (1901); see also Stimmel v. Brown, 7 Houst. 219, 30 Atl. 996 (Del. 1885).

[4] Gray v. Tobin, 259 Mass. 113, 156 N. E. 30 (1927); Neyman v. Pincus, 82 Mont. 467, 267 Pac. 805 (1928); Prete v. Cray, 49 R. I. 209, 141 Atl. 609 (1928).

[5] Chesapeake and O. Ry. v. May, 157 Ky. 708, 163 S. W. 1112 (1914); Cooper v. Altoona Concrete Construction and Supply Co., 53 Pa. Super. 141 (1913).

[6] Louisville and N. R. R. v. Colombo, 240 Ky. 102, 41 S. W. (2d) 672 (1931).

proper and natural use of his land.[7] In England and in many American jurisdictions the owner may recover for the damage done to his buildings as well as to the land if the land without the added weight would have fallen away as a result of the excavation on the contiguous soil.[8] A few courts, however, tend to support the view that there can be no recovery for damages to the buildings in the absence of negligence even though the land would have fallen without the additional weight.[9] Whether or not the land without the buildings would have fallen, the modern view seems to be that the owner who excavates his land must use ordinary care to protect buildings on the adjoining land and that he is liable for damages if he is negligent.[10] The excavating owner, however, is not a guarantor of the safety of the adjoining buildings and he is not bound to exercise extraordinary care;[11] but a trespasser digging on the supporting land is held to a higher standard of care than the owner.[12] Failure to give timely and sufficient notice of a proposed excavation;[13] failure to excavate friable soil otherwise than in sections;[14] failure to ascertain in advance whether the proposed excavation is likely to expose neighboring land with artificial additions to unreasonable risk;[15] use of inadequate instrumentalities;[16] changing the method

[7] Northern Transportation Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336 (1878); Moody v. McClelland, 39 Ala. 45 (1863); Ceffarelli v. Landino, 82 Conn. 126, 72 Atl. 564 (1909); Thurston v. Hancock, 12 Mass. 220 (1815); Gilmore v. Driscoll, 122 Mass. 199 (1877); Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519 (1896); Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087 (1910).

[8] Brown v. Robins, 4 H. & N. 186 (Ex. 1859); Att'y Gen. v. Conduit Colliery Co., 1 Q. B. 301 (1894); Langhorne v. Thurman, 141 Ky. 809, 133 S. W. 1008 (1911); Farnandis v. Great Northern R. R., 41 Wash. 486, 84 Pac. 18 (1906).

[9] Moellering v. Evans, 121 Ind. 195, 22 N. E. 989 (1889); Vandegrift v. Boward, 129 Md. 140, 98 Atl. 528 (1916); Weiss v. Kohlhagen, 58 Ore. 144, 113 Pac. 46 (1911); Ulrick v. Dakota Loan and Trust Co., 2 S. D. 285, 49 N. W. 1054 (1891).

[10] Moore v. Anderson, 5 Boyce 477, 94 Atl. 771 (Del. 1915); Wigglesworth v. Brodsky, 7 Boyce 586, 110 Atl. 46 (Del. 1920); Horowitz v. Blay, 193 Mich. 493, 160 N. W. 438 (1916); Diksajtsz v. Brosz, 104 Pa. Super. 246, 158 Atl. 620 (1932); Christensen v. Mann, 187 Wis. 567, 204 N. W. 499 (1925); RESTATEMENT OF TORTS (Tent. Draft No. 14, 1937) §1303.

[11] Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923); Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087 (1910).

[12] Jeffries v. Williams, 5 Ex. 792 (1850); Bibby v. Carter, 4 H. & N. 153 (Ex. 1859); see also Finegan v. Eckerson, 26 Misc. Rep. 574, 57 N. Y. Supp. 605 (1899).

[13] Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923); Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918 (1899); Gerst v. City of St. Louis, 185 Mo. 191, 84 S. W. 34 (1904); Schultz v. Byers, 53 N. J. L. 442, 22 Atl. 514 (1891); Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087 (1910).

[14] Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519 (1891); Davis v. Summerfield, 131 N. C. 352, 42 S. E. 818 (1902), *rehearing denied*, 133 N. C. 325, 45 S. E. 645 (1903); see also Hammond v. Schiff, 100 N. C. 161, 6 S. E. 753 (1888).

[15] Bissel v. Ford, 176 Mich. 64, 141 N. W. 860 (1913); Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923).

[16] Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923) (insufficient sheet piling).

of excavating after notifying the adjoining owner that a certain method was to be followed;[17] employment of incompetent workmen;[18] and maintaining an excavation under such conditions or for such a length of time as to expose adjoining land with buildings thereon to unreasonable risk of harm,[19] have been held to constitute negligence. When the excavator has given due notice and has otherwise exercised due care, the duty to take necessary precautions to provide proper support is generally placed on the owner of the buildings himself.[20]

Legislation has been enacted in many states in order to secure better protection to the public and to define more specifically the relative rights and duties of coterminous landowners. Statutes in a few states merely require the excavator to give notice and to take reasonable precaution to sustain the neighboring land, but the statutes say nothing about supporting buildings.[21] Others create new duties and require the excavator to provide temporary support for adjoining buildings where the excavation is to be made below a certain depth.[22]

The court in the principal case holds that "due care" includes the duty to make a preliminary soil test, and that the failure to exercise this duty amounts to negligence. The only other case which the writer has been able to find that imposed upon the excavator the duty of making a soil test involved an excavation over a hundred feet in depth.[23] In the principal case the defendant intended to dig only twenty feet deep. The requirement of making soil tests whether the proposed excavation be shallow or deep seems justifiable, particularly when applied in urban centers where nearly all available space is used for building purposes.

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[17] Cooper v. Altoona Concrete Construction and Supply Co., 231 Pa. 557, 80 Atl. 1047 (1911); Collias v. Detroit and Northern Michigan Bldg. and Loan Ass'n, 220 Mich. 207, 189 N. W. 866 (1922).

[18] Stockgrowers' Bank v. Gray, 24 Wyo. 18, 154 Pac. 593 (1916).

[19] Garvy v. Coughlan, 92 Ill. App. 582 (1901) (exposure to rain, snow and freezing for three years); Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296 (1898) (blocking gutter so as to bring surface water into the excavation); Hannicker v. Lepper, 20 S. D. 371, 107 N. W. 202 (1906) (exposure to weathering); Lochore v. City of Seattle, 98 Wash. 265, 167 Pac. 918 (1917) (weathering).

[20] Vandergrift v. Boward, 129 Md. 140, 98 Atl. 528 (1916); Obert v. Dunn, 140 Mo. 476, 41 S. W. 901 (1897); Eggert v. Kullman, 204 Wis. 60, 234 N. W. 349 (1931).

[21] GA. CODE (1933) §85-1203; IDAHO CODE ANN. (1932) §54-310; S. D. COMP. LAWS (1929) §361.

[22] CAL. CIVIL CODE (Deering, 1931) §832 (12 feet); MICH. COMP. LAWS (1929) §§13500-13503 (12 feet); N. J. COMP. STAT. (1910) §3926 (8 feet); OHIO CODE ANN. (Throckmorton's, 1929) §§3782, 3783 (9 feet); PA. STAT. (Purdon, 1936) §53-5648 (to a depth below the bottom of existing wall).

[23] Bissel v. Ford, 176 Mich. 64, 141 N. W. 860 (1913); see also Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923).

Conflict of Laws—Insurance—Service of Process.

Action was instituted by plaintiff, a citizen and resident of Mississippi, upon a default judgment rendered by a County Court of the State of Mississippi upon a policy of insurance issued as a result of the solicitation of defendant's Mississippi agent, defendant being a North Carolina corporation. It appeared from the Mississippi judgment that at the time of the institution of the action in the courts of Mississippi, defendant company was no longer doing business there and process was served on it by service on the Insurance Commissioner under a Mississippi statute requiring foreign insurance companies to appoint the Insurance Commissioner as their attorney to accept service so long as any liability of the company remained outstanding in the state. Summons was also served on the resident agent who had represented defendant company at the time the policy was issued. Defendant contends that the Mississippi Court did not have jurisdiction because it was not doing business in the State and had not appointed the Insurance Commissioner its attorney to accept service. *Held,* for plaintiff. Defendant was estopped to set up its noncompliance with the statute and it was conclusively presumed to have complied with such statute.[1]

Under the well settled rule that a state has the power to exclude, restrict or regulate foreign corporations, doing or seeking to do business within its borders,[2] statutes have been passed requiring the corporation before doing business in the state to have an agent in the state upon whom service of process may be had.[3] More particularly, foreign insurance companies, which may be regulated under the police power,[4] must designate some statutory agent such as the Insurance Commissioner to accept service of process.[5] These statutes have been held valid[6] and

[1] Dansby v. N. C. Mut. Life Ins. Co., 211 N. C. 120, 189 S. E. 122 (1937). See also 209 N. C. 127, 183 S. E. 521 (1936).

[2] Paul v. Virginia, 75 U. S. 168, 19 L. ed. 357 (1869); State of Wash. *ex. rel.* Bond and Goodwin and Tucker, Inc. v. Superior Court of Wash. for Spokane County, 289 U. S. 361, 53 Sup. Ct. 624, 77 L. ed. 1256 (1932); Northwestern Mut. Life Ins. Co. v. Wis., 247 U. S. 132, 38 Sup. Ct. 444, 62 L. ed. 1025 (1917) (The business of insurance, as ordinarily conducted, is not interstate commerce, and a state may absolutely exclude a foreign insurance company from doing business within the state or may permit it to come within the state under such restraints and regulations as the state may choose.); Fisher v. Trader's Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667 (1904); Lunceford v. Commercial Travelers' Mut. Acc. Ass'n of America, 190 N. C. 314, 129 S. E. 805 (1935); 17 FLETCHER, PRIVATE CORPORATIONS (Perm. ed., 1933) §§8386, n. 5, 8416, n. 3 (cases collected).

[3] 18 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8697 (statutes collected under footnote 54). As to jurisdiction of partnerships see Flexner v. Farson, 248 U. S. 289, 39 Sup. Ct. 97, 63 L. ed. 250 (1918).

[4] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011 (1914) (Insurance business clothed with public interest and may be regulated under state's police power.); La Tourette v. McMasters, Ins. Comm'r, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. ed. 362 (1919).

[5] MISSISSIPPI CODE ANN. §5165(3); N. C. CODE ANN. (Michie, 1935) §6411.

[6] Mut. Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47

are said to become part of insurance policies.[7] The limitations, conditions, restrictions and burdens imposed by these statutes must of course not infringe upon the rights accorded by the provisions of the Federal or State Constitutions.[8] In some types of situations the above mentioned statutes must, to be constitutional, require that the agent give the foreign corporation notice of the service of process upon him.[9] There is a difference of opinion as to the effect of the failure of a foreign corporation to appoint a designated state official its agent to receive service of process.[10] The most logical rule is found in those cases holding that when a foreign insurance corporation does business in a state but fails to comply with the statute requiring the appointment of a designated state official as its process agent, the corporation will nevertheless be bound by such service for all causes of action arising out of business transacted within the state;[11] as in the principal case, but not

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L. ed. 987 (1903); Biggs v. Mut. Reserve Fund Ass'n, 128 N. C. 5, 37 S. E. 955 (1901); Moore v. Mut. Reserve Fund Ass'n, 129 N. C. 31, 39 S. E. 637 (1901); Mut. Reserve Fund Ass'n v. Scott, 136 N. C. 157, 48 S. E. 581 (1904); 18 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8762, n. 97.

[7] Collier v. Mutual Reserve Fund Life Ass'n, 119 Fed. 617 (D. C. Mass., 1902); Am. Loan and Investment Co. v. Boraas, 156 Minn. 431, 195 N. W. 271 (1923); Woodward v. Mut. Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10 (1904).

[8] Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. ed. 915 (1887); Horn Silver Mining Co. v. N. Y., 143 U. S. 305, 12 Sup. Ct. 403, 36 L. ed. 164 (1891) (state cannot interfere with interstate or foreign commerce); So. Pacific v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. ed. 915 (1887); Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. ed. 297 (1895); (Thus a corporation cannot be deprived of the right to enter a state and transact business therein, when it has derived its existence from an Act of Congress, and is a lawful agency for the performance of governmental or quasi-governmental functions.); Liggett v. Baldridge, 278 U. S. 105, 49 Sup. Ct. 57, 73 L. ed. 204 (1928); Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53 (1904), *aff'd*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. ed. 451 (1905); State v. Agcy, 171 N. C. 831, 88 S. E. 726 (1916); Brust v. First National Bank of Stevens Point, 184 Wis. 15, 198 N. W. 749 (1924) (Nat. bank cannot be excluded); 17 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8390, n. 32. (cases collected).

[9] State of Wash. *ex rel.* Bond and Goodwin and Tucker v. Superior Ct. of Wash. for Spokane County, 289 U. S. 361, 53 Sup. Ct. 624, 77 L. ed. 1256, 89 A. L. R. 658 (1933) (Statute not invalid for failure to require state official to give foreign corporation notice of service on him since foreign corporation could have appointed its own agent.); Consolidated Flour Mills Co. v. Muegge, 278 U. S. 559, 49 Sup. Ct. 17, 73 L. ed. 505 (1928) (Where a foreign corporation has done business within the state in defiance of statutory conditions and then withdrawn, it may be brought into court by service on a state officer only if the statute imposes a duty to notify.); Note (1933) 89 A. L. R. 658 (review of holdings).

[10] Rothrock v. Dwelling House Ins., 161 Mass. 423, 37 N. E. 206, 23 L. R. A. 863 (1894) (service on state official whom the statute requires to be designated but who has not in fact been designated held insufficient to confer jurisdiction to render judgment against the corporation); Mason's Frat. Acc. Ass'n v. Riley, 60 Ark. 578, 31 S. W. 148 (1895).

