than *extradition* which connotes dealings between independent nations. 2 Moore, Extradition (1891), 1 ff. The duty of rendition is absolute, and the governor of the asylum state has no discretion in the matter once the act of Congress, 18 U.S.C. § 662 (1926), has been complied with. *Ky. v. Dennison*, 65 U.S. 66 (1860); *Johnston v. Riley*, 13 Ga. 97 (1853); *In re opinion of Justices to Governor and Council*, 201 Mass. 609, 89 N.E. 174 (1909); *Ex parte Graves*, 236 Mass. 493, 128 N.E. 867 (1920); *In re Panmore*, 96 N.J. Eq. 397, 125 Atl. 926 (1924); *People v. Moore*, 217 N.Y. 632, 112 N.E. 1070 (1916); *People v. Pinkerton*, 17 Hun. 199 (N.Y. 1879); *Ex parte Van Vleck*, 6 Ohio Dec. 636 (1878). Upon the "theory of discretion" however, it is asserted by some authority, judicial and legislative, that the duty to render is not absolute. *State v. Eberstein*, 105 Neb. 833, 182 N.W. 500 (1921); see Mass. Pub. Statutes 1882, c. 177 and Mass. Gen. Laws 1932, c. 226, §§ 12, 13, authorizing the attorney general to advise or give opinion as to the "legality or expediency" of complying with the demand for the fugitive; case of *Kimpton* (1878) discussed in Moore, *op. cit.*, 613. Since, by the weight of authority, the duty of rendition is absolute and ministerial in nature, it must follow that once the extradition warrant has been issued it cannot be revoked except in the case of a defective requisition. *Hosmer v. Loveland*, 19 Barb. 111 (N.Y. 1854). The court in the instant case leans toward the minority view for it rests its decision in part upon *State v. Toole*, 69 Minn. 104, 72 N.W. 53, 38 L.R.A. 224 (1897) which in turn relied upon *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345 (1877). It was stated in the latter case that the power of revocation was not limited to cases where the requisition was insufficient on its face. See also *State v. Eberstein, supra;* Moore, *op. cit., supra*, § 620. It would seem that the power to revoke a warrant cannot exist when there does not also exist the power to exercise discretion in its issuance. *Hosmer v. Loveland, supra.*

Though the governor of the asylum state is under a positive "duty" to deliver up a fugitive, it is certain the federal judiciary will not order him to perform it. *Ky. v. Dennison, supra.* As was expressed in *Ex parte Virginia*, 100 U.S. 339 (1879) concerning the rendition section of the Constitution, Art. 4, § 2, it "is only declaratory of the moral duty of the state" with no power of enforcement by the central government. An anomaly and a legal *impasse* result: a "duty" that cannot be enforced and a "right" without a remedy.

NEWELL A. CLAPP

Insurance—Duty Arising from Life Insurance Application—[Federal].—Plaintiffs, as executors of applicant for life insurance, petitioned to recover damages from the defendant in tort on the ground of failure to act on the application within a reasonable time. The deceased had made an advance payment of the required premium and had satisfactorily passed a medical examination. The plaintiffs asserted that the defendant had neither accepted nor rejected the application dated February 1, 1932 prior to the applicant's death on April 7, 1932. Upon notice of the death the defendant stated that the application had been declined March 1, 1932. Defendant demurred. *Held*, demurrer sustained. *Munger et al. v. Equitable Life Assur. Soc. of the United States*, 2 F. Supp. 914 (D.C. W. D. Mo., 1933).

Contrary to the orthodox basis of liability in reference to insurance contracts, the theory asserted in the petitition was that an unreasonable delay in declining the appli-

cation is a breach of duty owing an applicant for insurance which subjects the company to liability in tort. Such theory of tort liability is relatively novel in the law, inasmuch as insurance contracts have been written for centuries and relatively few cases have caused this basis of liability to be adjudicated. While the petition cites many of the cases of this nature, four undertake to demonstrate the pre-existing legal duty, none of which were controlling in the jurisdiction of the court.

Briefly they state the insurer's liability arises: (1) from the equitable principle that that which ought to have been done will be considered as having been done, *Carter v. Life Ins. Co.*, 11 Hawaii 69 (1897); (2) from the fact that insurance companies have a franchise from the state which was granted in the public interest; (3) from the fact that insurance companies impliedly agree to act honestly and fairly on applications submitted to them; (4) from the fact that where there has been an advance payment of the premium that an unreasonable delay in acting is a breach of the trust, in which the premium is held, *Duffie v. Bankers' Life Ass'n.*, 160 Iowa 19, 139 N.W. 1087 (1913); (5) from the fact that "some kind of a consensual relationship" has been entered into by the applicant and the company, *Kukuska v. Insurance Co.*, 204 Wis. 166, 235 N.W. 403 (1931); (6), from the value of the risk; (7) from the fact that the insurance company, having pre-empted the field, should not retain control of the situation and the applicant's funds indefinitely, *Strand v. Bankers' Life Ins. Co.*, 115 Neb. 357, 213 N.W. 349 (1927).

Until the application is accepted by the insurer, a promise to pay or payment is conditional upon the acceptance, and the application is still no more than a proposition to take and to pay for insurance should the company accept. The payment of the premium when the application is signed does not bind the company to accept his terms, and of course the applicant may recover the payment upon rejection. These are fundamental rules of the law of contracts which cannot be ignored. But the immediate inquiry is whether or not a decision against the insurance company because of alleged unreasonable delay in rejecting the application or serving notice of such rejection should expose it to tort liability. Arkansas, as well as the instant case, has flatly rejected the doctrine of tort liability. *National Union Fire Ins. Co. v. School Dist.*, 122 Ark. 179, 182 S.W. 547, L.R.A. 1916D, 238 (1916). Illinois has refused recovery although judgment was for the defendant solely on the ground that under the facts of the case the applicant's administrator had no right of action. *Bradley v. Fed. Life Ins. Co.*, 295 Ill. 381, 129 N.E. 171, 15 A.L.R. 1021 (1920). See also *Savage v. Insurance Co.*, 154 Miss. 89, 121 So. 487 (1929); *Thornton v. National Council, etc.*, 110 W.Va. 412, 158 S.E. 507 (1931).

The present case indicates the rise of a comparatively new social problem, the issue being, simply, whether or not the courts should recognize a duty on the part of insurance companies to reasonably act on insurance applications. See generally for the judicial technique in handling this sort of issue in other types of tort cases Green, The Duty Problem, 28 Col. L. Rev. 1014 (1928), 29 Col. L. Rev. 255 (1929). Moreover, the tendency in these cases seems to be to shift wherever possible the burden of loss due to accident or catastrophe from the shoulders of the individual to those of the community or of a group of the community. Funk, Duty of Insurer to Act Promptly on Insurance Applications, 75 Univ. Pa. L. Rev. 207 (1926). See also Vance, Insurance (2nd ed. 1930) 190 ff.

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