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Notes and Comments

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Admiralty—Federal Limitation of Liability Act v. State "Direct Action" Statute

In 1851 Congress amended the law of admiralty of the United States by the enactment of the Limitation of Liability Act[1] by which, in general, the liability of shipowners for loss or injury resulting from marine accidents is limited by the value of the interest of the owner in the ship. Prior to 1851 the rule of American law had been that the shipowner's liability was limited only by the amount of the loss or by his ability to pay the damages.[2] The United States was the last of the principal western maritime powers to abandon the rule of unlimited liability. While that rule had been part of the general English admiralty law (whence it came into American law), England had, by a series of acts of Parliament beginning in 1734, adopted the principle of limitation.[3] On the continent the rule of limited liability had, beginning with the Code Napoléon, become an established part of the civil codes of all maritime countries by the close of the Napoleonic era.[4] Thus, had Congress failed to act, American shipowners, required to bear the entire burden of the cost of disasters at sea, would have been at a fatal disadvantage in competition with foreign powers for the privilege of carrying the waterborne commerce of the world.

The provisions of the act of 1851, so far as they are pertinent to this discussion, have been amended only in minor particulars (with the single exception noted below), and are now found as §§ 183 (a), 185 and 186 of the United States Code.[5] Briefly, the act provides that the

[1] Act Mar. 3, 1851, ch. 43, 9 STAT. 635.

[2] Stinson v. Wyman, 23 Fed. Cas. 108 (D. Me. 1841). "The common law, as well as the civil law, holds the owners responsible for all the obligations of the master, to their full extent, whether they result from contract or tort." *Id.* at 109.

[3] English admiralty law was largely based on the Laws of Oléron, an early codification of the law of the sea taking its name from Ile d'Oléron, off the coast of France. This code was published first in France in 1485, and was translated into English during the reign of Henry VIII. The Laws of Oléron did not recognize the principle of limited liability. See 4 BENEDICT, THE LAW OF AMERICAN ADMIRALTY 352 (6th Ed. 1940-41).

[4] The law of admiralty of continental countries was founded on the Consolato del Mare, a code which was probably of Spanish origin and which was first published in Barcelona in 1494. See 4 BENEDICT, THE LAW OF AMERICAN ADMIRALTY 353 (6th Ed. 1940-41). For a comprehensive review of the history of the rule of limited liability, see The Rebecca, 20 Fed. Cas. 373 (D. Me. 1831).

[5] 46 U. S. C. §§ 183 (a), 185, 186 (1952): "183 (a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed

liability of the shipowner for loss or injury may be limited by the value of his interest in the ship and in the revenue from such freight as may be involved in the voyage, provided that the loss or injury has occurred without his knowledge or privity. Limitation proceedings in a federal district court are authorized, to which shall be summoned all claimants, and in which the owner is required to make available to the claimants, pursuant to court order, the value of his interest in the ship and freight, whereupon the court may enjoin all other actions against the owner based on the same accident. Should the court, in this proceeding, find knowledge or privity on the part of the owner, the petition for limitation will be dismissed. Otherwise, the court causes the interest of the owner in ship and freight to be appraised and the claims of claimants proved and evaluated. If the aggregate amount of the allowable claims is not in excess of the value of the owner's interest, each claimant receives his claim in full. If the owner's interest is less than the total of the claims allowed, each claimant receives a share pro rata.[6]

The constitutionality of the act was early established and has been consistently upheld over the years.[7]

Since 1886 the act has applied to every type of vessel whenever it is operating on navigable water.[8] While the act does not so state in terms,

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the amount or value of the interest of such owner in such vessel and her freight then pending.

185. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

186. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

[6] See Admiralty Rules of the Supreme Court, Rules 51-55.

[7] Wattson & Sons v. Marks *et al.*, 2 Am. Law Reg. 157 (E. D. Pa. 1853); Lord v. Steamship Co., 102 U. S. 541 (1880); Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578 (1883); Butler v. Boston S. S. Co., 130 U. S. 527 (1889); *In re* Garnett, 141 U. S. 1 (1891).

[8] As originally passed, it was provided that the act should not apply "to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." An act of 1886 (c. 421, § 4) substituted the following provision: "The provisions of the six preceding sections . . . shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." 24 STAT. 80, 46 U. S. C. § 188 (1952).

it has been held to apply to cases of personal injury or death as well as to injury to or loss of property.[9] The interest of the owner in the ship is measured by the value of the ship at the end of the voyage, after the accident, even though the voyage ends in sinking, with resultant total loss; furthermore, the owner is not required to account in the limitation proceeding for the value or proceeds of any insurance he may have carried on the vessel.[10]

It is evident that the Limitation of Liability Act gives the shipowner a pronounced advantage over the claimant for damages, including, of course, the personal injury and wrongful death claimant. The reason for that advantage was initially, and remains, established national policy to encourge and protect investment in the shipping industry. That policy is founded on the convction, long widely held, that a flourishing merchant marine is both a vital element of national defense and an essential accessory to peace-time prosperity.[11] But whatever the purpose has been, the practical effect of the limitation act is to promote the interest of the owner-defendant in a damage suit.

In marked contrast to the purpose of the federal act limiting the liability of shipowners, there began, some forty years ago, a movement on the part of state legislatures to provide statutory protection for plaintiffs in damage actions for personal injury or wrongful death.[12] One of the most comprehensive of these laws was the so-called "direct action" statute of Louisiana, enacted in 1930. This act provided that, regardless of contract provisions to the contrary, the plaintiff in a personal in-

[9] Butler v. Boston S. S. Co., 130 U. S. 527 (1889).

[10] These rules were laid down first by the district court in Wattson & Sons v. Marks *et al.*, 2 Am. Law Reg. 157 (E. D. Pa. 1853). In respect to the time when the value of the vessel was to be taken, the court reasoned that the owner, in the limitation proceeding, was required to make available to the court his interest in the vessel, and he could not then make available more than he had. If the vessel were a total loss, the owner's interest, and his consequent liability, would be reduced to zero. In reference to the problem of insurance, the court said: "The policy of insurance is a distinct independent subject of property. No equity attaches upon the proceeds of it in favor of third persons unless there be some contract, agreement, or trust, to that effect. . . . The assignment of a ship passes no interest in an outstanding policy. . . ." *Id.* at 167.

The same conclusions were later arrived at by the Supreme Court. In respect to the rule that the value of the ship is to be measured after the accident: Norwich Co. v. Wright, 13 Wall. (80 U. S.) 104 (1871); The Scotland, 105 U. S. 24 (1881). In respect to the rule that the owner need not account for insurance proceeds: Place v. Norwich & N. Y. Transportation Co., 118 U. S. 468 (1886).

[11] See MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY, ch. I (Boston, Little, Brown & Co., 1895).

[12] Massachusetts led the way in 1914 by passing a statute which permitted recovery by the injured plaintiff from the liability insurance carrier of the tort-feasor, in case a judgment against the latter should be unsatisfied by reason of insolvency or bankruptcy, notwithstanding a clause in the contract making the insurer liable only for damages actually paid by the insured. Mass. Acts 1914, c. 464, §§ 1, 2; MASS. GEN. LAWS c. 175, §§ 112, 113; c. 214, § 3 (10) (1932). For a review of state legislation in this field, *see Legislation: Legislative Efforts to Make Insurance Guarantee the Payment of Tort Claims,* 46 HARV. L. REV. 1325; also *Leigh, Direct Actions Against Liability Insurers,* INS. LAW J. 1949, p. 633.

jury or wrongful death action might, at his option, sue the insurance carrier of the alleged tort-feasor directly. The law was amended in 1950 to include liability contracts written by foreign insurance companies and issued outside the state.[13] As originally passed, the act was held to be constitutional by the Circuit Court of Appeals in 1931,[14] and as amended, by the Supreme Court in 1954.[15]

The theory underlying this legislation has been judicially declared to be that a policy of liability insurance is issued primarily for the benefit of the public, not for the protection of the insured.[16] In any individual action, the public obviously means the injured plaintiff. In addition to giving the judgment creditor an action against the insurer of the insolvent or bankrupt tort-feasor (now a feature of the legislation of almost every state), the Louisiana statute reverses the general rule of the American law of evidence to the effect that testimony tending to show that the defendant in a damage action is or is not insured is not admissible.[17] Of course, the effectiveness of this rule is frequently nullified by permissible questions to jurors as to their connections with insurance companies, thus establishing the inference that an insurance carrier is concerned in the case.[18] Indeed, judicial notice has been taken of the fact that jurors will assume that a defendant is insured.[19] The Louisiana statute replaces indirection and inference with direct

[13] As amended the act now appears as LA. REV. STAT. 22: 655 and 983(E) (1950). "655. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy. . . . The injured person or his or her heirs, at their option, shall have the right of direct action against the insurer within the terms and limits of the policy . . . , and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written and delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. . .