[11] Funk v. Anglo-Am. Ins. Co., 27 Fed. 336 (C. C. E. D. Mo., 1886); Knapp, Stout and Co. v. Nat. Mut. Fire Ins. Co., 30 Fed. 607 (C. C. E. D. Mo., 1887); Sparks v. Nat. Masonic Acc. Ass'n, 100 Iowa 458, 69 N. W. 678 (1896); Kulberg v. Frat. Union of Am., 131 Minn. 131, 154 N. W. 748 (1915); Braunstein v. Frat. Union of Am., 133 Minn. 8, 157 N. W. 721 (1916); Richardson Machinery v.

as to business transacted out of the state.[12] This rule is based on the theory that by doing business in the state the corporation is said to have consented to jurisdiction,[13] such consent being presumed;[14] or on the theory that the corporation is estopped to set up its violation of the statute.[15] The consent that is said to be implied in such cases is of course a mere fiction, justified by the accepted doctrine that the state could exclude the foreign corporation altogether, and could, therefore, establish this obligation as a condition to its admission to the state.[16]

By the great weight of authority under statutes similar to those under discussion, the withdrawal of the corporation from the state does not revoke the authority of the agent to receive service in an action arising in the state out of business done by the corporation therein[17] as the appointment of a state official is a power coupled with an interest and, therefore, irrevocable.[18] If this were not true the corporation would be able to avoid jurisdiction and thus place a great hardship upon those who had dealt with it. As was expressed in one case, "the end sought to be attained [protection of those dealing with the foreign corporation by providing statutory agent for receiving service] would be as illusory as a will o' the wisp, which fleets when it is sought to grasp it."[19] In addition to service upon a designated state

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Scott, 122 Okla. 125, 251 Pac. 482 (1926); Conques v. La. Western Ry., 295 S. W. 935 (Tex. 1937).

[12] Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. ed. 369 (1907).

[13] Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451 (1855).

[14] Knapp, Stout and Co. v. Nat. Mut. Fire Ins. Co., 30 Fed. 607 (C. C. E. D. Mo., 1887) (service prima facie good); Flinn v. Western Mut. Life Ass'n, 187 Iowa 507, 171 N. W. 711 (1919) (conclusive presumption).

[15] North Am. Union v. Oliphant, 141 Ark. 346, 217 S. W. 1 (1919); Erhman v. Teutonia Ins. Co., 1 Fed. 471 (1880) (The receipt of the premium and execution and delivery of the policy by the company are equivalent to an assertion that it has complied with the requirements of the statute to entitle it to do business in the state, and, as between the assured and the company, the latter is estopped upon the soundest principles of the law and morals to say that it has not done so.); Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667 (1904); 17 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8520, n. 36.

[16] Lafayette Ins. Co., v. French, 18 How. 404, 15 L. ed. 451 (1855).

[17] Woodward v. Mut. Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10 (1904); Biggs v. Mut. Reserve Fund Life Ass'n, 128 N. C. 5, 37 S. E. 955 (1901); Hinton v. Mut. Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474 (1904); RESTATEMENT, CONFLICT OF LAWS (1934) §93; Note (1926) 45 A. L. R. 1447; 18 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8762 (excellent treatment of the problem).

[18] Moore v. Mut. Reserve Fund Life Ass'n, 129 N. C. 31, 39 S. E. 637 (1901) (Exception to general rule that agency may be revoked recognized in that agency irrevocable when coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of someone, or some interest.); Frazier v. Steel and Tube Co. of America, 101 W. Va. 327, 132 S. E. 723 (1926). The objective seems to be to give the insured a feeling of security as to an adequate remedy on his policy.

[19] Biggs v. Mut. Reserve Fund Life Ass'n, 128 N. C. 6, 7, 37 S. E. 955, 956 (1901).

official, the former agent of the company which has withdrawn may be served with process so as to bind the foreign corporation, where the matter in controversy arose out of business transacted in the state by the corporation prior to its withdrawal.[20] This is to prevent the miscarriage of justice through efforts of the corporation to withdraw and thus avoid jurisdiction.[21]

North Carolina requires of foreign insurance companies as a condition precedent[22] to doing business in the state that they give the Insurance Commissioner an irrevocable power of attorney so long as any liability of the company remains outstanding in the state.[23] If this requirement is not complied with, service may be had as in the case of other corporations.[24]

The full faith and credit provision of the Constitution does not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.[25] By the weight of authority, however, the foreign judgment is conclusive on collateral attack except for want of jurisdiction or fraud.[26] As to judgments rendered by the courts not of record of another state the earlier cases held that such judgments were not conclusive on the merits,[27] but it is now generally settled that such judgments, when properly proved and when jurisdiction is shown to have existed, are entitled to full faith and credit in other states, and are as conclusive as the judgments of a court of record.[28]

[20] Mut. Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. ed. 987 (1903); Fisher v. Traders' Mut. Life Ass'n, 136 N. C. 217, 48 S. E. 667 (1904); FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1933) §8761, n. 67.

[21] Brown-Ketchan Iron Works v. Swift Co., 53 Ind. A. 630, 100 N. E. 584 (1913).

[22] Biggs v. Mut. Reserve Fund Life Ass'n, 128 N. C. 5, 37 S. E. 955 (1901).

[23] Mutual Reserve Fund Life Ass'n v. Scott, 136 N. C. 157, 48 S. E. 581 (1904); N. C. CODE ANN. (Michie, 1935) §6411.

[24] Hinton v. Mut. Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161 (1904); Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667 (1904); Brenzier v. Supreme Council, Royal Arcanum, 141 N. C. 409, 53 S. E. 835, 6 L. R. A. (N. S.) 235 (1906); Pardue v. Asher, 174 N. C. 676, 94 S. E. 414 (1917); N. C. CODE ANN. (Michie, 1935) §§483, 1137 (service on foreign corporations).

[25] Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897 (1873). To the same effect: Mottu v. Davis, 151 N. C. 237, 65 S. E. 969 (1909).

[26] Lewis v. United Order of Good Samaritans, 182 Ark. 914, 33 S. W. (2d) 53 (1930).

[27] Wood v. Wood, 78 Ky. 624 (1880); Warren v. Flagg, 2 Pick. 448 (Mass. 1824).

[28] Helton v. Turner, 153 So. 866 (Ala. 1934) (In action on a judgment on note rendered by Tenn. justice of the peace court, the courts of Ala. are bound to presume that the Tenn. court legally possessed jurisdiction over the subject matter upon which it professed to adjudicate, until the contrary is made to appear.); Glass v. Blackwell, 48 Ark. 50, 2 S. W. 257 (1886); Banister v. Campbell, 138 Cal. 455, 71 Pac. 504 (1903); Baltimore and Ohio Ry. v. Freeze, 169 Ind. 370, 82 N. E. 76 (1906); Matter of Curtis, 134 App. Div. 547, 119 N. Y. Supp. 556 (1909), *aff'd*, 197 N. Y. 583, 91 N. E. 1111 (1910).

Some courts say that all facts essential to jurisdiction must appear on the face of the record or be shown by competent evidence before the adjudication can be accepted as binding and conclusive.[29] Other courts go so far as to hold that foreign judgments may be attacked for want of jurisdiction, even though jurisdictional facts are recited therein.[30] In determining the question of jurisdiction of the parties in the foreign judgment, courts have made use of certain presumptions[31] which are relied upon only in the absence of evidence or averments respecting the facts presumed.[32] Such presumption of jurisdiction may be either rebuttable[33] or conclusive.[34] In the absence of a presumption the burden of proving want of jurisdiction is on the defendant pleading it.[35] If the record of the judgment shows on its face that the court rendering it did not have jurisdiction, the judgment will not be recognized by the courts of other states.[36] Neither will there be a presumption of jurisdiction if the judgment is in proceedings which are special and statutory and not according to the course of the common law.[37] Once the jurisdiction of the subject matter of the suit and the person of the defendant are obtained, it will be presumed that jurisdiction continued to the judgment in the absence of evidence to the contrary.[38] It has been held that a direct adjudication by the courts of one state

[29] Galpin v. Page, 18 Wall. 350, 21 L. ed. 959 (1873); Helton v. Turner, 153 So. 866 (Ala. 1934); Toler v. Coover, 335 Mo. 113, 71 S. W. (2d) 1067 (1934); Fox Vliet Drug Co. v. Arnold, 84 S. W. (2d) 1012 (Tex. 1935).

[30] Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 37 Sup. Ct. 492, 61 L. ed. 966 (1917); Drummond v. Lynch, 82 F. (2d) 806 (C. C. A. 5th, 1936); Dyke v. Ill. Commercial Men's Ass'n, 358 Ill. 458, 193 N. E. 490 (1935); Mottu v. Davis, 151 N. C. 237, 65 S. E. 969 (1909); Bonnett-Brown Corp. v. Coble, 195 N. C. 491, 142 S. E. 772 (1928); Fisher v. March, 26 Grat. 765 (Va. 1875).

[31] Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F. (2d) 790 (C. C. A., 4th, 1935).

[32] Galpin v. Page, 18 Wall. 350, 21 L. ed. 959 (1873).

[33] McAlister v. McAlister, 214 Ala. 345, 107 So. 843 (1926) (jurisdiction prima facie in absence of showing on face of properly certified transcript of want of jurisdiction); Makorios v. Green Co., 256 Mass. 598, 153 N. E. 11 (1926).

[34] Brotherhood of Ry. Trainmen v. Agnew, 170 Miss. 615, 155 So. 205 (1934) (Unless the contrary appears from the record, all jurisdictional facts are conclusively presumed to have existed, whether there be recitals in the record to show them or not, and this rule applies, although the judgment attacked was rendered by default, or constructive service of process alleged to be defective. Presumption conclusive on collateral attack; and on direct attack, the defendant must affirmatively show that the defect existed as a matter of fact.). But *cf.* Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1925) (the jurisdiction of the court of the first instance over the parties and subject matter must affirmatively appear).

[35] Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F. (2d) 790 (C. C. A. 4th, 1935); Miller v. Brown, 170 Ark. 949, 281 S. W. 904 (1926); Rodenbeck v. Crews State Bank and Trust Co., 97 Ind. App. 21, 163 N. E. 616 (1928).

[36] Holland v. Universal Life Co., 180 Atl. 328 (Del. 1935); Old Wayne Mut. Life Ass'n v. Flynn, 31 Ind. App. 473, 68 N. E. 327 (1903); Smith v. Central Trust Co., 154 N. Y. 333, 48 N. E. 553 (1897).

[37] Holland v. Universal Life Co., 180 Atl. 328 (Del. 1935) (substituted service statute involved).

[38] Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. ed. 525 (1896).

that the court which rendered a certain judgment had the requisite authority and that the parties were legally brought before the court is conclusive on the question and is not open to collateral attack.[39] Mere irregularities cannot be set up against the judgment when brought in question in another state[40] but it is well settled that the defense may be interposed that the judgment was obtained by fraud.[41]

The principal case follows the weight of authority. The defendant not having shown lack of jurisdiction or fraud in the procurement of the judgment could not overturn it. Defendant was estopped to show lack of jurisdiction by setting up its own violation of the statute requiring it to designate the Insurance Commissioner as its attorney to accept service.

J. D. MALLONEE, JR.

Constitutional Law—Local Laws—Regulation of Professions—Real Estate Brokers.

In 1868 the General Assembly of North Carolina was given constitutional power to tax trades and professions.[1] In 1899 the first license tax was placed on real estate dealers.[2] A tax on this trade for the purpose of raising revenue has continued to the present[3] and paying this has been the only state-wide legal requirement for engaging in the real estate business.

In 1927 an act[4] was passed which made the qualifications for obtaining a license in eight counties depend upon the applicant's ability to show to the satisfaction of a Real Estate Commission his reputation for honesty and fair dealing and his competency to transact the business in such a manner as to safeguard the public.[5]

This statute was held unconstitutional in *State v. Warren*[6] on the ground that it was local in effect, applying to but eight counties, and was thus discriminatory and in violation of the right to equal protection of the laws. Had the act been applicable to the whole state, the majority opinion implies that it would have been a valid use of the police power.

[39] Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628 (1893); Citizens' Nat. Bank v. Consolidated Glass Co., 83 W. Va. 1, 97 S. E. 689 (1919).

[40] Drummond v. Lynch, 82 F. (2d) 806 (C. C. A. 5th, 1936).

[41] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538 (1890); Jaster v. Currie, 198 U. S. 144, 25 Sup. Ct. 614, 49 L. ed. 998 (1904); Cannon v. Howell, 131 N. C. 125, 42 S. E. 555 (1902); Levin v. Gladstein, 142 N. C. 448, 55 S. E. 371, 32 L. R. A. (N. S.) 905 (1906); Mottu v. Daniels, 151 N. C. 237, 65 S. E. 969 (1909); Roberts v. Pratt, 152 N. C. 731, 68 S. E. 240 (1910); Ring and Wellborn v. Whitman, 194 N. C. 544, 140 S. E. 159 (1927); Bonnett-Brown Corp. v. Coble, 195 N. C. 491, 142 S. E. 772 (1928).

[1] N. C. CONST. art. V, §3.
[2] P. L. N. C. 1899, c. 2, §50.
[3] P. L. N. C. 1935, c. 371, §100.
[4] Public-Local Laws 1927, c. 241.
[5] The act likewise provided eleven causes for which the license might be suspended or revoked.
[6] 211 N. C. 75, 189 S. E. 108 (1937).

The effect of the decision is that the state can set character and professional qualifications for *all* real estate brokers and salesmen, but cannot regulate only a *part* as the sale of real estate is state-wide and can be regulated only by general laws which affect every county.

It was not specifically stated which constitutional provisions were violated by the act. It was condemned because it was not state-wide and because it was discriminatory. The North Carolina Constitution prohibits local legislation relating to trade;[7] therefore, if the regulation of real estate men so as to insure honesty and business capability can be classed as a regulation of the real estate trade, then perhaps the legislation was invalid under this constitutional provision. But the court did not refer to the provision. If the court thought that the act in question did contravene the prohibition, no doubt it would have been indicated. Therefore, we turn to the second objection to the act.

