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The Law of Burial Insurance

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NOTES

THE LAW OF BURIAL INSURANCE

I. Introduction

Burial insurance, used in the sense of a risk-shifting device to aid the less fortunate, has existed in the form of friendly societies from time immemorial.[1] Indeed, it is probable that this noncommercial type was the first form of insurance. There is some evidence that such societies existed in Egypt, 2500 B.C.[2] There exists more concrete evidence that they thrived in ancient China, India, Greece and Rome.[3] The Grecian societies, although largely religious and ritualistic, had as their main function the guarantee of a decent burial for their members.[4] The existence around A.D. 117-138 of Roman societies, called *collegia,* is established beyond doubt by the finding of a marble bearing an inscription setting forth the by-laws.[5] Although there is no documentary proof, it is probable that the societies survived the invasions and continued to exist in their ancient form until they were revived by the medieval guilds with many attributes of our modern mutual benefit organizations.[6]

In modern insurance, the means for providing burial insurance have taken several forms. The first type is a standard policy written by regularly constituted life insurance companies under which the insured is guaranteed at death a funeral worth a fixed sum. These policies usually provide for a cash payment in lieu of services at the death of the insured, or can be surrendered for cash during the life of the policy.[7] The second type is entirely different.

1. Vance, *Early History of Insurance Law,* 8 Col. L. Rev. 1, 3 (1908).

2. Trenerry, The Origin and Early History of Insurance 173 (1926). This seems somewhat "far-fetched" to one noted authority on insurance. Patterson, Cases and Materials on Insurance 80, n.2 (2d ed. 1947).

3. Vance, *supra* note 1, at 3.

4. *Ibid.*

5. *Id.* at 4, n.13: "An Association *(collegium)* constituted under the provisions of a decree of the Roman Senate and People, to the honor of Diana and Antinous, by which decree the privilege is granted of meeting, assembling and acting collectively. Anyone desiring to pay a monthly subscription for funeral rites may attend the meetings of the Association; but persons are not allowed, under the color of this Association, to meet more than once a month, and that only for the purpose of contributing for the sepulture of the dead. Ye who are desirous of becoming new members of this Association, first read through its laws carefully, and so enter it as not afterwards to complain, or to leave a subject of dispute to your heirs. It is absolutely required by the Association that anyone wishing to enter, shall pay an entrance-fee of one hundred sesterces, give an amphora of good wine, and pay as monthly dues five asses. . . ."

6. Patterson, Cases and Materials on Insurance 80 (2d ed. 1947); Vance, *supra* note 1, at 4.

7. See, *e.g.,* specimen policies of Cosmopolitan Life Insurance Company, Memphis, and Consolidated Insurance Company, Nashville. The provision for cash instead of burial services is required by some state statutes. See note 67 *infra.*

This involves an arrangement whereby a group of people associate and provide for the burial of any member from a fund accumulated by regular payments or assessments from each member. Usually such associations are organized by enterprising undertakers who contract with the association to furnish the burial services for a stipulated price.[8] A third type is worthy of mention. An insured under an industrial life policy can be assured of a burial by assigning the policy to an undertaker who will agree to furnish funeral services for the face amount of the policy.[9] Since this is not strictly burial insurance but is otherwise orthodox industrial insurance, an extended discussion of this type is not warranted.

Many problems of state regulation arise in connection with the two primary types, especially burial associations, where the possibilities of fraud make the need for regulation acute. It is the purpose of this Note to indicate and discuss some of these problems. Cases will be collected and discussed concerning the courts' treatment of the somewhat unrelated aspects of burial insurance contracts. The principal reason for choosing this topic for discussion is the fact that it has been practically ignored by legal writers. Texts and encyclopedias have treated it but briefly, and law reviews have almost completely neglected it. Generally, state legislatures have been apathetic in acting on the problem. Yet its importance and scope cannot be minimized. Burial insurance has a strong natural appeal to the poor because of the horror conjured by the thought of being buried in potter's field. According to one study, in several southern states in 1943 one half the total population held membership in burial associations.[10]

II. Application of General Insurance Statutes

Burial insurance is life insurance since it is determinable upon human life and is dependent upon that contingency.[11] This is the almost universal holding of courts faced with the problem of applying state regulatory insurance laws to arrangements guaranteeing a burial at death.[12] Burial insurance has been defined as "a contract based upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives,

8. 1 Appleman, Insurance Law and Practice § 14 (1941).

