ment of the *Erie* doctrine as a means of separating state and national functions[16] have also been most insistent that national regulations be made by Congress alone.

An additional problem is whether, after a decision such as the one in the present case, state courts will hereafter be required to apply the rule laid down by the federal court, just as state courts would be required to apply a federal statute. Instances, before the *Erie* case, in which state courts were required to apply a well-established federal court rule in preference to a state rule,[17] indicate that the state courts will be required to apply the rule of the federal decision.

There appears to be no direct authority on the analogous problem of whether, following a federal court statement that a particular statute is an occupation of the field, all questions within that field become "federal questions" over which federal courts have original jurisdiction. It is clear that the court in the instant case, having acquired jurisdiction by diversity of citizenship, found authority for applying a federal rule by giving an extended application to the federal statute. It might therefore be argued that the same extended effect should be given to that statute for the purpose of determining jurisdiction. This result could not be reached, however, without changing the practice of refusing to accept removal from a state court unless the construction of the statute is in issue.[18]

Finally, it may be questioned why the court in the present case, having independently determined that the cause of action was based upon the oral contract, proceeded to apply the state statute of limitations. It is true that where a cause of action arises directly under a federal statute which contains no period of limitation, state statutes of limitations are applied.[19] The reasoning in those cases, however, is that the Congress, by failing to set up a period of limitations, manifested an intention that the state statute should apply. In the instant case, Congress had not even set up the cause of action; and the same considerations which enable the court to say that the cause of action is a federal matter would seem also to dictate that there be a uniform statute of limitations. The failure of the court in the instant case to promulgate a definite period of limitations is probably explained on the ground that the universally statutory nature of definite periods of limitation causes the matter to be viewed as being entirely beyond the scope of the judicial function.

Insurance—Incontestability Clause—Age Adjustment Not a Contest within Statutory Incontestability Clause—[Federal].—An insurance policy, containing an incontestability clause was issued by the defendant upon the life of the insured. There was a specific exception as to age adjustment in the incontestability clause itself. Upon the death of the insured it was discovered for the first time that he had misstated his age. The defendant paid the amount due under the age adjustment clause[1] of the

[16] See Barnett, Mr. Justice Black and the Supreme Court, 8 Univ. Chi. L. Rev. 20, 31–32 (1940).

[17] See note 12 supra. [18] See note 14 supra.

[19] Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390 (1906).

[1] "*Age.*—If the age of the insured has been misstated, any amount payable under any of the provisions of this contract, shall be that amount which the premium charged would have purchased for the insured's correct age."

policy without prejudice to the plaintiff's right to sue for the remainder. The district court held that the application of the age adjustment clause after the expiration of the contestable period was prohibited by an Alabama statute,[2] and gave judgment for the plaintiff for the difference between the adjusted amount which the company had paid and the face value of the policy.[3] Upon appeal, *held*, there was no contest of the policy such as to bring into operation the incontestability clause required by statute. The insurer was not seeking to avoid the policy but rather to enforce it according to its terms. Judgment reversed. *Equitable Life Assurance Society of the United States v. First Nat'l Bank of Birmingham.*[4]

The instant case raises the problem of whether an incontestability clause prescribed by statute[5] prohibits the application of an age adjustment clause after the contestable period has run.

Inasmuch as the age adjustment clause was expressly excluded from the operation of the incontestability clause, no argument could arise that there was an internal inconsistency in the policy which would have been resolved in favor of the insured.[6] The plaintiff stressed the point that the Alabama statute, providing in effect that life insurance policies shall as to fraud or irregularities in the application be incontestable after the contestable period has run, prevented the defendant from invoking the age adjustment clause. The contention of the insurer-defendant, on the other hand, was that it was not contesting the policy within the meaning of the statutory incontestability clause but rather that it was seeking to enforce it according to its terms.[7]

A contest, within the meaning of an incontestability clause, has been defined as some form of judicial proceeding in the nature of a suit in equity for cancellation of the policy[8] or a plea to an action at law on the policy.[9] Several jurisdictions, however, hold that a mere disclaimer of liability accompanied by a tender of premiums by the insurer is sufficient to constitute a contest.[10] It has even been held that a suit for

[2] "No life insurance company shall contest a claim under any policy of insurance on the plea of fraud or irregularities in the application after two annual premium payments have been made on policy, but must pay the full amount of policy within sixty days after proofs of death have been received at the home office of the company in the United States. . . . ." Ala. Code Ann. (Michie, 1928) § 8365.