983 (E). No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this Title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. . . ."

[14] Hudson v. Georgia Casualty Co., 57 F. 2d 757 (W. D. La. 1932).

[15] Watson v. Employers Liability Assurance Corp., 348 U. S. 66 (1954).

[16] West v. Monroe Bakery, Inc., 217 La. 189, 46 So. 2d 122 (1950); Davies v. Consolidated Underwriters, 199 La. 459, 6 So. 2d 351 (1942).

[17] Graves v. Harrington, 177 Okla. 448, 60 P. 2d 622 (1936); Kaplan *et al.* v. Loev, 327 Pa. 465, 194 Atl. 653 (1937); McLaughlin v. Shelton Auto Transportation Co., 139 Wash. 253, 246 Pac. 575 (1926). See also Beghtol, *The Present Rule Against Disclosure of Insurance*. 15 NEB. L. BULL. 327 (1936-37).

[18] See Annotation, 105 A. L. R. 1319 (1936), and cases cited thereunder.

[19] Brown v. Walter, 62 F. 2d 798 (2d Cir. 1933); Takoma Park Bank v. Abbott, 179 Md. 249, 19 Atl. 2d 169 (1941); Odegard v. Connolly, 211 Minn. 342, 1 N. W. 2d 137 (1941).

and open evidence of insurance. Thus, in theory at least, the balance is in part adjusted between the impecunious and inexperienced plaintiff and the wealthy corporate defendant with an imposing array of legal talent at his call.

In Louisiana, with one of the important seaports of the country, and many miles of navigable rivers, conflict between the direct action statute of the state and the limitation of liability act of the United States was almost inevitable. The conflict came about in 1951. In the previous year the towboat, *Jane Smith,* plying on the Atchafalaya River, had struck the abutment of a bridge, capsized and sunk. Five members of the crew were drowned. The owner and charterer[20] were covered by public liability insurance in the aggregate amount of $180,000.[21] Limitation proceedings were begun by the owner and charterer in the federal district court of Louisiana, and in the same court at the same time the representatives of the seamen who had lost their lives began a consolidated action for damages against the insurance carriers under the direct action statute.[22]

The issues may be summarized (1) from the standpoint of the owner and charterer, who, while not parties in the direct action, were vitally interested in the outcome; (2) from the standpoint of the insurance carriers; and (3) from the standpoint of the plaintiffs.

(1) It is evident that the owner and charterer purchased insurance not to protect their employees or the families of deceased employees (whatever the theory of liability insurance may be), but to protect themselves against liability in the event of an accident such as the one which actually occurred; that they assumed that, absent their knowledge or privity, their liability would be limited to the value of the vessel, and that, therefore, the total insurance coverage need not exceed that value; and that, since in the actual case the aggregate of the death claims exceeded $600,000, there was every likelihood that if the direct action against the insurance carriers was permitted to proceed to judgment, the whole of the insurance fund would be exhausted in satisfying such judgment, so that in the limitation proceeding they would be denied the insurance protection which they thought they had and for which they had paid.

(2) In the direct action the insurers contended that the direct action

[20] Neither owner nor charterer was a party to the direct action in this case; they are identified only by the fact that both were citizens of the state of Louisiana.

[21] Maryland Casualty Co. had issued an employers' liability policy to the charterer alone in the amount of $10,000; the Home Insurance Co. had issued a "protection and indemnity" policy in the amount of $170,000, in which both the owner and charterer were named.

[22] Cushing v. Texas & Pacific Railway Co. *et al.,* 99 F. Supp. 681 (E. D. La. 1951). The named defendant was the owner of the bridge; its interests are not discussed in any of the opinions handed down in the case.

statute did not apply to policies of marine insurance; that even if it did so apply, it would be inoperative in this case as in conflict with the federal limitation of liability act, and thus an infringement upon the exclusive admiralty jurisdiction of the United States.

(3) The plaintiffs insisted that the direct action statute was primarily a regulation of the business of insurance, enacted by the state in conformity with authority specifically conferred by the McCarran Act;[23] that the purpose of liability insurance was to protect the public, and that the direct action statute, in giving effect to that purpose, merely gave an added remedy to the injured parties, without affecting the uniformity of substantive admiralty law or the rights of shipowners under that law. It was pointed out that state legislation dealing, directly or indirectly, with a variety of admiralty matters had been upheld by the Supreme Court,[24] and that the Louisiana statute should not be denied application because of its incidental effect upon the remedies of parties in an admiralty case.

The district court rendered summary judgment for the defendants and dismissed the action. The judgment was based on the conclusion that the direct action statute did not apply to policies of marine in-

[23] 15 U. S. C. §§ 1011, 1012 (1952). "1011. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
1012 (a). The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
(b). No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."
This statute was passed to counteract the decision in United States v. South-Eastern Underwriters Association, 322 U. S. 533 (1944), in which it was held that the business of insurance was commerce within the meaning of the commerce clause of the federal Constitution, and that therefore, insofar as the insurance business crossed state lines it was within the regulatory power of Congress.

[24] 1 BENEDICT, THE LAW OF AMERICAN ADMIRALTY 79 (6th Ed. 1940-41). "In the absence of Congressional legislation, State legislation has been regarded in a wide variety of instances as effective to create rights, to establish principles of liability and even to create liens *in rem* enforceable in admiralty though not enforceable in State courts, which may not appropriate the distinctive character and effect of an admiralty proceeding *in rem*." Among the instances referred to are:
a. Right of action for death by wrongful act committed on navigable water: Steamboat Co. v. Chase, 16 Wall. (83 U. S.) 522 (1872); Sherlock v. Alling, 93 U. S. 99 (1876).
b. Municipal ordinances and local regulations respecting wharfage charges: Keokuk Packet Co. v. Keokuk, 95 U. S. 80 (1877); Parkersburg & Ohio River Transportation Co. v. Parkersburg, 107 U. S. 691 (1882); Ouachita Packet Co. v. Aiken, 121 U. S. 444 (1886).
c. Harbor pilotage regulations: Cooley v. Board of Wardens, 12 How. (53 U. S.) 299 (1851); Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (69 U. S.) 450 (1864).
d. Inspection and quarantine laws: Morgan's S. S. Co. v. Louisiana Board of Health, 118 U. S. 455 (1885); Compagnie Française etc. v. State Board of Health, 186 U. S. 380 (1901).

surance,[25] and that if the state law were applied the rights of the owners would be so materially affected through the substantial denial of the proceeds of insurance that the purpose of Congress in passing the limitation act would be frustrated. The conclusion was that the state law interfered with a substantive admiralty right and was therefore inapplicable.

The Court of Appeals reversed.[26] That court held that since the state law was remedial it should be construed liberally, and that while the law made no specific reference to marine insurance it was proper to presume that the legislature intended to include all types of liability contracts. The court also relied on the provision of the United States Code conferring admiralty jurisdiction upon district courts in "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[27] On this point the court conceded that the state may not legislate in the field of substantive admiralty law, but insisted that the state had concurrent jurisdiction in respect to the "other remedies" referred to in the Code. "In no case has this court held void a state statute which neither modified the substantive maritime law nor dealt with the remedies enforceable in admiralty."[28] Finally, the court asserted that the federal act did not relate to the business of insurance, and that while it precluded injured parties from pursuing other remedies against the owner, it interposed no bar to the pursuit of legally permitted remedies against others.

