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Comments

COMMENTS

INDEMNITY AMONG JOINT TORT-FEASORS— AS AFFECTED BY THE FEDERAL EMPLOYERS LIABILITY ACT

The case of *Atlantic Coast Line R.R. Co. v. Whetstone*[1] decided by the South Carolina Supreme Court in 1963 is apparently the only United States case in which an employer has been denied his common law right to indemnity, after being liable under the FELA[2] for failing to provide his employee a safe place to work, when his negligence was only passive and the dangerous condition was created by the active negligence of a third party.

In *Whetstone*, the defendant, doing business as the Commodity Engineering Company, was in the process of constructing a building adjacent to a spur track of the plaintiff. He erected an unlighted scaffold in such close proximity to the track that there was not sufficient clearance for the plaintiff's engines and railroad cars to pass without striking the scaffold. At approximately 9:45 P.M., August 20, 1960, an employee of the plaintiff was riding in the lead end of a tank car which was being moved at a speed of about three or four miles per hour over the spur track to a point beyond the place where the scaffold had been erected. When the scaffold became visible, it was apparent that the tank car could not clear it. The employee signalled for the engineer to stop the car, but before this could be done, the car struck it causing it to collapse and fall on the employee, seriously injuring him. The employee subsequently made a claim against the plaintiff under the FELA for failure to provide him with a safe place to work. The plaintiff settled the claim for $6,000 and then brought the present action for indemnity from the defendant for the full amount paid. It was alleged that the injury was directly and proximately caused by the active gross negligence and carelessness of the defendant. The case was considered on appeal from an order of the lower court sustaining a demurrer to the complaint and affirmed. The court reasoned that in order for an injured employee to recover under the FELA he must prove that the employer was negligent and that such negligence was the proximate cause, in whole or in part, of his injury, and in the absence of such negligence there can be no recovery. Since no liability of the plaintiff existed in the absence of negligence on its part, it is logical to conclude that the plaintiff, in making

1. 243 S.C. 61, 132 S.E.2d 172 (1963).

2. Liability for Injuries to Employees Act (FELA), 45 U.S.C. §§ 51-60 (1952).

settlement with the injured employee, admitted that it was guilty of actionable negligence and such was, at least, a concurring proximate cause of the employee's injury. Since the plaintiff asserts its right to indemnity, such action presupposes actionable negligence of both parties towards the employee. The plaintiff and the defendant were therefore joint tort-feasors and their several acts united to produce the injury sustained by the employee of the plaintiff. It is said to be an established principle of the common law that as between joint tort-feasors there can be no right of contribution or indemnity, the rule being premised on the doctrine that the courts are not open to wrongdoers to assist them in adjusting the burdens of their misconduct, and that the law will not lend its aid to one who founds his cause of action on a delict.

This rule with regard to indemnity is subject to many exceptions. The *ratio decidendi* of the cases granting indemnity has frequently been expressed in such general terms as the indemnitee was not personally at fault; the parties were not *in pari delicto*; the negligence of the indemnitee was merely passive as compared to the negligence of the indemnitor which was active; and that the liability of the indemnitee was only secondary as compared to the liability of the indemnitor which was primary. It seems that such general propositions will not serve as adequate standards to determine whether or not a tort-feasor guilty of ordinary negligence may recover indemnity against a tort feasor guilty of gross negligence. The plaintiff and defendant were joint tort-feasors and even though their acts of negligence were of different degrees, each united and concurred to produce the injury sustained by the employee. The trial judge correctly sustained the demurrer because there can be no indemnity among mere joint tort-feasors.

In a vigorous and comprehensive dissent, Mr. Justice Brailsford stated that to apply the ordinary rule denying contribution or indemnity between wrongdoers in this situation is unrealistic, because the rationale of the rule (that the courts should not be open to wrongdoers) is inapplicable. Here the plaintiff was liable to its employee solely by reason of its failure to discover and correct the dangerous condition created by the active negligence of the defendant. No one would contend that, if on these allegations, the plaintiff were claiming damages for an injury to its locomotive, the complaint would be demurrable. That a railroad may become liable to an injured employee by breach of

its non-delegable duty to insure the safety of the place of work, without an iota of actual negligence or wrongdoing on its part, is clear under court interpretations of the FELA. Cases of this type furnish classic examples of factual situations in which justice requires the formulation of rules allowing indemnity, even though the party seeking it is technically tarred with the stigma of joint tort-feasor.

I. HISTORICAL BACKGROUND

"Too great a refinement of analysis may lead one away from the basic principle with which an argument began, and load the thesis with unnecessary repetition and citations."[3] While Justice Bonham's sagacious statement is undoubtedly true, it seems equally true that on an intricate point of law, too broad and cursory an analysis may not only cause a court to miss the applicable point of law, but also to create a dangerous precedent in associated areas. This approach presents perhaps the most danger in the law of torts, where, so often, no one explanation can be found which will cover all of the cases.[4]

A. Contribution

Although the rights of one tort-feasor to contribution and indemnity from another are often considered together,[5] it is mandatory that the terms be distinguished from the outset. The right of contribution is the right of one joint tort-feasor to force another to pay his proportionate share of the damages, while indemnity shifts the entire loss from the tort-feasor compelled to pay it to the shoulders of another who should have paid it.

To date, only nine jurisdictions in the United States have allowed contribution without some form of legislation: the District of Columbia, Iowa, Louisiana, Maine, Minnesota, Nevada, Pennsylvania, Tennessee, and Wisconsin. In addition there are some twenty-three states that have statutes which permit contribution to some extent.[6]

The landmark English case of *Merryweather v. Nixan*[7] is generally credited with laying down the rule that there is no

3. Holcombe v. Garland and Denwiddie, 162 S.C. 379, 383, 160 S.E. 881, 882 (1931).

4. PROSSER, TORTS 48 (3d ed. 1964).

5. Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 132 S.E.2d 172 (1963).

6. PROSSER, *supra* note 4; for a complete listing of those jurisdictions having statutes see Note, 68 YALE L. J. 964, 981-82 (1959).

7. 8 T.R. 186, 101 Eng.Rep. 1337 (1799).

right of contribution among joint tort-feasors. In this case a third party had brought an action against the plaintiff and defendant in trespass on the case as joint tort-feasors and recovered a certain sum of money. He levied the whole amount on the plaintiff, who then brought the action against the defendant for contribution. Lord Kenyon stated that no such action existed under the common law, but that this decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves.

At the time the case was decided, the action of trespass on the case was considered in conjunction with the parent action of trespass which had its origin in what today would be regarded as the criminal law. The action retained so much of its criminal aspect that tort liability appeared to be imposed solely as a penalty for wrongdoing, like the functions of a criminal prosecution. Therefore, it would follow that it would be just as improper to allow one tort-feasor to force his fellow wrongdoer to share his punishment as it would be to permit a person who, jointly with another, was guilty of a crime to require a fellow criminal to serve part of his sentence. This reasoning, even at this time, would only seem to logically apply where the parties were conscious of their wrongdoing and were tort-feasors in the actual and not merely technical sense. In the latter case the party forced to pay might be guilty of neither moral nor social fault. Despite the fact that this distinction was early made in England, American courts have used *Merryweather v. Nixan* as authority for denying contribution in all cases.[8]

B. Indemnity

While the doctrine barring contribution is likewise applicable where indemnity, or complete restitution, is sought, all courts in the United States (with the possible exception of South Carolina) appear to permit the action in cases where equity clearly demands that one party should bear the entire loss. One court has frankly stated that here courts have been so liberal in finding exceptions to the general rule that it can hardly, with propriety, be called a general rule.[9] The consistent principle running through all the cases seems to be that when both parties are guilty of active or conscious negligence, or when both parties are

8. Bohlen, *Contribution and Indemnity between Tortfeasors,* 21 CORNELL L. Q. 552 (1935).

9. Miller v. N.Y. Oil Co., 34 Wyo. 372, 243 Pac. 118 (1926).

guilty of passive negligence, no matter whether in varying degrees, the right of indemnity does not exist; however, where one party is guilty of active and one of passive or technical negligence the right of indemnity arises, as the parties are not *in pari delicto* or in equal fault.

> Indemnity thus turns on the kind and character, not the comparative degree of negligence which caused the injury and, it necessarily arises out of an independent legal relationship, under which the indemnitor owes a duty either in contract or tort to the indemnitee apart from the joint duty they owe to the injured party.[10]

An example of one line of reasoning is illustrated by the case of *Middlesboro Home Tel. Co. v. Louisville & N. R.R.*[11] where a railroad employee had recovered against the railroad for an injury received when he was snatched off the top of a moving railroad car by a low hanging wire of the telephone company. In allowing indemnity by the railroad the court stated that the general rule is that recovery over as between wrongdoers may not be had where they are *in pari delicto*. The cases which have permitted recovery over have not been exceptions to the general rule but have done so because they do not measure up to the general rule which forbids recovery over; that is, the parties are not found to be *in pari delicto*.

One of the best rationalizations of the right of indemnity is stated by the New York Court of Appeals:

> The right of indemnity, as distinguished from contribution, is not dependent upon the legislative will. It springs from a contract, express or implied, and full, not partial, reimbursement is sought. Where several tort-feasors are involved, an implied contract of indemnity arises in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent. The actively negligent tort-feasor is considered the primary or principal wrongdoer and is held responsible for his negligent act not only to the person directly injured thereby, but also to any other person indirectly harmed by being cast in damages by operation of law for the wrongful

10. Peak Drilling Co. v. Halliburton Oil Well Cementing Co., 215 F.2d 368, 370 (10th Cir. 1954); see RESTATEMENT, RESTITUTION § 95 (1937).

