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Note and Comment

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NOTE AND COMMENT

FREEDOM OF PRESS AND USE OF THE MAILS.—Strangely enough, the First Amendment to the Federal Constitution, although it guarantees against federal attack highly important and fundamental rights, has received very little authoritative interpretation by our courts. It remained for the Great War and conditions following in its train to bring before that tribunal almost the first really important controversies relating to freedom of press and of speech. The case of *U. S. ex rel. Milwaukee Social Democratic Publishing Company, Plaintiff in Error,* v. *Postmaster-General Albert S. Burleson,* decided March 7, 1921, is the latest of a series of notable cases concerning this important matter. The case, however, adds little to the development of the subject by the court in the preceding cases in this group, which have been reviewed in an article by Professor Goodrich, 19 MICHIGAN LAW REVIEW, pages 487-501.

In the group of recent cases referred to, a divergence of opinion among the judges themselves had appeared. In *Schenck* v. *U. S.,* 249 U. S. 47, 39 Sup. Ct. Rep. 247, in the unanimous opinion written by Mr. Justice Holmes, the test of liability for speech was expressed as follows:

"The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress had a right to prevent."

This would seem to be a definite rejection of "the tendency" or "indirect causation" tests and the court adhered to this view in two cases decided shortly thereafter. *Frohwerk* v. *U. S.*, 249 U. S. 204, 39 Sup. St. Rep. 249; and *Debs* v. *U. S.*, 249 U. S. 211, 39 Sup. Ct Rep. 252. The *Debs* case, particularly, has been criticized on the ground that it did not apply the test as stated above to the facts in the case. (See references in Professor Goodrich's article above referred to, 19 MICH. L. REV. 487, 492. See also the book of Professor Z. Chafee, Jr., "FREEDOM OF SPEECH," 90-93.) Other cases in which the court appeared to adhere to its statement of the test in the *Schenck* case are referred to, 18 MICH. L. REV. 490, n. 12. But on March 8, 1920, the court announced the decision in *Pierce* v. *U. S.*, 252 U. S. 239, 40 Sup. Ct. Rep. 205, in which as pointed out by Professor Goodrich in the article before referred to, Justice Pitney, writing the opinion for the court, declares the doctrines known as "indirect causation" and "constructive intent" as the basis of liability. It will be seen from this brief review of the cases that the court is divided in opinion and that it cannot be said with confidence that any test of liability has been definitely and permanently adopted by the court.

In the case decided March 7th, 1921, freedom of the press is discussed especially by Justice Brandeis, in a vigorous and able dissenting opinion, but the case has brought the court no nearer to a final position as to what is the "freedom of press" guaranteed by the First Amendment. A majority of the court sustain the Postmaster-General in revoking the second-class mail privilege which had been granted to the publisher of the *Milwaukee Leader*, some years before. That revocation was put upon the ground that as shown by the utterances of the paper during the six months after the United States had entered the war, the journal was seditious, violative of Section I of Title XII of the Act of June 15, 1917, known as "The Sedition Act"; that it had ceased to be "mailable matter" under the Congressional law providing for the classification of mails; and that the Postmaster-General's decision as to these points was conclusive, unless a wanton or very clear case of abuse of authority by him were shown.

The alleged objectionable matter printed in the newspaper published by the relator in this case is characterized by Mr. Justice Clark as "not designed to secure amendment or repeal of the laws denounced in them as arbitrary and oppressive, but to create hostility to, and to encourage violation of, them. * * * Without further discussion of the articles, we can not doubt that they conveyed to readers of them, false reports and false statements with intent to promote the success of the enemies of the United States, and that they constituted a willful attempt to cause disloyalty and refusal of duty in the military and naval forces and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law, and that therefore their publication brought the paper containing them within the express terms of Title XII of that law, declaring that such a publication shall

be 'non-mailable' and 'shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier.'"