The Supreme Court granted certiorari.[29] The decision of the Court[30] in this case is interesting, not only because of the judgment finally arrived at, but because of the method by which the Court reached its result. There were two opposing opinions, one written by Mr. Justice Frankfurter, with the concurrence of Mr. Justice Burton, Mr. Justice Jackson, and Mr. Justice Reed; the other by Mr. Justice Black, joined by the Chief Justice, Mr. Justice Douglas and Mr. Justice Minton. The Court was thus arrayed with four members on one side and four on the other. Mr. Justice Clark wrote a separate opinion, concurring in part,

[25] The direct action statute refers specifically to policies or contracts of liability insurance. Liability and "maritime protection and indemnity insurance" are defined in separate sections of the insurance code (LA. REV. STAT. 22:6 (4) and (13) (e) (1950). The court argued that since the legislature had differentiated liability from maritime insurance at one place in the Code, and in another had referred only to liability insurance, it must be presumed that in the latter instance it was the intention of the legislature to omit maritime insurance.

[26] Cushing *et al.* v. Maryland Casualty Co. *et al.*, 198 F. 2d 536 (5th Cir. 1952).

[27] 28 U. S. C. § 1333 (1952).

[28] 198 F. 2d 536, 538. In referring to "remedies enforceable in admiralty" the court has in mind characteristic admiralty proceedings *in rem* against the ship. Such proceedings are within the exclusive jurisdiction of the federal courts. The Moses Taylor, 4 Wall. (71 U. S.) 411 (1866).

[29] 345 U. S. 902 (1953).

[30] Maryland Casualty Co. *et al.* v. Cushing *et al.*, 347 U. S. 409 (1954).

but dissenting in important particulars from the opinion of Mr. Justice Frankfurter. The latter justice and his colleagues accepted the divergent views of Mr. Justice Clark in order "to break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation. . . ."[31] This is certainly one of the rare instances, if, indeed, it is not the only instance, in which the process of arriving at a prevailing opinion, normally conducted by the Court in the privacy of the conference room, has been spread upon the record.

Mr. Justice Frankfurther would have reversed the Court of Appeals and reinstated the judgment of the district court. In his view, the McCarran Act could not be relied upon as a source of new state power, because the purpose of that Act was not to confer new power, but to confirm power already vested. In discussing the effect of the direct action statute upon the limitation act, great stress was laid on the function of the latter act in assembling at one time in a single forum all those with claims against the shipowner. To quote the opinion:

> "Direct actions against the liability underwriter of the shipowner or charterer would detract from the benefit of a *concursus* and undermine the operation of the congressional scheme for the 'complete and just disposition of a many-cornered controversy.'[32] * * * The ship's company would be subject to call as witnesses in more than one proceeding, perhaps in diverse forums. Conflicting judgments might result. Ultimate recoveries might vary from the proportions contemplated by the statute. Moreover it is important to bear in mind that the *concursus* is not solely for the benefit of the shipowner. The elaborate notice provisions of the Admiralty Rules are designed to protect injured claimants. They ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages. To permit direct actions to drain away part or all of the insurance proceeds prejudices the rights of those victims who rely, and have every reason to rely, on the limitation proceeding to present their claims."[33]

The opinion expressed an equally positive conviction that the direct action statute was in fatal conflict with the limitation act because of the possible effect of the former on the insurance rights of the owner. It was assumed that the value of the ship would be found to be $25,000, "the amount for which we are advised a stipulation has been filed in

[31] *Id.* at 423.
[32] The quotation is from Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U. S. 207, 216 (1926).
[33] 347 U. S. 409, 416, 417.

the limitation proceeding."[34] Should that prove to be the final figure, the owner's insurance would be adequate to indemnify him for the loss. This protection the direct action statute may well operate to destroy. The opinion said:

> "Thus, to permit direct actions under the State statute would require that shipowners become self-insurers for liability risks in order to be sure of getting the full protection of the limitation legislation. In view of the fact that 'substantially all marine risks are insured,'[35] . . . this sort of qualification would be completely inconsistent with the Limitation Act."[36]

As to the proper canons of construction of state legislation, this was said:

> "Of course, wholly apart from the respect to be accorded State legislation, this Court would be slow to find that even where Congress has exercised its legislative power it has not left room for State action. * * * But where, as in this case, the evident design of Congress can only be carried out by barring State action, it must be barred."[37]

As to the effect of the state law upon the uniformity of federal admiralty law, the position was stated as follows:

> "Of course, liability underwriters are not entitled to 'limitation of liability' as that phrase is used as a term of art in admiralty. To state the issue in these terms is to misconceive it. The question is whether the Court is to disregard the effect of a direct action on the federal proceedings. The Louisiana statute, as applied to authorize suits against the insurers of shipowners and charterers who have instituted limitation proceedings, is a disturbing intrusion by a State on the harmony and uniformity of one aspect of maritime law. It is accentuated by the fact that the federal law involved is not a more or less ill-defined area of maritime common law, incursion upon which need not be here considered, but an Act of Congress, well-defined and consciously designed, with detailed rules for its execution established by this Court."[38]

It will be noted that the opinion did not refer to the fact that here liability insurance was involved, whereas in the leading case holding

[34] *Id.* at 418.
[35] The quotation is from Keen v. Overseas Tankship Corp., 194 F. 2d 515, 518 (2d Cir. 1952).
[36] 347 U. S. 409, 419.
[37] *Id.* at 420.
[38] *Id.* at 421, 422.

that insurance need not be accounted for by the owner, the coverage in issue was hull insurance.[39] Mr. Justice Frankfurter apparently viewed the distinction as one not worthy of discussion. The district judge had referred to the point, but it was held by him to be immaterial.[40]

The opinion evidently gave some weight to the possibility that the effect of the direct action statute would be to increase liability insurance rates to shipowners. The dissenting opinion of Mr. Justice Black properly disposes of this point by noting that it was not the purpose of the limitation act "to impose a ceiling on premiums."[41] The question of the cost of insurance protection does not seem to be relevant to the legal issue.

Mr. Justice Black's opinion was, in important particulars, curiously unrelated to the other opinions in the case. Almost half of the opinion was devoted to the argument that the direct action statute was not unconsitutional. Mr. Justice Frankfurter had not referred to the question of constitutionality; by inference the statute was assumed to be valid except as to admiralty cases such as the one at bar.[42]

There was also revealed a strange misunderstanding as between Mr. Justice Black and Mr. Justice Frankfurter as to the probable value of the vessel. As noted, *supra,* p. 471, Mr. Justice Frankfurter assumed that the value of the vessel would be $25,000. But in rejecting the argument that the direct action statute would be inoperative because it would deprive the owners of the benefit of their insurance, Mr. Justice Black had this to say:

> "It was conceded at the bar, however, that the ship here is without value—a total loss. If this is true, there would be no fund in the limitation proceedings and no possibility of any recovery at all against the shipowner. Under these circumstances, the shipowner does not stand to lose a dime if the insurance companies are held liable for the full amount of their policies, and there is no reason for deferring trial of these lawsuits."[43]

Obviously, the value of the vessel in this particular instance can have no proper bearing upon the legal issue involved, whichever one of the learned justices was right. The legal question was clearly joined, however, when Mr. Justice Black insisted that neither the Congress in passing the limitation act nor the courts in construing it ever intended

[39] Place v. Norwich & N. Y. Transportation Co., 118 U. S. 468 (1886).
[40] 99 F. Supp. 681 (E. D. La. 1951).
[41] 347 U. S. 409, 435.
[42] In Watson v. Employers' Liability Assurance Corp., 348 U. S. 66 (1954), decided eight months later than the principal case, Mr. Justice Black wrote the leading opinion of a unanimous Court affirming the constitutionality of the Louisiana statute. Mr. Justice Frankfurter wrote a concurring opinion.
[43] 347 U. S. 409, 433, 434.