11. 214 Ky. 822, 284 S.W. 104 (1926).

act. Whether negligence is passive or active is, generally speaking, a question for the jury.[12]

Perhaps the leading case in the United States on the right of indemnity is that of *Lowell v. Boston & L. R.R.*[13] which involved an accident when a third party drove into an excavation made by the defendant railroad while it was constructing a road crossing, which it had failed to protect by barriers. The third party in a prior action recovered damages from the plaintiff town because of its negligence in failing to keep its streets in a reasonably safe condition and the plaintiff in turn sued defendant for indemnity. It was argued that the plaintiff had no right in as much as it had been negligent as well as the defendant. The court in allowing indemnity by the town stated the general rule that where two parties participate in the commission of a criminal act, and one party suffers liability, he is not entitled to indemnity, or contribution from the other party. The court went on to state that the law does not in every case disallow an action by one wrongdoer against another for indemnity and that the rule is *in pari delicto potior est conditio defendentis.* If the parties are not equally criminal, the principal delinquent can be held liable by his co-delinquent for damages incurred by their joint offense. Where any moral delinquency or turpitude is involved in the offense, all parties are deemed equally guilty, and courts will not inquire into their relative guilt; however, if the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them. The court gives a number of analagous situations: where a servant unknowingly commits a tort on order of his master, the master must indemnify him for any liability he incurs because he is deemed the principal offender; where a sheriff's deputy takes the property of *A*, on a writ of execution against *B*, the sheriff can maintain an action for indemnity against the deputy for any liability; and where *A* with a forged warrant arrests *B* and commands *C*, to whom he shows his warrant, to confine *B* a reasonable time until he could carry him to prison, and *C*, being ignorant of the forgery, confines *B* accordingly, an action for indemnity by *C* against *A* would lie, notwithstanding both parties were trespassers. The principle in all these cases is the same. The

12. McFall v. Campagnie Maritime Belge (Lloyd Royall) S.A., 304 N.Y. 314, 328, 107 N.E.2d 463, 471 (1952).

13. 40 Mass. (23 Pick.) 24 (1839).

parties are not *in pari delicto*, and the principal offender is held responsible.

This right of a municipal corporation to indemnity was affirmed in the much quoted case of *Washington Gaslight Co. v. District of Columbia.*[14] Here a third party recovered against the city because of a defect in the street created by the Gaslight Co. In speaking for the Supreme Court, Mr. Justice White stated that the city's right of indemnity qualified and restrained within just limits the rigor of the rule forbidding recourse between wrongdoers and that this rule is not predicated upon the peculiar or exceptional rights of a municipal corporation but is general in its nature.[15]

Perhaps with the exception of "master-servant" indemnity cases, where the master who has been vicariously liable for the tort of the servant is allowed indemnity from the servant, the greatest number of cases seem to deal with municipalities. The general rule in this country is that municipalities are invested with full and complete control over the streets and highways within their corporate limits and are charged with the duty of keeping them in repair and free from menace. They are liable in damages for injuries received as a consequence of their failure to use such care as to keep them in a reasonably safe condition for public travel.[16] Because of this duty the majority of states hold the municipality liable where any defect or unsafe condition has been brought about by a third person. This liability arises through the failure to correct the defect or unsafe condition within a reasonable time after it had knowledge of the defect or was chargeable with such knowledge.[17] In a seemingly unbroken line of decisions, municipalities that have been held liable have been allowed indemnity over against the third party (where they did not join in the creation of the particular defect).[18] Even knowledge on the part of the municipality that

14. 161 U.S. 327 (1896).

15. Chicago v. Robbins, 67 U.S. (2 Black) 425 (1863); City of Brooklyn v. Brooklyn City R.R., 47 N.Y. 478 (1872).

16. 25 AM. JUR. *Highways* § 348 (1938). South Carolina is with minority in holding that no liability exists in absence of statute which is closely construed. See Dunn v. Barnwell, 43 S.C. 398, 21 S.E. 315 (1895).

17. See: Malchow v. City of Leoti, 95 Kan. 787, 149 Pac. 687 (1915); Dougherty v. City of St. Louis, 25 Mo. 514, 158 S.W. 326 (1913); Johnson v. City of Huntington, 80 W.Va. 178, 92 S.E. 344 (1917).

18. For extensive case listing see: 40 L.R.A. (NS) 1166 n. 2 (1912); 25 AM. JUR. *Highways* § 392 n. 10 (1940).

this defective condition has been created is not sufficient to prevent recovery absent additional circumstances.[19]

The reasoning upon which this right of the municipality is based was early applied in the case of an individual held liable due to the active intervention of a third party tort-feasor.[20] From these precedents it seemed an easy and natural result for the courts to hold that a railroad has a right of indemnity when held liable because of the active negligence of a third party who had placed some obstruction on its tracks or premises. Massachusetts allowed a railroad indemnity in a factual context analagous to *Whetstone* in 1899.[21]

II. Federal Employer's Liability Act

In 1908 the Federal Employer's Liability Act[22] was passed to make it reasonably possible for employees of railroads to recover for personal injuries, since common law rights were completely inadequate.[23] The act provides:

> Every common carrier while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, *or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed . . . or other equipment.*[24] (Emphasis added.)

19. For conditions under which recovery has been denied see Annot., 40 L.R.A. (NS) 1169-71 (1912).

20. Gray v. Boston Gaslight Co., 114 Mass. 149 (1873). The gaslight co. fastened a wire to plaintiff's chimney without his permission causing it to collapse and fall on a passerby.

21. Old Colony R.R. v. Slavens, 148 Mass. 363, 197 N.E. 327 (1889). See text accompanying note 68, *infra.*

22. Liability for Injuries to Employees Act (FELA), 45 U.S.C. §§ 51-60 (1952).

23. Lewis, *Federal Employers Liability Act,* 14 S.C.L.Q. 447 (1962) states that in 1888, a railroad brakeman had one chance in five of dying a natural death. The average life expectancy of a railroad switchman in 1893 was seven years. In 1907, the year before the act was passed 4,534 men were killed in railroad work and 87,634 were injured. In 1950, although more men were employed, only 329 were killed and 22,000 were injured.

24. 45 U.S.C. § 51 (1952).

While contributory negligence on the part of the employee will result in a diminution of damages it is not a defense to a tort action under the act,[25] nor is assumption of the risk.[26] The most pertinent concept of railroad liability under the act and probably the most often used is the so-called "safe place to work" concept. Although this is not spelled out as such in the act, it is based on the above italicized portion making railroad employers liable for injuries to employees caused by reason of any defect or insufficiency due to its negligence, in its cars, engines or other equipment.[27]

The act plainly requires negligence on the part of the railroad as a prerequisite to its liability, and in at least one recent case, the defendant railroad was held to be free from negligence and thus not liable to its injured employee.[28] It would, however, be an understatement to say that railroads are held, through judicial interpretation, to a much higher standard of care than that required by the common law. The latest Supreme Court case interpreting this duty is that of *Shenker v. Baltimore & O. R.R.*[29]

Shenker brought suit against the defendant railroad and the Pittsburgh and Lake Erie Railroad after he was injured while loading sacks of mail into a P. & L. E. car. The door of the car was defective so as to force Shenker to "twist around" to get large sacks aboard the train. In so twisting, he ruptured an intervertebral disc. Both railroads maintained stations at Morgantown, Pennsylvania, where Shenker worked, but B. & O. furnished employees for both stations. He was paid by B. & O. and was under its supervision. Judgment was directed in favor of P. & L. E. on the ground that the evidence failed to establish that Shenker was employed by them. A verdict of forty-thousand dollars was found against B. & O. by the jury. In upholding the judgment the Supreme Court stated that B. & O. had a duty to inspect P. & L. E. cars before permitting its employees to work on them and that it had taken no precautions to protect them from possible defects in those cars.

In a dissenting opinion, Mr. Justices Goldberg, joined by Justices Harlan and Stewart, stated that there was nothing in

25. 45 U.S.C. § 53 (1952).

26. 45 U.S.C. § 54 (1952).

27. Chicago & N. W. Ry. v. Chicago, R. I. & P. R.R., 179 F. Supp. 33 (N.D. Iowa 1959).

28. Inman v. Baltimore & O. R.R., 361 U.S. 138 (1959). Here decedent employee was run over by an automobile while standing in the middle of a railroad crossing; four justices dissented.

29. 374 U.S. 1 (1963).

the record to show that B. & O. had knowledge of any defect or that a thorough inspection would have revealed one. He continued:

> Under the rationale and result of this case, a railroad would be liable for a defect which just appeared immediately prior to the injury for which recovery is sought and even the most scrupulous kind of inspection could neither have avoided nor detected. What the court appears to have done is to create not simply a duty of inspection, but an absolute duty of discovery of all defects; in short, it has made the B. & O. the insurer of the condition of all premises and equipment, whether its own or others, upon which its employees may work.[30]

One South Carolina case, decided in 1937, stated that liability is governed by the act and the principles of the common law as applied in the courts of the United States.[31] The South Carolina courts are, of course, bound by the federal courts' interpretation of the act.[32]

Although the FELA obviously places a much stricter duty of care on the railroads, the "safe place to work" requirement is very similar to that required of municipalities, differing only in degree.[33]

Prior to the 1950's there were several cases in which indemnity was allowed a railroad held liable to an employee because of the active negligence of a third party.[34] A representative example is the case of *Snohomish County v. Great No. Ry.*[35] which was appealed from the federal district court of Washington. Here the plaintiff railroad was held liable for the wrongful death of one of its employees when one of the plaintiff's passenger trains was derailed because of debris washed onto the track. This was caused by the collapse of a highway fill which occurred through the negligence of the defendant county. The court held that the rail-

30. *Id.* at 14; Carney v. Pittsburgh & L. E. R.R., 316 F.2d 277 (3d Cir. 1963) decided a few months earlier held a railroad liable for an employee's injuries resulting from the negligence of the YMCA, where the employee was temporarily staying at railroad expense, in failing to make up his bed properly.