The excerpts from the paper quoted by Mr. Justice Clarke seem to bear out all that he says of them and it can scarcely be doubted that they were seditious and that they did *tend* to obstruct the government in the prosecution of the war. The question remains, however, whether the Postmaster-General had authority to deal with the matter as he did. In his dissent, Mr. Justice Brandeis denies that Congress had conferred authority upon the Postmaster-General to revoke or suspend the second-class mail privilege in such case, and in this respect the dissent seems to be upon solid ground. There are at least three distinct questions in the case:

First.—Were the expressions in the *Milwaukee Leader,* referred to by the court. seditious or otherwise illegal?

Second.—If there were seditious expressions in the paper, could it be excluded altogether from the mails, *in futuro?*

Third.—Did the Postmaster-General have authority to revoke the second-class mailing privilege because of seditious or illegal utterances?

The majority of the court answer the first and third of these questions in the affirmative and so decide the case. Mr. Justice Brandeis answers the second and third in the negative, and discusses but does not finally answer the first, obviously because he does not think it necessary to a correct decision. If we concede that the utterances complained of were seditious, it by no means follows that the Postmaster-General had the right to take the action adopted in this case. No statute expressly gives him such authority. Congress has classified the mail into first, second, third and fourth classes, not with reference to the legal, ethical, or patriotic qualities of written or printed matter, but with reference to the size, periodicity and other external or mechanical attributes. There would seem no warrant whatever for the revocation of a granted privilege in one of these classes, for reasons which had nothing whatever to do with the classification. True, the permit issued recites "that the authority herein given is revocable upon determination by the department that the publication does not conform to law"; but a revocation limited only to one class of mail, to be valid ought to be based upon some violation of law touching the basis of the particular class of mail affected. A violation of law by a publisher, which goes to the fundamental character of the publication, may give ground for prosecution or for total exclusion from the mails; but to permit the Postmaster-General to have final determination in such decision and action as was involved in this case would open the door perhaps to all of the dangers pictured by Mr. Justice Brandeis in his vigorous opinion.

Upon the larger question as to whether the practical suppression of this paper involved an illegal abridgment of freedom of the press, it may well be doubted whether Mr. Justice Brandeis is upon sure ground. What would be permissible freedom of press and speech in peace time obviously would not necessarily be such during the emergency of a world war. Those who argue that constitutional guaranties, including the First Amendment, imply

the necessity of an unalterable attitude during all conditions, on the one hand, or as the only other alternative, the complete abandonment of such constitutional guaranties during time of war, show little knowledge of our constitutional law and its development during recent years at the hands, among others, of the two Justices, Brandeis and Holmes, dissenting in this case. See, for example, the opinions of Mr. Justice Holmes in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, and *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, especially pages 364-66. See also E. S. Corwin in 30 YALE L. JOUR. 48; Carroll, "Freedom of Speech and Press in the Federalist Period," 18 MICH. L. REV. 615; Wigmore, 14 ILL. L. REV. 539; Goodrich, 19 MICH. L. REV. 487; Chafee, 32 HARV. L. REV. 932. Upon the fundamental question here involved, this REVIEW plans to make a more comprehensive statement, in the near future. H. M. B.

WORKMEN'S COMPENSATION—COMPULSORY STATUTES AND DUE PROCESS.—Modern workmen's compensation acts are of European inception, the first of them having been enacted in Germany in 1884. This has been amended and extended from time to time until as late as 1911. The British Compensation Act was passed by Parliament in 1897. Its scope has been greatly extended by amendments in 1900 and 1906, and by supplemental legislation in 1912. At the present time compensation acts of one sort or another are in force in practically all the European countries. 1 BRADBURY'S WORKMAN'S COMPENSATION, (2nd ed.) 7; BOYD, WORKMEN'S COMPENSATION, § 8.

The movement for the enactment of such laws became widespread in the United States about the beginning of the present century, and bore first fruit in the federal act of 1908, the Montana act of 1909, and the first New York act of 1910. The succeeding ten years have witnessed a very extensive acceptance of the compensation idea, so that at present there are workmen's compensation acts of various sorts upon the statute books of more than thirty of our states.