to give the shipowner the benefit of liability insurance. The following excerpt is pertinent to this point:

> "There is a vital difference between liability insurance and hull insurance with which The City of Norwich[44] dealt. The latter provides recovery for loss of the shipowner's property. But liability insurance is not bought to guarantee reimbursement for loss of a shipowner's property. Its purpose is to pay for damage done to others by the shipowner or his agents. The shipowner has an insurable 'interest' in his ship; if it is lost or damaged any insurance money collected is his own. I cannot believe he has an insurable 'interest' in his seamen which could possibly entitle him to reduce the already limited financial obligations the Act imposes by taking for himself insurance money which otherwise would go to compensate seamen or their families for injuries he inflicts. . . . It is a far cry from the decision in The City of Norwich that a shipowner is entitled to keep the insurance collected for loss of his ship to today's holding that states cannot assure seamen that they instead of the shipowner can get the full benefit of liability policies bought in order to pay their just claims for injuries caused by the ship."[45]

It is obvious that Mr. Justice Black assumed that liability insurance is, in fact, and is intended by the shipowner to be, for the benefit of seamen. It is also probable that the argument was based in part on the doctrine that the seaman is the "ward of admiralty" and entitled to the special and peculiar protection of the Court.[46] Whatever view one accepts in this particular case, it must be conceded that the effect of Mr. Justice Frankfurter's position in respect to liability insurance has resulted in a marked expansion of the insurance doctrine in limitation cases.

The final point made by Mr. Justice Black was that the McCarran Act substantially commands the application of the Louisiana statute. On this point he said:

> "Courts are pointedly told [by the McCarran Act] to leave states free to regulate 'the business of insurance' in the absence of some congressional act that 'specifically relates' to the same subject. The 'business of insurance' includes maritime insurance and by no stretch of the imagination can it be said that the 1851 Act 'specifically relates' to insurance. Thus the unambiguous

[44] 118 U. S. 468 (1886).
[45] 347 U. S. 409, 434, 435.
[46] See Mr. Justice Black's opinion in Garrett v. Moore-McCormack Co., Inc. *et al.*, 317 U. S. 239 (1942).

> language of the McCarran Act forbids courts to construe federal statutes such as the Limited Liability Act so as to impair a state law like Louisiana's. . . . I would not disregard its mandate."[47]

But surely since the McCarran Act was passed for the specific purpose of preventing possible conflict between the states and the federal government in the field of insurance regulation, it would be an unwarranted expansion of the meaning of the Act to hold that it mandates the courts to sustain state insurance statutes which conflict with federal admiralty jurisdiction.

It was Mr. Justice Clark who single-handedly made it possible for the Court to render a judgment. In his opinion he agreed with Mr. Justice Frankfurter that the direct action may not be permitted to interfere with the progress of the limitation proceeding. But he argued that, upon conclusion of the limitation proceeding, in which the claims of the plaintiffs would be filed and proved, and the extent of the liability of the owner and charterer determined, thus fixing the liability of the insurers to owner and charterer, the direct action should then be allowed to proceed against the insurers. Thus, if damages should be awarded in the latter action, there would be available for their satisfaction the balance of the insurance fund, not required to reimburse the owner and charterer.[48] Mr. Justice Frankfurter and his associates adopted as their own the solution of Mr. Justice Clark, who proposed that the district court be directed "to first conclude the limitation proceeding, after which the liability, if any, of the petitioners on their policies in the direct actions could be determined."[49]

This judgment established the shipowner as the preferred claimant on the insurance fund; so long as his liability is less than the liability of the inurer he will emerge without loss. But the injured plaintiffs will not be wholly without redress if there is a balance of unused insurance. Certainly in the case of any major disaster, with material damage to, or loss of, the ship, the chance that the liability of the shipowner would exhaust the insurance fund is not as great as that the damage actions would do so. Hence the likelihood that some recovery would be available to the damage claimants is by no means inconsiderable.

The insurers can interpose no legal objection to this solution. It is not their liability that is limited by the limitation proceeding. As Mr. Justice Frankfurter pointed out, "limitation of liability" is a phrase

[47] 347 U. S. 409, 437.

[48] The principle set out in Mr. Justice Clark's opinion was stated by Circuit Judge Rives, who, after concurring in the original decision of the Court of Appeals, 198 F. 2d 536 (5th Cir. 1952), changed his mind and dissented from the decision denying a re-hearing, 198 F. 2d 1021 (5th Cir. 1952).

[49] 347 U. S. 409, 427.

of art in admiralty (*supra,* p. 472), and operates solely for the benefit of the owner, not of his insurance carrier.

The result of this particular contest between plaintiff and defendant in the arena of personal injury and death actions was an unquestioned victory for the defendant-owner, but a limited measure of success was reserved also for the plaintiff. It was an example of reasoned judicial compromise, supported by the weight of both legal principal and common sense. This can be said in spite of the almost fortuitous manner in which the conclusion was reached.

As a practical matter, whatever advantage remains to the plaintiffs, it may well be short-lived. If, as suggested, marine liability insurance rates are increased, shipowners may decide to be self-insurers so far as their public liability is concerned, on the theory that they can normally make sure that they are free of the taint of "knowledge or privity." In that case insurance on the hull would fully protect them in any limitation proceeding, and even Mr. Justice Black has said that hull insurance belongs to the owner, not to the damage claimants. It is, of course, too early to say whether such a trend will develop in practice.

MILTON E. LOOMIS.

Appeal and Error—Excluded Evidence on Cross-examination—Preservation for Appeal

It is a generally accepted rule that an exception to a ruling of a trial court, complaining of an erroneous refusal to allow a witness to answer a question, will not be considered on appeal where the record does not set out what the answer of the witness would have been if he had been permitted to testify, or what the interrogating counsel expected to elicit or prove by the question asked.[1] The reasons for the

[1] Bridges v. Harold L. Schaefer, Inc., 207 Ark. 122, 179 S. W. 2d 176 (1944); Swearingen v. Dill, 21 Cal. App. 2d 151, 68 P. 2d 388 (1937); Read v. Micek, 105 Colo. 35, 94 P. 2d 452 (1939); Gilpin v. State Highway Board, 39 Ga. App. 238, 146 S. E. 651 (1929); Whyte v. Rogers, 303 Ill. App. 115, 24 N. E. 2d 745 (1940); Pearson v. Butts, 224 Iowa 376, 276 N. W. 65 (1937); Greenway Wood Heel Co. v. John Shea Co., 313 Mass. 177, 46 N. W. 2d 746 (1943); Anderson v. Anderson, 158 Miss. 116, 130 So. 91 (1930); State *ex rel.* State Highway Commission v. Baumhoff, 230 Mo. App., 1030, 93 S. W. 2d 104 (1936); Gugelman v. Kansas City Life Insurance Co., 137 Neb. 411, 289 N. W. 842 (1940); Whiteheart v. Grubbs, 232 N. C. 236, 60 S. E. 2d 101 (1950); Carolina Coach Co. v. Central Motor Lines, 229 N. C. 650, 50 S. E. 2d 909 (1948); Newbern v. Hinton, 190 N. C. 108, 111, 129 S. E. 181, 183 (1925) ("We are precluded from passing upon the merits of the defendant's objections to the evidence, since the record does not disclose what the witnesses would have said if the questions had been allowed. The burden is on the appellant to show error, and, therefore, the record *must show* the competency and materiality of the proposed evidence. This Court will not do the vain thing to send a case back for a new trial when it does not appear what the excluded evidence is, or even that the witnesses would respond to the questions in any way material to the issues. This is the established practice in this Court, in both civil and criminal cases."); Wallace v. Barlow, 165 N. C. 676,

rule are obvious. Unless such information is entered into the record at the time, the trial court cannot tell how to rule on the objection to the question propounded to the witness,[2] nor can the appellate court ascertain the competency or materiality of the proposed testimony. If on appeal it is found that the objection to the question was erroneously sustained, the appellate court will be unable to determine if the exclusion of the testimony was prejudicial, justifying a reversal, for the simple reason that the court will not have the rejected testimony before it to see if such testimony would have been favorable or unfavorable to the excepting party.[3]

Undoubtedly the general rule applies where a question is asked on direct examination of a friendly witness.[4] However, the matter of preservation in the record of excluded testimony for purposes of appeal presents problems when the answers are excluded on cross-examination of an adversary's witness or examination of a hostile witness. Should the general rule requiring that rejected evidence be perserved in the record be applied in such situations?