31. Williamson v. Southern Ry., 183 S.C. 312, 191 S.E. 79 (1937).

32. Thomas v. Atlantic Coast Line R.R., 221 S.C. 462, 71 S.E.2d 403 (1952).

33. 25 AM. JUR. *Highways* § 373 (1940).

34. Central of Georgia Ry. v. Macon Ry. and L. Co., 140 Ga. 309, 78 S.E. 931 (1913); Seaboard Air Line R.R. v. American Dist. Elec. Co-op. Co., 107 Fla. 833, 143 So. 316 (1932); Middlesboro Home Tel. Co. v. Louisville & N. R.R., 214 Ky. 822, 284 S.W. 104 (1926). See text accompanying note 11, *supra*.

35. 130 F.2d 996 (9th Cir. 1942).

road's negligence in not discovering the dangerous condition constituted passive but not active negligence and that the plaintiff and the defendant were not *in pari delicto*.[36] Prior to the cases specifically considered in terms of the FELA, only one jurisdiction has been found which denied a railroad the right of indemnity in a *Whetstone* type situation.[37]

Since there are apparently no cases prior to the *Whetstone* case, arising under the FELA, in which indemnity has been denied it will perhaps be most beneficial to discuss them with regard to the problems that arise under the act. The rationale for recovery has not been changed from that of *Lowell v. Boston & L. R.R.*,[38] but perhaps the best statement of that principle with regard to FELA liability is from the case of *Gulf, M. & O. R.R. v. Arthur Dixon Transfer Co.*[39] This case involved an injury to a railroad employee from a truck negligently parked too near the railroad's sidetrack by the defendant trucking company. The railroad settled the employee's FELA claim and sued the trucking company for indemnity. In holding that a right of action existed, the court stated:

> The vast growth of negligence law has markedly changed the characteristics of negligence actions. Legal negligence no longer embodies a concept of misbehavior just short of the criminal or the immoral. The courts have, therefore, had to find a way to do justice within the law so that one guilty of an act of negligence—affirmative, active, primary in its character—will not escape scot free, leaving another whose fault was only technical or passive to assume complete liability. In dealing with the question, the courts have had before them the problem . . . that in practically all cases the indemnitee has himself been guilty of legal negligence. This led to some confusion in terms used. That the vocabulary of negligence law is not adequate for our day is apparent from the contemporary writings on the subject. Thus in these decisions the courts say plaintiff (indemnitee) was without fault or that he was only technically negligent even

36. See Alaska S.S. Co. v. Pacific Coast Gypsum Co., 71 Wash. 359, 128 Pac. 654 (1912).

37. Glappa v. Boomer, 194 Mich. 52, 160 N.W. 542 (1916). The court clearly recognized the concept of *in pari delicto*; however, it was apparently felt that as the train was moving at the time of the accident, this movement constituted active negligence, even though the movement itself was not negligent.

38. 40 Mass. (23 Pick.) 24 (1839). See text accompanying note 13, *supra*.

39. 343 Ill. App. 148, 98 N.E.2d 783 (1951).

> though the liability was based on legal negligence. What is meant is that plaintiff by act of defendant was made liable for failing to discharge a responsibility even though he, plaintiff, was not guilty of any active negligence. . . . From the facts set forth in the second amended complaint and the legal situation which confronted plaintiff we understand clearly that what it meant was that the railroad was guilty of only passive technical negligence and that the active and primary negligence was that of defendant in placing its truck where it was a danger to plaintiff's employees.[40]

One problem arising under the act is that contributory negligence is not a defense[41] to FELA claim. This fact caused a Louisiana federal district court to disallow a railroad's claim to indemnity.[42] Although this case was later reversed on jurisdictional grounds,[43] the court's reasoning is illustrative of the problem. The railroad's employee was killed as a result of an accident caused by certain boxes and crates negligently placed too near the railroad's tracks by a third party. The railroad was sued by the employee's administratrix and it expressly pleaded contributory negligence on the part of the employee and cross claimed against the third party for indemnity in the event liability was established. In sustaining a demurrer to the cross-claim the court stated that this was not the typical indemnity situation allowed by the law of Louisiana,[44] but that here there was a distinct difference in the defenses available to the defendants. Proof of contributory negligence is not a defense against the railroad, but merely ground for diminishing the amount of recovery. This obviously involves the invoking of the doctrine of comparative negligence, which is unknown to the law of Louisiana. Were the jury to find contributory negligence and indemnity were then allowed, it would amount to subjecting the third party, which is sued under the state laws, to the doctrine of comparative negligence which had been rejected by the state courts. This problem is simply solved by just submitting the question to a jury, and recovery will be allowed only if it is found that the *sole* cause

40. *Id.* at 154, 98 N.E.2d at 787. Quoted in Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 78-79, 132 S.E.2d 172, 180-81 (1963) (dissenting opinion).

41. 45 U.S.C. § 53 (1952).

42. Wallace v. New Orleans Pub. Belt R.R., 78 F. Supp. 724 (E.D. La. 1948).

43. 173 F.2d 145 (5th Cir. 1949).

44. See Appalachian Corp. v. Brooklyn Cooperage Co., Inc., 151 La. 41, 91 So. 539 (1922).

of the injury is the active negligence of the third party tortfeasor.[45]

Another problem attending these cases is the "good faith settlement." It is common practice for railroads to settle employee's claims arising under the FELA in view of the extreme difficulty in defending them. The claim has then been made in the subsequent indemnity suit that the plaintiff was a "mere volunteer," or that it had conceded its negligence. The court in the case of *Chicago, R. I. & P. R.R. v. United States* stated with regard to this contention:

> We think this contention is also without merit. It does not follow from the finding here that plaintiff and its employee 'were in the exercise of due care and caution in their behalf' [by the jury in granting indemnity to the employer in this case], that a similar finding would have been made by the triers of fact in an action by the employee against the plaintiff. Plaintiff at the time it made settlement with the employee did not have the benefit of such a finding. It was required at that time to use its foresight rather than its hindsight in evaluating the situation relative to its probable liability. Taking into consideration that which we all know, that is, the almost insurmountable difficulties attending the defense by a railroad in an action for damages under the Federal Employer's Liability Act, it cannot be said that plaintiff made other than a fair and reasonable settlement of its potential liability. To have resisted settlement to the point of a jury verdict would have been sheer folly under the circumstances.[46]

A third problem arises from the fact that, in a large portion of these cases, the train is moving at the time of the accident. The defense is then made that the movement of the train constituted active negligence. The courts seem to have had likewise little difficulty in disposing of this contention. The case of *Kansas City So. Ry. v. Payway Feed Mills, Inc.*[47] presented a defense of this sort. The action was brought by the plaintiff for indemnity against the defendant shipper after plaintiff had settled a claim by one of its switch foremen. He had received injuries when his legs were caught between a boxcar upon which

45. United States v. Chicago, R. I. & P. R.R., 171 F.2d 377 (10th Cir. 1948); St. Louis-San Francisco Ry. v. United States, 187 F.2d 925 (5th Cir. 1951).

46. 220 F.2d 939, 941 (7th Cir. 1955).

47. 338 S.W.2d 1 (Mo. Sup. 1960).

he was riding and defendant's moveable dock. This was the result of insufficient clearance due to the shipper's negligence. The court had this to say of the defense:

> It is said that the positive act of plaintiff in moving the car . . . constituted active negligence. We have already indicated our view that the failure of the plaintiff to discover the dangerous condition would not be considered active negligence. We are also of the opinion that that fact, coupled with the movement of the train, would not amount to active negligence under the circumstances of this case. There is nothing in the transcript to indicate any contention at the trial that plaintiffs were guilty of negligence in moving the cars. The negligence of plaintiffs was in failing to discover the dangerous condition and thereafter to either move the dock or warn the injured trainman. Plaintiffs had a right to move cars . . . and did so several times each day. In so doing they were not guilty of negligence.[48]

The cases are numerous in the last fifteen years in which a railroad has been granted indemnity for liability incurred to its employees under the FELA.[49] The *Whetstone* case appears to be the first in which this right has been denied.[50]

III. Common Law Rights of Contribution and Indemnity in South Carolina

South Carolina has no statute allowing contribution and clearly follows the majority common law view that contribution is not allowed among joint tort-feasors.[51] Where less than all joint tort-feasors are sued, the defendants have no right to bring in other wrongdoers.[52] These rules in South Carolina tort law are complicated by the rule, unique to South Carolina, that where

48. *Id.* at 8; See Booth-Kelley Lumber Co. v. Southern Pac. Co., 183 F.2d 902 (9th Cir. 1950); Gulf, Mobile & O. R.R. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 98 N.E.2d 783 (1951).

49. See notes 39-40, 42-48, *supra*; Chicago Great W. Ry. v. Casura, 234 F.2d 441 (8th Cir. 1956); Waylander-Peterson Co. v. Great No. Ry., 201 F.2d 408 (8th Cir. 1953); Sewanee Valley E. Co-op. v. Live Oak, P. & G. R.R., 73 So.2d 820 (Fla. 1954).

50. Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 132 S.E.2d 172 (1963) (dissenting opinion).