While the American statutes present many types which differ more or less from one another yet all fall clearly into one or the other of two general classes: (1) optional statutes, in which the employer does not come under the act unless he so elects, but in which he is deprived of certain common law defenses in failure of such election; and (2) compulsory statutes. The great majority of the state statutes are of the optional or elective variety, and such laws have universally been upheld in the face of constitutional objections. L. R. A. 1916A, 414. Compulsory statutes, on the other hand, have been enacted in but five states,—New York (2 statutes), Washington, California, Montana and Ohio. It is with this type of law that the present note has to do, and more particularly with the constitutional objection urged against such acts that they effect a taking of property without due process of law.

The first of these statutes to receive judicial review was the New York act of 1910, (Laws of 1910, c. 674), which came before the Court of Appeals in the case of *Ives* v. *South Buffalo Ry. Co.* (1911), 201 N. Y. 271. The constitutionality of the act was attacked under both the State and Federal Con-

stitutions on the ground, *inter alia*, that it constituted a taking of property without due process of law. In holding the act invalid the court based its decision squarely upon the broad ground that the imposition upon the employer of liability without fault was in derogation of the due process clause of the State Constitution, and that the statute was not justifiable as a valid exercise of the police power because it did not tend to contribute directly to the promotion of the general welfare. The act in question, which provided for direct payment by employers to their injured employees of the benefits provided therein, was also subject to the same objection which later proved the stumbling block of the Montana act, namely, that the employee's common law remedies against the employer were preserved, thus exposing the employer to a double liability. See *Cunningham* v. *Northwestern Improvement Co., post.* But the court in the *Ives Case* made no point of this feature. Nor was the finding in this case in any sense an adjudication of the validity of the act under the 14th amendment of the Federal Constitution, although it has been sometimes cited in that regard. The court expressly say that *Noble State Bank* v. *Haskell,* 219 U. S. 104, is controlling as to the federal aspect of the case, and further that a finding of invalidity under the State Constitution is sufficient for the purposes of the decision.

Four months after the decision in the *Ives Case,* the Supreme Court of Washington handed down a decision upholding the compensation act of that state, (Laws of 1911, p. 345), in *State, ex rel. Davis-Smith Co.* v. *Clausen* (1911), 65 Wash. 156. Instead of the direct payment plan of the New York act this statute provided for compulsory payments into a state insurance fund. The only effect of this difference, as far as the constitutional question was concerned, was to give rise to an additional objection to the act which could not be made to the New York law, namely, that the statute takes the property of one employer to pay the obligations of another. The court concedes at the outset that there is a basis in fact for both this objection and that other objection which was finally controlling in the *Ives Case,* that the statute imposed liability without fault. "But," the court goes on to say, "These contentions do not furnish an absolute test of the validity of the act. * * * The test of the validity of such a law is not found in the inquiry, Does it do the objectionable things? but is found rather in the inquiry, Is there no reasonable ground to believe that the public safety, health or general welfare is promoted thereby?" In holding that public welfare was promoted, by a removal of the burden of industrial injuries from the workman and his dependents, thus lessening indigency, and placing it upon the employer and through him, by means of adjustment of the prices of his commodity, upon the consuming public, the court takes a stand sharply at variance with that of the New York Court of Appeals in the *Ives Case.* It is not necessary to the validity of a statute under the police power, say the Washington Court, that it should be "*directly* designed to conserve health, safety, comfort, peace and order," but on the other hand, quoting from *Noble State Bank* v. *Haskell, supra,* "An *ulterior* public advantage may justify a comparatively insignificant taking of private property for what, in its *immediate* purpose, is a private use."

The Montana act, (Laws of 1909, c. 67, p. 81), was held invalid in *Cun-*

ningham v. *Northwestern Improvement Co.* (1911), 44 Mont. 180, solely on the ground that it preserved to the employee his common law right of action against the employer for injuries due to the latter's negligence, and thus exposed the employer to a double liability and so deprived him of the equal protection of the laws. As to the due process aspect of the case, the court is fully as broad in its views as the Washington Court in the *Clausen Case*, the opinion in which is quoted from with approval and at considerable length. "Any measure," says the court, "which tends to minimize indigency, of necessity raises the general standard of the people." The court also quotes with approval the comprehensive definition of police power laid down in the *Noble Bank Case* by Justice Holmes in the following words: "It may be said in a general way that the police power extends to all the great public needs. (*Camfield* v. *United States*, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The next case to arise was *State of Washington* v. *Mountain Timber Co.*, decided by the Supreme Court of Washington in 1913 and reported in 75 Wash. 581. The decision in the state court amounts to nothing more than a reaffirmance of the position taken in the *Clausen Case*. The case was taken to the Supreme Court of the United States on error, and the decision there will be considered presently.