Perhaps the most frequently employed method of preserving the excluded testimony is for the excepting counsel to state to the court, out of the hearing of the jury, the expected answer of the witness.[5]

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81 S. E. 924 (1914); Steeley v. Dare Lumber Co., 165 N. C. 27, 80 S. E. 963 (1914); *In re* Smith's Will, 163 N. C. 464, 79 S. E. 977 (1913); Dickerson v. Dail, 159 N. C. 541, 75 S. E. 803 (1912); Stout v. V. C., S. & E. P. Turnpike Co., 157 N. C. 366, 72 S. E. 993 (1911); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911); Whitmire v. Heath, 155 N. C. 304, 71 S. E. 313 (1911); Boney v. Atlantic Coast Line R. Co., 155 N. C. 95, 71 S. E. 87 (1911); Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629 (1895); Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900); 4 C. J. S., *Appeal and Error* § 291 (b) (1) n. 44 (1937); 4 C. J., *Appeal and Error* § 1662 n. 14 (1916); 3 C. J., *Appeal and Error* § 736 (bb) n. 53 (1916); 1 WIGMORE, EVIDENCE § 20 n. 6 (3d ed. 1940); Blume, *The Problem of Preserving Excluded Evidence in the Appellate Record*, 13 MINN. L. REV. 169 (1929).

[2] Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (1903).

[3] Newbern v. Hinton, 190 N. C. 108, 129 S. E. 181 (1925); State v. Lane, 166 N. C. 333, 337, 81 S. E. 620, 622 (1914) ("We must know what the answer would have been before we can pass upon the competency or relevancy of the evidence."); Steeley v. Dare Lumber Co., 165 N. C. 27, 80 S. E. 963 (1914); Allred v. Kirkman, 160 N. C. 392, 393, 76 S. E. 244 (1912) ("We must be governed by the record in such case, and as it appears from it that the question was not answered, there is no ground for the exception, an unanswered question not being objectionable."); Whitmire v. Heath, 155 N. C. 304, 306, 71 S. E. 313, 314 (1911) ("A court can never pass intelligently upon the evidence unless it knows what the evidence is, in order that its bearing upon the issue may be determined.").

[4] See note 1 *supra*.

[5] "But ordinarily the exclusion of oral testimony can be made available as error only by asking some pertinent question, and, if an objection is sustained, informing the Court at the time what the answer would be, so that he can then determine whether the fact is or is not material. It will not do to state thereafter what the witness would have answered. . . . If a new trial should be granted because the answer was excluded, it might happen that on the second trial the question would be again propounded, allowed, and the witness give hearsay, inadmissible, or irrelevant testimony, or the answer might be harmful instead of helpful, or the witness may reply, 'I do not know,' with the result that the time

When this method is employed, the trial court must rely on the good faith of the interrogating counsel.[6] It is readily apparent that the interrogating counsel cannot state as fully what the answer would have been had the witness been allowed to testify where the question is asked to an adverse or hostile witness, as he could if he were examining a friendly witness introduced by himself.[7] Counsel does not always know on cross-examination what he expects to elicit from the witness in response to a particular question, since by its very nature, cross-examination is often exploratory.[8] Some courts have said that the application of the general rule where a question is asked on cross-examination or examination of a hostile witness requires counsel to hazard a guess as to the probable answer of the witness or to deal with the court unfairly.[9]

Another reason advanced by some courts for allowing an exception to the general rule in the case of cross-examination of an adversary's witness or examination of a hostile witness is the fact that requiring counsel to disclose the expected answer would often tend to hinder or defeat the very purpose of the interrogation. The witness is apprised of what counsel is attempting to elicit or prove by a series of questions. If the witness is apprised of the expected answer, he is placed on guard and can defeat the objective of the examination. This being the case, the real value of cross-examination might be lost if such a disclosure were required.[10]

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and money of the parties and the country has been wasted for so inconsequent a conclusion. That this is not unlikely to occur is shown by the experience of all practising lawyers, who have often seen a long and heated argument as to the right to ask a question, followed by the laughter of all bystanders when the Court held it competent, and the witness replied that he knew nothing about the matter. Parties can often agree in the presence of the Court as to what the witness would testify, or, if not, the witness or examining attorney can state what the answer would be; and, where the subject-matter is important, the judge may, in his discretion, retire the jury until its admissibility has been settled. We are well aware that the rule may be perverted into a means of getting inadmissible evidence before the jury, or, by forcing their constant withdrawal, retard the trial. The Courts must rely upon the good faith of counsel not to bring about such a result. But it would never do to grant a new trial until it appeared not only that the question was proper, but that the answer was material, and would have been of benefit to the complaining party." Griffin v. Henderson, 117 Ga. 382, 384, 43 S. E. 712, 713 (1903); Blume, *The Problem of Preserving Excluded Evidence in the Appellate Record*, 13 MINN. L. REV. 169 (1929).

[6] Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (1903).

[7] Brock v. Cato, 75 Ga. App. 79, 42 S. E. 2d 174 (1947); Gilpin v. State Highway Board, 39 Ga. App. 238, 146 S. E. 651 (1929); Harness v. State, 57 Ind. 1 (1877); State v. Martino, 27 N. M. 1, 192 Pac. 507 (1920); Martin v. Elden, 32 Ohio St. 282 (1877); Burt v. State, 23 Ohio St. 384 (1872); Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629 (1895).

[8] Alford v. United States, 282 U. S. 687 (1931); Costa v. Regents of University of California, 116 Cal. App. 2d 445, 254 P. 2d 85 (1953); Tossman v. Newman, 37 Cal. 2d 522, 233 P. 2d 1 (1951).

[9] State v. Goodager, 56 Ore. 198, 106 Pac. 638 (1910), *rehearing denied*, 56 Ore. 261, 108 Pac. 185 (1910); Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629 (1895).

[10] *In re* Powell, 83 Neb. 119, 119 N. W. 9 (1908); State v. Goodager, 56

Because of these problems, the majority of the jurisdictions in the United States have held that the general rule applies only to direct examination of a friendly witness, allowing an exception in cases of cross-examination or examination of a hostile witness;[11] a minority of courts have refused to make such an exception.[12]

Prior to 1936 the North Carolina Supreme Court specifically refused to recognize an exception to the general rule in the case of cross-examination of an adversary's witness or examination of a hostile witness.[13] In 1936, the court, relying on the reasoning of a New Mexico

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Ore. 198, 106 Pac. 638 (1910); *rehearing denied,* 56 Ore. 261, 108 Pac. 185 (1910); Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900).