51. Hills v. Price, 79 F.Supp. 494 (E.D. S.C. 1948); Brown v. Southern Ry. 111 S.C. 140, 96 S.E. 701 (1917).

52 Deas v. Rock Hill Printing & Finishing Co., 171 S.C. 58, 171 S.E. 20 (1933); Little v. Robert G. Lassiter & Co., 156 S.C. 286, 153 S.E. 128 (1930).

more than one joint tort-feasor is sued, the jury may apportion the damages.[53]

South Carolina apparently has no reported cases involving the question of indemnity, prior to 1963, apart from those in which there was a master-servant relationship. This is probably due, at least in part, to the restrictive liability of this state's municipal corporations.[54] However, as early as 1875, the court was discussing indemnity situations with regard to whether a decision fixing liability on the indemnitor would be *conclusive* as against the indemnitee.[55]

It seems never to have been questioned that a master has a right of indemnity over against his servant when the master has been held vicariously liable for the servant's tort.[56] Mr. Justice Jones' opinion in *Shumpert v. Southern Ry.*[57] is an example of the reasoning sustaining this right of the master. He quotes from Judge Cooley[58] to the effect that some of the exceptions to the rule barring indemnity rest upon reasons as forcible as those that support the rule. These exceptions arise when the law holds all of the parties liable to the injured party as tort-feasors, yet among themselves, some are not wrongdoers at all. There are many cases where a party, because of some relation, is chargeable because of the conduct of others, such as where a railroad is made liable for an injury caused by one of its servants. Both parties are liable, but the moral wrong is the servant's and the railroad is only liable through its obligation to be accountable for the action of those to whom it entrusts its business. In an action for indemnity the railroad bases no claim upon its own wrong, but only upon that of the servant.

Of particular value in determining previous court opinion regarding the law of indemnity among joint tort-feasors is the case of *Johnson v. Atlantic Coast Line R.R.*[59] Although the case

53. Johnson v. Atlantic Coast Line R.R., 142 S.C. 125, 140 S.E. 443 (1927); Rhame v. City of Sumter, 113 S.C. 151, 101 S.E. 832 (1920).

54. Dunn v. Barnwell, 43 S.C. 398, 21 S.E. 315 (1894).

55. Smith v. Moore, 7 S.C. 209 (1875).

56. South Carolina Elec. & Gas Co. v. Utilities Constr. Co., 244 S.C. 79, 135 S.E.2d 613 (1964); Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 132 S.E.2d 172 (1963); Cannady v. Atlantic Coast Line R.R., 166 S.C. 35, 164 S.E. 235 (1932); Beauchamp v. Winnsboro Co., 113 S.C. 522, 101 S.E. 856 (1920); Ilderton v. Charleston Consol. Ry. & Lighting Co., 113 S.C. 145, 101 S.E. 282 (1919); Sparks v. Atlantic Coast Line R.R., 109 S.C. 145, 95 S.E. 344 (1918); Jones v. Southern Ry., 106 S.C. 20, 90 S.E. 183 (1916); Shumpert v. Southern Ry., 65 S.C. 332, 43 S.E. 813 (1902).

57. 65 S.C. 332, 43 S.E. 813 (1902).

58. COOLEY, TORTS (2d ed. 1888).

59. *Supra* note 53.

involved a master-servant relationship, Mr. Justice Blease strongly implies in dicta that the law of South Carolina does not restrict this right of indemnity to the master-servant relationship:

> In a leading and often cited case; Oceanic S. N. Co. v. Compania T. E.,[60] . . . in summing up conclusions based on a review of various authorities and cases, the court said:
>
> ". . . One who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter, no matter whether contractual relations existed between them or not. . . . *The right to indemnity stands upon the principle that everyone is responsible for the consequences of his own negligence, and, if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.*"
>
> See, also, . . . Lowell v. Boston & L. R. Co.. . . . (the court's italics.)[61]

One other case, with somewhat analogous facts to *Whetstone*, is worth discussion. This case, *Washington Bridge Co. v. Pennsylvania Steel Co.*,[62] was decided in the United States Court of Appeals, 4th Circuit on appeal from a West Virginia district court, but it rests on common law principles and not West Virginia law. The opinion is by Judge Woods, formally an Associate Justice of the South Carolina Supreme Court, and is referred to at some length in *Johnson v. Atlantic Coast Line R.R.*[63]

Here the defendant bridge company entered into a contract for the construction of a steel bridge over the Potomac River. It sub-contracted with the plaintiff steel company to furnish and put in position the steel girder spans. During the construction, a pier supporting the steel work gave way, seriously injuring an employee of plaintiff named Benning. He brought an action against the steel company alleging negligence in not providing him with a reasonably safe place to work. He recovered a judgment against the steel company for 13,500 dollars. The steel company paid the judgment and then brought a suit for indemnity

60. 134 N.Y. 461, 467, 31 N.E. 987, 989 (1892). This case held that where a judgment is recovered against the lessee of a wharf for injuries to a person caused by a defect due to the negligence of a sublessee and occupant, and to which the lessee did not contribute, he may sue the sublessee for indemnity.
61. 40 Mass. (23 Pick.) 24 (1839). See text accompanying note 13, *supra*.
62. 215 Fed. 32 (4th Cir. 1914).
63. *Supra* note 53.

against the bridge company, claiming that the cause of the collapse was the negligence of the bridge company in not properly inspecting the concrete piers which had been constructed by a contractor of the bridge company, independent of the steel company, under the supervision of a bridge company engineer. In his opinion Judge Woods stated the following:

> If the record in the Benning case had shown that the negligence of the steel company in failing to perform its non-delegable duty of using due care to provide a reasonably safe place for Benning to work was necessarily due solely to negligence of the bridge company in not exercising due care to furnish a pier strong enough to bear the superstructure, and could not have been due to any independent breach of duty on the part of the steel company, then the judgment in the Benning case would be conclusive of the actionable negligence of the bridge company and of its liability to the steel company. This is the principle upon which Washington Gaslight Co. v. District of Columbia, . . . and a number of other cases were decided.[64]

Along the same line of reasoning as the other South Carolina cases, but broader in its implications, is the case of *Little v. Robert G. Lassiter & Co.*[65] Here the court held that an agent who unconsciously commits a tort at the direction of his principal and is held liable is then entitled to indemnity from the principal. Here the liability is not vicarious but rests on the act of the agent; however, equity demands his restitution since he is not a conscious wrongdoer.

From these cases it seems but a logical step to allow indemnity to one who, though only passively negligent and without moral or social fault, has been held liable in damages because of the active and conscious wrongdoing of a third party. It can at least be clearly seen that prior to the *Whetstone* decision the court felt that the right of indemnity in South Carolina was not restricted to those cases in which a master had been held vicariously liable for the tort of a servant.

IV. Summary And Conclusion

The various courts in the United States have, in general, restricted the right of indemnity among joint tort-feasors to cases

64. *Supra* note 62, at 35.
65. 156 S.C. 286, 153 S.E. 128 (1930).

where one party is actively and one passively negligent (not *in pari delicto*). This right seems to be a clear one and has been clearly defined.

This definition can be best illustrated, in summary, by discussing three cases in which these indemnity actions arise.

First, no right of indemnity exists where both parties are passively negligent. An example of this line of reasoning is the case of *Union Stock Yards Co. v. Chicago B. & Q. R.R.*[66] Here the plaintiff was in the business of switching railroad cars delivered to its stockyards. The defendant delivered to the plaintiff a refrigerator car of the Hammond Packing Company to be further transferred to that company. The car had been obtained by the defendant from a third party. It was defective, but while this defect was discoverable upon a reasonable inspection, neither the defendant nor the plaintiff made such an inspection. Subsequently one of the employees of the plaintiff was thrown from the car and injured. The employee recovered from the plaintiff who in turn sued the defendant for indemnity. The court held that this case did not fall within the exception to the general rule denying indemnity:

> In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.
>
> In the present case, the negligence of the parties has been of the same character. Both the railroad company and terminal company failed, by proper inspection, to discover the defective condition.[67]

Second, the right of indemnity clearly exists when the parties are not *in pari delicto*. In the case of *Old Colony R.R. v. Slavens*,[68] defendants had a contract for carrying the mail from plaintiff's railroad station in Boston to the post office. One of defendant's employees took a load of mailbags from a train and left them on the station platform in such manner that they became an obstruction. A third party was injured when he fell

66. 196 U.S. 217 (1905).
67. *Id.* at 228.
68. 148 Mass. 363, 19 N.E. 327 (1889).

over them. He sued the plaintiff and recovered a judgment. The plaintiff then sued the defendant for indemnity. The court held that the plaintiff had a right of indemnity from the defendant:

> The verdict establishes it as a fact that the defendants might have done the work of transferring and loading the mail bags without obstructing the sidewalk as it was obstructed on the occasion of the injury to [the third party]. . . . [W]e think the plaintiff and the defendants were not, as to each other, *in pari delicto*. The plaintiff was held liable to [the third party] because bound to keep the sidewalk reasonably safe. But, the ground of the present action is that the defendants by their negligent act exposed the plaintiff to this liability. The plaintiff's neglect to keep the sidewalk safe did not make the plaintiff a joint wrongdoer with the defendants in any such sense as to prevent the plaintiff from recovering.[69]

Third, where both parties are actively negligent there is no right of indemnity. In the case of *Jacobs v. General Acc., F. & L. Assur. Corp.*,[70] the pertinent facts alleged were that *A* and *B* were racing in their automobiles on a Milwaukee street. In avoiding a collision with *C*, who pulled out of a side street, *B* lost control of his car and then struck a parked car injuring *X* and *Y*, his two passengers. *X* and *Y* then brought an action against *B* and *C*. *C* served a cross-complaint against *B* for indemnity, claiming that the plaintiff's injuries were due only to his simple negligence while *B* was grossly negligent in causing the injury. The court held that no right of indemnity existed:

> The facts of this case do not fit into any of the type situations where indemnity has ordinarily been awarded. Here we have a liability for injury directly produced (allegedly) by the improper operation of cars by two drivers. One was morally more reprehensible because he was so reckless as to be deemed guilty of intentional wrong. Both violated the same type of duty to others, including each other, as well as plaintiffs. The liability-generating conduct of each was virtually simultaneous. No legal relationship existed between them before this occurrance. . . . We decide that in a case like the present one, where there is no distinction between the tort-feasors with respect to the causal relationship be-

69. *Id.* at 366, 19 N.E. at 372-73.
70. 14 Wis.2d 1, 109 N.W.2d 462 (1961).

tween their conduct and the injury, the negligent tort-feasor is not entitled to indemnity from the grossly negligent one.[71]

In seems clear that in the *Whetstone* case, the Atlantic Coast Line was held liable to its employee solely by reason of its passive negligence in failing to discover the dangerous condition created by Whetstone. There was no moral or social fault on the part of the railroad, as it was not even conscious of the fact that the dangerous condition existed. The case clearly falls within the second class of cases in which settled principles of law declare a right of indemnity to exist.