In 1915 the second New York compensation law, (Laws of 1914, c. 41), came before the Court of Appeals and was upheld in *Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514. This act provided for compulsory contribution to a state insurance fund except in cases of employers who should insure with private indemnity companies or who should be shown to be of sufficient financial ability to render certain the payment by them directly to their injured employees of the benefits conferred under the act. The double liability objection was not present inasmuch as the liability prescribed in the act was made exclusive. Also, it is to be noted that by an amendment to the New York Constitution in 1913 compulsory compensation acts were expressly authorized, so the due process question under the state constitution was eliminated. In passing upon the federal question the court considered itself bound by the decision in the *Noble Bank Case*. Thus, the *Jensen Case* cannot be considered as being in conflict with the *Ives Case;* and yet a decided change of attitude is apparent from an examination of the two opinions. While not expressly relinquishing the position that a statute must directly tend to promote the public welfare in order to be sustainable as a valid exercise of the police power, the court affirm that the act under consideration is sufficiently direct in its application to such object to render it unobjectionable, which in effect amounts to the same thing. They say, "A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss," (referring to the *Noble Bank Case*).

The California statute, (Stat. of 1913, p. 279), which, like the second New

York act, was passed pursuant to the authority of a constitutional amendment, was sustained in *Western Indemnity Co.* v. *Pillsbury* (1915), 170 Cal. 686. It provided for compulsory direct payment, with an option to insure in either a state fund or a private indemnity company. The court directs attention to the distinction taken in the *Ives Case* between the fellow-servant, contributory negligence and assumption of risk rules on one side, and the rule that fault on the part of the employer must be shown, on the other. "Why this distinction?" asks the court. "Is the latter doctrine any more sacred or inherently necessary than any of the former?" The court thinks not, and is clear that there is no fundamental inhibition on the legislature in the one case any more than in the other.

The first adjudication on any of these statutes in the Supreme Court of the United States was the decision in *New York Cent. Ry. Co.* v. *White* (1917), 243 U. S. 188, upholding the second New York act. The court concedes that there is a taking, but justifies it as a proper exercise of the police power of the state. "And for this reason: The subject-matter * * * is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. * * * When the individual health, safety and welfare are sacrificed or neglected, the state must suffer. (*Holden* v. *Hardy*, 169 U. S. 366.) * * * One of the grounds of its [the public's] concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime." In holding that the statute is not arbitrary or unreasonable the court follows the reasoning of the Washington Court in the *Clausen Case*, namely, that industry itself is responsible for the injuries to workmen and should therefore stand the burden imposed by such injuries. "The loss of earning power, * * * however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that is ordinarily paid by the employer."

The Washington act was sustained by a divided court in *Mountain Timber Co.* v. *State of Washington* (1917), 243 U. S. 219, the Chief Justice and Justices McKenna, Van Devanter and McReynolds disenting. If this act merely substituted one form of employer's liability for another the points raised against it would be sufficiently answered by the decision in *New York Cent. Ry. Co.* v. *White, supra*, but the Washington law goes farther and enforces contribution from all designated employers regardless of whether injuries have occurred to their employees or not. This, in its practical operation, may often require the most careful employers to pay indemnity to the injured employees of their negligent competitors. The answer which the court makes to this objection is that the nature of the industries embraced in the act is such that there can, in the nature of things, be no assurance of immunity from personal injuries, even in the most carefully managed plants. It therefore follows, in view of the unforeseeability of such accidents and the practical inability to insure against them by careful management, that it is neither arbitrary nor unreasonable to place the burden of such accidents upon the industries as a whole, compelling each unit to contribute its ratable share. To

the point that such an arrangement is not novel in the law, the court cites a number of examples. *Noble State Bank* v. *Haskell, supra,* (all banks taxed to make up a fund out of which to reimburse depositors of a failing bank); *Kane* v. *New Jersey,* 242 U. S. 160, (automobile license tax to improve roads); *Horn* v. *People,* 46 Mich. 183, (tax on dogs to create a fund out of which to pay sheep owners whose sheep are killed by dogs); *Holst* v. *Roe,* 39 Oh. St. 340, (same).