9. See, *e.g.*, assignment form of Life and Casualty Insurance Co. However, an assignment of this type is void by statute in Ohio as being in restraint of trade. See Robbins v. Hennessey, 86 Ohio St. 181, 99 N.E. 319 (1912), construing and holding constitutional what is now Ohio Gen. Code Ann. § 666 (1946).

10. See Patterson, Cases and Materials on Insurance 29 (1947), citing Botts, *A New Development in Burial Insurance*, 21 Jour. Am. Ins. 9 (1944).

11. 1 Joyce, Insurance § 336d (2d ed. 1917).

12. *E.g.*, State v. Willett, 171 Ind. 296, 86 N.E. 68, 23 L.R.A. (N.S.) 197 (1908); Renschler v. State, 90 Ohio St. 363, 107 N.E. 758, 1915D L.R.A. 501 (1914); Oklahoma Southwestern Burial Ass'n v. State, 135 Okla. 151, 274 Pac. 642, 63 A.L.R. 704 (1928). See additional cases cited in note 27 *infra*.

at death, a burial reasonably worth a fixed sum."[13] The fact that a burial policy is payable not in money but in services equal in value to money is not sufficient to exclude it from classification as a life insurance contract.[14]

Of the many different standard forms of life insurance, burial insurance, as written by regularly constituted companies complying with state insurance laws, is most nearly like industrial insurance. The two have these features in common: (1) strong appeal to the low income group, (2) small or limited amount for which each type is written, and (3) small premiums usually collected at short periodical intervals by agents of the insurer. It has been said that industrial insurance amounts in fact to burial insurance because the benefits usually accrue to the insured rather than to his beneficiaries.[15] As insurance, contracts for burial benefits are perfectly valid provided there is compliance with state regulatory laws.[16] These contracts are regarded favorably by the law as being socially desirable.[17]

Few problems of state regulation arise out of the standard burial policies. These policies are usually written by regularly constituted life insurance companies at standard rates. Thus there is no twilight zone in which it is doubtful that state insurance laws are applicable, as is sometimes the case with burial associations. The insurer's books are subjected to periodical inspection by the insurance commissioner, and the provisions of the policy are carefully scrutinized. Since reserve requirements guaranteeing financial responsibility are rigid under state insurance laws, companies offering this type of policy overcome one of the chief objections to burial associations.[18] Companies entering this field have found it lucrative since they get no competition from the large standard life companies which have chosen not to deal in this type of contract, probably because of the small amount involved and the necessity of dealing with a local undertaker.[19] Where volume of business and convenience warrant it, a company may organize and incorporate its

13. 1 JOYCE, INSURANCE § 7c (2d ed. 1917). *See* Sisson *ex rel.* Nardolillo v. Prata Undertaking Co., 49 R.I. 132, 141 Atl. 76 (1928).

14. See Benevolent Burial Ass'n v. Harrison, 181 Ga. 230, 181 S.E. 829 (1935), where it was held that an association offering funeral services was engaged in the life insurance business even though the statutory definition of a life insurance policy was a contract to pay a certain amount of money upon death. And see 1 COUCH, CYCLOPEDIA OF INSURANCE LAW § 32 (Cum. Supp. 1945).

15. *See* Gontrum v. Union Liberty Life Ins. Co., 177 Md. 624, 11 A.2d 625, 627 (1940); 1 COUCH, CYCLOPEDIA OF INSURANCE LAW § 32 (1929). "It is not the purpose to create an estate for administration, the payment of debts, and distribution among next of kin. The end and aim is to provide for a proper burial and funeral when the occasion arrives." Jordan's Mut. Aid Ass'n v. Edwards, 232 Ala. 80, 166 So. 780, 781 (1936).

16. 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 14 (Supp. 1952).

17. The public is relieved of a possible burial charge, and the kindred of the insured are spared the humiliation of having a member of the family buried as a pauper. See State *ex rel.* Reece v. Gooch, 165 Tenn. 97, 101, 52 S.W.2d 143 (1932).