The South Carolina court, however, when presented with this classic fact situation in which these principles of law were available to allow the granting of indemnity, refused to exercise its prerogative to grant that right, and in a sweeping decision, implied that no right of indemnity exists in South Carolina other than to a master held vicariously liable for the torts of a servant.

The court largely predicated this decision on cases from other jurisdictions, all of which when closely analyzed are consistent with the plaintiff's right to recovery.[72]

Although the court states that the rule that there is no right to indemnity between joint tort-feasors is subject to many exceptions, it is difficult to see, under the language of the decision, how any could exist. The crux of the majority opinion is, "Since the appellant now asserts its right to indemnity from the respondent, such action presupposes *actionable* negligence of both parties towards the employee. . . . Therefore, the appellant and the respondent were joint tort-feasors and their several acts *united* to produce the injury sustained by the employee of the appellant."[73] The court then concludes, "It is our conclusion that the appellant and the respondent were joint tort-feasors and even though their acts of negligence were of different degrees, such united and concurred to produce the injury sustained by Monteith. We think the trial judge correctly sustained the demurrer interposed by the respondent because there can be no indemnity among mere joint tort-feasors."[74]

By this definition, the concepts of active and passive negligence (not *in pari delicto*) are precluded from any consideration

71. *Id.* at 9, 11, 109 N.W.2d at 466, 467-68.

72. For a thorough discussion of these cases see Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 132 S.E.2d 172 (1963) (dissenting opinion).

73. 243 S.C. at 68, 132 S.E.2d at 175.

74. *Id.* at 70, 132 S.E.2d at 176.

in this state. Since the right of indemnity can only arise when the indemnitee has been guilty of *actionable* negligence, by the court's reasoning, this alone would preclude an indemnity action. The breadth of this conclusion must have been intended by the court since they expressly made one exception, "Let it be understood that our decision in nowise encroaches upon the rule that an employer has a right of action over against his employee where the employer has been made liable to a third party by reason of the employee's negligence."[75]

This result clearly appears to be contrary to the law in other jurisdictions and is not based upon any previous South Carolina law.

Whetstone undoubtedly would have been held liable to the employee, Monteith. If he had been held to be likewise liable to the Atlantic Coast Line, he would not have been denied the protection of any rule of law, and such a finding would have been in accord with principles of equity and justice. "Cases of this type furnish classic examples of factual situations in which justice required the formulation of rules allowing indemnity, even though the party seeking it is technically tarred with the stigma of joint tort-feasor."[76]

The *Whetstone* decision was handed down slightly less than two years ago, but within a year the court suggested a limitation of that decision to cases in which no legal relationship existed between the parties.[77] This is not, however, a sufficient expansion to meet that which is required by all rules of justice in these cases.

In 1927, Mr. Justice Blease, speaking for the South Carolina Supreme Court, stated with regard to a case decided only a few years previously what would seem equally applicable here:

> The writer admits . . . that there is some strength in the suggestion that it is better not to "compass" the destruction of a decision "before the ink is dry upon that decision," except in instances where the decision destroyed is absolutely out of harmony with the holdings of this court for many years, and when the effect of the decision is to bring about an upheaval in the administration of justice in our courts. . . . When a decision should be overruled, however, for the

75. *Id.* at 71, 132 S.E.2d at 176.

76. *Id.* at 82, 132 S.E.2d at 182 (dissenting opinion).

77. South Carolina Elec. & Gas Co. v. Utilities Constr. Co., 244 S.C. 79, 135 S.E.2d 613 (1964).

excellent purpose of aiding "in bringing our people to a greater respect of our laws and the courts," this court should not hesitate to overrule it.[78]

JOHN J. MCKAY

78. Johnson v. Atlantic Coast Line R.R., 142 S.C. 125, 163, 140 S.E. 443, 455-56 (1927).

JURISDICTION OVER A FOREIGN CORPORATION TRANSACTION OF BUSINESS V. MINIMUM CONTACT

In November of 1964 the question of establishing jurisdiction over a foreign corporation came before the South Carolina Supreme Court in the case of *Phillips v. Knapp Monarch.*[1] Mr. Phillips, the appellant, was a Greenville retailer who was injured when a coffee pot manufactured by Knapp Monarch exploded. The coffee pot, which was manufactured at the respondent's plant in St. Louis, Missouri, was sold to the appellant by an independent distributor in Charlotte, North Carolina. Although the respondent's products enjoyed substantial circulation in South Carolina, he was neither licensed to do business here nor did he have any agents present in the state.

In a continuance of the policy formulated by prior decisions, the court refused to sustain Mr. Phillip's contention that jurisdiction could be established over the foreign corporation and service of process effected under Section 10-424 of South Carolina Code Annotated (1952).[2] The court, through Mr. Justice Brailsford, pointed out that the statute requires transaction of business within the state by the foreign corporation before effective service of process can be achieved. Since there was no transaction of business as South Carolina interprets the phrase,[3] the court had no jurisdiction and dismissed appellant's petition.

Given the above fact situation in light of South Carolina's current statutory provision, certainly no one can argue with the correctness of this decision. A study of authorities from other jurisdictions as well as several recent United States Supreme Court decisions, however, seems to indicate that the South Carolina Legislature should give some thought to extending the coverage of the present jurisdiction statute.

A brief look at the historical development of jurisdiction over nonresident corporations might prove helpful in studying this subject.

Originally the test of a state's power to subject a foreign corporation to jurisdiction was whether the corporation was actually incorporated within the forum state. Under this view the corporation was an artificial person which existed only with-

1. Phillips v. Knapp Monarch, ___ S.C. ___, 140 S.E.2d 786 (1965).
2. *Ibid.*
3. See footnotes 20-23 *infra* and accompanying text.

in the territorial confines of the sovereignty which created it.[4] As a result, jursdiction could be acquired only by service of process on the head officer of the corporation and this event had to occur within the borders of the state of incorporation.[5] Consequently it was virtually impossible for a state to establish jurisdiction over a foreign corporation without its consent.

This theory, enunciated in *Bank of Augusta v. Earle*,[6] soon grew to be too cumbersome for America's rapidly expanding industrial community. As the practice of multi-state business transactions and long distance product delivery arose, so did the need for the states to find some ground upon which jurisdiction could be established over a foreign corporation. The approach which became most widely adopted was to make consent to be sued a condition precedent to the foreign corporation's transaction of business in a state. This method was based on the theory that since a corporation was not a citizen under the privileges-and-immunities clause of the Constitution, it had no inherent right to do business in any state other than that of its incorporation.[7]

The view that a foreign corporation had to receive authorization from the state before it could transact any business soon ran into opposition on the grounds that such a requirement interferred with interstate business and was a violation of the commerce clause of the Constitution. The Supreme Court, however, laid this argument to rest when it held that though the commerce clause gave a corporation the right to do interstate business, the amenability to suit, through this consent theory, was a reasonable restriction which could be imposed by the state, even if the corporation was engaged exclusively in interstate business.[8]

In applying the consent theory the courts did not hesitate to use it even if the corporation had not appointed an agent to receive service of process in the foreign state. The apparent rationale behind this was that the courts were not going to allow corporations to escape amenability to suit simply because they refused to comply with the state's statutory provisions.

A subsequent theory of jurisdiction which enjoyed some usage was that of implied corporate presence. This was a modification of the actual presence theory whereby, rather than demanding

4. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 591 (1839).
5. Pennoyer v. Neff, 95 U.S. 714 (1878).
6. 38 U.S. (13 Pet.) 519 (1839).
7. Paul v. Virginia, 75 U.S. (8 Wall) 168 (1869).
8. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

actual physical presence in the forum state as a prerequisite to jurisdiction, the court would imply or construe the corporation as being present in the state if the corporation could be found to be doing business there. Although this theory was first advanced in 1882,[9] it was not independently used to sustain jurisdiction until 1914.[10]

Under both the implied consent and presence theories the test for determining jurisdiction was whether the corporation was at the determinative time "doing business" in the forum state.[11] The most disputed question of these theories became the extent of activity on the part of the foreign corporation that was necessary before it would be deemed "doing business." Case law suggests that a quantitative approach was used to determine this issue.[12] This presented an obvious stumbling block to the courts in that causes of action could accrue out of limited corporate activity that was insufficient to establish "doing business" for jurisdictional purposes, but which logically should have been adjudicated in the state that found itself helpless because of this "doing business" requirement.

It was not until 1945, in what has since become a landmark case, that Mr. Chief Justice Stone in *International Shoe v. Washington*,[13] laid to rest these rigid cumbersome theories and replaced them with the more flexible doctrine of "minimum contact." As was stated in his opinion:

> But now that the capias ad respondendum has given way to personal service of summons or other forms of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[14]

The doctrine of *International Shoe* has since been consistently applied by the courts of this country and has been used as a legislative springboard for drafting jurisdiction statutes. The concept that due process requires only that there be some definite link, some minimum contact between the state and the person or

9. St. Clair v. Cox, 106 U.S. 350 (1882).
10. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).
11. *Id.* at 583, 589.
12. Note, 73 HARV. L. REV. 909 (1960).
13. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
14. *Id.* at 316.

corporation over whom it seeks to exercise its jurisdiction stands firm today.

Twelve years after this decision, in *McGee v. International Life Insurance Co.*,[15] a California resident was successful in a suit against a Texas corporation. This corporation was not doing business in the usual sense of the word in California but was served with process in Texas pursuant to a California statute. The United States Supreme Court held that the due process clause did not preclude the California court from entering a judgment, stating that it was sufficient for the purpose of due process that the suit was based on a contract which had substantial connection with the state.