The giving of exclusive emoluments or privileges is forbidden by the North Carolina Constitution;[8] the taking of life, liberty or property without due process are forbidden by both the North Carolina Constitution[9] and the Fourteenth Amendment; denial of equal protection of the laws is forbidden by the Fourteenth Amendment. These are doubtless the constitutional prohibitions which the court had in mind when it said that the act was unconstitutional because discriminatory. An examination of the cases involving local laws wherein discrimination or lack of due process was urged shows three classes of attempted regulations under the police power. First, when the matters regulated were of such a nature that local sentiment and circumstances were mainly responsible for the enactment, the test for determining whether discrimination existed has been whether the act equally affected all within the territory defined in the act.[10] When the police power was invoked to require Indian children to attend school longer than white, a warning was sounded when two dissenting justices argued that this law was an invalid departure from the constitutional requirement of uniformity in all the essentials of the school system.[11] Uniformity here meant uniformity throughout the state. Second, in the field of criminal law, the court said in condemning a local law making the killing of cattle

[7] N. C. CONST. art. II, §29.
[8] N. C. CONST. art. I, §7.
[9] N. C. CONST. art. I, §17.
[10] Local liquor laws held constitutional because locally uniform: State v. Muse, 20 N. C. 463 (1839); State v. Barringer, 110 N. C. 525, 14 S. E. 781 (1892); State v. Barrett, 138 N. C. 630, 50 S. E. 506 (1905). Local laws regulating dogs held constitutional: State v. Blake, 157 N. C. 608, 72 S. E. 1080 (1911) (citing cases involving local laws on many subjects); Newell v. Green, 169 N. C. 462, 86 S. E. 291 (1915). Local law relating to the use of profanity on the property of a certain mill in one county upheld: State v. Warren, 113 N. C. 683, 183 S. E. 498 (1893). The disposition of cotton in three counties regulated: State v. Moore, 104 N. C. 714, 10 S. E. 143 (1889).
[11] State v. Wolf, 145 N. C. 440, 59 S. E. 40 (1907).

by a railroad in certain counties a misdemeanor that an act divested of any peculiar circumstances and *per se* made indictable should be equally and uniformly indictable throughout the state.[12] However, it was not pointed out in this case, or in a majority of the others, what part of the constitution was violated. Third, when under the guise of a police regulation, agents in certain counties were required to pay a thousand dollar license fee before hiring laborers to work outside the state, the court held such fee to amount to a tax on a vocation and void for lack of uniformity required of taxes on trades or professions.[13] It was pointed out that the legislature in exercising police power, as the term police power is commonly interpreted, is not restrained by the constitutional provision for uniformity. (Uniformity here presumably means uniformity throughout the state.)

An examination of the legislation regulating other trades and professions discloses that these laws have been all-inclusive in territorial scope. Without doubt, this fact had great weight with the court in the instant case.[14]

[12] State v. Divine, 98 N. C. 778, 4 S. E. 477 (1887); State v. Fowler, 193 N. C. 290, 136 S. E. 709 (1927) (A law applicable to five counties limiting the punishment for the first offense of violating the prohibition law to a fine, *held* a grant of special exemption, an arbitrary class distinction.).

[13] State v. Moore, 113 N. C. 697, 18 S. E. 342 (1893) (N. C. CONST. art. V, §3 authorizes a tax on trades and professions, and although it is not expressly provided that such tax shall be uniform, yet a tax not uniform would be inconsistent with other sections of the constitution. See Worth v. Wilmington and Weldon R. R., 89 N. C. 291 (1883); Dalton v. Brown, 159 N. C. 175, 75 S. E. 40 (1912) (An act levying a tax on lumber hauled by any lumber *company* using the public roads of a certain county was held to be a legitimate police regulation for the maintenance of the roads. A strong dissent urged that since the act did not apply to private individuals or other heavy haulers, the tax was void for lack of uniformity.); State v. Bullock, 161 N. C. 223, 75 S. E. 942 (1912) (Where the tax applied to *all* in the county who hauled heavy materials, it was unanimously held non-discriminatory.). The following cases involve acts or ordinances enacted under the police power, but do not exactly fit into the three categories set out in the text. Plott Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688 (1932) (An act applicable to Buncombe County which sought to prescribe a greater measure of liability upon a bond of indemnity than was imposed in the other ninety-nine counties was held burdensome and discriminatory.); Edgerton v. Hood, Comm'r of Banks, 205 N. C. 816, 172 S. E. 481 (1934) (An act providing that depositors in closed banks in certain counties might sell their claims to debtors of the bank and that the bank should accept such claims at face value in payment of debts was held to be a discrimination against debtors and creditors of closed banks in other sections of the state.); State v. Sasseen, 206 N. C. 644, 175 S. E. 142 (1934) (A municipal ordinance requiring operators of vehicles for hire to deposit with the city treasurer policies of liability insurance or cash or securities was held void as creating a monopoly and a turning of business over to a privileged class since personal sureties were not allowed.).

[14] State v. Van Doran, 109 N. C. 864, 14 S. E. 32 (1891) (doctors); State v. Call, 121 N. C. 643, 28 S. E. 517 (1897) (doctors); State v. Hicks, 143 N. C. 689, 57 S. E. 441 (1907) (dentists); State v. Siler, 169 N. C. 314, 84 S. E. 1015 (1915) (osteopaths); State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921) (accountants); State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930) (barbers); Roach v. Durham, 204 N. C. 587, 169 S. E. 149 (1933) (plumbers); N. C. CODE ANN. (Michie, 1935) §5259(1)-(29) (cosmetologists).

The 1937 General Assembly evidently believed that by following existing interpretations of the constitutional prohibition against local laws,[15] that is, by the procedure of enacting a general law and excepting the counties that did not wish to require by law a showing of honesty and business capability from the real estate men, the odium of the previous law, held unconstitutional in the principal case, could be avoided. The 1937 Real Estate License Act,[16] which embodies the previous act almost word for word, is undoubtedly a general law, but it is not necessarily a state-wide law since 48 counties are excepted from its provisions.[17]

The 1937 act may be valid so far as the constitutional prohibition against local laws is concerned, granting that the prohibition is applicable at all to real estate dealing as "trade". The act might have been held not to violate this prohibition if it had originally been made to apply to all the counties except ninety-two, instead of to eight counties. It would not be a praiseworthy result, however, to hold that a law applicable to counties *A, B,* and *X* is invalid, whereas a law applicable to all counties excepting every county but *A, B,* and *X* is valid. Legal formalism is justly condemned when the form serves no purpose.

But even though the legislature has framed the new act to avoid possible violation of the prohibition against local legislation, the objection that the act is discriminatory is as forceful as ever. If the court adheres to its position that such regulation of the real estate business is a matter of state-wide, not local, concern, it is hard to see how the new act can escape the fate of the old, since real estate men in forty-eight counties do not have to meet the requirements of the act.[18]

WILLIAM THORNTON WHITSETT.

[15] In 1917 the North Carolina Constitution was amended, N. C. CONST. art. II, §29 prohibiting local laws in fourteen enumerated fields. Under this provision in distinguishing between general laws and local acts the court has gone so far as to hold that though the constitution prevented local legislation relating to bridges and ferries, an act which created in one county a commission for the building of bridges was valid. Huneycutt v. Comm'rs of Stanly County, 182 N. C. 319, 109 S. E. 4 (1921). It held that an act to be condemned as local must direct the construction of a particular bridge at a specific spot. Day v. Comm'rs of Yadkin and Surry counties, 191 N. C. 780, 113 S. E. 164 (1926). Likewise, the court held that a law was no less general because a number of counties were excepted from the act. *In re* Harriss, 183 N. C. 633, 112 S. E. 425 (1922) (though forty-four counties were excepted from the law establishing courts inferior to the Superior court, this was held to be a general law and as such valid despite the prohibition against local legislation in this field.). Spruill, *The Proposed Constitution and Special, Private, and Local Legislation in North Carolina* (1933) 11 N. C. L. REV. 140.

[16] P. L. N. C. 1937, c. 292, §§1-17½. [17] P. L. N. C. 1937, c. 292, §17½.

[18] In spite of the dicta by the North Carolina court in the principal case to the effect that a state-wide law regulating those engaged in the real estate business would be upheld, there are grounds for arguing that legislative control in this occupation is too wide an extension of the police power. The court quotes with approval from Rawles v. Jenkins, 212 Ky. 287, 292, 279 S. W. 350, 352 (1925) which held a state-wide regulation of the real estate trade unconstitutional. "'If

Constitutional Law—Minimum Wage Legislation.

In a recent comment in this Review the cases involving the constitutionality of minimum wages were reviewed.[1] In a 5-4 decision in April, 1937 the United States Supreme Court reversed itself on the question.[2] Taking judicial notice of "the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent,"[3] the Court expressly overruled the *Adkins* case[4] and upheld a Washington statute regulating minimum wages for women and children.

The condemning feature of previous minimum wage statutes in that they looked at only one side of the employment contract was not entirely absent from the Washington case.[5] Notwithstanding this objection heretofore sustained, the Court justified the act as a proper exercise of the state police power.[6] The majority recognized that the need for protection of women by minimum wage legislation outweighed all arguments as to denial of due process. "The Constitution," Chief Justice Hughes wrote, "does not speak of freedom of contract. . . . And regulation which is reasonable in relation to its subject and is adopted in the interests of the community"[7] is not an unreasonable restraint on that liberty of which no one may be deprived without due process. Moreover, the health and morals of our women employees are sufficiently close to public interest to justify legitimate protection; minimum wage requirements afford an "admissible means to that end."[8]

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occasional opportunity for fraud is to be the test, then there is no reason why every grocer, every merchant, every automobile dealer, . . . and every mechanic who deals more frequently with the public in general and whose opportunities for fraud are far greater than those of the real estate agent or salesman, may not be put on the same basis. . . . The result will be that all . . . who fail to establish their moral fitness will not only be deprived of their means of livelihood, but will become a burden . . . on . . . the community at large. . . . Fitness on the part of the real estate broker, . . . is a thing greatly to be desired, but . . . we shall have to leave something to religious and moral training, to public opinion, and to the ordinary laws of the land.'"

[1] (1936) 15 N. C. L. REV. 50.

[2] West Coast Hotel Co. v. Parrish, 57 Sup. Ct. 578, 81 L. ed. Ad. Op. 455 (1937).

[3] 57 Sup. Ct. 578, 585, 81 L. ed. Ad. Op. 455, 463.

[4] Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1922).

[5] The Washington statute requires the employer to pay a wage "sufficient for the decent maintenance" of the woman worker, thus apparently imposing an obligation to pay irrespective of the value of the services as did the District of Columbia law which required the minimum wage to be sufficient to supply "the necessary cost of living." See (1936) 15 N. C. L. REV. 50, 51.

[6] "The statute now before us is like the latter (speaking of the District of Columbia law) but we are unable to conclude that in its minimum wage requirement the State has passed beyond the boundary of its broad protective power." West Coast Hotel Co. v. Parrish, 57 Sup. Ct. 578, 584, 81 L. ed. Ad. Op. 455, 461.

[7] 57 Sup. Ct. 578, 581, 81 L. ed. Ad. Op. 455, 458.

[8] 57 Sup. Ct. 578, 585, 81 L. ed. Ad. Op. 455, 462.

In an attempt to distinguish its position from that adopted in the recent New York case[9] 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 Act[3] 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 more[6], 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* cases[21] 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-

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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. Edye 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 Act[30] 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 compulsion[2] 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

relaxation of the law has led to the modern doctrine of business compulsion.

The typical fact situations to which this doctrine applies may be described roughly as follows: to protect himself against serious economic loss, a party is coerced into paying a sum of money which he does not owe.[5] The payment may be of a sum greater than is due,[6] or payment may be made where nothing is owed to the party exercising the coercion.[7] This doctrine of economic or business compulsion clearly expands the older category of duress of goods in that here no property is withheld by the coercing party. Rather does one in a position of power merely take undue advantage of the economic plight of his adversary to extort a payment which is not only involuntary, but is not legally owed. This pressure exerted by the strong against the weak is felt to destroy the free volition which is a prerequisite to the existence of a valid contract.[8]

The doctrine, in terms of duress or of economic compulsion,[9] has attained judicial recognition in a substantial number of states.[10]

Still in its infancy, the doctrine of economic compulsion already

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officer to secure stolen ring); Fenwick Shipping Co. v. Clark, 133 Ga. 43, 65 S. E. 140 (1909) (payment to prevent seizure of baggage); Berger v. Bonnell Motor Co., 4 N. J. Misc. 589, 133 Atl. 778 (1926) (wrongful withholding of automobile by garage after repairing it); Ferguson v. Associated Oil Co., 173 Wash. 672, 24 P.(2d) 82 (1933) (refusal to deliver gasoline under contract whereby plaintiff was forced to pay excessive amount or suffer loss of his lease); Astley v. Reynolds, 2 Strange 915 (K. B. 1732) (withholding of plaintiff's plate by pawnbroker); WOODWARD, THE LAW OF QUASI-CONTRACTS (1913) §216; (1934) 8 WASH. L. REV. 140. *Contra:* Karschner v. Latimer, 108 Neb. 32, 187 N. W. 83 (1922) (where proof of damage and great hardship was required before the payments could be recovered).

[5] Rowland v. Watson, 4 Cal. App. 476, 88 Pac. 495 (1906); City of Chicago v. Northwestern Mutual Life Ins. Co., 218 Ill. 40, 75 N. E. 803 (1905); Pittsburgh Steel Co. v. Hollingshead, 202 Ill. App. 177 (1916); Bates v. New York Ins. Co., 3 John's Cas. 238 (N. Y. 1802); Kilpatric v. Germania Life Ins. Co., 183 N. Y. 163, 75 N. E. 1124 (1905); Homecrest Bldg. Co. v. Weinstein's Estate, 165 N. Y. Supp. 176 (1917); Harris v. Carey, 112 Va. 362, 71 S. E. 55 (1911); York v. Hinkle, 80 Wis. 642, 50 N. W. 895 (1891); Guetzkow Bros. v. Breese, 96 Wis. 592, 72 N. W. 45 (1897); (1932) 20 VA. L. REV. 474. *Contra:* Smithwick v. Whitley, 152 N. C. 369, 67 S. E. 913 (1910). Where plaintiff was in possession of real property under a land contract and had paid an excessive amount to defendant in fear of losing improvements, *held* recovery denied.

[6] Kilpatric v. Germania Life Ins. Co., 183 N. Y. 163, 75 N. E. 1124 (1905).

[7] Ramp Bldgs. Corp. v. Northwest Bldg. Co., 164 Wash. 603, 4 P.(2d) 507 (1931).