The recent case of *Thornton* v. *Duffy,* (Sup. Ct., 1920), 41 Sup. St. Rep. 137, brought before the court a question which, in its constitutional aspects, is no different from that presented in the *Mountain Timber Case.* The Ohio Workmen's Compensation Law was involved. This act, as originally passed (103 Ohio Laws, 72), provided for compulsory contribution to a state insurance fund except in cases of employers who should be shown to be of sufficient financial ability to make direct payment to injured employees, which employers should, upon deposit of security with the Commission, be allowed to settle directly. Whether an employer in any given case was of the requisite financial ability was to be determined as a finding of fact by the Commission. By § 22 of the act, the Commission was authorized to "at any time change or modify its findings of fact * * * if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of this act." By an amendment in 1917, (107 Ohio Laws 159), the legislature withdrew the privilege of direct payment from all employers who should insure themselves in private indemnity companies or otherwise. The Commission accordingly changed certain of its findings of fact, and it was claimed that such changes, as well as the amendment in pursuance to which they were made, deprived employers who had made contracts of insurance of property without due process of law under the 14th amendment. (The state question is disposed of by a constitutional provision. Art. II, sec. 35.) After holding that the express reservation in § 22 authorized a withdrawal of the option of direct settlement, and that no inviolable property rights had been acquired by reliance upon its extension in the first instance, the court disposes of the case very briefly upon the authority of the *Mountain Timber Case.*

Statutes of the type of the second New York act would seem to be quite clearly justifiable under the police power as it has been understood. The object is obviously of general concern, and it is neither arbitrary nor unreasonable to require the industries causing the injuries to assume the burden thereof. It is simply a substitution of one form of liability for another,—merely a legislative change in the rules of law applicable to industrial accidents,—and no person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. *Munn* v. *Illinois,* 94 U. S. 113; *Hurtado* v. *California,* 110 U. S. 516.

It is not so easy, however, to justify the additional step of forcing an employer to contribute regardless of the effect of his plant in producing the injuries compensated, as is done in the Washington and Ohio acts. In its final analysis this is nothing less than taking the property of one employer to pay the obligations of another, and in its practical effect it must necessarily operate to force the careful employer to assist in maintaining his negligent

rival in business. To this objection the court in the *Mountain Timber Case* answer that such accidents are inevitable even in the most carefully managed plants and that it is therefore reasonable to impose the burden upon the industry as a whole. With all due respect to the learned justice who delivered the opinion, the conclusion seems too broad to be sustained by the premise. Granting such injuries are inevitable, their frequency is certainly much higher in a negligently managed plant than in one which is carefully managed. The frequency of accidents can hardly be said to be uncertain in any given plant as compared with any other plant. But even if such uncertainty does exist, the mere fact that such a comparison will show a higher frequency of accidents in one plant than in another of approximately the same size and equipment would seem to make it unreasonable to require contribution on any such basis as the payroll of the plant.

The case of a tax on dogs to create a fund to reimburse sheep owners for sheep killed by dogs offers no analogy, for here there is a very real difficulty, if not an impossibility, in tracing the source of the damage sustained. The same may be said of the automobile license case, where it is apparently impossible to determine in what proportion various automobile owners enjoy the highway.