Since this decision holding that a single business transaction is sufficient to establish the constitutionally required minimum contact, a number of states have enacted wide-reaching jurisdiction statutes.[16] Of these, Illinois was the forerunner in enacting a statute [17] comprehensively dealing with personal jurisdiction and plainly attempting to occupy the entire field of its constitutional power under the liberalization of the due process clause in *International Shoe* and subsequent cases.[18]

In essence these states by enacting these single act statutes have merely attempted to spell out what would be sufficient minimum contact, and in so doing have provided the courts with more definite guidelines in the formerly nebulous area of jurisdiction. A typical example of this type of statute is that of New York Civil Practice Law and Rules, Sec. 302, which reads as follows:

> § 302. Personal jurisdiction by acts of non-domiciliaries
>
> (a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in

15. 355 U.S. 220 (1957).

16. IDAHO CODE ANN. § 5-514 (Supp. 1963); ILL. REV. STAT. c. 110, § 17 (1963); IOWA CODE ANN. § 617.3 (Supp. 1963); MD. ANN. CODE art. 23, § 92 (1957); ME. REV. STAT. ANN. c. 112, § 21 (Supp. 1963); MINN. STAT. ANN. § 303.13 (Supp. 1962); MONT. REV. CODES ANN. § 93-2702-2B (Supp. 1963); NEV. REV. STAT. § 14.080 (1961); N.M. STAT. ANN. § 21-3-16 (Supp. 1963); N.Y. CIV. PRAC. LAW & RULES § 302 (1963); N.C. GEN. STAT. § 55-145 (1965); PA. STAT. ANN. tit. 12, § 331 (1953); TEX. REV. CIV. STAT. art. 2031b (4) (1964); VT. STAT. ANN. tit. 12, § 855 (1958); WASH. REV. CODE § 4.28.185 (1962); W. VA. CODE § 3083 (1961); WIS. STAT. ANN. § 262.05 (Supp. 1963).

17. ILL. REV. STAT. c. 110, § 17 (1963).

18. McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. owns, uses or possesses any real property situated within the state.

(b) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

Comparing South Carolina's statute[19] to that of New York or any of the other states with similar statutes, it is apparent that our courts must find sufficient activity by the nonresident corporation within the state to support a claim of general jurisdiction whereas the so-called single act statutes will allow specific jurisdiction. Basically the distinction between the two is that under the single act statutes a court can exercise jurisdiction over defendants who perform single or occasional acts which, because of their nature and quality and the circumstances of their commission, may be deemed sufficient contact to subject the defendant to personal jurisdiction, but only on causes of action related to those acts. For example a New York court would have jurisdiction over a New Jersey corporation in a tort action for an injury caused by one of its products that was shipped into the state,[20] although the court would not have jurisdiction over the same corporation for a cause of action not related to the injury-causing activity.

On the other hand, under the general jurisdiction statutes (such as South Carolina's) it is essential that the court have complete jurisdiction over the nonresident corporation in all matters before it can force such a corporation to answer for any cause of action, regardless of the nature or quality of the act from which the cause of action arises.

In order for a South Carolina court to obtain general jurisdiction over such a corporation it is essential that the non-domi-

19. S.C. CODE ANN. § 10-424 (1962).

20. Johnson v. Equitable Life Assurance Soc'y of the United States, 43 Misc.2d 850, 252 N.Y.S.2d 477 (1964).

ciliary corporation be physically present in this state.[21] That is to say that at one time or another the corporation must have someone actually transacting business within the borders of this state. Although at first blush this may appear to be a reasonable position, a brief study of the matter in light of modern merchandising practices will show that many inequities result therefrom.

Under our current statute if a foreign corporation accepts orders for his products from South Carolina customers and then delivers the same products in his own trucks into this state, he is said to be transacting business in South Carolina and will be amenable to suit here.[22] On the other hand if the nonresident corporation does the same thing with the exception of placing the goods on a carrier out of state, f.o.b. plant, he will not be amenable to suit in South Carolina.[23] When a Massachusetts corporation supplied its products under contracts to dealers in South Carolina but accepted the orders and placed them on a carrier out of state, even though the corporation had a solicitation agent present in South Carolina, it was held that it did not have sufficient ties with this state to justify jurisdiction here.[24] A similar factual situation involving a Georgia corporation was decided the same way.[25]

Today it is no longer necessary for a manufacturer or producer to send personal agents or representatives into an area that he is or hopes to financially exploit. With the modern methods of communication and improved practices in long distance delivery a manufacturer can now set up his plant in the most obscure location in the country; hawk his wares by radio, television and magazines; take orders by mail, telephone and telegraph; and deliver them by trucks, trains, ships and airplanes. Such a producer can directly focus his sales and deliveries into a state as though he were a domiciliary, thus deriving a substantial source of revenue. He can be as much in competition with local merchants and foreign corporations authorized to do business here as though he were personally present in the state, but he will be insulated from suit here simply because he is not actually physically present.

21. S.C. CODE ANN. § 10-424 (1962).
22. Shealy v. Challenger Mfg. Co., Inc., 304 F.2d 102 (1962).
23. State v. W. T. Rawleigh Co., 172 S.C. 415, 174 S.E. 385 (1934).
24. Springs Cotton Mills v. Machinecraft, Inc., 156 F. Supp. 372 (W.D.S.C. 1957).
25. Zeigler v. Puritan Mills, 188 S.C. 367, 199 S.E. 420 (1938).

An example of such a situation now present in South Carolina is the large discount or wholesale store that orders large quantities of goods from out of state to be sold to residents of this state. Frequently these establishments send their buyers to the factories or distribution centers to purchase the goods and have them shipped into South Carolina via independent carriers or the retailers' or wholesalers' own trucks. If through such a transaction a negligently manufactured product should find its way into this state causing an injury to the ultimate purchaser of the product, the purchaser would have no recourse against the manufacturer in the courts of this state. If the person so injured were not the actual purchaser of the product but rather a member of the purchaser's family or a guest, he would have no recourse at all in South Carolina because of the privity requirement,[26] unless he could show negligence on the part of the retailer.

The end result of this state of affairs is to make a corporation virtually judgment-proof because the injured party would be faced with the tremendous expense of litigating in a distant forum, unless the damages are in excess of $10,000, in which case the claimant could bring his action in a federal court. Even if the claimant could absorb the expense of foreign litigation it would be extremely difficult for him to obtain witnesses who would or could travel to the place of the trial.

It would seem that the sheer momentum of twentieth century development and the increasing expansion in trade between the states and nonresidents would force the South Carolina legislature to give some thought toward extending the current statutory provisions for jurisdiction, such as a number of other states have done. In so doing it would be protecting citizens of this state against any happening similar to the above situation. This is not to say that there should be a total abrogation of state borders or an evacuation of sound jurisdictional policies, but rather that we should take a more realistic position toward foreign corporations which are competing with domestic corporations in channels of intrastate commerce. As stated by Mr. Chief Justice Warren in *Hanson v. Denkla*:[27]

> [T]he requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff

26. For discussion on the state of privity in S.C. see Note, 17 S.C.L.Rev. 259 (1965).

27. 357 U.S. 235, 251 (1958).

> . . . to the flexible standard of International Shoe v. Washington. . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdictions of the state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, the defendant may not be called on to do so unless he has had the 'minimal contacts' with that state that are a prerequisite to its exercise of power over him.

As long as there is a definite connection between the nonresident corporation and the state it is only just to require it to answer to our state courts. It would seem that, when a foreign corporation purposefully ships products into this state and attempts to compete with local merchants and to sell to our public, this would be a sufficient connection for the purpose of minimum contact.

The degree of such a corporation's exploitation of the local market should not be the determinative factor in deciding jurisdiction, for as stated by Mr. Justice Stone in the *International Shoe* case, "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative."[28] The test should not be how much business the nonresident does, but rather what connection there is between the state and the activity from which the cause of action arose.

As long as this connection between the activity and the state can be found, there would seem to be no arbitrary exercise of power since the nonresident has the protection of the state's laws while acting herein. If a foreign corporation voluntarily elects to exploit our market it should be answerable to our state courts. The consequences imputed to it lie within its own control, since it need not send its products into this state unless it so desires.

It is foreseeable that the situation could develop in which the corporation's product finds its way into this state through no fault or effort of its own, for example, if a resident buys something out of state and brings it in himself, or a situation in which you have a valid independent intervening distributor. Under these circumstances it would indeed be a violation of the

28. 326 U.S. 310, 319 (1945).

defendant's right of due process to force him to answer to the purchaser's state courts.[29] Of course under such circumstances the requirement of contact would be missing and this would present no problem to a properly drawn jurisdiction statute. Such a statute should also prescribe that jurisdiction will be conferred for the purpose of the specific litigation arising out of the particular activity from which the cause of action arose within the state. Again it would be a violation of the defendant's right of due process to subject a nonresident to this state's jurisdiction for a cause of action not related to the activity through which contact was satisfied and jurisdiction acquired.

The development of the right of a state to force a nonresident corporation to submit to its jurisdiction has been slow but steady. It has wound its way through cumbersome theories of actual presence, implied consent, and implied presence through doing business. It was not until the middle of this century that a flexible and realistic theory was developed.

Now that such a theory has been enunciated by the highest court of this land, it would seem that South Carolina should take cognizance of this liberalization of the due process clause and revise our current statutory provisions so as to take advantage of it. In so doing, the legislature would be doing no more than affording our citizens protection against the possibility of incurring an injury through no fault of their own, for which they could find no recourse in the courts of this state.