[3] 31 F. Supp. 969 (Ala. 1940).

[4] 113 F. (2d) 272 (C.C.A. 5th 1940).

[5] Patterson. Cases and Materials on Insurance 645–46, 671 n. 3 (1932), for a classification of the three types of such statutes; The Incontestable Clause in Combination Life Insurance Policies, 31 Ill. L. Rev. 769, 772 n. 14 (1937), for a summary of the incontestability statutes extant in thirty-one states, indicating that the statutory requirement "is in most cases uniform. . . ."

[6] Vance, Insurance 820 (2d ed. 1930).

[7] Incontestability Clauses in Life Insurance Policies, 64 U.S.L. Rev. 225 (1930), for a discussion of the large amount of litigation that has turned on the meaning of "incontestable."

[8] Jefferson Standard Life Ins. Co. v. Keeton, 292 Fed. 53 (C.C.A. 4th 1923); New York Life Ins. Co. v. Hurt, 35 F. (2d) 92 (C.C.A. 8th 1929).

[9] Priest v. Kansas City Life Ins. Co., 119 Kan. 23, 237 Pac. 938 (1925); Missouri State Life Ins. Co. v. Cranford, 161 Ark. 602, 257 S.W. 66 (1923).

[10] Northwestern Mutual Life Ins. Co. v. Laury, 174 Minn. 498, 219 N.W. 759 (1928); Feierman v. Eureka Life Ins. Co., 279 Pa. 507, 124 Atl. 171 (1924); Stiegler v. Eureka Life

reformation on the ground that the wrong policy had been issued through a mutual mistake of fact is a contest.[11] Few cases have dealt with the question of whether age adjustment is a contest.[12] But these cases seem to substantiate the holding of the circuit court of appeals.

Incontestability clauses have been held to apply only to conditions of forfeiture and not to conditions defining the risk assumed.[13] It is not certain that the age adjustment clause falls into either of these categories. It could be argued that age adjustment is a partial forfeiture, thus falling within the former category. Conversely, since the age adjustment clause defines the scope of the risk assumed, it could be contended that age adjustment is within the purview of the statutory provisions for incontestability.

The desire to mitigate the severity of common law warranties was one of the motivating forces which gave rise to the incontestability clause. Age adjustment is another device to mitigate the forfeiture resulting from breach of a common law warranty with respect to age. From this it may be argued that the incontestability clause was not designed to include within its scope age adjustment clauses. It may be said, on the other hand, that the incontestability clause was intended to have the same effect on all statements that were at one time common law warranties. And since statement of age was, before the insertion of age adjustment clauses, a common law warranty, any age adjustment should be barred after the contestable period.

The clear language of the Alabama Code to the effect that "No life insurance company shall contest a claim under any policy of insurance on the plea of fraud or irregularities in the application after two annual premiums have been made . . . ." would seem to indicate an intention on the part of the legislature to preclude contests in the form of age adjustments. Furthermore, the statute provides that the insurer "must pay the *full* amount of the policy within sixty days after proofs of death have been received." Inasmuch as the statute is unambiguous on its face it may be taken to mean that after the expiration of the contestable period the company cannot dispute either in whole or *in part* its liability for the full amount it has promised to pay, because of any misstatement contained in the application. Since there is a strong public policy in favor of incontestability clauses to protect the insured,[14] it does not seem unreasonable for the legislature to have intended such a result.

Ins. Co., 146 Md. 629, 127 Atl. 397 (1925). One court has gone so far as to suggest that the layman's conception of the word "contest" be given effect. See Mareck v. Mutual Reserve Fund Life Ass'n, 62 Minn. 39, 64 N.W. 68, 69 (1895).

[11] Columbian Nat'l Life Ins. Co. v. Black, 35 F. (2d) 571 (C.C.A. 8th 1929).