[8] "This kind of duress consists in imposition, oppression, undue influence, or the taking of undue advantage of the business or financial stress or the extreme necessities or weakness of another, whereby his free agency is overcome." Pittsburgh Steel Co. v. Hollingshead, 202 Ill. App. 177, 178 (1916).

[9] Earlier cases read in terms of duress—Harris v. Carey, 112 Va. 362, 71 S. E. 551 (1911). More recent cases adopt the term "economic compulsion". Criterion Holding Co. v. Cerussi, 250 N. Y. Supp. 735 (1931). Contrast also majority and concurring opinions in Ramp Bldgs. Corp. v. Northwest Bldg. Co., 164 Wash. 603, 4 P.(2d) 507 (1931).

[10] See cases cited *supra* note 5 and also cases collected (1931) 79 A. L. R. 655.

involves difficult problems as to when a payment is, or is not, voluntary. Payment under protest alone is not considered involuntary.[11] This is to prevent the rule from operating as a boomerang, inviting proof that a payment was under protest when it in fact was not.[12] The courts will not consider the mere demand for payment sufficient compulsion to constitute duress; another element must be present—proof that advantage was taken of the economic stress of the payor. This later element is essential to the existence of undue coercion.[13]

What is, or is not, improper coercion was a fundamental and paramount problem in cases involving the traditional concept of duress; it remains a problem as to economic compulsion. For example, the earlier cases held that there was no duress unless the threatened acts, if actually committed, would be either illegal or tortious.[14] Modern decisions generally hold that a threat to do that which one has a legal right to do may still constitute improper pressure if the free will of the other party is overcome.[15] Thus a mere threat to breach a contract, in the absence of other circumstances, has never been treated as a basis of duress;[16] but under the doctrine of economic compulsion where such a threat is accompanied by an injury to the business of the threatened party, for which his legal remedies are inadequate, such a threat may constitute improper pressure.[17]

[11] Detroit v. Martin, 34 Mich. 170 (1830); Congdon v. Preston, 49 Mich. 204, 13 N. W. 516 (1882); Warren v. Federal Life Ins. Co., 198 Mich. 342, 164 N. E. 449 (1917); Stanford v. U. S. Investment Corp., 272 S. W. 568 (Tex. Civ. App. 1925).

[12] "There would be a danger in holding otherwise in that any man in doubt as to the validity of his payment could pay with a feigned protest and later sue to recover the amount. . . ." Hicks v. Levett, 19 La. App. 836, 838, 140 So. 276, 277 (1932).

[13] Thus, "where an unfounded or illegal demand is made upon a person, and the law furnishes him adequate protection against it or gives him an adequate remedy, and instead of taking the protection the law gives him. . . , he pays what is demanded, such payment is deemed to be voluntary and not compulsory payment." 48 C. J. 753, quoted with approval in Edwards v. Williams, 93 S. W. (2d) 452, 454 (Tex. Civ. App. 1936).

[14] Martin v. New Rochelle Water Co., 42 N. Y. Supp. 893 (1896) *aff'd* 162 N. Y. 599, 57 N. E. 1117 (1900); Charlotte Bank and Trust Co. v. Smith, 193 N. C. 141, 136 S. E. 358 (1927).

[15] Bither v. Packard, 115 Me. 306, 98 Atl. 929 (1916); Welch v. Beeching, 193 Mich. 338, 159 N. W. 486 (1916); see also Durfee, *Recovery of Money Paid Under Duress of Legal Proceedings* (1917) 15 MICH. L. REV. 228.

[16] Mason v. U. S., 17 Wall. 67, 21 L. ed. 564 (1872); U. S. v. Nederlandsch-Amerikaansche Stoomvaart Maatschoppiy, 252 U. S. 148, 41 Sup. Ct. 72, 65 L. ed. 193 (1920); Hartsville Oil Mill v. U. S., 271 U. S. 43, 46 Sup. Ct. 389, 70 L. ed. 822 (1926); Hackley v. Headley, 45 Mich. 569, 8 N. W. 511 (1881); Doyle v. Trinity Church, 133 N. Y. 372, 31 N. E. 221 (1892).

[17] Hazelhurst Oil Mill and Fertilizer Co. v. U. S., 42 F.(2d) 331 (Ct. of Claims, 1930). (The government, by refusing to accept goods for which it contracted with plaintiff, would cause a drastic fall in the price of cotton linters of which the plaintiff had a large quantity. By threat of such refusal the government procured a settlement. If plaintiff had not settled, but had sued for breach of contract, the damages would have been inadequate; therefore the court elimi-

Another problem frequently raised is that of promptness of action after the removal of the duress. The courts have held that even if there is duress, it is necessary that the payor seek his remedy immediately after the pressure under which he acted is removed.[18] Though the courts require "immediate" action, in fact the question of promptness of action seems to be one of reasonable time, varying with the circumstances of the individual case.

There appears to be an important exception to the doctrine. In the case of a tax paid under valid protest there can be no recovery unless there was immediate danger of seizure of person or property.[19] Thus in this instance only, the older concepts of duress of person and of goods seem to have undergone no stage of expansion. Generally however, the law of duress has made marked growth to date, and is even now in a state of great development.

As applied to insurance cases, the doctrine has been generally invoked where the prerequisite facts have been present,[20] and there appears to be no authority for the proposition that the doctrine is not applicable to cases of insurance. *Pacific Mutual Life Insurance Co. of California v. McCaskill*[21] is a case squarely in point. This recent case, involving a fact situation identical with that of the principal case, reaches a directly contrary result, the court allowing the plaintiff to recover his payments to the insurance company on the basis of economic compulsion.

While the principal case might have been decided differently on the theory of unjust enrichment,[22] the facts fit more coherently into the scheme of economic compulsion. The jury verdict, which allowed the plaintiff to recover, established the fact that he was permanently and totally disabled at the time he filed his claim for the installments; therefore the company made illegal demands in regard to the continued payment of premiums; the plaintiff in fear of losing his property, viz.,

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nated the settlement on the ground of economic compulsion, and allowed the plaintiff to recover on the basis of the original contract.).

[18] Deibel v. Jefferson Bank, 200 Mo. App. 506, 207 S. W. 869 (1919); Oregon Pacific Ry. v. Forrest, 128 N. Y. 83, 28 N. E. 137 (1891); White v. Little Co., 118 Wash. 582, 204 Pac. 186 (1922).

[19] City of Morganfield v. Walker, 202 Ky. 641, 261 S. W. 12 (1924); Benoline Oil Co. v. State, 122 Ohio St. 175, 171 N. E. 33 (1930); Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839 (1906); see Field, *Recovery of Illegal Taxes* (1932) 45 HARV. L. REV. 501. Consideration must be given to the statutory exemptions which provide for refund regardless of whether there is a protest, if there is an overpayment.

[20] Bates v. N. Y. Ins. Co., 3 John's Cas. 238 (N. Y. 1802); City of Chicago v. Northwestern Mutual Life Ins. Co., 218 Ill. 40, 75 N. E. 803 (1905); Rosenfeld v. Boston Mut. Life Ins. Co., 222 Mass. 284, 110 N. E. 304 (1915). The doctrine is approved in Warren v. Federal Life Ins. Co., 198 Mich. 342, 164 N. W. 449 (1917); however, recovery was denied on the basis of insufficient protest.

[21] 170 So. 579 (Fla. 1936).

[22] WOODWORD, THE LAW OF QUASI-CONTRACTS (1913) §§1, 8, 115-124.

the benefits of the policy, complied with the wrongful demands. The result reached by the court might possibly be justified by treating the threat to cancel the policy as a threat to breach a contract, such a threat having been held not to constitute duress;[23] however, in order to sustain this reasoning it must appear that the plaintiff's action on the contract of insurance would adequately compensate him[24] and that he would suffer no loss pending the time of the trial of his cause in the event that he should ultimately lose the case.

At any rate, it seems that the court should have considered the doctrine of economic compulsion; and there is little justification for deciding the case on a rule of law[25] which is at most questionably applicable, since the payment of the premiums can scarcely be considered voluntary.[26]

JOHN TAYLOR SCHILLER.

Insurance—Burial Associations—Definition of Insurance.

Defendant funeral home was enjoined from doing an insurance business without complying with the insurance laws.[1] Thereafter defendant sold contracts for $50, payable in monthly installments, which provided that the purchaser would be rendered certain funeral services on death, and that the purchaser's representative would be entitled to funeral merchandise at reduced prices. There was a further stipulation that the exercise of the privileges under the contract would render the unpaid balance due and collectible. Contempt proceedings were instituted by the Insurance Commissioner. *Held*: Since no element of risk was involved the agreements were not insurance contracts and defendant did not violate the injunction in making sales subsequently thereto.[2]

Statutory definitions of insurance are ordinarily couched in such general terms as to be of little value. North Carolina has one of the more widely accepted definitions: "A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity for, the destruction, loss, or injury of something

[23] See note 16 *supra*.
[24] See note 17 *supra*.
[25] ". . . money *voluntarily* paid with full knowledge of the facts cannot be recovered back except where it was paid under duress, fraud, or mistake." (Italics the writer's). Ignatovig v. Prudential Ins. Co. of America, 16 F. Supp. 764 (M. D. Pa. 1935).
[26] A settlement of the case was subsequently made. For a recent discussion of this subject see (1937) 3 U. OF PITTSBURGH L. REV. 241.

[1] South Georgia Funeral Homes v. Harrison, 182 Ga. 60, 184 S. E. 875 (1936).
[2] South Georgia Funeral Homes v. Harrison, 188 S. E. 529 (Ga. 1936).

in which the other party has an interest."[3] The broad generalities of the definition are obvious.

Though there is a perplexing problem as to what constitutes insurance, all insurance contracts necessarily contain the following elements:[4] "(1) One party possesses an interest susceptible of pecuniary estimation". This insurable interest requirement is based on public policy which condemns as a mere wager any agreement for insurance on anything in which the parties have no interest. "(2) That interest is subject to some well-defined peril or perils, the happening of which will destroy or impair it, thereby causing loss to the risk bearer." A contract which might otherwise be held insurance is likely to be called an executory sales agreement where there is no element of risk. "(3) There is an assumption of this risk by the other party to the contract." Insurance is primarily considered as a risk-shifting device. "(4) The contract for assuming the risk must be an integral part of a general scheme for distributing a loss that may be suffered by any individual interest owner among a considerable group of persons exposed to similar perils. (5) The insured must make a ratable contribution, called a premium, to the general insurance fund."[5]

However the fact that the above elements are present in a particular instance is not conclusive. The courts in addition devise and apply other tests.

One frequest test is *control.* This is ordinarily applied in regard to indemnities accompanying sales of goods. If the happening of the risk is within the control of the vendor, then the courts hold that the contract is not insurance. Or stated differently, if the warranty includes hazards other than defects in articles sold, it is insurance. Thus a contract to repair plate glass windows and to replace them if broken from any cause is an insurance contract because the breakage is beyond the control of the repairer;[6] a contract to furnish mercantile reports which guarantees their accuracy is not insurance since the credit company can control the accuracy of its reports;[7] an organization which pays

[3] N. C. CODE ANN. (Michie, 1935) §6262. At least 10 other states have almost the identical statute, including Alabama, Colorado, Idaho, Maine, Massachusetts, Mississippi, Nebraska, Oklahoma, Tennessee, Washington. Other states have adopted definitions for particular branches of insurance. For example, GEORGIA CODE (1933) §56-901, "A life insurance policy is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another shall die within the time limited by the policy. The life may be that of the insured or of another in the continuance of whose life the insured has an interest."

[4] VANCE, INSURANCE (2d ed. 1930) §5.

[5] The presence of elements 4 and 5 distinguishes an insurance contract from an ordinary guaranty or warranty. An ordinary suretyship contains elements 1, 2, and 3 but is not considered insurance.

[6] People v. Standard Plate Glass and Salvage Co., 174 App. Div. 501, 156 N. Y. Supp. 1012 (1916). But *cf.* Moresh v. O'Regan, 120 N. J. Eq. 534, 187 Atl. 619 (1936); People v. Roschli, 291 N. Y. Supp. 473 (1936).

[7] People *ex rel.* Daily Credit Service Corp. v. May, 162 App. Div. 215, 147

benefits to its members on marriage is not engaged in the insurance business as there is no risk outside the control of its members.[8]

Another test imposed is that of the *purpose of the contract.* Where benefits, predicated on the occurrence of an event, are but incidental to the main purpose of a contract, the transaction is not insurance. Thus, a contract of a hospital to care for a patient the remainder of her life for a stated sum is not ultra vires as an insurance agreement;[9] an indemnity promise accompanying the sale of lightning rods is not insurance, as the guaranty is incidental to the sale;[10] a contract of a brewing company guaranteeing the payment of rent by a saloon-keeper is incidental to the saloon-keeper's contract to sell only the brewing company's beer;[11] also employee relief funds made up from the employee's wages and administered by the employer are not insurance;[12] nor is an employer's contract to protect employees from violence by strikers an insurance contract.[13]

However many courts do not apply the *purpose of the contract* test and construe incidental benefits within the definitions of insurance. A sale of furniture on the installment plan with a provision that the balance of the installments due would be cancelled in case of death of the purchaser before final payment was held to be insurance.[14] Building and loan associations which contract for extinguishment of a debt in case of death of the debtor have been held to be dealing in insurance.[15] A promise by a newspaper to pay a sum to the estate of any person accidentally killed with a copy of such newspaper in his possession was held an insurance contract and therefore ultra vires of the publishing company.[16]

Concerns organized with the purpose of dealing in risks, or conducting a business or offering a line of service founded on risk, are almost uniformly declared to be insurance companies. Burial associations

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N. Y. Supp. 487 (1914), *aff'd* 212 N. Y. 561, 106 N. E. 1039 (1914). But *cf.* Ops. Att'y Gen. (N. Y. 1921) 235.

[8] Chafart v. Payton, 91 Ind. 202 (1883); State v. Towle, 80 Me. 287, 14 Atl. 195 (1888); *cf.* White v. Equitable Nuptial Ben. Union, 76 Ala. 251 (1884); Garratt v. Baker, 5 Cal. (2d) 745, 43 P. (2d) 828 (1935), *rev'd* 56 P. (2d) 225 (1936).