18. BUSINESS WEEK, Oct. 20, 1945, p. 48.

19. *Ibid.*

own funeral homes to perform the obligations the company incurs under its policies.[20] Where this is not practicable the company may act as agent for the insured in contracting with an independent undertaker for services at a price equal to the face value of the policy, or an assignment to an undertaker may be made where not prohibited by state law.[21]

An entirely different approach to burial insurance is furnished by burial associations. When unhampered by state regulation these associations flourish, often preying on the public for the personal profit which accrues to the undertakers organizing them.[22] The objections to associations of this nature, whether financed by regular installments or by assessments made on each member at the death of other members, are numerous. (1) The possibilities of fraud are exceedingly great. The contracts into which the members enter are drawn by the association without the restraining force of the state commissioner of insurance, often resulting in a one-sided agreement.[23] The members have no way of knowing whether the charges they pay are fair and reasonable for the benefits they hope to receive. It is inevitable that many members will pay assessments for years and then drop their membership. This relieves the association of its obligation and results in clear profit of the amount paid in before discontinuance. Similarly, the members are ignorant as to the administration expenses of the association and the actual costs to the official undertaker in furnishing the services. The percentage of profit is almost at the whim of the organizers of the association. These matters rarely receive judicial attention because the small amount for which each burial certificate is written makes it not feasible in most instances for the member to bring suit. If a suit is threatened the association will usually perform the particular contract in order to avoid the suit. (2) Stability, one of the most essential elements of an insurance organization for adequate public protection, is totally lacking. There is no certainty that there will be a solvent concern able to perform the contract on the death of a member.[24] (3) The official undertaker is the person who derives the primary benefit from the contract

20. Such a method has been found practical and profitable, for example, by the Cosmopolitan Life Insurance Co. of Memphis, Tenn. Four funeral homes are now being operated in the cities of Memphis, Nashville, Knoxville and Chattanooga. They are incorporated separately under the name Cosmopolitan Funeral Home.

21. See note 9 *supra.*

22. Quinn, *Burial Associations and the Law,* 23 LAW STUD. HELPER 11 (1915).

23. "Some of the provisions are unreasonable, some unguarded, and others indefinite, and tend to expose the concern to the suspicion that the whole system is, in real design, but the scheme of an undertaker to promote his private business, largely at the expense of persons of small means." State v. Willett, 171 Ind. 296, 86 N.E. 68, 71 (1908).

24. "[T]he contract is not one that the courts will strain the laws to uphold. It is freighted with the greatest possibilities of fraud. . . . It is certain that many of these certificates will not be ripe for redemption for a number of years, and it is reasonably certain that some of them will survive the life of the corporation itself." State *ex rel.* Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 Pac. 878, 879, 1915B L.R.A. 976 (1914).

rather than the relatives of the insured.[25] (4) The contract obligates the survivors of the insured to accept the services of the association's official undertaker, thereby taking away the right to purchase maximum services at minimum price in the open market.[26] (5) There is a tendency to promote inferior service.

Because of these basic objections, the courts are unsympathetic toward these associations and endeavor to bring them within the scope of state insurance statutes by holding that the contracts with members are life insurance contracts.[27] When an injunction is secured against an association it is usually driven out of existence since by its nature, there is an inability to comply with state insurance statutes. However, beneficial societies which are deemed to be founded on philanthropic, benevolent or charitable principles rather than for business purposes, are more favorably regarded by the courts.[28] These societies are regulated under separate statutes in most states with the requirements for inclusion being that the societies are nonprofit organizations with limited membership and a ritualistic form of work.[29]

Many attempts have been made to avoid state regulation by disguising the insurance features of the burial contract. These attempts are very rarely successful because of the realistic attitude adopted by most courts to determine the validity of the contract by its nature and effect, rather than by the terminology used to characterize it.[30] Thus, in *State v. Smith Funeral Serv-*

25. State v. Willett, 171 Ind. 296, 86 N.E. 68, 23 L.R.A. (N.S.) 197 (1908). However, for purposes of meeting the argument that burial contracts are not life insurance contracts because of the lack of a beneficiary, it has been held that the person who would otherwise be obligated to pay the burial expenses of the deceased is the beneficiary in the legal sense. State *ex rel.* Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 Pac. 878, 879, 1915B L.R.A. 976 (1914).

26. See Robbins v. Hennessey, 86 Ohio St. 181, 99 N.E. 319 (1912); Quinn, *Burial Associations and the Law*, 23 LAW STUD. HELPER 11 (1915).