[11] Alford v. United States, 282 U. S. 687 (1931); *California:* Costa v. Regents of University of California, 116 Cal. App. 2d 445, 254 P. 2d 85 (1953); Tossman v. Newman, 37 Cal. 2d 522, 233 P. 2d 1 (1951); *Georgia:* Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (1903) (leading case); Brock v. Cato, 75 Ga. App. 79, 42 S. E. 2d 174 (1947); Gilpin v. State Highway Board, 39 Ga. App. 238, 146 S. E. 651 (1929); *Hawaii:* Choy v. Otaguro, 32 Hawaii 543 (1932); *Indiana:* Hyland v. Milner, 99 Ind. 308 (1884); Hutts v. Hutts, 62 Ind. 214 (1878); *Iowa:* Schulte v. Ideal Food Products Co., 203 Iowa 676, 213 N. W. 431 (1927); *Kansas:* Leavens v. Hoover, 93 Kan. 661, 145 Pac. 887 (1915); McIntosh v. Standard Oil Co., 89 Kan. 289, 131 Pac. 151 (1913); *Massachusetts:* Grandell v. Short, 317 Mass. 605, 59 N. E. 2d 274 (1945); *Michigan:* O'Donnell v. Segar, 25 Mich. 366 (1872); *Minnesota:* Uhlman v. Farm Stock & Home Co., 126 Minn. 239, 148 N. W. 102 (1914); *Montana:* Loncar v. National Union Fire Ins. Co., 84 Mont. 141, 274 Pac. 844 (1929); Howard v. Fraser, 83 Mont. 194, 271 Pac. 444 (1928); *Nebraska:* Larson v. Hafer, 105 Neb. 257, 179 N. W. 1013 (1920); *In re* Powell, 83 Neb. 119, 119 N. W. 9 (1908); *New Mexico:* State v. Martino, 27 N. M. 1, 192 Pac. 507 (1920); *Ohio:* Martin v. Elden, 32 Ohio St. 282 (1877); Burt v. State, 23 Ohio St. 394 (1872); *Oregon:* Arthur v. Parish, 150 Ore. 582, 47 P. 2d 682 (1935); State v. Goodager, 56 Ore. 198, 106 Pac. 638 (1910), *rehearing denied,* 56 Ore. 261, 108 Pac. 185 (1910); *Texas:* Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629 (1895); Galveston, H. & S. A. Ry. v. Currie, 91 S. W. 1100 (Tex. 1906) (exception to the general rule was not allowed when a leading question was propounded on cross-examination because evidently counsel knew what he intended to elicit from the witness); *Vermont:* State v. Parker, 104 Vt. 494, 162 Atl. 696 (1932); Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900); *Washington:* Le Doux v. Seattle North Pacific Shipbuilders Co., 114 Wash. 632, 195 Pac. 1006 (1921). The exception to the general rule is also supported by Wigmore. 1 WIGMORE, EVIDENCE § 20 (3d ed. supp. 1953).

[12] Birmingham Electric Co. v. McQueen, 253 Ala. 395, 44 So. 2d 598 (1947); Flowers v. Graves, 220 Ala. 445, 125 So. 659 (1929); Williams v. State, 175 Ark. 752, 2 S. W. 2d 36 (1927); Munsell v. Yerger, 155 Ark. 385, 244 S. W. 465 (1922); Vale v. Illinois Pipe Line Co., 281 Ky. 1, 134 S. W. 2d 940 (1939); Walker v. Rogers, 209 Ky. 619, 273 S. W. 439 (1925); Holladay v. Moore, 115 Va. 66, 78 S. E. 551 (1913); American Bonding & Trust Co. v. Milstead, 102 Va. 683, 691, 47 S. E. 853, 856 (1904) ("'Where a question is asked, and the witness is not permitted to answer, the bill of exceptions must show what the party offering the witness expected or proposed to prove by him.' And the same rule applies where a question is asked on cross-examination which the witness is not permitted to answer."); Soules v. Brotherhood of American Yeoman, 19 N. D. 23, 120 N. W. 760 (1909).

[13] State v. Brewer, 202 N. C. 187, 162 S. E. 363 (1932); Steeley v. Dare Lumber Co., 165 N. C. 27, 80 S. E. 963 (1914); Stout v. V. C., S. & E. P. Turnpike Co., 157 N. C. 366, 72 S. E. 993 (1911); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911).

case,[14] decided *Etheridge v. Atlantic Coast Line Railway Company*,[15] recognizing an exception where the question was asked a witness on cross-examination or examination of a hostile witness. The court in the *Etheridge* case stated:

> "Upon examination, we have been unable to find in North Carolina [a case], in applying the general rule, where the question was asked on cross-examination of an adversary and hostile witness. The decision in the *Martino case, supra,* seems to be the 'logic of the situation.' "[16]

The reason advanced by the court for the exception was the fact that the interrogating counsel could not be expected to state to the court what the witness would answer in such a case. This proposition was followed in two later cases,[17] decided in 1936 and 1940 respectively. However, in the interim, the court in 1939, without overruling or disapproving the previous cases which recognized the exception, refused to allow an exception to the general rule where the question was asked on cross-examination.[18] Until the recent case of *State v. Poolos*,[19] the North Carolina position in regard to this matter was somewhat uncertain. In the last previous case in which the court discussed the allowance of an exception where the question was asked on cross-examination or examination of a hostile witness, *State v. Wray*,[20] decided in 1940, the court recognized the exception. However, in 1950 the court, without mention of the previous cases which allowed such an exception, applied the general rule even though the question was propounded to the witness on cross-examination.[21]

[14] "It is further to be noted that this witness was asked this question upon cross-examination, and counsel for appellant where not charged with knowledge of what the answer of the witness would be. He was not appellant's witness. Counsel for appellant, therefore, would not be expected to be able to state to the court what the witness would answer. Under such circumstances the rule requiring a statement by counsel, advising the court of the nature of the testimony which the witness would give, has no application." State v. Martino, 27 N. M. 1, 8, 192 Pac. 507, 509 (1920).

[15] 209 N. C. 326, 183 S. E. 539 (1936).

[16] Etheridge v. Atlantic Coast Line Ry. Co., 209 N. C. 326, 332, 183 S. E. 539, 542 (1936).

[17] State v. Wray, 217 N. C. 167, 7 S. E. 2d 468 (1940); State v. Huskins, 209 N. C. 727, 184 S. E. 840 (1936).

[18] Hammond v. Wiliams, 215 N. C. 657, 35 S. E. 2d 437 (1939).

[19] 241 N. C. 382, 85 S. E. 2d 342 (1955) (Counsel for the defendant, cross-examining one of the State's witnesses, asked the witness if on one occasion she had tried to commit suicide by eating bobby pins. The State's objection to the question was sustained. Defendant's counsel merely excepted to the ruling and assigned it as error. On appeal, the question was found to be a proper one for the purpose of impeaching the credibility of the witness, but the appellate court refused to consider the exception because the record did not disclose what the reply of the witness would have been if she had been allowed to testify.).

[20] 217 N. C. 167, 7 S. E. 2d 468 (1940).

[21] Whiteheart v. Grubbs, 232 N. C. 236, 60 S. E. 2d 101 (1950).

The *Poolos* case disapproved the New Mexico case[22] and the previous North Carolina cases[23] which had recognized the exception, and refused to accept as a valid reason for an exception in the case of cross-examination or examination or a hostile witness the fact that the interrogating counsel could not be expected to state the expected answer.

> "We do not think this reasoning is sound, for, after all, it is not what the attorney knew or did not know that is determinative of the question. Here, as in other similar situations, it is what the witness would have said in response to the question, if she had been permitted to answer, that would enable us to determine whether the appellant was prejudiced by the ruling below."[24]

Thus, all doubt is now removed as to the position of the North Carolina courts. The rule may now be stated that when an objection is sustained to a question propounded to a witness on either direct or cross-examination, and the record fails to show what the witness would have answered had he been permitted to do so, the exception to the exclusion of the testimony will not be considered on appeal.[25]

In North Carolina, when an objection is made to a question asked a witness, and there is some doubt as to the competency of the answer, the trial judge should ask the interrogating counsel in the absence of the jury, to state what he expected to prove by the question asked.[26] If counsel does not show what he intended to prove by the proposed testimony, an exception to an exclusion of the testimony will not be considered by the appellate court.[27] If the trial judge then sustains the objection, excluding the testimony proposed to be elicited, the interrogating counsel must see that the testimony the witness would have given, if he had been permitted to answer, is entered in the record by the witness to the court stenographer outside of the hearing of the jury, in order for an exception to the ruling to be considered on appeal.[28] This practice meets all of the needs of the reviewing court.