[9] Sisters of Third Order of St. Francis v. Guillaume's Estate, 222 Ill. App. 543 (1921).

[10] Cole Bros. and Hart v. Haven, 7 N. W. 383 (Iowa, 1880).

[11] James Eva Estate v. Mecca Co., 40 Cal. App. 515, 181 Pac. 415 (1919).

[12] Colaizzi v. Pa. Ry., 208 N. Y. 275, 101 N. E. 859 (1913); State *ex. rel.* Sheets v. Pittsburgh, C., C. and St. L. R. R., 68 Ohio St. 9, 67 N. E. 93 (1903).

[13] Hansen v. Dodwell Dock and Warehouse Co., 100 Wash. 46, 170 Pac. 346 (1918).

[14] Att'y Gen. v. Osgood Co., 249 Mass. 473, 144 N. E. 371 (1924), (1924) 24 COL. L. REV. 802, (1924) 23 MICH. L. REV. 191.

[15] United Security Life Ins. and Trust Co. v. Bond, 16 D. C. App. 579 (1900); State v. Beardsley, 88 Minn. 20, 92 N. W. 472 (1902).

[16] Commonwealth v. Philadelphia Inquirer, 15 Pa. Co. Ct. Rep. 463 (1882).

which offer burial services for periodic payments are ordinarily subjected to insurance regulations.[17] Various attempts to camouflage the real nature of the business under the guise of a service organization have been of no avail. Thus, automobile associations offering contingent accommodation services and legal aid,[18] title guaranty companies,[19] realty corporations guaranteeing the value of auctioned land,[20] a crop insurance company disguising its contracts as sales options,[21] and physicians' defense associations,[22] have all been deemed insurance companies.

A third test is termed the *necessity of regulation.* Is the company of such a type that it should be subjected to insurance regulation? Although this appears to be one of the most satisfactory standards, the problem has been approached in this manner in only a few instances. Benevolent associations are not considered insurance companies because of their philanthropic objects although the usual insurance elements are present.[23] Ordinarily annuity contracts are not considered insurance because they provide for periodic receipts in consideration of the payment of a lump sum to begin at the inception of the contract.[24] Yet annuity contracts are regulated as insurance in some jurisdictions so as to assure the company's ability to pay.[25] Although an ordinary

[17] State v. Wichita Mutual Burial Ass'n, 73 Kan. 179, 84 Pac. 757 (1906); Oklahoma Southwestern Burial Ass'n v. State, 135 Okla. 151, 274 Pac. 642 (1929); State v. Mutual Mortuary Ass'n, 166 Tenn. 260, 61 S. W. (2d) 664 (1933); State *ex. rel.* Reece v. Stout, 16 Tenn. App. 10, 65 S. W. (2d) 827 (1933); *cf.* State v. Gooch, 165 Tenn. 97, 52 S. W. (2d) 143 (1932); N. C. CODE ANN. (Michie, 1935) §6476(z); P. L. N. C. 1937, c. 239, commented on in this REVIEW.

[18] Allin v. Motorist's Alliance of America, 234 Ky. 714, 29 S. W. (2d) 19 (1930); State v. Spaulding, 166 Minn. 167, 207 N. W. 317 (1926); State v. Bean, 193 Minn. 113, 258 N. W. 18 (1934); National Automobile Service Corp. v. State 55 S. W. (2d) 209 (Tex. Civ. App. 1932).

[19] Title Insurance and Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 Pac. 667 (1923); People v. New York Title and Mortgage Co., 346 Ill. 278, 178 N. E. 661 (1931). Accord: Wilson v. Louisville Title Co., 244 Ky. 683, 51 S. W. (2d) 971 (1932).

[20] Commonwealth v. Fidelity Land Value Assurance Co., 312 Pa. 425, 167 Atl. 300 (1933). But *cf.* People v. Potts, 264 Ill. 522, 106 N. E. 524 (1914). *Contra:* Saltzman v. Fairbanks Realty Co., 145 Misc. 478, 260 N. Y. Supp. 334 (1932).

[21] *In re* Hogan, 8 N. D. 301, 78 N. W. 1051 (1899).

[22] Physicians' Defense Co. v. Cooper, 199 Fed. 576 (C. C. A. 9th, 1912); Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396 (1907). *Contra:* Vredenburgh v. Physicians' Defense Co., 126 Ill. App. 509 (1906); State *ex. rel.* Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N. E. 567 (1905).

[23] Fischer v. American Legion of Honor, 168 Pa. 279, 31 Atl. 1089 (1895); Northwestern Masonic Aid Ass'n of Chicago v. Jones, 154 Pa. 99, 26 Atl. 253 (1893); Comm. *ex. rel.* Att'y Gen. v. Equitable Benefit Ass'n, 137 Pa. 412, 18 Atl. 1112 (1890); *cf.* Peterson v. Manhattan Life Ins. Co., 244 Ill. 329, 91 N. E. 466 (1910).

[24] Rischel v. Pacific Mutual Life Ins. Co. of Cal., 78 F. (2d) 881 (C. C. A. 10th, 1935); Hall v. Metropolitan Life Ins. Co., 146 Ore. 32, 28 P. (2d) 875 (1934).

[25] For example, MASS. LAWS ANN. (1933) c. 175, §118. Applied in Mutual Benefit Life Ins. Co. v. Commonwealth, 227 Mass. 63, 116 N. E. 469 (1917).

surety is not considered as an insurer, when a company makes a business of suretyship it may be subjected to insurance law to protect the public.[26]

Thus it may be seen that predictability as to whether a company will be held to be engaging in insurance is a rather complex problem. Contracts of private[27] undertaking establishments which offer future burial services and sell funeral merchandise in consideration of installment payments (depending on the longevity of the buyer) present a fertile field for the insurance tests. Analytically, an application of the *control* test would necessitate a finding that the contract is insurance, since the risk is beyond the control of the undertaker. The *necessity of regulation* test would lead to the same result, since the undertaker's ability to perform should be safeguarded. However, the risk element is merely incidental to the main purpose of the contract, to promote business. Hence, the *purpose of the contract* test would lead to an opposite conclusion. Since most of the contracts fit the broad statutory definitions of insurance and contain the elements of an insurance agreement, the private undertaking establishments are usually subjected to insurance regulation.[28]

In the instant case[29] the defendant cleverly evaded insurance regulation by removing from the contract the essential element of a risk. This was accomplished by the insertion in the agreement of the stipulation that the exercise of privileges under the contract would render the unpaid balance due and collectible. The court then construed the contract as an exchange of stated value for value. The fact that the defendant might receive interest on that amount of money paid in, the size of which amount was dependent upon the longevity of the purchaser, was a contingency which the court apparently failed to consider. Therefore the court was not accurate in holding that there was no risk involved. Aside from conformity to definitions, small concerns like the defendant are those most needing insurance regulation to make certain their ability to perform. Hence, the interest of the public would have been better served if the court had adopted the

[26] Home Title Ins. Co. v. United States, 50 F. (2d) 107 (C. C. A. 2d, 1931), *aff'd*, 285 U. S. 191, 52 Sup. Ct. 319, 76 L. ed. 695 (1932); Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623 (1910); *cf.* Southern Surety Co. v. Austin, 17 S. W. (2d) 774 (Comm. of Appeals, Tex. 1929).

[27] Not to be confused with burial associations. See note 17, *supra*.

[28] State v. Jones Co., 108 Fla. 613, 147 So. 230 (1933); Renschler v. State, *ex. rel.* Hogan, 90 Ohio St. 363, 107 N. E. 758 (1914); Lukens v. Bair Co., 104 Pa. 280, 158 Atl. 654 (1932); Ruto v. Italian Burial Casket Co., 104 Pa. 288, 158 Atl. 657 (1932); Sgro v. Pa. Burial Co., 113 Pa. 20, 171 Atl. 425 (1934); Sisson, Att'y Gen. *ex. rel.* Nardolillo v. Prata Undertaking Co., 49 R. I. 132, 141 Atl. 76 (1929); State *ex. rel.* Fishback v. Globe Casket and Undertaking Co., 82 Wash. 124, 143 Pac. 878 (1914).

[29] South Georgia Funeral Homes v. Harrison, 188 S. E. 529 (Ga. 1936).

necessity of regulation test and declared that the defendant was carrying on a business which should be regulated by insurance laws.

JOHN HUGH WILLIAMS.

Insurance—Defense of Actions—Negligence

Plaintiff, the insured, was sued by *X* for injuries caused by plaintiff's negligently driven automobile. Defendant, the plaintiff's insurance company, defended the suit as required by the terms of the policy, and *X* recovered a judgment considerably in excess of the amount of the policy. Plaintiff sought to recover the difference between the amount of the policy and the judgment recovered against him. He alleged that defendant was negligent in: (1) waiving the defense of contributory negligence, (2) admitting negligence on the part of the insured, (3) relying solely upon the validity of a doubtful release obtained from the injured party, (4) failing to settle the case before trial, or (5) for an amount less than the policy after judgment had been entered. A directed verdict for defendant was reversed and a new trial granted.[1]

Provisions in liability insurance policies requiring the insurer to defend all suits within the protection of the policy are common. Yet, cases alleging a negligent defense of such suits are rarely litigated. The scarcity of this litigation can undoubtedly be attributed to the fact that counsel employed by the insurer are usually of equal, if not higher, calibre than those who would be employed by the insured.

The decisions are uniform in holding that an indemnity insurer who assumes the defense of a suit against the insured is liable in damages to the insured if such defense is conducted in a negligent manner.[2] Good faith alone will not satisfy the insurer's duty.[3] It is said that this duty is that of an agent to exercise reasonable care about his principal's business.[4] A comparable standard of care is imposed upon attorneys, physicians, and other professional men.[5]

Cases establishing liability on the part of the insurer may be classified as follows:

I. For a negligent failure to settle claims.[6] Suppose *A* has indemnity

[1] Ballard v. Ocean Accident and Guarantee Co., 86 F. (2d) 449 (C. C. A. 7th, 1937).

[2] Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co., 240 Fed. 573 (C. C. A. 2d, 1917); Anderson v. Southern Surety Co., 107 Kan. 375, 191 Pac. 583, 21 A. L. R. 766 (1920); Aycock Hosiery Mills v. Maryland Casualty Co., 157 Tenn. 559, 11 S. W. (2d) 889 (1920).

[3] Aycock Hosiery Mills v. Maryland Casualty Co., 157 Tenn. 559, 11 S. W. (2d) 889 (1920).

[4] Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co., 240 Fed. 573 (C. C. A. 2d, 1917).

[5] 2 Cooley, Torts (3rd ed. 1906) 1387-1390.

[6] Cavanaugh Bros. v. General Accident Fire and Life Assur. Corp., 79 N. H. 186, 106 Atl. 604 (1919); Douglas v. United States Fidelity and Guaranty Co., 81 N. H. 371, 127 Atl. 708 (1924).

insurance for $5,000.00 and negligently injures *B* who offers to settle his claim with *C* insurance company for $4,500.00. It is known to *C* insurance company that *B* has an apparently valid claim, yet *C* refuses to settle for this amount. Clearly it would be much to *A's* advantage if this settlement were effectuated; however, *C* is determined to gamble $500 by letting the claim go to trial. *B* recovers a judgment for $10,000.00. It would seem that *C's* conduct was reasonable and "business like" as it affected its own interests, yet as it affected *A's* interests it may have been negligent, if not bordering on bad faith. Where there is a good chance that the claimant will recover a judgment in excess of the amount of the policy, but offers to settle for the amount of the policy or a little less, a refusal to settle should clearly raise a rebuttable presumption that the failure to settle constituted negligence. The insured's interests should at all times be treated as paramount. It is said that the insurer must act as would an average man under similar circumstances.[7]

II. For a wrongful refusal to defend as required in the policy.[8] This is clearly a case of breach of contract. The damages recoverable necessarily include the cost of trial and attorney's fees as such were part of the insurer's undertaking.[9]

III. For a negligent defense when the policy provided that the insurer defend.[10] This is the instant case. While the case might seem hopeless to the insurer (*i.e.* that the claimant is sure to recover at least the amount of the policy) nevertheless there should be no "let up" in the amount of diligence used. The interests of the insured are still at stake, and he is relying on the insurer to protect him to its utmost ability. By the familiar doctrine of agency the agent is required to use due care and good faith in all negotiations affecting his principal.[11] Where the policy requires that the insurer either pay the amount of the policy or defend the claim and the insurer elects to do the latter the same duty of reasonable care in conducting the defense is imposed on the insurer.[12]

The following conduct on the part of the insurer, has been deemed negligent: (a) Failure to introduce legal evidence available which would tend to absolve the insured of liability,[13] (b) Promising to appeal where

[7] Cavanaugh Bros. v. General Accident and Life Assur. Corp., 79 N. H. 186, 106 Atl. 604 (1919).

[8] Western Indemnity Co. v. Walker-Smith Co., 203 S. W. 93 (Tex. Civ. App., 1918).

[9] Pontious v. American Motorist Ins. Co., 158 Wash. 264, 290 Pac. 580 (1920).

[10] Aycock Hosiery Mills v. Maryland Casualty Co., 157 Tenn. 559, 11 S. W. (2d) 889 (1920); Schwartz v. Norwich Union Indemnity Co., 212 Wis. 593, 250 N. W. 446 (1933).

[11] MECHEM, OUTLINES OF AGENCY (3rd ed. 1923) §§324, 325.

[12] Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co., 240 Fed. 573 (C. C. A. 2d, 1917). Accord: Wynnewood Lumber Co. v. The Travelers Ins. Co., 173 N. C. 269, 91 S. E. 946 (1917).

[13] Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co., 240 Fed. 573 (C. C. A. 2d, 1917).

apparent error exists but failing to do so,[14] (c) Failure to plead that claimant was violating a statute when injured,[15] (d) Agreeing to restore a case to the docket after a nonsuit had been taken.[16]

HARRY LEE RIDDLE, JR.

Lotteries—"Bank Nights."

The use of prize contests as a method of stimulating sales by business concerns is nothing new and is quite legitimate.[1] But when these schemes lose their status as contests and take on the elements of lotteries they become unlawful.