27. *E.g.*, State *ex rel.* Landis v. De Witt C. Jones Co., 108 Fla. 613, 147 So. 230 (1933); Clark v. Harrison, 182 Ga. 56, 184 S.E. 620 (1936); State v. Willett, 171 Ind. 286, 86 N.E. 68, 23 L.R.A. (N.S.) 197 (1908); State *ex rel.* Att'y Gen. v. Wichita Mut. Burial Ass'n, 73 Kan. 179, 84 Pac. 757 (1906); Renschler v. State *ex rel.* Hogan, 90 Ohio St. 363, 107 N.E. 758, 1915D L.R.A. 501 (1914); Oklahoma Southwestern Burial Ass'n v. State *ex rel.* Read, 135 Okla. 151, 274 Pac. 642, 63 A.L.R. 704 (1929); Sisson *ex rel.* Nardolillo v. Prata Undertaking Co., 49 R.I. 132, 141 Atl. 76 (1928); State *ex rel.* Dist. Att'y Gen. v. Mutual Mortuary Ass'n, 166 Tenn. 260, 61 S.W.2d 664 (1933); State *ex rel.* Reece v. Stout, 17 Tenn. App. 10, 65 S.W.2d 827 (M.S. 1933).

28. State *ex rel.* Kuble v. Capitol Ben. Ass'n, 237 Iowa 363, 21 N.W.2d 890 (1946); Pirics v. First Russian Slavonic Greek Catholic Benevolent Society, 83 N.J. Eq. 29, 89 Atl. 1036 (Ch. 1914); State v. Taylor, 56 N.J.L. 49, 27 Atl. 797 (Sup. Ct. 1893); Cowan v. New York Caledonian Club, 46 App. Div. 288, 61 N.Y. Supp. 714 (2d Dep't 1899); Commonwealth *ex rel.* Att'y Gen. v. Equitable Beneficial Ass'n, 137 Pa. 412, 18 Atl. 1112 (1890).

29. *E.g.*, GA. CODE ANN. §§ 56-1601 *et seq.* (1937); N.J. STAT. ANN. §§ 17:39-1 *et seq.* (1939); TENN. CODE ANN. §§ 6357 *et seq.* (Williams 1934). Insofar as the societies cited in note 28 *supra* do not fall in this separate category the cases are contra to the majority view, which holds organizations of this type amenable to life insurance regulations.

30. *E.g.*, State *ex rel.* Att'y Gen. v. Wichita Mut. Burial Ass'n, 73 Kan. 179, 84 Pac. 757 (1906); State *ex rel.* Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 Pac. 878, 1915B L.R.A. 976 (1914).

ice,[31] the certificates furnished to members as evidence of membership in a burial association, allowed an 80% discount on a casket and grave clothes, and provided that the right to purchase could be exercised by the certificate holder at any time prior to death. The court in striking down the arrangement for noncompliance with state statutes said, "the apparent right given to a certificate holder of defendant to demand his coffin and grave clothes prior to his death is a right of such improbable exercise that it does not alter what we regard the real nature of the contract."[32] Similarily, calling the contracts options to purchase (as in *South Georgia Funeral Homes v. Harrision*),[33] mutual notes,[34] or contending that the certificates were merely personal service contracts[35] has been of no avail in defeating the application of regulatory insurance laws. However, after the decision in the *South Georgia Funeral Homes* case granting the insurance commissioner an injunction, the defendant added a provision to the contract making the unpaid balance due and collectible at the exercise of the option to purchase by the holder. Defendant continued to deal in these amended option contracts, and an action was instituted for contempt for violating the injunctive order.[36] The court refused to look through the terminology of the contract and held that this was not a contract of insurance because the element of risk had been eliminated.[37] This unrealistic attitude is subject to criticism in light of the need for regulation of a business of this type.[38] The Georgia legislature expressed its disapproval of the decision by declaring contracts of this nature to be life insurance even though "the cost or value of the undertaking on the part of the insurer be more or less than the consideration flowing to him."[39] Two years later in *Harrison v. Tanner-Poindexter Co.*,[40] an injunction was sought by the commissioner against a defendant who had entered into contracts with its customers, whereby defendant agreed to sell caskets and burial supplies, each buyer-member agreeing to pay 75 cents every two months until the sum of $250 was paid. If the buyer died before the full amount was paid his estate would be liable for the balance. The court had little trouble in

31. 177 Tenn. 41, 145 S.W.2d 1021 (1940), 16 TENN. L. REV. 878 (1941).