It has been suggested, (65 U. of Pa. L. Rev. 682), that the *Noble State Bank Case* is distinguishable by reason of the mutual interdependence of banks, by reason of which careless management in any one may ruin any other. But it is believed that as a matter of practical experience it is generally, if not always, the bank in which negligent or dishonest methods are followed that becomes insolvent. This basis of distinction would therefore seem to be without merit. It is also pointed out in the same source that the regulation to which banks are subject guarantees a certain minimum of careful management in all banks, which is not the case in industry generally. This objection can be overcome, and has already been overcome to a large extent, by legislative regulation of industry, principally by way of requiring the adoption and use of mechanical safety devices and other cautionary and preventative measures. Another writer has attempted to distinguish the cases on the ground that a bank can cause but one loss, it being then insolvent, while a particular industrial plant may continue to operate and cause successive losses. See 84 Cent. L. Jour. 245. This distinction, if it be one at all, goes simply to the matter of degree, and it is impossible to see why such a difference should make the arrangement arbitrary in one case and not in the other. It would seem that, although the *Noble State Bank Case* was a somewhat stronger case, it properly was considered as controlling in the *Mountain Timber Case.* What has been said in regard to the latter case is of course true with regard to *Thornton* v. *Duffy, supra,* which was decided on grounds of *stare decisis.*

That the decisions in these cases do effect an extension of the limits of the police power and reduce the compass of rights protected by the due process clause of the constitution can hardly be doubted. It may be said, and not without a semblance of reason, that such decisions effect an encroach-

ment, the ultimate result of which may be to render the constitutional guaranties illusory or wholly to abrogate them. It seems a sufficient answer to say that if and when such a result is accomplished it will be because it is "the expression of social, economic and political conditions," and that "by the prevailing morality or strong and preponderant opinion" such guaranties are no longer necessary. FREUND, POLICE POWER, § 3; *Noble State Bank* v. *Haskell, supra.* Nor should we deprecate the prospect of such a state of affairs, for after all "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient." HOLMES, THE COMMON LAW, p. 1. And it is right that it should be so, for laws are made for man, not man for laws. L. H. M.

RIGHT TO SUE IN TORT FOR NEGLIGENT DELAY OF INSURANCE AGENT IN FORWARDING APPLICATION TO HOME OFFICE.—In cases where an insurance agent negligently delays in sending in an application for an insurance policy to the home office, and the thing sought to be insured is destroyed before the application is acted upon, it would seem illogical to hold that there is a liability on the part of the company for such negligence of its agent. It is a well established rule that an insurance company may reject an application for insurance without giving any reason for so doing. That being so, it is difficult to see any basis for imposing a tort liability on the company for negligent delay in acting upon such an application. But on such a state of facts it has been held that the company was liable in a tort action brought by the applicant, based upon the negligence of the agent in failing to forward the application within a reasonable time. *Boyer* v. *State Farmers' Mutual Hail Ins. Co.*, 86 Kan. 422. In that case Boyer applied for insurance on a growing crop of corn, against damages by hail. The agent negligently delayed in sending in the application, and in the meantime the crop was destroyed by a hailstorm. In allowing a recovery the court distinctly states that the action is not in contract, but is based upon the negligence of the company's agent in not forwarding the application until too late to be of any benefit to the applicant. This decision was followed in *Wilkin* v. *Capital Fire Ins. Co.*, 99 Neb. 828, three justices dissenting, but the same court later reversed itself in *Meyer* v. *Central State Life Ins. Co.*, 103 Neb. 640. By statute it may be provided that an application for such insurance shall be deemed accepted unless rejected within a specified time. See *Wanberg* v. *Ins. Co.*, (N. Dak.), 179 N. W. 666, 19 MICH. L. REV. 340.

A further difficulty is presented where the application is for a policy of life insurance. Where the agent, in such a case, negligently delays in sending in the application, and the applicant dies before his application has been acted upon, it would seem that an action of tort, brought by the administrator of his estate, could not under any circumstances be maintained. And yet, on precisely that state of facts, the Supreme Court of Iowa allowed a recovery by the administrator. *Duffie* v. *Bankers Life Ass'n.*, 160 Ia. 19. In that case it was held that it is the duty of an insurance company to act promptly on an application for insurance, and to notify the applicant of its