"Bank Night" as a scheme for advertising and increasing the attendance at theatres has been widely adopted in the United States during the past two years.[2] Under the various arrangements the question when a lottery exists has been brought to the forefront. By statute[3] North Carolina made lotteries illegal but this statute, like those of most states, fails to define a lottery. To constitute a lottery three elements must be present: (1) prize, (2) chance, and (3) consideration.[4] There is no question but what the first two elements are present in "Bank Night" schemes. The difficulty arises in determining if a consideration exists in such schemes.

Where the chances for the prize are limited to those purchasing tickets of admission to the theatre such schemes are unanimously held to be lotteries.[5] The price paid is considered to cover both the ticket of admission and the chance on the prize. Analogous situations are those where merchants give free chances only to purchasers of merchandise, and such are considered lotteries.[6]

[14] McAleenan v. Massachusetts Bonding and Ins. Co., 219 N. Y. 563, 114 N. E. 114 (1916). But in the North Carolina case of Wynnewood Lumber Co. v. The Travelers' Ins. Co., 173 N. C. 269, 91 S. E. 946 (1917) it was held that a failure to appeal where the insurer so agreed did not of itself constitute negligence in the absence of anything to show that the judgment was erroneous.

[15] Anderson v. Southern Surety Co., 107 Kan. 375, 191 Pac. 583 (1920).

[16] Aycock Hosiery Mills v. Maryland Casualty Co., 157 Tenn. 559, 11 S. W. (2d) 889 (1928).

[1] (1932) 45 HARV. L. REV. 1196.

[2] Time Magazine, February 3, 1936, p. 57; Literary Digest, March 6, 1937, p. 36.

[3] N. C. CODE ANN. (Michie, 1935) §4428. Statute 10 and 11, Wm. III, c. 17 declared lotteries illegal in England and this statute constituted part of the common law of the United States. Most states now have statutes declaring lotteries illegal.

[4] Horner v. U. S., 147 U. S. 449, 13 Sup. Ct. 409, 37 L. ed. 237 (1893); Yellow-Stone Kit v. State, 88 Ala. 196, 7 So. 338 (1890); State v Lipkin, 169 N. C. 265, 84 S. E. 340 (1915); Brevard Manufacturing Co. v. W. Benjamin and Sons, 172 N. C. 53, 89 S. E. 797 (1916); State v. Eames, 87 N. H. 477, 183 Atl. 590 (1936).

[5] Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, 276 Mich. 127, 267 N. W. 602 (1936); People v. Miller, 271 N. Y. 44, 2 N. E. (2d) 38 (1936); Society Theater v. City of Seattle, 118 Wash. 258, 203 Pac. 21 (1922).

[6] U. S. v. Wallis, 58 Fed. 942 (S. D. Idaho, 1893); U. S. v. Jefferson, 134 Fed. 299 (W. D. Ky., 1905); Davenport v. City of Ottawa, 54 Kan. 711, 39 Pac. 708

There are two lines of authority where the chances are given to anyone whether they purchase admission tickets or not. The first in order to find a lottery looks to see whether the patron is required to give something of value, some consideration directly or indirectly to the theatre owner for a chance to participate in the drawing.[7] Consideration is defined as being money or something of value and not the technical consideration that is sufficient to support a contract.[8] A mere benefit to the theatre owner is insufficient. If the distribution of the free chances is a reality then the majority of courts say no lottery exists.[9] Others view the plan as it actually works and if most of the participants buy admission tickets and only a few take advantage of the free chances then it is a lottery.[10]

The other line of authority, the minority, is to the effect that if there is a pecuniary benefit to the theatre owner this is sufficient consideration. Increase in attendance by attraction of customers to the promoter's business constitutes sufficient consideration.[11] The benefit received

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(1895); State v. Powell, 170 Minn. 239, 212 N. W. 169 (1927); Retail Section of Chamber of Commerce of Platsmouth v. Kieck, 128 Neb. 13, 257 N. W. 493 (1934); Blair v. Lowham, 73 Utah 599, 276 Pac. 292 (1929). *Contra:* Williams Furniture Co. v. McComb Chamber of Commerce, 147 Miss. 649, 112 So. 579 (1927).

[7] People v. Cardos, 137 Cal. App. Supp. 788, 28 P. (2d) 99 (1933); State v. Hundling, 220 Iowa 1369, 264 N. W. 608, 103 A. L. R. 866 (1936); State v. Eames, 87 N. H. 477, 183 Atl. 590 (1936); Cross v. People, 18 Col. 321, 32 Pac. 821 (1893) (analogous plan).

[8] Commonwealth v. Wall, 3 N. E. (2d) 28 (Mass. 1936); People v. Mail and Express Co., 179 N. Y. Supp. 640, *aff'd* 231 N. Y. 586, 132 N. E. 898 (1921) (analogous plan).

[9] People v. Cardos, 137 Cal. App. Supp. 788, 28 P. (2d) 99 (1933) (no lottery because holders of tickets did not pay any consideration. The winner of one of the prizes was a patron who had not purchased an admission ticket.); State v. Hundling, 220 Iowa 1369, 264 N. W. 608, 103 A. L. R. 866 (1936); State v. Eames, 87 N. H. 477, 183 Atl. 590, 592 (1936) (Court said: "As we understand the actual situation of this case, however, free participation is a reality. If this is so, then regardless of the motive which induced the defendant to give such free participation, the scheme is not within the ban of the statute."); People v. Schafer, 289 N. Y. Supp. 649, 160 Misc. 174 (1936).

[10] General Theatres v. Metro-Goldwyn Distributing Corp., 9 Fed. Supp. 546 (D. C. Colo. 1935) (In one month 354,000 chances were given to patrons who purchased tickets of admission to the theatre and 180,000 were given to non-purchasers and scheme was held to be a lottery.); Commonwealth v. Wall, 3 N. E. (2d) 28 (Mass. 1936); Glover v. Malloska, 238 Mich. 216, 213 N. W. 107 (1927) (where gas and oil station gave away a few chances on a prize free but most of them were given only to customers); Featherstone v. Independent Service Station Ass'n of Texas, 10 S. W. (2d) 124 (Tex. 1928) (Oil station gave away chances on auto and actually only very few chances were given to persons not making purchases; held to constitute lottery.); State v. Danz, 140 Wash. 546, 250 Pac. 37 (1926) (The evidence showed that by a card conspicuously placed at the entrance to the theatre the appellants offered free tickets to the drawing without the necessity of purchasing an admission ticket to the theatre; however, the evidence also showed without dispute that no one ever asked for or received the one without buying the other; held a lottery.).

[11] Central States Theatre Corp. v. Patz, 11 Fed. Supp. 566 (S. D. Iowa, 1935); Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, 276 Mich. 127,

from advertising is enough.[12] The profits made on "Bank Night" greatly exceed those of any other night.[13] Therefore can it be said that no consideration is paid for the chances? The promoter is receiving increased profits as a direct result thereof. Inferior pictures are often shown on "Bank Night"[14] and the price of admission could be held to cover both admission and the chance.

It has long ago been determined that lotteries are an evil which the law should prevent. In substance "Bank Nights", whatever their form, are a variety of the same abuse. People are induced to part with their money for the chance of winning a larger sum. The promoters of "Bank Nights" expect them to. Otherwise there would be no object in the schemes. The problem has not been presented to the North Carolina Supreme Court, but when and if it is, it is to be hoped that the Court will look to the substance and not the form of these transactions.

JAMES A. WELLONS, JR.

Officers—Law Enforcement—Bonds.

A statute proposed but not enacted in the recent session of the North Carolina legislature would have required all peace officers of every city and town in the state to be bonded.[1] However, a bill was passed requiring the bonding for faithful performance of their duties of all members of the Highway Patrol and every other peace officer employed by the state.[1a] This legislation, and that attempted, was an effort to make more adequate the remedies available to innocent persons who are injured by police officers in the performance of their duties. This is desirable since the duties of police officers place them in a position where they are more likely to injure innocent parties than are other members of the general public, and all too often the officer is execution proof.

267 N. W. 602 (1936); Maughs v. Porter, 157 Va. 415, 161 S. E. 242 (1931), *criticized in* (1932) 18 VA. L. REV. 465, (1932) 80 U. OF PA. L. REV. 744 (chances given to anyone attending an auction sale. Attendance of persons at sale constituted consideration); Society Theatre v. City of Seattle, 118 Wash. 258, 203 Pac. 21 (1922); Willis v. Young, 1 K. B. 448 (1907) (increase in circulation of newspaper held consideration).

[12] See Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579, 581 (E. D. N. Y. 1910).

[13] Central States Theatre Corp. v. Patz, 11 Fed. Supp. 566 (S. D. Iowa, 1935).

[14] *Ibid.*

[1] S. B. No. 389, Session 1937.

Sheriffs are required to give bond for faithful performance of their duties. N. C. CODE ANN. (Michie, 1935) §3930. For a discussion of the extent of liability on sheriff's official bond see (1934) 12 N. C. L. REV. 394. Every injured party may sue in the name of the state the officer and his surety for any injury inflicted by virtue of or under color of office. N. C. CODE ANN. (Michie, 1935) §354; Warren v. Boyd, 120 N. C. 56, 26 S. E. 700 (1897).

[1a] P. L. N. C. 1937, Ch. 339. *Cf.* p. 342, *supra.*

The municipality is free from liability for torts inflicted in the performance of governmental functions. Law enforcement comes within this category.[2] The majority of states which allow the garnishment of debtors prohibit the use of this remedy in the case of officers for reasons of public policy and allied grounds.[3] At least one city[4] has assumed its "moral" obligation for injuries to private persons, incurred in the course of law enforcement, by obtaining passage of legislation authorizing reimbursement for injured parties. Some states have authorized to a certain extent compensation in instances where persons are injured when commandeered to aid officers.[5] Provisions for compensation by cities or states could be made adequate, but in the light of the difficulty in obtaining the passage of such legislation, it is impractical as an immediate solution.

The remedy which appears to be most practical and to offer more proper relief is the requirement of official bonds for all officers.[6] This means of redress is today undergoing a period of development as evidenced by the proposed North Carolina statute. Many states at present require the bonding only of sheriffs and constables. Some states provide that certain cities bond their police officers for the benefit of the public,[7] while others allow such bonding in the discretion of the particular municipality.[8] However, the courts have, in many instances, defeated the purpose of such bonds by strict construction of the bonds or by strict and narrow interpretations of the statutes regarding them.[9] For individuals to sue upon the bonds where the city is named as the

[2] Sandlin v. City of Wilmington, 185 N. C. 257, 116 S. E. 733 (1923); 6 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS (2ND ED. 1928) §2591.

[3] Hall, *The Law of Arrest in Relation to Contemporary Social Problems* (1936) 3 U. OF CHI. L. REV. 345, 346.

[4] N. Y. Local Law 13, of 1927 (authorizing the city of New York to compensate persons injured by police officers while the latter are engaged in making arrests or executing legal processes); Evans v. Berry, 262 N. Y. 61, 186 N. E. 203 (1933); (1933) 42 YALE L. J. 241; Borchard, *Recent Statutory Developments in Municipal Liability in Tort* (1936) 2 LEGAL NOTES ON LOCAL GOV'T 89, 98; Tooke, *The Extension of Municipal Liability in Tort* (1932) 19 VA. L. REV. 97, 118.

[5] MICH. LAWS (Mason's Supp., 1933) §2746, 237; NEW JERSEY STAT. SERVICE (1932) 136-1611; NEW YORK LAWS (Cahill Supp. 1931-35) §41-1848.

[6] Hall, *The Law of Arrest in Relation to Contemporary Social Problems* (1936) 3 U. OF CHI. L. REV. 345, 349.

[7] IDAHO CODE ANN. (1932) §49-116.

[8] W. VA. CODE (1931) §11; ILL. REV. STAT. (Cahill, 1933) Chap. 34, §66(9).

[9] Brookes v. Fidelity and Deposit Co. of Md., 147 Md. 194, 127 Atl. 758 (1925) (Sheriff imprisoned and tortured woman whom he suspected of knowing whereabouts of escaped prisoner. Recovery denied against surety. Surety only liable for official acts of officer because bond was for faithful performance of duties. Officer here exceeded his authority. Bond is a contract and to be strictly construed.); Williams v. Boles, 160 Ky. 775, 170 S. W. 170 (1914) (Recovery on bond denied where statute did not specifically provide for liability on bond of town marshal for policemen specially appointed by him though it did for specially appointed deputies, and the authority of town marshal to appoint both was given in same statutory provision.); State v. Sriver, 1 N. E. (2d) 579 (Ind. 1936)

obligee, there must be express statutory authority.[10] Recovery is denied where the act of the officer is merely under color of office,[11] as for instance where the officer exceeded his territorial jurisdiction.[12] Death of the officer has even been held to abate the action against the surety.[13] A technical irregularity in the execution of the bond has defeated recovery.[14] Some courts, though, have been more liberal and allow recovery even though the act of the officer was not within the technical scope of his duties.[15] Such a result is undoubtedly more sound

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(Bond executed by policeman of city belonging to a class in which the police were under control of board of public safety, payable to city and approved by said board, for the faithful performance of duties, *held* to have been executed pursuant to municipal corporation act and hence not subject to general statutes covering official bonds. Suit was for an assault committed by officer while on duty.).

[10] Sunter v. Fraser, 194 Cal. 337, 228 Pac. 660 (1924); Martin v. Magee, 179 La. 913, 155 So. 433 (1934) (La. had such a statute.); City of Eaton Rapids v. Stump, 127 Mich. 1, 86 N. W. 438 (1901); Carr v. City of Knoxville, 144 Tenn. 483, 234 S. W. 328 (1921); U. S. Fidelity and Guaranty Co. v. Crittenden, 62 Tex. Civ. App. 283, 131 S. W. 232 (1910); *cf.* Cushing v. Lickert, 79 Neb. 384, 112 N. W. 616 (1907) (recovery allowed only on bonds required by law unless specifically given right to sue on others by statute).