32. 177 Tenn. at 46, 145 S.W.2d at 1023.

33. 182 Ga. 60, 184, S.E. 875 (1936).

34. Renschler v. State *ex rel.* Hogan, 90 Ohio St. 363, 107 N.E. 758, 1915D L.R.A. 501 (1914). The contract, termed a mutual note, provided that the member would pay fifteen cents (called interest) by the tenth of every month, while the defendant agreed to furnish a funeral worth $50 to $100 if the member be not in default at death.

35. State *ex rel.* Landis v. De Witt C. Jones Co., 108 Fla. 613, 147 So. 230 (1933).

36. South Georgia Funeral Homes v. Harrison, 183 Ga. 379, 188 S.E. 529 (1936).

37. "There is nothing in the contract itself nor is there any evidence to show that the amount paid by a purchaser is less than the value of the funeral services contracted to be performed, or that there is any element of risk involved. . . . The contract on its face does not appear to be one of life insurance." 188 S.E. at 531.

38. See 15 N.C.L. REV. 417 (1937).

39. GA. CODE ANN. § 56-901 (Cum. Supp. 1951).

40. 187 Ga. 678, 1 S.E.2d 646 (1939).

holding that defendant was engaged in the life insurance business even though the contract apparently contained no element of risk.

III. APPLICATION OF SPECIFIC STATUTES TO BURIAL ASSOCIATIONS

The most significant observation concerning legislation on burial associations is the lack of specific statutory regulation. Most state legislatures have not taken official cognizance of the problems by placing associations of this type in separate categories in their codes. In these states the task is left to the courts to bring the associations within the scope of the general insurance statutes by holding that the business carried on is life insurance.

However, several states have enacted specific legislation that more or less rigidly regulates burial associations. Of these the North Carolina treatment is probably the most comprehensive.[41] Burial associations are subject to detailed regulations and are placed under the direct control and supervision of a special commissioner appointed by the governor. Each association is required to adopt the set of rules and by-laws set out in the code as a condition of doing business. In order to meet the expenses of supervision each association is assessed on a *pro rata* basis according to the number of members it has. The amount and frequency of assessments collected from the members and the benefits flowing to them are specifically set out. A minimum membership of 800 is required of each association, and if this number is not secured within ninety days after the charter is granted, the commissioner must revoke the license and transfer the membership to another association. A bond in the amount of 25% of the surplus, but in no case less than $1000 is required of the secretary-treasurer of all associations. Provision is also made for an election of the funeral benefits or a return of assessments paid by the widow or next of kin of a serviceman killed while in service.

The Mississippi treatment is less comprehensive but still adequate.[42] At least three incorporators with not less than $5000 capital are required to form an association. Securities ranging in amount from one to ten thousand dollars must be deposited with the commissioner who is given extensive powers of inspection and supervision. The Nevada code, after defining burial contracts and requiring registration of burial associations, provides that they shall be governed by all statutory provisions concerning life insurance.[43] The Florida legislature has attempted to restrict the organization of burial associations, rather than to recognize and regulate them.[44] The statutes forbid any organization from entering into a contract designating a specific under-

41. N.C. GEN. STAT. §§ 58-224 to 58-241.4 (1950).
42. MISS. CODE ANN. §§ 5592-5605 (1942).
43. NEV. COMP. LAWS ANN. §§ 3656.110-3656.113 (Supp. 1941).
44. FLA. STAT. ANN. §§ 639.01-639.05 (1944).

taker to conduct the funeral, or to organize or promote any plan whereby a member is deprived of the advantages of competition in the purchase of burial services in the open market. Illinois,[45] Nebraska[46] and Virginia[47] have similar provisions against this restraint on trade; but unlike Florida, these states recognize the legality of associations that comply with their regulations.