WILLIAM M. BOWEN

29. O'Brien v. Comstock Foods, Inc. 123 Vt. 461, 194 A.2d 568 (1963).

TORT LIABILITY OF INSURANCE COMPANY—RULES OF INSURABLE INTEREST AND CONSENT

In a case of novel impression the South Carolina Supreme Court held that the insured's complaint stated a cause of action in negligence where the defendant insurance company issued a policy on the life of the insured to his wife as beneficiary without the insured's knowledge or consent and the wife attempted to poison the insured to collect the proceeds of the policy.[1] A search of the cases from other jurisdictions reveals only one other decision allowing tort recovery under analogous facts.[2] The purpose of this comment is to analyze the rights and remedies of the insured under this and similar factual situations against the insurer and to trace the development of a cause of action in tort against the insurance company. Also to be considered is the burden of this precedent on the insurance company balanced against the protection given to the insured to prevent an opportunity for crime by some unworthy beneficiary.

When a person procures a policy of insurance on the life of another where such person has no insurable interest or when the insured has no knowledge or has not consented to the policy, the courts have adopted two theories to render the policy unenforceable: (1) that such a policy is a wagering contract as a speculation on the length of human life (2) that such a policy presents an opportunity for crime.[3]

An insurable interest[4] is some benefit or advantage based on the relationship of the parties, either pecuniary or by blood or affinity, that the person procuring the insurance has in the continuation of the life of the party to be insured.[5] If this interest is present the policy is not a wagering or a gaming contract on human life in which the person procuring the insurance is interested more in the death than the life of the insured. It also provides protection against temptations to murder the insured to collect the proceeds of the policy because of the natural affec-

1. Ramey v. Carolina Life Ins. Co., 244 S.C. 16, 135 S.E.2d 362 (1964).

2. Liberty Nat'l Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So. 2d 696, 61 A.L.R.2d 1346 (1957).

3. See generally, 29 AM. JUR. *Insurance* §§ 231, 433-34 (1960); 3 COUCH, INSURANCE § 24:118 (2d ed. 1960).

4. For an exhaustive analysis of this doctrine see Patterson, *Insurable Interest*, 18 COLUM. L. REV. 381 (1918).

5. Warnock v. Davis, 104 U.S. 775 (1882); Crosswell v. Connecticut Indem. Ass'n, 51 S.C. 103, 28 S.E. 200 (1897).

tion between the parties.[6] The authorities are not in agreement on the relationship sufficient to constitute an insurable interest. However, it is generally agreed, that there is an insurable interest between brothers,[7] parent and child,[8] husband and wife,[9] and creditor and debtor.[10] On the other hand, there is no insurable interest present in the relationship of nephew and aunt,[11] or where the relationship is that of aunt-in-law and niece-in-law.[12] Generally a person may take out a policy on his own life and designate the beneficiary whether the latter has an insurable interest or not. The insurable interest of the insured in his own life prevents running afoul of the wagering contract doctrine.[13] The assignment of a policy procured by the insured with his consent to one without an insurable interest is valid and the policy is enforceable.[14]

Whether the insured has consented to or has knowledge of the procurement of the policy has been relied on by the courts to judge its validity.[15] These cases hold that policies issued without the knowledge or consent of the insured are void or voidable because there was no authority to make the life insurance contract,[16] or that this lack of authority destroys the insurable interest of the beneficiary[17] and therefore subjects the insured to great dangers and are against public policy.[18] The theories of insurable interest and consent as determining whether a life policy is valid have also tended to set the limits of the rights and remedies of the insured or beneficiaries in these cases.

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6. *Ibid.*

7. Rogers v. Atlantic Life Ins. Co., 135 S.C. 89, 133 S.E. 215 (1926).

8. Crosswell v. Connecticut Indem. Ass'n, 51 S.C. 103, 28 S.E. 200 (1897).

9. Metropolitan Life Ins. Co. v. Monohan, 102 Ky. 13, 42 S.W. 924 (1897).

10. Rittler v. Smith, 70 Md. 261, 16 Atl. 890 (1889).

11. Elmore v. Life Ins. Co., 187 S.C. 504, 198 S.E. 5 (1938).

12. Liberty Nat'l Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So. 2d 696 (1957).

13. Ellison v. Independent Life & Acc. Ins. Co., 216 S.C. 475, 58 S.E.2d 890 (1950); Crosswell v. Connecticut Indemn. Ass'n, 51 S.C. 103, 28 S.E. 200 (1897). *Contra,* Cheeves v. Anders, 87 Tex. 287, 28 S.W. 274 (1894).

14. Grigsby v. Russell, 222 U.S. 149 (1911); Crosswell v. Connecticut Indemn. Ass'n, 51 S.C. 103, 28 S.E. 200 (1897). *Contra,* Cheeves v. Anders, 87 Tex. 287, 28 S.W. 274 (1894).

15. See generally, 3 COUCH, INSURANCE § 24:123 (2d ed. 1960).

16. Callicott v. Dixie Life & Acc. Ins. Co., 198 Ark. 69, 127 S.W.2d 620 (1939); American Benefit Life Ins. Ass'n v. Armstrong, 183 Ark. 47, 34 S.W.2d 1082 (1931).

17. Metropolitan Life Ins. Co. v. Monohan, 102 Ky. 13, 42 S.W. 924 (1897); Ramey v. Carolina Life Ins. Co., 244 S.C. 16, 135 S.E.2d 362 (1964); Hack v. Metz, 173 S.C. 413, 176 S.E. 314 (1934); Moseley v. American Nat'l Ins. Co., 167 S.C. 112, 166 S.E. 94 (1932).

18. Ramey v. Carolina Life Ins. Co., 244 S.C. 16, 135 S.E.2d 362 (1964).

Ramey v. Carolina Life Ins. Co.[19] held that a cause of action in tort was stated against the insurance company for negligent issuance of a policy on the insured's life without his knowledge or consent. The wife of the insured procured the policy and attempted to collect the proceeds by giving the husband-insured arsenic. The defendant insurance company demurred to the complaint on the grounds that the wife had an insurable interest in the life of the husband and that the intervening criminal act of the wife was the proximate cause of plaintiff's injury and this act was not reasonably foreseeable by the defendant. Circuit Judge Eppes overruled the demurrer and the South Carolina Supreme Court affirmed.[20]

The case relied heavily on *Liberty Nat'l Life Ins. Co. v. Weldon*[21] which held insurance companies liable for issuing life policies to an aunt-in-law on her niece-in-law when the aunt-in-law murdered the insured to collect the proceeds. The father of the young girl sued for wrongful death on the theory that the insurance company had negligently issued the policies to the aunt-in-law, who had no insurable interest in her niece-in-law, and that the defendants could reasonably foresee that their failure to ascertain this interest could, and did, lead to the murder of the insured. The Alabama court cited an early case in that state[22] which said that the primary reason for not allowing a life insurance policy where the beneficiary had no insurable interest was that "a constant temptation is created to commit for profit the most atrocious of crimes."[23] Since there was no insurable interest present in this case between the aunt-in-law and niece-in-law and the very purpose of the rule was to prevent an opportunity for murder the case held that the insurance company had a duty to use reasonable care to ascertain the interest of the aunt-in-law before issuing the policy.[24] This duty was rested on the general tort theory that all persons must "exercise reasonable care not to injure another."[25]

19. *Ibid.*

20. *Ibid.*

21. 267 Ala. 171, 100 So. 2d 696 (1957).

22. Helmtag's Adm'x v. Miller, 75 Ala. 183 (1884).

23. *Id.* at 187. The case held that an assignment of a policy procured by the insured to a creditor over the amount of the debt was void and against public policy and is therefore, in this respect, opposed to the South Carolina and majority view. Cases cited note 14 *supra.*

24. Liberty Nat'l Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So. 2d 696 (1957).

25. *Id.* at 185, 100 So. 2d at 708.

In the *Ramey* case[26] our court has equated "no insurable interest" with "no consent" and reached the same results. This case imposes on the insurance company the burden of ascertaining not only the insurable interest of the party procuring the policy but also the insured's consent to the policy before it is issued. The *Ramey* case was a more difficult case for the plaintiff than the *Weldon* case[27] because in *Ramey* the policy was procured by the insured's wife who, as a general rule, has an insurable interest in her husband.[28] The court met this argument by pointing out that a person has no insurable interest under a contract which he had no authority to make; and where the insured has no knowledge or has not consented to the issuance of the policy the wife here would not as a matter of law have an insurable interest.[29]

A Kentucky case[30] was perhaps the strongest authority that the wife had no insurable interest in the life of the husband in the *Ramey* case. There the wife took out a policy on the husband without his knowledge or consent and allegedly paid the premiums with the husband's money. In a suit by the husband for return of the premiums the court stated:

> It is certainly against public policy for one to procure a policy of insurance on the life of another without such one's knowledge or consent. The wife has an insurable interest in the life of the husband; yet she could not obtain insurance upon his life without his knowledge and consent. Neither should the husband be allowed to procure a policy of insurance on the life of the wife without her knowledge and consent. If such practice was indulged, it might be a fruitful source of crime.[31]

The defendant in *Ramey* contended that although the wife may not have had an insurable interest in her husband, and that

26. 244 S.C. 16, 135 S.E.2d 362 (1964).

27. 267 Ala. 171, 100 So. 2d 696 (1957).

28. Connecticut Mut'l Ins. Co. v. Schaefer, 94 U.S. 457 (1877); Crosswell v. Connecticut Indemn. Ass'n, 51 S.C. 103, 28 S.E. 200 (1897). The interest is pecuniary, i.e., support of husband and the natural affection of husband and wife which protects the insured.

29. Ramey v. Carolina Life Ins. Co., 244 S.C. 16, 20-21, 135 S.E.2d 362, 364-65 (1964). The court cites 2 JOYCE, INSURANCE § 892 (2d ed. 1917) but this statement is supported by citation of cases involving property insurance where the party did not own the property sought to be insured and, therefore, seems distinguishable from the reasons for the rule requiring insurable interest in life policies.