[22] See note 14 *supra*.
[23] See notes 16 and 17 *supra*.
[24] State v. Poolos, 241 N. C. 382, 384, 85 S. E. 2d 342, 343 (1955).
[25] State v. Poolos, 241 N. C. 382, 85 S. E. 2d 342 (1955).
[26] Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106 (1906); STANSBURY, NORTH CAROLINA EVIDENCE § 27 (k) (1946).
[27] Steeley v. Dare Lumber Co., 165 N. C. 27, 30, 80 S. E. 963, 964 (1914) ("'The general rule is that the party asking the question which is excluded must disclose to the court what he expects to prove by the witness,' for the reason that the court must be able to judge of the competency or materiality of the evidence proposed to be elicited—not the counsel."); *In re* Smith's Will, 163 N. C. 464, 79 S. E. 977 (1913); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911); Boney v. Atlantic Coastline R. Co., 155 N. C. 95, 71 S. E. 87 (1911); Bernhardt v. Dutton, 146 N. C. 206, 59 S. E. 651 (1907); STANSBURY, NORTH CAROLINA EVIDENCE § 27 (k) (1946).
[28] State v. Poolos, 241 N. C. 383, 85 S. E. 2d 342 (1955); Carolina Coach Co. v. Central Motor Lines, 229 N. C. 650, 50 S. E. 2d 778 (1954); Snyder v. Asheboro, 182 N. C. 708, 710, 110 S. E. 84, 85 (1921) ("Since the record fails to dis-

It is submitted that the necessity of having the anticipated testimony in the record in order to determine whether the exclusion was prejudicial outweighs the reasons advanced for allowing an exception to the general rule where a question is asked on cross-examination or examination of a hostile witness. The *Poolos* case is in accord with the accepted practice in this jurisdiction as it prevailed prior to 1936 and to this writer represents the sounder view.

GEORGE M. BRITT.

Constitutional Law—Use of the Police Power for the Attainment of Aesthetic Considerations

In the recent case of *Berman v. Parker*[1] the Supreme Court decided that the appellant was not deprived of his rights under the Fifth Amendment to the United States Constitution by the condemnation of his private property for aesthetic considerations by the exercise of the police power of Congress delegated to the District of Columbia Redevelopment Land Agency. The condemnation was made under the authority of the District of Columbia Redevelopment Act of 1945, D. C. Code §§ 5-701 to 5-719 (1951), hereinafter referred to by section number.

The general purpose of the statute as set out in § 5-701 is "to eliminate the substandard housing conditions and the communities in the inhabited alleys and blighted areas" in the District of Columbia by acquiring the property through gift, purchase, or the use of eminent domain.

This act empowers the District of Columbia Redevelopment Land Agency, hereinafter called the Agency, to acquire and assemble real property in order to "further the redevelopment of *blighted territory* in the District of Columbia by the prevention, reduction, or elimination of *blighting* factors or causes of *blight*."[2] (Emphasis added) The Agency, once such property is assembled, then has the power, in accordance with the plan of the District of Columbia Planning Commission, to transfer to the District or to the United States all property to be devoted to public uses, and to lease or sell the remainder to private individuals or corporations to redevelop in accordance with the plan of the commission.

Under the definition of "redevelopment" given in § 5-702 (n) of the Act, the redeveloper would have the power to replan, clear, redesign, and rebuild the project area. This would seem to include totally

close what the witness would have said, we cannot assume that his answer would have been favorable to the defendant. It would be vain to grant a new trial upon the hazard of an uncertain answer by the witness."); STANSBURY, NORTH CAROLINA EVIDENCE § 29 (b) (1946).

[1] 75 Sup. Ct. 98 (1954).
[2] D. C. CODE § 5-703 (1951).

changing the area, including street layouts, to suit the needs and purposes of the redevelopment.[3]

Although § 5-702 of the Act is devoted to defining terms used in the Act, it is alarming to note that the term "blighted area," which is used so freely in the Act to describe the type areas the Agency is to take over and cause to be redeveloped, is not defined. The term "substandard housing conditions" is the only defined term which in anyway describes the type of condition which the Agency is to eliminate. This term is defined as "conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia."[4] This would seem to refer exclusively to dwellings of one type or another.

The particular area in which the appellant's property is located is a fifteen-block-square area in the city of Washington in which slum[5] conditions are said to exist. The western boundary is an irregular line which includes some establishments along a street and excludes others on the same side of the same street. It is on this boundary that the appellant's property lies.[6]

No acute housing shortage is to be met; no more residents than presently reside in the area are to be provided for, according to the commission's plan; and no rearrangement of the streets is planned. The plan provides that certain streets be widened somewhat and that an expressway and a greenway be built. This would, of course, be a legitimate exercise of eminent domain, and such property would be conveyed to the District.[7] However, the plan does not call for the appellant's property to be used for the greenway or expressway. His property is to

[3] D. C. CODE § 5-702 (n) (1951): "'Redevelopment' means replanning, clearance, redesign, and rebuilding of project areas, including open-space types of uses, such as streets, recreation and other public grounds, and spaces around buildings, as well as buildings, structures, and improvements, but not excluding the continuance of some of the existing buildings or uses in a project area. For the purposes of sections 5-701 to 5-719, 'redevelopment' also includes the replanning, redesign, and original development of undeveloped areas which, by reason of street lay-out, lot lay-out, or other causes, are backward and stagnant and therefore blighted and for which replanning and land assembly are deemed necessary as a condition of sound development."

[4] D. C. CODE § 5-702 (r) (1951).

[5] The word "slum" meaning conditions injurious to public health, safety, morals, and welfare. Schneider v. District of Columbia, 117 F. Supp. 705, 723 (D. D. C. 1953).

[6] These facts were gleaned from the District Court opinion, Schneider v. District of Columbia, 117 F. Supp. 705, 723, *et seq.* (D. D. C. 1953).

[7] D. C. CODE § 5-706 (a) (1951).

be sold to private individuals for redevelopment and private use in accordance with the plan.

The question arises as to why the appellant's property should be taken at all. The Court admits that this is not a taking of private property for slum clearance, an accepted public use in eminent domain, but is taking "a man's property merely to develop a better balanced, more attractive community."[8] The Court then concludes that the latter is a proper "public use," justified on the grounds that if the purpose of the legislation is within the police power, it may also be a public purpose in eminent domain. However, it is not claimed that the building is dilapidated or unsafe or in any way detrimental to the public health, safety, or morals. The inference is that the appellant's property, with its department store, constitutes a "blighted area." What factor concerning the appellant's building causes it to be a blight is uncertain since the term is nowhere defined in D. C. Code §§ 5-701 to 5-719. The only hint as to the meaning to this word is found in § 5-702 (n): "'[R]e-development' also includes the replanning, redesign, and original development of *undeveloped* areas which, by reason of street layout, lot layout, or *other causes,* are backward and stagnant and therefore blighted. . . ." (Emphasis added) It would seem, therefore, that a blighted area could be almost anything the Agency wanted to designate as such, or could extend as far beyond a substandard housing condition as the Agency should wish to extend it.

The real purpose for taking the property appears to be for aesthetic considerations; that is, though the appellant's property cannot be classified as unsafe, unhealthy, or immoral, the public welfare seems to demand that buildings be pleasing to the eye as well as safe and sanitary and that they fit in with the latest architectural whim of the city fathers. This appears to be the Court's concept as it says: "The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[9] This raises the question: Should the police power be used for aesthetic purposes?

This question has been raised before in connection with the regulation of outdoor advertising and in the case of the zoning laws. Massachusetts decided in 1935 that neither the Massachusetts nor the Federal Constitution guarantees a land owner the right to maintain a sign on his land in such a manner as to impair the beauty of public buildings, or

[8] Berman v. Parker, 75 Sup. Ct. 98, 102 (1954).
[9] *Id.* at 102, 103.

grounds, or natural scenery.[10] It has been pointed out that the issue raised by the restriction of billboard advertising is that of the right to accost citizens by visual solicitation and is a refinement of the law of assault; while the issue raised by the attempted regulation of the sightliness of buildings stems from the conception of nuisance at the common law.[11] The Massachusetts court in *General Outdoor Advertising Co. v. Dept. of Public Works*[12] reaffirmed what had been said in *Opinion of the Justices:* "It has been decided quite generally, if not universally in the courts in which the question has been raised, that aesthetic considerations alone or as the main end do not afford sufficient foundation for imposing limitations upon the use of property under the police power,"[13] and went further to say that if the primary and substantive purpose of the act was such as to justify it, aesthetic considerations might enter as an auxiliary factor.