The Oklahoma legislature has provided that all nonprofit associations which limit their benefits to $100, and which pay no salaries or fees to their officers, are exempt from the operation and effect of the other insurance laws of the state.[48] But under this act not more than 25% of the association funds can be used for operating expenses, while 75% must be held as a trust fund for the benefit of its members. For supervision, a nonsalaried board consisting of five members experienced in operating funeral homes and burial associations, is appointed by the governor for two-year terms. Until the recent repeal of its statute on the matter, Texas grouped burial associations with all life, health and accident companies whose funds are derived from assessments.[49] Kentucky specifically regulates associations in much the same manner as the other states discussed but imposes the very restrictive requirement that securities in the amount of $100,000 be deposited with the commissioner for the benefit of members.[50]

The problems of regulation of burial associations in Tennessee are both interesting and provocative. These problems arise from an exemption from state insurance laws granted by the legislature. "Nothing contained in this article shall be construed to affect or apply to . . . domestic lodges, orders or associations of a purely religious, charitable and beneficiary description, *which do not provide for a death benefit of more than $100.00.*"[51] This was first construed in *State* ex rel. *Reece v. Gooch*[52] in 1932. It was held that a voluntary association organized on the assessment plan with burial benefits limited to $100 was a benevolent society and came within the exemption from compliance with the insurance laws.[53] The question has arisen only twice subsequent to the *Gooch* case. In *State* ex rel. *Dist. Att'y Gen. v. Mutual Mortuary Ass'n,*[54] and *State* ex rel. *Reece v. Stout,*[55] it was held that associations of the type in the *Gooch* case were engaged in the life insurance

45. ILL. ANN. STAT. c. 73, §§ 950-963 (1936).
46. NEB. REV. STAT. §§ 21-1001 to 21-017 (1943).
47. VA. CODE ANN. §§ 38-143 to 38-158 (1950).
48. OKLA. STAT., tit. 36, §§ 771-775 (1941).
49. TEX. CIV. STAT. ANN. art. 5068-1, §§ 23, 24 (1925). (Repealed 1951).
50. KY. REV. STAT. ANN. §§ 303.090-303.990 (Baldwin 1943).
51. TENN. CODE ANN. § 6421 (Williams 1934) (italics added).
52. 165 Tenn. 97, 52 S.W.2d 143 (1932).
53. *Id.* at 101.
54. 166 Tenn. 260, 61 S.W.2d 664 (1933).
55. 17 Tenn. App. 10, 65 S.W.2d 827 (M.S. 1933).

business, and since the benefits they offered were not limited to $100 they were not exempt under section 6421.

The exemption granted in section 6421 was evidently a compromise by the Tennessee legislature. The definition of a contract of insurance is so broadly worded[56] that it would include almost every conceivable form or arrangement guaranteeing a burial at death. It was not desired completely to prohibit this type of insurance since it is socially desirable in the sense that it insures a decent funeral to people in the low income group at a comparatively low cost.

The exemption allowed in section 6421 being the only code provision concerning burial associations, the statutory law imposes no restrictions upon them other than the $100 limitation. There is no provision for registration with the commissioner of insurance, and the only authority granted the commissioner is that of section 6422 empowering him to require from any society such information as will enable him to determine whether a particular society is exempt.[57] These associations have been organized in all parts of the state. Undoubtedly there are many of whose existence the commissioner's office is unaware. It is the policy promptly to investigate all complaints against associations, whether made by individuals or discovered by field investigators; but until there is a reported violation the presumption is that of compliance with the law.

In 1931, when the exemption was written into law $100 was an adequate amount to purchase a decent funeral. But the exemption has not kept stride with the changed economic conditions so that today, in light of the inflated condition of our currency, $100 is hardly a sufficient amount to decently bury a person. This has led many undertakers, acting through the association device, to try to evade the $100 limitation by organizing one or more new associations, each offering $100 death benefits. Then the members of the old association are solicited to join the new association or associations, the inducement being that the memberships can be combined for a funeral worth two or three hundred dollars. This combination of death benefits has never been held to violate the exemption of section 6421; but the commissioner, charged with the administration of the exemption, has demanded factual disunity of burial associations offering this combination of benefits. Any circumstance tending to show that the associations are not in fact maintained as separate and distinct organizations has been declared to violate the spirit of section 6421. The most frequent violations of this administrative order include (1) soliciting new members in the same advertisements, (2) maintaining com-

56. TENN. CODE ANN. § 6085 (Williams 1934).
57. *Id.* § 6422.

mon office facilities, (3) billing assessments for two or more associations on the same statement, and (4) receiving payments of assessments for two or more associations at the same place. Whenever any one or a combination of the above is found to exist, pressure is immediately brought on the associations to discontinue the practices. The threat of withholding the exemption of section 6421 is usually sufficient to deter associations from continuing the practices. The paucity of reported cases concerning burial associations in Tennessee can be explained by the infrequent necessity for the commissioner to resort to the courts for an injunction.