action, and that where the company, either directly or through its agents, is negligent in this respect, it cannot avoid responsibility by the fact that the application had not been received and acted upon prior to the applicant's death. This decision was favorably commented on in a note in 27 HARV. L. REV. 92. See also a note in 11 MICH. L. REV. 606, where the writer, in commenting on the *Duffie* case, says, "but the novel feature of this case is the holding that an action *ex delicto* lies against the insurer. It would be a strange doctrine if ordinary private parties were held liable for negligence in failing to accept or reject a proposed offer." And indeed that does present a logical difficulty which the Iowa court apparently overlooked. An application for insurance is in reality nothing more than an offer on the part of the applicant to enter into a contract with the company, and it is difficult to see why the negligent delay of the company in failing either to accept or reject it should give rise to a tort liability for such delay. It would seem that the same difficulty would prevent a recovery in cases like the *Boyer* case, above cited, but the question does not appear to have been considered.

But a greater obstacle in the way of a recovery in life insurance cases was brought out by the court in a recent Illinois decision. *Bradley* v. *Federal Life Ins. Co.*, 129 N. E. 171. There the applicant was solicited by an agent of the defendant company to take out an accident policy. He accordingly filed an application and paid a sum of money to keep the policy in force for a period of three months. The agent negligently delayed in forwarding the application, and in the meantime the applicant was accidentally killed. The administrator of his estate brought the action in tort to recover the amount of insurance which the decedent had applied for, basing his claim on the negligence of the agent. It was held that no right of action could accrue or survive to the administrator. The difficulty which the court deems insurmountable is that if any right of action accrued at all, which point the court declines to decide, it would accrue to the applicant, and such a right of action could not survive his death. In commenting on *Duffie* v. *Bankers Life Ass'n., supra,* the court says, "the question of the action accruing or surviving does not appear to have been raised." Indeed if the point had been raised it would be difficult to justify the decision on any logical basis.

There is no question but that the action, if any does accrue in such a case, must be in tort, for clearly there is no contractual relationship, either express or implied, between the parties. The overwhelming weight of authority is that the insurer is not liable *ex contractu* for such delays. *N. W. Mutual Life Ins. Co.* v. *Neafus,* 145 Ky. 563; *More* v. *N. Y. Bowery Ins. Co.,* 130 N. Y. 537; *Brink* v. *M. & F. M. N. Ins. Ass'n.,* 17 S. D. 235. Furthermore it is clear that the action would accrue to the applicant, if to anyone, and under the well established rule that tort actions do not survive, it is indeed difficult to see how the administrator could logically be held to have a cause of action. Even to hold that a cause of action accrues to the applicant is impossible to justify on any logical basis, and a holding, not only that such a right of action accrues, but also that it survives the death of the applicant, is a doctrine not in conformity with reason or sound legal principles.

P. W. G.

VALIDITY OF STATUTE REQUIRING HOTELS, RESTAURANTS, ETC., USING FOREIGN EGGS TO POST NOTICE OF USE.—A statute of Washington regulates the sale, labelling and marking of eggs. After dealing with the branding of cold storage, preserved, and eggs imported from foreign countries, the statute provides that all restaurants, hotels, bakeries, and confectioners using or serving foreign eggs must place a sign in some conspicuous place, to read, "We use foreign eggs." In an action for a permanent injunction to restrain the enforcement of the provision set out above, on the ground of unconstitutionality, *held*, the act being within the police power of the state and not regulating foreign commerce, is constitutional. *Parrot & Co.* v. *Benson*, (Wash., 1921), 194 Pac. 986.

The courts will not declare a statute invalid unless its conflict with the constitution is plain. *Atchinson T. & S. F. R. Co.* v. *Mathews*, 174 U. S. 96; *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265. The statute in the principal case was sustained on the ground that it was a proper police measure, intended for the protection of the public from the sale of stale and unwholesome eggs and was not an unjust discrimination nor an unreasonable restriction. The police power includes within its scope not only public health, morals and safety but also regulations designed to promote the general welfare, prosperity and the public convenience. *Chicago R. Co.* v. *Illinois*, 200 U. S. 561; *Noble State Bank* v. *Haskell*, 219 U. S. 104. That trades may be regulated in the exercise of the police power is well settled. *Schmidinger* v. *Chicago*, 226 U. S. 578. Plainly a regulation protecting the public from the sale of unwholesome eggs is a proper police measure. But to constitute a valid exercise of the police power the means must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. There must be a real and substantial relation between the means used and the purpose to be accomplished. *Lawton* v. *Steele*, 152 U. S. 133. However, if a state of facts can be reasonably presumed to exist which would justify the act, the court must presume that it did exist and that the law was passed for that reason. *Otis* v. *Parker*, 187 U. S. 606.