[12] Langan v. United States Life Ins. Co., 344 Mo. 989, 130 S.W. (2d) 479 (1939); Edelson v. Metropolitan Life Ins. Co., 95 Misc. 218, 158 N.Y. Supp. 1018 (S. Ct. 1916); Messina v. New York Life Ins. Co., 173 Miss. 378, 161 So. 462 (1935); Murphy v. Travelers' Ins. Co., 134 Misc. 238, 234 N.Y. Supp. 278 (S. Ct. 1928); Sipp v. Philadelphia Life Ins. Co., 293 Pa. 292, 142 Atl. 221 (1928).

[13] Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930). The distinction may seem to be a rather tenuous one, but it is based on a difference in legal effect. See Head v. New York Life Ins. Co., 43 F. (2d) 517 (C.C.A. 10th 1930).

[14] Richards, Insurance 667 (4th ed. 1932): "It is obviously a matter of grave concern that widows, children, or dependents should not be deluded with a mere chose in action in place of available means of support upon decease of the breadwinner. . . . . Most of the regular life companies therefore, advertise and insert in their policies as a conspicuous feature the incontestable clause, and public welfare is clearly on the side of its full enforcement."

Although it may be said that one who either misrepresents or mistakenly gives the wrong age has no reasonable ground for relying upon the effect of the incontestability clause, third party beneficiaries and creditors may have justifiably relied on the face value of the policy, and this reliance should be taken into consideration.

To hold that an age adjustment falls within the scope of the statutory incontestability clause would tend to increase the security function of insurance.[15] The age of an applicant is a fact which can be established by investigation, just as any other fact, and more easily so by an insurance company, with its staff of trained investigators, its experience in such matters, and the resources at its command. As a matter of social policy, the true age of the insured ought to be ascertained as early as is conveniently possible, in fairness to both the insurer and the insured. To make certain that the statutory incontestability clause would have such an effect, it is submitted that the legislature might specifically indicate the extension of the incontestability clause, and the exceptions thereto.

Labor Law—Validity of NLRB Instatement Orders—[Federal].—Two workers who had applied at the respondent's plant for employment were refused jobs because of their activities in a labor union. The National Labor Relations Board ordered the respondent to hire the workers with back pay from the date of the refusal to hire.[1] On a petition to the Circuit Court of Appeals for the First Circuit to secure the enforcement of the board's order, *held*, that the order was a valid exercise of the authority conferred upon the board by the National Labor Relations Act.[2] Order affirmed. *NLRB v. Waumbec Mills, Inc.*[3]

Previous to this decision the Circuit Court of Appeals for the Second Circuit in two cases[4] held that under Section 8(3)[5] of the act a refusal to hire because of union activities is not an unfair labor practice, and that under Section 10(c)[6] the court would lack

[15] "The value of a clause declaring a policy incontestable lies to no slight degree in the definiteness of the protection accorded to the holder. The good that it promises is in part a state of mind. . . . . Alike for insured and for his beneficiaries, there is to be the peace of mind that is born of definiteness and certainty." Cardozo, C. J., in Killian v. Metropolitan Life Ins. Co., 251 N.Y. 44, 49, 166 N.E. 798, 800 (1929).

[1] Waumbec Mills, Inc., 15 N.L.R.B. 37 (1939). The board had earlier ruled that discriminatory refusal to hire was an unfair labor practice. Montgomery Ward & Co., 4 N.L.R.B. 1151 (1938); Algonquin Printing Co., 1 N.L.R.B. 264 (1936); NLRB Ann. Rep. 73 (1939).

[2] 49 Stat. 449 (1935), 29 U.S.C.A. § 151 et seq. (Supp. 1939).

[3] 114 F. (2d) 226 (C.C.A. 1st 1940).

[4] NLRB v. Nat'l Casket Co., 107 F. (2d) 992 (C.C.A. 2d 1939); Phelps Dodge Corp. v. NLRB, 113 F. (2d) 202 (C.C.A. 2d 1940).

[5] "It shall be an unfair labor practice for an employer— . . . . (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." with a proviso for a closed shop agreement. 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (Supp. 1939).

[6] "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . . shall issue . . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (Supp. 1939).