IV. Aspects of the Contract

Since contracts guaranteeing a burial at death are by nature life insurance contracts, the rules of construction governing life policies are applied to burial contracts in most instances. For example, the insurer's contractual obligation has been held to run to the beneficiary, as in the case with life insurance, rather than to his administrator[58] or executor.[59] Also, concerning the effect of misrepresentations the rule applied to life policies applies equally to burial policies so that a misrepresentation, in fact false and material to the risk, avoids the policy even though made through mistake, or in good faith.[60] The doctrine of waiver has been held applicable to strike down an insurer's defense to a suit on a burial policy.[61] Although no cases have been found, it is likely that the law of warranties, so frequently resorted to in suits on life policies, will be applied to burial contracts. Again, a burial association may be held liable in tort to an applicant for the unreasonable delay in accepting or rejecting his application for membership just as some states impose liability upon life insurers under similar circumstances.[62]

However, there are certain problems found in burial insurance contracts which are not raised by the standard life insurance contract. These stem largely from the fact that burial contracts are payable in services rather than in money. Though this fact does not deprive the burial contract of its character

58. Jordan's Mutual Aid Ass'n v. Edwards, 232 Ala. 80, 166 So. 780 (1936).

59. *In re* Beidelman's Estate, 133 Atl. 873 (N.J. Orph. Ct. 1926).

60. Blanchard v. Jackson Funeral System Ass'n, 327 Ill. App. 290, 64 N.E.2d 201 (1945). *Contra:* Walters v. Reliance Industrial Life Ins. Co., 180 So. 880 (La. App. 1938).

61. Tarbutton v. First Nat. Life Ins. Co., 17 So.2d 365 (La. App. 1944).

62. Capitol Hill Burial Ass'n v. Oliver, 185 Okla. 261, 91 P.2d 673 (1939). The rationale of decisions holding the insurer liable in tort for not accepting or rejecting applications within a reasonable time is that the insurer, enjoying a state franchise, has a duty to process applications promptly. See, *e.g.*, Bekken v. Equitable Life Assurance Society, 70 N.D. 122, 293 N.W. 200 (1940); Great Northern Life Ins. Co. v. Scott, 181 Okla. 179, 72 P.2d 790 (1937); Dyer v. Missouri State Life Insurance Co., 132 Wash. 378, 232 Pac. 346 (1925). The law review material on this subject is voluminous. See, *e.g.*, Funk, *The Duty of an Insurer to Act Promptly on Applications*, 75 U. of Pa. L. Rev. 207 (1927); Prosser, *Delay in Acting on an Application for Insurance*, 3 U. of Chi. L. Rev. 39 (1935).

as a life insurance contract,[63] it does present some rather unique problems of construction. The services to be rendered upon the death of an insured are of such an emergency nature that the insurer is held to the highest degree of performance. In *Winders v. Co-operative Burial Ass'n*,[64] it was said: "There was an implied obligation of the most solemn character in this membership certificate that the deceased's body would be promptly removed from his home, after death, to a decent place where the bodies of the dead are prepared for burial, and that such be done efficiently and with no undue embarrassment or mortification to those in grief."[65] The court in this case held that the contract was breached when the defendant offered funeral arrangements involving an unreasonable delay. The amount of recovery was the cost to the plaintiff in securing a funeral with an undertaker other than the one designated by the association.

Several interesting cases have arisen from the fact that the insured died under such circumstances that it was impossible or impractical for the insurer to render the burial services required by the contract. The usual holding in cases of this nature is that the insurer is not relieved of its obligation by the impossibility but rather is held liable for the face amount of the policy in cash.[66] These decisions are often predicated on statutes which provide for cash payments of the contractual obligations in lieu of services.[67] However, it was held in a recent Texas case that where the certificate of membership provided that no cash would be paid if services were not accepted, the defendant fulfilled its obligation by tendering the services even though the member had been lost at sea and acceptance was impossible.[68] This result was

63. See note 14 *supra*.

64. 157 So. 320 (La. App. 1934).