In the principal case there were facts tending to show that eggs imported from China were produced and shipped under conditions if not unwholesome, that at least might justify the consumer in preferring domestic eggs to such foreign eggs. The statute in question requires identification of imported eggs and permits such choice. It does not, however, effect its purpose—the protection of the public from the sale of unwholesome eggs. It does not even tend to accomplish that end. Imported eggs are not necessarily stale nor unwholesome. Nor are domestic eggs necessarily fresh and wholesome. While it is true that a classification having some reasonable basis does not offend against the equal protection clause merely because it is not made with mathematical nicety, (*Lindsey* v. *Carbonic Gas Co.*, 220 U. S. 61), still there must be some reasonable basis and that is lacking in this case. The basis of the restriction is the place from which the article comes, not the distance nor the time consumed in shipment. The quality and purity of the eggs is not the real aim of the law, nor does it accomplish that purpose. The act has no substantial relation to the objects for which the police power may be validly exercised

and moreover it invades the rights of the individual to engage freely in business; for those reasons it is involid. *Frost* v. *Chicago,* 178 Ill. 250. The real purpose of the law seems to be to aid the domestic producer of eggs, by appealing to the prejudices of people against eggs produced in a foreign land. The state may not under the guise of the police power enact laws which do not pertain to police purposes, but which do impose onerous burdens on business. *Ex parte Hayden,* 147 Cal. 649. Upon these grounds a similar statute regulating the sale of foreign eggs was held unconstitutional in *Matter of Foley,* 172 Cal. 744. In *State* v. *Jacobson,* 80 Or. 648, such a statute was held to be unconstitutional as being in conflict with the commerce clause of the constitution.

The power to regulate foreign commerce is exclusively in the Congress of the United States. *Henderson* v. *New York,* 92 U. S. 259. The statute in the principal case deals with a recognized commodity of international commerce and places restrictions upon its sale. It discriminates against goods of foreign origin by reason of their origin alone. The restrictions placed upon the sale of foreign eggs must of necessity interfere and obstruct the freedom of transportation and exchange between this and foreign countries, which such articles on their merits would otherwise have. Such state interference with foreign commerce is unjustified. *Welton* v. *Missouri,* 91 U. S. 275. The decision in the principal case in dealing with this problem of interference with foreign commerce, considered the egg after reaching the hotel or restaurant, as no longer an article of foreign commerce. But unless the commerce clause could prevent such discrimination, the power of Congress to regulate foreign commerce exclusively would be incapable of enforcement. The power, however, does reach to the interior of every state so far as it is necessary to protect products of other countries from discrimination by reason of their foreign origin. *Guy* v. *Baltimore,* 100 U. S. 434. To enforce this statute would be in effect to permit the state to discriminate against or prohibit indirectly the importation of foreign eggs. This cannot be allowed. *Collins* v. *New Hampshire,* 171 U. S. 30. The power of Congress to regulate commerce does not effect the surrender of the police power of the state. Where the purpose is proper and the law does not directly interfere with commerce, the police power of the state may be exercised. Thus a Massachusetts statute to prevent the manufacture or sale of oleomargarine colored to imitate butter, was held a valid exercise of the police power to prevent deception and cheating of the public, although it did interfere indirectly with interstate commerce. *Plumley* v. *Massachusetts,* 155 U. S. 461. As shown, there was no valid exercise of the police power in the form of the statute involved in the principal case, therefore the interference with foreign commerce there attempted was unjustified. The Washington court has failed utterly to apply properly the well defined principles controlling the exercise of the police power and the interference with foreign commerce by the state. The decisions in *Matter of Foley, supra,* and *State* v. *Jacobson, supra,* holding contra to the principal case, are sound. J. P. T.