30. Metropolitan Life Ins. Co. v. Monohan, 102 Ky. 13, 42 S.W. 924 (1897).

31. *Id.* at 14-15, 42 S.W. at 924.

the policy was void when issued without his knowledge or consent, such facts did not allow the plaintiff to recover in tort. The case of *Hollomon v. Life Ins. Co.*[32] was the basis of the defendant's argument. In *Holloman* the defendant insurance company's agent had asked the plaintiff to allow her son to take out a policy on her life. She had refused but the agent told the son that his mother had consented. The policy was later cancelled and the plaintiff brought suit. The court rejected an action for fraud and deceit because the misrepresentations were made to the son and there was no reliance on them by the plaintiff. An action for invasion of the plaintiff's right of privacy was likewise rejected by the court because the plaintiff was not subjected to any unwarranted publicity. The third theory advanced was that the plaintiff had been subjected to the dangers of speculative insurance. The court stated:

> While this point does not appear to have ever come before this court, the authorities generally are to the effect that except in the case of an infant a policy of life insurance taken out without the knowledge or consent of the insured person is not enforceable. . . . We have not found any authority, however, for the view that the issuance of a policy of life insurance without the consent of the insured would give rise to a cause of action in tort in favor of the insured person. But even if this might be true under some exceptional circumstances, we find nothing in the complaint here from which damages to the plaintiff could be inferred.[33]

Judge Eppes in *Ramey* found that the "exceptional circumstances" were present because the husband had alleged injury from the arsenic given him by the wife.[34]

One point not discussed by the court in *Ramey*, however, was that in *Holloman* the son had procured the policy without the insured's consent and the argument was made that the plaintiff was subjected to the danger of a wagering contract; but this contention failed with the answer that the son had an insurable interest in the plaintiff.[35] This is difficult to reconcile with the court's reasoning in *Ramey* that the wife had no insurable interest because the insured-husband had not consented to the policy. It seems arguable, however, that the court has used the

32. 192 S.C. 454, 7 S.E.2d 169 (1940).
33. *Id.* at 457, 7 S.E.2d at 170, 171.
34. 244 S.C. 16, 23, 135 S.E.2d 362, 366 (1964).
35. 192 S.C. 454, 457-58, 7 S.E.2d 169, 171 (1940).

insurable interest rule or the theory of consent or knowledge to reach a just result to protect the insured.

Another interesting issue in the *Ramey* case was the plea by the defendant that the criminal act of the wife was an independent intervening cause and that the plaintiff's injury was not reasonably foreseeable to the defendant. This contention failed when the court found that the primary reason for not allowing life insurance of this kind was to prevent crime and therefore the criminal act was reasonably foreseeable. The defendant's negligent issuance of the policy was the proximate cause of the injury.[36]

Another line of cases involving the murder of the insured by the beneficiary is relevant here. In *Henderson v. Life Ins. Co.*,[37] a foster-father procured a life policy on his step-son with the intention of murdering the insured. After the foster-father had murdered the insured, the victim's mother brought an action for the proceeds. The court held that the policy was void in its inception because it was procured with the intent to murder the insured and the beneficiary had no insurable interest in the insured. The defendant insurance company consequently was not required to pay the proceeds to the insured's estate. It was also pointed out that the defense of insurable interest could not be waived, which put to rest *dicta* to the contrary in earlier decisions.[38] *Keels v. Atlantic Coast Line R.R. Co.*[39] and *Smith v. Todd*[40] were distinguished because, although the beneficiary had killed the insured and the insured's estate recovered the proceeds, the insured had procured the policy and the beneficiary had no motive to kill the insured when the policy was issued.[41]

The courts have utilized the doctrine of insurable interest and consent to declare life policies unenforceable in a variety of cases. Where the beneficiary sues for the proceeds on a policy obtained without the consent of the insured, recovery has been denied;[42] also where there was an assignment to one without an

36. 244 S.C. 16, 27, 135 S.E.2d 362, 367-68 (1964). This aspect of the case is beyond the purpose of this comment but see Liberty Nat'l Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So. 2d 696 (1964) citing RESTATEMENT TORTS § 448 (1934) which was relied on by Judge Eppes in the *Ramey* case.

37. 176 S.C. 100, 179 S.E. 680 (1935).

38. *Id.* at 130, 179 S.E. at 692.

39. 159 S.C. 520, 157 S.E. 834 (1931).

40. 155 S.C. 323, 152 S.E. 506 (1930).

41. Henderson v. Life Ins. Co., 176 S.C. 100, 132-33, 179 S.E. 680, 693 (1935).

42. Callicott v. Dixie Life & Acc. Ins. Co., 198 Ark. 69, 127 S.W.2d 620 (1939); Moseley v. American Nat'l Ins. Co., 167 S.C. 112, 166 S.E. 94 (1932).

insurable interest and without the consent of the insured to the assignment, recovery has been denied, even though the insured was a minor.[43] The insured can, however, maintain an action against the insurance company for return of the premiums paid to the company on a policy procured by his wife without his consent, if he can prove that the premiums were paid with his money.[44] A beneficiary's claim has been allowed for return of premiums from the insurance company, where the beneficiary has no insurable interest and the policy is void, on the ground of a failure of consideration because the company undertook no risk on the policy.[45] As shown by the *Ramey*[46] and *Weldon*[47] cases these same rules have been applied to allow the insured or his estate a cause of action in tort. This extension of these rules has been questioned[48] because the early application of the doctrine was contractual as shown by the above cases, and the purpose of the rule requiring insurable interest was said to be to prevent wagering or gaming, and not to prevent crime.[49]

The use of insurable interest and consent as a deterrent to crime[50] seems justified: "The very meaning of an insurable interest is an interest in having the life continue and so one that is opposed to crime."[51] The Tennessee court[52] takes the view that temptation of crime is "the more potent reason for condemning such insurance contracts"; as has Texas: "the paramount reason for holding such insurance to be unlawful . . . is, the danger in offering an inducement to destroy human life."[53] The *Weldon* case states: "The rule is designed to protect human life. Policies in violation of the insurable interest rule are not dangerous because they are illegal; they are illegal because they are

43. Hack v. Metz, 173 S.C. 413, 176 S.E. 314 (1934).

44. Metropolitan Life Ins. Co. v. Monohan, 102 Ky. 13, 42 S.W. 924 (1897).

45. Interstate Life & Acc. Co. v. Cook, 19 Tenn. App. 290, 86 S.W.2d 887 (1935).

46. 244 S.C. 16, 135 S.E.2d 362 (1964).

47. 267 Ala. 171, 100 So. 2d 696 (1957).

48. Duesenberg, *Insurer's Tort Liability for Issuing Policy Without Insurable Interest—A Comment*, 47 CALIF. L. REV. 64 (1959).

49. *Ibid.*; *accord*, Rittler v. Smith, 70 Md. 261, 16 Atl. 890 (1889). The contention is that if it were, legacies and life estates would be void; however see Patterson, *Insurable Interest*, 18 COLUM. L. REV. 381, 390-91 (1918) where the distinction is made that at least in a legacy the ancestor consents to the situation.

50. Patterson, *Insurable Interest*, 18 COLUM. L. REV. 381, 385-86 (1918).

51. Grigsby v. Russell, 222 U.S. 149 (1911) (Holmes J.).

52. Interstate Life & Acc. Co. v. Cook, 19 Tenn. App. 290, 86 S.W.2d 887, 892 (1935).

53. Cheeves v. Anders, 87 Tex. 287, 28 S.W. 274, 276 (1894).

dangerous."[54] South Carolina is in agreement with this proposition. In the *Henderson* case it is stated that to allow life insurance without an insurable interest may

> tend to incite the crime of murder, or operate to cause the beneficiary to decline in the event of accident . . . to save the life of the insured—and the rule is enforced, and the defense permitted, not in the interest of the defendant insurer, but solely for the sake of the law, and in the interest of a sound public policy. . . .[55]

It is also stated in *Crosswell v. Connecticut Indem. Ass'n* that

> with respect to life insurance . . . the matter of "insurable interest" is important only in ascertaining whether the contract is obnoxious to the public policy which condemns gambling on the continuance of human life, because such speculative contracts are supposed to tend to bring about the death of the insured, by creating an interest in his death.[56]

The *Ramey* case settles the question in South Carolina: "The rule against issuing policies on the life of a person without his knowledge or consent is 'designed to protect human life.' "[57] It would appear, therefore, that the better view is that these rules are primarily for the protection of life. There is certainly more need to safeguard the insured from murder or injury than to void a policy because it is a form of speculation or gaming. The function of the law is to redress civil wrongs with a remedy and to act as a deterrent to crime. These rules provide convenient tools to fulfill this dual task.

The duty placed on the insurance company to ascertain the interest of the person procuring the policy[58] and to obtain the consent of the insured[59] should not be difficult to bear. They could require their agents to investigate the relationship of the parties thoroughly before a policy is issued, and to be certain that it is sufficient to constitute an insurable interest. The consent of the insured should not be a problem, but the company has to be sure that the signature of the insured on the applica-

54. 267 Ala. 171, 186, 100 So. 2d 696, 708 (1957).
55. 176 S.C. 100, 131, 179 S.E. 680, 692 (1935).
56. 51 S.C. 103, 113, 28 S.E. 200, 204 (1897).
57. 244 S.C. 16, 135 S.E.2d 362 (1964).
58. Liberty Nat'l Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So. 2d 696 (1957).
59. Ramey v. Carolina Life Ins. Co., 244 S.C. 16, 135 S.E.2d 362 (1964).

tion has not been forged.[60] It may be suggested that the signature of the insured in the application could be verified by witnesses, which would be one means the company could use to protect itself. The courts have balanced the burden placed on the insurance company against the protection afforded human life by these rules. Their decision to have it fall on the insurer is proper both under sound logic and established legal principles.

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60. *Ibid.*