65. *Id.* at 323.

66. Bruce v. Kilpatrick Life Ins. Co., 27 So.2d 634 (La. App. 1946); Mississippi Ben. Ass'n v. Majure, 201 Miss. 183, 29 So.2d 110 (1947); Guardian Burial Ass'n v. Rodgers, 163 S.W.2d 851 (Tex. Civ. App. 1942). "Liability cannot be avoided by defendant by the imposition of an impossible condition precedent to its discharge of said liability. The body of the unfortunate service man is somewhere in the depths of the ocean that engulfed it when the carrier sank therein. If the condition imposed in this case be tenable, then payment under all such policies may be avoided in cases presenting like facts. This is unthinkable." Bruce v. Kilpatrick Life Ins. Co., *supra* at 636.

67. See, *e.g.*, LA. GEN. STAT. ANN. § 4170.38(4) (1939). The Tennessee statute on this matter reads: "It shall be unlawful for any person, partnership, corporation, company, or any organization . . . to execute or issue a contract on the life of any person residing in this state, which provides that the death benefit, upon the insured's death, shall be settled by furnishing the deceased insured with burial or some part of such service, at a price named in said contract exceeding one hundred ($100.00) dollars, unless it is also stipulated therein that said death benefit may be paid in cash in a like amount as the maximum price named or expressed for the burial service or benefit in settlement of such contract, at the option of the representative of the deceased insured . . . and be it further provided, that nothing contained in this act shall be construed to apply to any organizations named in Section 6421 of the Code . . . or to any burial association which issued certificates for burial benefits not exceeding one hundred ($100.00) dollars in each case." TENN. CODE ANN. § 6459.74 (Supp. 1951).

68. Burleson Burial Ass'n v. Free, 176 S.W.2d 1021 (Tex. Civ. App. 1943).

reached in spite of the existence of a cash-in-lieu-of-services statute.[69] An analogous question is presented when the insured is buried in potter's field or at the expense of relatives because the insurer has refused to perform its contractual obligation. Recovery in these instances is not limited to the actual expense to the relatives,[70] or to what it would have cost the insurer to furnish the burial,[71] but is for face amount of the policy. The situation has not arisen in reported cases where the relatives of the insured, not knowing he holds membership in an association, buries him at their own expense, and then later sue to recover on the membership certificate. If recovery is allowed, it will be an extension beyond which the courts have gone thus far. Standard life insurance policies provide for a stated period after death within which the insurer must be notified. Since this period in burial policies is necessarily so short, it is not unlikely that the courts will impose liability even though notice was not given the insurer before the insured was buried.

V. Conclusion

Burial insurance furnishes a means by which persons in the low income group can be assured of a decent burial at a comparatively low cost. When properly regulated and supervised it performs a very useful social function. However, when ignored or unattended, the association device may become an instrument of public abuse in the hands of those seeking the personal profit to be gained. That a contract guaranteeing a funeral at death is a form of life insurance is too well settled by logic and decision for there to be a serious contention otherwise. Consequently, unless the legislature has provided for specific regulation, the courts will make a blanket application of the general life insurance statutes, which impose standards much higher than burial associations are able to meet. Thus the financially sound and conscientious associations are driven out of business, leaving the fly-by-night and depredatory organizations, with the result that many people are denied this type of insurance, particularly in rural areas where the regularly organized insurers have not sought this business for one reason or another.

It is apparent that the means by which desirable aspects of burial associations can be retained, while at the same time insuring protection of the public from abuses, lies in the hands of state legislatures. Specific statutes recognizing and regulating this business as a distinct form of life insurance are needed. Statutes designed to regulate life insurance companies should not be

69. Tex. Rev. Civ. Stat. Ann. art. 5068-1, § 24 (1940). (Repealed 1951).

70. Jefferson County Burial Soc. v. Curry, 237 Ala. 548, 187 So. 723 (1939); Walters v. Reliance Industrial Life Ins. Co., 180 So. 880 (La. App. 1938). *See* Clegg v. Johnson, 164 Miss. 888, 143 So. 848, 850 (1932).

71. Allen v. Enterprise Benevolent & Burial Ass'n, 159 So. 127 (La. App. 1935)