[11] Taylor v. Shields, 183 Ky. 669, 210 S. W. 168 (1919) (unlawful arrest); Fidelity and Casualty Co. of N. Y. v. White, 209 Ky. 402, 272 S. W. 902 (1925) (false arrest); Indemnity Ins. Co. of North America v. Bonta, 217 Ky. 265, 289 S. W. 231 (1926) (unlawful arrest and assault); Young v. Amis, 220 Ky. 484, 295 S. W. 431 (1927) (unlawful arrest and later killing to prevent escape); Reed v. Philpott's Adm'r, 235 Ky. 429, 31 S. W. (2d) 339 (1930) (Deceased, an officer, had prisoner under arrest. Defendant, an officer, tried to take prisoner from deceased, and arrest him as his own prisoner, and in the affray shot deceased. Court held that defendant exceeded his authority. Surety not liable.); Shelton v. Nat. Surety Co. of N. Y., 235 Ky. 778, 32 S. W. (2d) 339 (1930) (unlawful arrest and search); Goins v. Hudson, 246 Ky. 517, 55 S. W. (2d) 388 (1932) (jailer unlawfully imprisoned plaintiff).

[12] Brittain v. U. S. Fidelity and Guaranty Co., 219 Ky. 465, 293 S. W. 956 (1927) (Street was city limits. Officer shot plaintiff in attempting to make an arrest in house situated on side of street which was outside city limits.)

[13] Veatch v. Derrick, 224 Ky. 332, 6 S. W. (2d) 279 (1928); Jonas v. Taylor, 166 Wash. 302 6 P. (2d) 615 (1932).

[14] Finney v. Shannon, 166 Wash. 28, 6 P. (2d) 360 (1931) (city council had not properly voted on requiring the execution of the bond).

[15] Burge v. Scarbrough, 211 Ala. 377, 100 So. 653 (1924) (assault and battery in making arrest); Ingram v. Evans, 227 Ala. 14, 148 So. 593 (1933); Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12 (1909) (false arrest and imprisonment); Helgeson v. Powell, 54 Idaho 667, 34 P. (2d) 957 (1934) (officer, while attempting to arrest deceased unlawfully, shot and killed him); City of Cairo v. Sheehan, 173 Ill. App. 464 (1912) (wrongfully assaulting man under arrest); Scott v. Feilschmidt, 191 Iowa 347, 182 N. W. 382 (1921) (officer without cause arrested and insulted girl in public on charge of immorality); Haack v. Pollei, 134 Minn. 78, 158 N. W. 908 (1916) (officer without justification shot man under arrest when he attempted to run); Lee v. Charmley, 20 N. D. 570, 129 N. W. 448 (1910) (false arrest); Santora v. Callan, 18 Ohio App. 92 (1924) (officer, off duty and not in uniform, was intoxicated and shot innocent bystander while attempting to make an unjustifiable arrest. Surety was held liable for acts under color of office, therefore if officer was pretending to act as an official it was color of office.); Burkeland v. Bliss, 62 S. D. 91, 252 N. W. 25 (1933); Riter v. Neatherly, 157 S. W. 439 (Tex. 1913) (unlawful arrest); Branch v. Guinn, 242 S. W. 482 (Tex. 1922) (false arrest and imprisonment); Jackson v Harries, 65 Utah, 282, 236 Pac. 234 (1925) (Unlawful search of home. Test of liability of surety is whether official would have acted if he had not been an

because if the acts outside the scope of an officer's duties are not included the bond is useless to members of the public wrongfully injured, because it is not the duty of police to injure persons wrongfully.

The real solution of the problem can be effected by proper legislation regarding bonding. In order to obviate judicial strictness of interpretation, both the statutes and the bonds should be carefully and minutely drawn. Each must be worded with respect to the other. Every law enforcement officer, capable of making an arrest, should be required to give a bond for the benefit of any person injured by the officer in the execution of official acts or those under color of office. What then shall be the extent of liability on the bond? Consideration must be given the various interests involved, which are those of the individual, the officer and the general public. Since the latter are the most important, the liability on the bond should not be so broad as to paralyze law enforcement. In many instances the officer must act quickly in making arrests, and he cannot stop to weigh responsibilities. Therefore to allow recovery on the bond for every technically irregular arrest would require officers to spend a large part of their time defending minor suits; as a consequence officers would act only when sure as to the guilt of the individual, and law enforcement would be retarded. Consequently, liability on the bond should be limited to damages for actual injuries or extended false imprisonment.

The cost of these bonds should be borne by the governmental unit hiring the officer because the bonds are primarily for the general public good. Additional reasons are economy, expediency, prevention of lapses, and certainty of existence of the bond.

Where the surety has paid for a wilfull or grossly negligent injury a cause of action by the surety against the officer should be allowed to restrain the officer from becoming excessively careless and high-handed in his acts.

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officer); Town of Mabscott v. Saunders, 114 W. Va. 196, 171 S. E. 410 (1933) (officer negligently shot plaintiff); Village of Barboursville v. Taylor, 115 W. Va. 4, 174 S. E. 485 (1934) (Officer in making arrest fired tear gas gun near face of prisoner and severely injured him. Case remanded on other grounds than liability of surety.); City of Princeton v. Fidelity and Casualty Co. of N. Y., 188 S. E. 757 (W. Va. 1936) (unlawful shooting to prevent escape of prisoner); 19 A. L. R. 73. Accord: Hodge v. U. S. Fidelity and Guaranty Co., 42 Ga. App. 84, 155 S. E. 95 (1930) (Approved rule allowing recovery where act is under color of office, but held that where deceased was shot by officer while engaging in a purely personal affray with the officer this was not in any way connected with his office.).

Recovery allowed on bond for "faithful performance of duties" where officer negligently operated a motor vehicle causing the damage. Manwaring v. Geisler, 191 Ky. 532, 230 S. W. 918 (1921); National Surety Co. of N. Y. v. Hester's Adm'r, 241 Ky. 623, 44 S. W. (2d) 563 (1931); Curnyn v. Kinney, 119 Neb. 478, 229 N. W. 894 (1930); U. S. Fidelity and Guaranty Co. v. Samuels, 116 Ohio St. 586, 157 N. E. 325 (1927).

Sales—Torts—Foreign Matter in Food.

Plaintiff ordered ice cream in defendant drug store. It was scooped out and served to him on a plate and he was injured by glass imbedded in it. He sued both the manufacturer of the ice cream and the drug store. *Held:* nonsuit as to the drug store reversed, the court saying that it was under duty to exercise ordinary care to see that the ice cream was free from deleterious foreign matter, even though it was proved that the glass was in the ice cream when it was sold to the druggist by the manufacturer.[1]

When one is injured by eating food containing harmful foreign matter, he may have either of two grounds for recovery: (1) tort action for negligence,[2] or (2) contract action for breach of implied warranty.

In the tort action, the plaintiff consumer must of course prove the negligence of the defendant, whether he be a manufacturer, retail dealer or restaurant keeper. Some courts hold that proof of injury and the presence of deleterious matter raises a prima facie case of negligence.[3]

[1] Crowley v. Lane Drug Stores, 189 S. E. 380 (Ga. 1936).

[2] In some cases the plaintiff, unable to show actual negligence, has recovered for the defendant's violation of a pure food statute, such violation being held to constitute actionable negligence as a matter of law. Meshbesher v. Channellene Oil and Mfg. Co., 107 Minn. 104, 119 N. W. 428 (1909); Kelley v. Daily, 56 Mont. 63, 181 Pac. 326 (1919); see Ward v. Morehead City Sea Food Co., 171 N. C. 33, 34, 87 S. E. 958, 959 (1916). N. C. CODE ANN. (Michie, 1935) §4751 provides that "No person, firm, or corporation, by himself or agent, shall manufacture, sell, expose for sale, or have in his possession with intent to sell, any article of food, drug, confectionery or liquor which is adulterated or misbranded. . . ."

[3] Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924) (arsenate of lead in flour); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914) (mouse in coca-cola); Freeman v. Schults Bread Co., 100 Misc. 528, 163 N. Y. Supp. 396 (1916) (nail imbedded in bread); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 500, 78 So. 365, 366 (1918) (decomposed human toe in chewing tobacco, the court saying "we can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco . . . and it seems to us that somebody has been very careless."); Copeland v. Curtis, 36 Ga. App. 288, 136 S. E. 324 (1926). In the last-mentioned case the court said: "While negligence on the part of the defendant must be alleged and proved, where plaintiff establishes the unwholesome quality of the food, with injury from its consumption, these facts in themselves would sufficiently speak of defendant's negligence to make a prima facie case; and, until defendant is exonerated, the jury would be authorized to apply the maxim res ipsa loquitur, and to find such issue in favor of plaintiff."

Contra: Horn and Hardart Baking Co. v. Lieber, 25 F. (2d) 449, 28 N. C. C. A. 189 (C. C. A. 3rd, 1928) (tack in dish of strawberries); Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N. E. 396, 4 A. L. R. 1559 (1918) (tack in blueberry pie made and sold by defendant, court refusing to apply *res ipsa loquitur* on the ground that it was just as likely that the tack became imbedded in one of the berries before the defendant received them); O'Brien v. Liggett Co., 255 Mass. 553, 152 N. E. 57, 47 A. L. R. 148 (1926) (glass in strawberry shortcake); Jacobs v. Childs Co., 166 N. Y. Supp. 798 (1916) (where nail was concealed in cake, *held, res ipsa* did not apply because the nail was obviously not used in mixing the dough nor in connection with the other ingredients of the cake, but was apparently dropped into the dough carelessly or wilfully by one of the defendant's servants or an outsider); Liggett and Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S. W. 1009, L. R. A. 1916A 179 (1915) (bug in chewing tobacco).

This is the better view, as the plaintiff would usually have considerable difficulty in proving what the defendant's actual negligence was. In this connection the courts apparently make no distinction between suits against a manufacturer, retail dealer and restaurant keeper, except in the case of a retail dealer who purchased the food from a reputable dealer and sold it in the original package. There is no presumption of negligence on the part of the retailer in such a case, since he could not be expected to open for inspection the individual packages.[4]

There is some dispute among the authorities as to the validity of the doctrine of implied warranty when one is injured by food containing foreign matter. When the defendant is a manufacturer of food sold to the consumer by a retailer, the trend favors the application of the doctrine, in spite of the lack of contractual relation between the manufacturer and the consumer.[5] Likewise, the doctrine applies generally in a suit against a retailer.[6] But when the retailer sells goods in the original package, the majority view, in those states not having the Uniform Sales Act, is that he cannot be held on implied warranty, since he has no means of knowing the condition of the package's contents.[7] Under the Uniform Sales Act,[8] a warranty is implied, if the buyer relies on the retailer's judgment instead of asking for a particular brand.[9] When the defendant is a restaurant keeper, an interesting problem arises. Some cases[10] have held the transaction to be a service rather than a sale

[4] Fleetwood v. Swift and Co., 27 Ga. App. 502, 108 S. E. 909 (1921) (decomposed rat's head in butter).

[5] Eisenbeiss v. Payne, 42 Ariz. 262, 25 P. (2d) 162 (1933); Cudahy Packing Co. v. Baskin, 170 Miss. 834, 155 So. 217 (1934).

[6] Heinemann v. Barfield, 136 Ark. 500, 207 S. W. 62 (1918); Wiedemann v. Wheeler, 171 Ill. 93, 49 N. E. 210 (1897).

[7] Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Julian v. Laubenberger, 16 Misc. 646, 38 N. Y. Supp. 1052 (1896); Pennington v. Cranberry Fuel Co., 186 S. E. 610 (W. Va. 1936); Scruggins v. Jones, 207 Ky. 636, 638, 269 S. W. 743, 744 (1925), in which the court said: "Neither seller nor purchaser can otherwise judge of its condition (canned goods) and in this respect both stand upon equal footing. So that . . . where the article is one of general use and put up by a reputable manufacturer or packer in a sealed can, the exterior of which is in good condition, the retailer is not responsible to his customer for defective or unwholesome condition of the contents unless and except at the time of the sale he expressly warrants the same to be free from defects." *Contra:* Chapman v. Roggenkamp, 182 Ill. App. 117 (1913); Sloan v. Woolworth Co., 193 Ill. App. 620 (1915).

[8] Section 15, subsection (1) "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

[9] Burkhardt v. Armour and Co., 115 Conn. 249, 161 Atl. 385, 90 A. L. R. 1269 (1932); Bowman v. Woodway Stores, 258 Ill. App. 307 (1930); Ward v. Great A. and P. Tea Co., 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 248 (1918); Griffin v. Butler Grocery Co., 108 N. J. 92, 156 Atl. 636 (1931). *Contra:* Aronowitz v. Woolworth Co., 134 Misc. 272, 236 N. Y. Supp. 133 (1929).

[10] Valeri v. Pullman Co., 218 Fed. 519 (S. D. N. Y. 1914); Nisky v. Childs Co., 103 N. J. 464, 135 Atl. 805 (1927).

and hence that there is no implied warranty.[11] However, a number of courts have leaped this technical barrier and have raised an implied warranty, because of the high regard the law has for human life.[12] Where the Uniform Sales Act is in effect, the restaurateur has been held on implied warranty, since the transaction amounts to a sale under this statute and the purchaser clearly relies on the restaurateur's judgment.[13]

The doctrine of implied warranty seems rather harsh, especially in the case of goods in cans or packages, in that it makes the retailer or restaurateur an absolute insurer of the quality of his food, he being liable though not at fault. The courts are naturally anxious to protect the unfortunate consumer; but it would not be necessary for them to resort to this often unfair doctrine if they would instead apply *res ipsa loquitur* in tort actions. This course would seem justifiable in that the purchaser has little chance of proving negligence, not being in possession of the facts. With canned food, the burden under the *res ipsa* doctrine would be placed not on the retailer but on the manufacturer, where it should be.

North Carolina shows little sympathy toward one injured by consuming food which contains impurities. With the minority, it refuses to apply the *res ipsa loquitur* doctrine in a suit against the manufacturer.[14] The plaintiff is not required to produce direct proof of negligence; he may prove his case by other relevant facts from which actionable negligence may be inferred.[15] But in showing that like products manufactured by the defendant contained deleterious substances, the plaintiff must prove that they were manufactured (1) under substantially similar conditions,[16] (2) at approximately the same time,[17] and (3) that the deleterious substances were of the same nature.[18]

[11] The argument in these cases is based on the holding in Parker v. Flint, 12 Mod. 254, 88 Eng. Rep. 1303 (1701) that an innkeeper "does not sell but utters his provision"; and on BEALE, INNKEEPERS (1906) §302, where it is said that "an innkeeper is not an 'insurer' of the quality of the food that he serves but would be liable for knowingly or negligently furnishing bad or deleterious food."

[12] Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407 (1918); Race v. Krum, 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918F 1172 (1918); Temple v. Keeler, 238 N. Y. 344, 144 N. E. 635 (1924).

[13] Goetten v. Owl Drug Co., 49 P. (2d) 286 (Calif. 1935), affirmed on appeal, 6 Calif. (2d) 674, 59 P. (2d) 142 (1936); Schuler v. Union News Co., 4 N. E. (2d) 465 (Mass. 1936).

[14] Blackwell v. Coca-Cola Bottling Co., 208 N. C. 751, 182 S. E. 469 (1935).

[15] Broadway v. Grimes, 204 N. C. 623, 169 S. E. 194 (1933); Hampton v. Bottling Co., 208 N. C. 331, 180 S. E. 584 (1935); Enloe v. Bottling Co., 208 N. C. 305, 180 S. E. 582 (1935).

[16] Enloe v. Bottling Co., 208 N. C. 305, 180 S. E. 582 (1935).

[17] Collins v. Lumberton Coca-Cola Bottling Co., 209 N. C. 821, 184 S. E. 834 (1936) (Admission of evidence that others had found foreign substances in coca-colas manufactured by defendant was held error since there was no evidence of the time when the manufacturer sold the other bottles to dealers.).

[18] Enloe v. Bottling Co., 208 N. C. 305, 180 S. E. 582 (1935) (Where plaintiff

In *Ward v. Sea Food Co.*,[19] where the defendant was a manufacturer who sold through a retailer, Chief Justice Clark stated that "the authorities are numerous that there is an implied warranty that runs with the sale of food for human consumption, that it is fit for food and not dangerous or deleterious." Yet the court in *Thomason v. Ballard and Ballard Co.*[20] pointed out that the decision in the Ward case was grounded on negligence, and held that there was no implied warranty on the part of a manufacturer who sells his products through a retailer, since there was no contractual relation between the manufacturer and the consumer.[21] However, *Poovey v. Sugar Co.*[22] held that there was an implied warranty where the defendant manufactured and himself sold to the consumer. There have been no North Carolina cases where a manufacturer sold to a consumer through a retailer and suit was brought against the retailer. From the holdings in the three cases just mentioned, it would seem that recovery might be had against the retailer on implied warranty. This would lead to an undesirable result in that the retailer, who in most cases is not at fault, would suffer. Or if the retailer were allowed to recover from the manufacturer, there would be needless circuity of action.

The decision in the principal case is questionable.[23] The same reason that acquits the retailer where the food is sold in the original package—that is, he is not expected to open the package and is not in a position to discover the danger[24]—would seem to apply where glass is imbedded in ice cream. Though the courts should be diligent in seeing that the consumer is protected, this should not be at the expense of an innocent retail dealer. True, it is somewhat doubtful if the plaintiff will be able to prove the manufacturer's negligence.[25] It may have been the realization of this fact that moved the court to reverse the nonsuit judgment and give the plaintiff a shot at the retailer as well as

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was injured by rat in coca-cola, evidence of glass found in another coca-cola manufactured by defendant was held improperly admitted.).

[19] 171 N. C. 33, 87 S. E. 958 (1916). [20] 208 N. C. 1, 179 S. E. 30 (1935).

[21] Clarkson, J., dissented vigorously, pointing out that the weight of authority is opposed to the view taken by the majority of the court. 26 C. J. 785; 11 R. C. L. 1122.

[22] 191 N. C. 722, 133 S. E. 12 (1926).

[23] In a comparable case, Sheehan v. Menkes, 8 Misc. 867, 152 Atl. 326 (N. J. 1930), where defendant manufacturer sold mincemeat to defendant retailer who made pie out of it and served it to plaintiff who broke a tooth on an iron bolt in the pie, the manufacturer only was held liable when the retailer, by showing his own due care, proved facts from which it reasonably appeared that the bolt was in the mincemeat when the manufacturer sold it to him. The principal case presents an even stronger situation favoring a decision for the retailer, since glass in a solid lump of ice cream would be more difficult to discover than an iron bolt in mincemeat out of which pie was made.

[24] Howard v. Jacob's Pharmacy Co., 189 S. E. 373 (Ga. 1937) (worms in patent medicine).

[25] Judgment of nonsuit as to the manufacturer also was reversed.

the manufacturer. But rather than bearing down on the retailer, it is submitted that a more equitable result would be reached by application of the doctrine of *res ipsa loquitur* against the manufacturer.

CHARLES AYCOCK POE.

Usury—Insurance—Life Insurance as Condition Precedent to Loan.

A North Carolina statute, enacted in 1915, provides that an insurance company, as a condition precedent to lending money, and in addition to other collateral, may require the borrower to take out an insurance policy with the company on his own life, or that of another, and deposit such policy as collateral with the company.[1] A recent North Carolina case held that the statute was not unconstitutional as being violative of §7 Article I of the Constitution of North Carolina, which provides, "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."[2]

The court admits that the statute is unconstitutional if its effect "is to exempt insurance companies from the provision of" the usury statutes. The holding that the statute does not so exempt insurance companies reverses decisions made prior to the enactment of the statute that it was usurious to require a borrower to insure with the company as a condition precedent to making the loan.[3] The federal courts hold that such a transaction is usurious.[4]

It is uniformly stated by the courts that if an insurance company, with the purpose of evading the usury statutes, requires a borrower to take a policy with the lender company, merely as a device to conceal its usurious nature, the transaction is nevertheless usurious.[5] It is difficult to understand how the courts determine that a guilty intent is lacking in most cases where the point under discussion is involved. Why should an insurance company require a policy as a condition precedent, if it does not seek a profit in addition to the maximum rate of interest allowed by law? It is well known that insurance companies do not

[1] N. C. CODE ANN. (Michie, 1935) §6291.

[2] Cowan v. Security Life and Trust Co., 211 N. C. 18, 188 S. E. 812 (1936).

[3] Roberts v. Life Ins. Co. of Virginia, 118 N. C. 429, 24 S. E. 780 (1896); Miller v. Life Ins. Co. of Virginia, 118 N. C. 612, 24 S. E. 484 (1896); Carter v. Life Ins. Co. of Virginia, 122 N. C. 338, 30 S. E. 341 (1898).

[4] Moore v. Union Mutual Life Ins. Co., Fed. Cas. No. 9, 777 (C. C. D. Neb. 1876); Missouri Valley Life Ins. Co. v. Kittle, 2 Fed. 113 (C. C. D. Neb. 1880); National Life Ins. Co. v. Harvey, 7 Fed. 805 (C. C. D. Iowa, 1881); Brower v. Life Ins. Co. of Virginia, 86 Fed. 748 (C. C. W. D. N. C. 1898); see Brown v. Fletcher, 244 Fed. 854 (D. C. S. D. N. Y. 1917), *aff'd*, 253 Fed. 15 (C. C. A. 2nd, 1918).

[5] John Hancock Mutual Life Ins. Co. v. Nichols, 55 How. Prac. 393 (N. Y. 1878.)

lend a greater amount on a policy than the cash surrender value of that policy. Usually an insurance policy has no cash surrender value until it has been in effect for some three years. Hence, to say that a policy bought at the time that the loan was made is required as *collateral* is to put an argument that will not hold water. Of course, in the event of the insured's death during the term of the loan, the debt would be paid out of the insurance, but the insurance company requires ample security in addition to the policy. Six states hold that in the absence of proof of actual intent to evade the statute the transaction is not usurious.[6] These decisions are generally based on the argument that the insurance company gives protection in exchange for the premiums, and therefore the borrower-insured gets value for value. Where the borrower is allowed to deposit a policy taken out with another company, it is clearly not usurious, because the lender has no interest in the premiums which are paid to keep the policy in force.[7]

Only one other statute similar to the North Carolina statute has been found.[8] Its constitutionality has not yet been passed upon. A somewhat analagous situation exists where states have, to varying extents, exempted building and loan associations from usury laws, by permitting them to take premiums, fines, etc., in addition to the maximum legal rates of interest.[9] The borrowers are generally required to

[6] Craig v. McMullin, 39 Ky. 311 (1840) (A free negro, desiring to free his son, borrowed money to purchase the boy, agreeing to pay ten per cent interest, and an additional ten per cent per year for the risk the lender would bear of the boy's dying before he was paid for by his father. The stipulation for ten per cent for insurance was held not to be usurious.); Washington Life Ins. Co. v. Paterson Silk Manufacturing Co., 25 N. J. Eq. 160 (1874); Homeopathic Mutual Life Ins. Co. v. Crane, 25 N. J. Eq. 418 (1874); Stitch v. Samek, 19 Misc. 534 43 N. Y. Supp. 1068 (1897) (A pawnbroker made an extra charge in addition to the maximum legal rate of interest, for insuring the property against dust and moths. *Held,* not usurious.); New York Fire Ins. Co. v. Donaldson, 3 Edw. Ch. 199 (N. Y. 1838); John Hancock Mutual Life Ins. Co. v. Nichols, 55 How. Prac. 393 (N. Y. 1878); Union Central Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462 (1900) (borrower was required to insure the life of his grandson); Heaberlin v. Jefferson Standard Life Ins. Co., 114 W. Va. 198, 171 S. E. 419 (1933); see Niles v. Kavanagh, 179 Cal. 98, 175 Pac. 462 (1918).

[7] See Sledd v. Pilot Life Ins. Co., 52 Ga. App. 359, 183 S. E. 199 (1935). In this case the court points out that the borrower would have been permitted to take out insurance with "any reputable company," but the policy was actually taken out with the lender.

[8] KY. STAT. ANN. (Baldwin, 1936) §2219a.

[9] ALA. CODE ANN. (Michie, 1928) §7107, "The premium to be charged upon any loan must be fixed by the by-laws, but such premium and the interest on the loan taken together shall not exceed one per cent per month on the amount actually lent or advanced." The maximum legal rate of interest in Alabama is eight per cent. ALA. CODE ANN. (Michie, 1928) §8563; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §619; COLO. ANN. STAT. (Michie, 1935) Vol. 2c.5 §14(17); CONN. GEN. STAT. (1930) §4017(3); DEL. REV. CODE (1935) §2339; DIST. OF COL. CODE (1930) §46; FLA. COMP. GEN. LAWS ANN. (1927) §6165; GA. CODE ANN. (Harrison, 1933) §16-210; KY. STAT. (Baldwin, 1936) §865a (impliedly grants permission to charge premium in addition to the legal rate of interest); MD. CODE

be members of the association, and are not allowed to borrow more than a certain percentage of the amount represented by their stock. These statutes are generally held constitutional.[10] It seems that this practice, but for the statutes, clearly would be usurious. But since the rule against usury is purely of statutory origin, it follows that the definition of usury can be changed by the legislatures.

Granting the constitutionality of the North Carolina statute, there remains the question of its advisability. A possible argument in favor of the North Carolina statute, from the standpoint of public policy, is that the statute enables insurance companies to increase their business, and to become increasingly prosperous financially. It is desirable that through the medium of insurance, risks of various sorts be spread out over the general public. Hence, broadly stated, where the insurance company benefits, the public benefits through better and cheaper insurance protection. The validity of this argument is open to question.[11]

On the other hand is found the policy back of usury statutes. It is desirable to protect the person in straitened circumstances, with poor bargaining power, as against the lender who, of course, generally has the superior bargaining power. One can only speculate as to the purpose of the North Carolina statute. It probably was passed exclusively for the benefit of the insurance companies. Little benefit results to the borrower when he is forced to buy insurance which he may not need, can not afford, and would not buy if he were not pressed for money. Still less benefit accrues to the borrower where he is required to insure the life of a third person, with the insurance company as beneficiary,

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ANN. (Bagby, 1924) art. 23 §164; MINN. STAT. ANN. (Mason, 1927) §7754; MISS. CODE ANN. (1930) §3986 (Permits building and loan associations to charge ten per cent on loans to members. Otherwise the legal rate is lower.); NEB. COMP. STAT. (1929) §8-315; N. Y. CON. LAWS (Cahill, 1930) Ch. 3 §378(3); ORE. CODE ANN. (1930) §25-308; TENN. CODE ANN. (Williams, 1934) §3900, "The premiums bid by borrowing stockholders for the preference or priority of a loan shall be paid before the loan is consummated, not as a part of the loan, not as interest, but as a means of determining which one of the shareholders shall receive the loan."

[10] Linton v. Fulton Building and Loan Ass'n, 262 Ky. 198, 90 S. W. (2d) 22 (1936); Livingston Loan and Building Ass'n v. Drummond, 49 Neb. 200, 68 N. W. 375 (1896). In view of the constitutional provision quoted in the text, what would North Carolina hold as to the constitutionality of a statute specifically exempting building and loan associations from the usury statute? North Carolina appears to have no such statutory exemption.

[11] Another argument advanced in favor of the statute is that where a fraternity or other similar organization borrows money from an insurance company, an easy method of collecting the debt is established in the following way. Several members of the fraternity are persuaded to buy participating policies of life insurance, and the lender company is named beneficiary to the extent of each member's proportionate share of the indebtedness. The policyholders pay regular premiums and each dividend paid by the company is applied to the indebtedness until it is paid off. But this method is apt to be an expensive way of collecting, in so far as the members of the fraternity are concerned. Also, unless the policies are allowed to be taken out with a company other than the lender, the transaction is usurious in spirit and should not, therefore, be allowed.

which requirement the North Carolina statute would permit an insurance company to make. Often the borrower, as the insurance company well knows, does not intend to continue paying the premiums after repayment of the loan. In other words, he buys insurance, not for his own protection, but simply because he is forced to do so. Therefore, by strict analysis, the insurance company gets, in addition to the legal rate of interest, extra business, a bonus as it were, that the company would not ordinarily get. Such transactions should therefore be discouraged as violating the purpose, if not the letter, of the usury statutes.

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