With the decision of *Village of Euclid v. Ambler Realty Co.*[14] and the holding by the Court that general zoning ordinances are constitutional, there has been an upsurge in zoning litigation, and the question of aesthetic considerations as a basis for zoning regulations has been considered a number of times.

Massachusetts and Virginia seem to follow the principle suggested in the *Outdoor Advertising* case,[15] and while not allowing aesthetic considerations to be a basis for zoning regulation of private property, they are regarded as a factor which may not be disregarded.[16] Other jurisdictions in which the question has been raised have not laid much emphasis on the necessity of consideration of the aesthetic side of the matter. However, all seem to agree that aesthetic considerations alone may not be the basis for zoning regulations.[17]

This question of the taking of private property by the state for aesthetic considerations has been raised in North Carolina only on three

[10] General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149, 193 N. E. 799 (1935).

[11] Gardner, The Massachusetts Billboard Decision, 49 HARV. L. REV. 869, 882 (1936).

[12] 289 Mass. 149, 184, 185, 193 N. E. 799, 815 (1935).

[13] 234 Mass. 597, 604, 127 N. E. 525, 528 (1920).

[14] 272 U. S. 365, 47 S. Ct. 114 (1926); noted in 5 N. C. L. REV. 237 (1927).

[15] General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149, 184, 185, 193 N.E. 799, 815 (1935).

[16] Barney and Casey Co. v. Town of Milton, 324 Mass. 440, 87 N. E. 2d 9 (1950); West Bros. Brick Co. v. Alexandria, 169 Va. 271, 192 S. E. 881 (1937).

[17] Women's Kansas City St. Andrew Society v. Kansas City, 58 F. 2d 593 (8th Cir. 1932); Papaioanu v. Commissioners of Reholoth, 25 Del. Ch. 327, 20 A. 2d 447 (1941); Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N. E. 2d 499 (1951); Neef v. City of Springfield, 380 Ill. 275, 43 N. E. 2d 947 (1942); Hichman v. Oakland Township, 329 Mich. 331, 45 N. W. 2d 306 (1951); City of Scotsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543 (1952); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N. E. 2d 440 (1952), *appeal dismissed* 158 Ohio St. 258, 108 N. E. 2d 679 (1952); Niday v. City of Belaire, 251 S. W. 2d 747 (Tex. Civ. App. 1953).

occasions. In *Yarborough v. The North Carolina Park Commission*[18] it was decided that private property might be taken by *eminent domain* even for aesthetic purposes if for a public use. The court here is referring to the taking of land to create state parks, thereby preserving the scenic beauty of the state. It is doubtful that this case would support the taking of property on which there was a building which did not constitute a hazard to the public safety, health, morals or welfare, and selling that property to a third party for his private use. In *MacRae v. Fayetteville,*[19] an attempt was made to enforce an ordinance prohibiting building a service station within 250 feet of a residence within the corporate limits of Fayetteville. The court held that "the law does not allow aesthetic taste to control private property, under the guise of police power."[20] The court in a later case, deciding that an ordinance restricting the height of walls in the city of Greensboro was valid, said: "[W]hile esthetic considerations are by no means controlling, it is not inappropriate to give some weight to them in determining the reasonableness of the law under consideration."[21]

The Court in allowing the police power to be used for aesthetic considerations seems to be leaving the door open to many abuses. This decision will undoubtedly lead to a great deal more litigation before it is finally determined, if ever, just what aesthetic considerations will be allowed.

PAUL B. GUTHERY, JR.

Constitutional Law—Validity of Adoption Statute—Requirements Concerning Religion of Child and Adoptive Parents

A recent Massachusetts case, *Petitions of Goldman,*[1] upheld the constitutional validity of a statute[2] which said that whenever practicable, the judge in making orders for adoption, "must give custody only to persons of the same religious faith as that of the child." In the prin-

[18] 196 N. C. 284, 145 S. E. 563 (1928).
[19] 198 N. C. 51, 150 S. E. 810 (1929).
[20] *Id.* at 54, 150 S. E. at 812.
[21] *In re* Appeal of Parker, 214 N. C. 51, 57, 197 S. E. 706, 710 (1938); *appeal dismissed,* Parker v. City of Greensboro, N. C., 305 U. S. 568, 59 S. Ct. 150 (1938).

[1] — Mass. —, 121 N. E. 2d 843 (1954); *cert: denied,* 348 U. S. 942 (1955). This case might have been appealed to the Supreme Court pursuant to 62 STAT. 929 (1948), 28 U. S. C. § 1257 (1953).

[2] MASS. ANN. LAWS c. 210, § 5B (Supp. 1953): "In making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother.

"If the court, with due regard for the religion of the child, shall nevertheless grant the petition for adoption of a child proffered by a person or persons of a religious faith or persuasion other than that of the child, the court shall state the facts which impelled it to make such a disposition and such statement shall be made part of the minutes of the proceedings."

cipal case the lower court found that the petitioners, who were Jewish, were morally and financially qualified to bring up the twins, whose mother and "natural father" were Catholic. The court also found that there were many fine Catholic families in the area who had filed applications for adoption with the Catholic Charities Bureau. Therefore, the court affirmed the dismissal of the petitions on the grounds that it was practicable, within the meaning of the statute, to grant the custody of the children only to persons of the Catholic faith.

The subject matter of this note is confined largely to the constitutional aspects of this problem under the Constitution of the United States.[3] It is now well settled law that the religious guaranties contained in the First Amendment[4] are incorporated into the Fourteenth Amendment.[5]

The court in the *Goldman* case held that the statute in question did not effect an establishment of a religion as all religions were treated alike, no sect was subordinated to another, no burden was placed on any religion for the maintenance of another, nor was the exercise of religion required. To the argument that the statute interfered with the mother's constitutional right to determine her children's religion[6] the court said: "she seems to have consented rather than commanded and seems to have 'been interested only that the babies were in a good home' . . ." and concluded that there was clearly no interference with the mother's wish so long as she retained her status as a parent.

It is a well recognized principle that parents have a fundamental right to rear their children in a particular religious faith.[7] However, there are certain limitations on the free exercise of religion in this area. Thus where a child distributed religious literature in violation of a child labor statute;[8] where a father sent his child to a private school which had no secular instruction;[9] or where a parent, for religious

[3] See Note, 54 COL. L. REV. 376 (1954) for a thorough and detailed analysis of the cases and statutes relating to religion as a factor in adoption, guardianship and custody.

[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U. S. CONST. AMEND. I.

[5] "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U. S. CONST. AMEND. XIV, § 1; Hamilton v. Regents, 293 U. S. 245 (1934).

[6] Petitions of Goldman, — Mass. —, —, 121 N. E. 2d 843, 846 (1954). The children were born in a hospital from which the petitioners took them. The mother of the twins never saw the petitioners, but she knew they were Jewish. The mother gave her written consent to the adoption prayed for.

[7] *See, e.g.,* Prince v. Massachusetts, 321 U. S. 158, 167 (1943); Pierce v. Society of Sisters, 268 U. S. 510, 534 (1925); Lewis v. Spaulding, 193 Misc. 857, 85 N.Y.S. 2d, 682, 690 (Sup. Ct. 1948).

[8] Prince v. Massachusetts, 321 U. S. 158 (1943).

[9] Shapiro v. Dorin, 199 Misc. 643, 99 N. Y. S. 2d 830 (Dom. Rel. 1950). The only subjects taught to the children were the Bible, the Talmud, and elementary Jewish law.

reasons, refused to provide his child with medical necessities,[10] the states have intervened to protect the child's welfare.

In the foregoing cases, the court felt that state intervention was necessary to protect the child's welfare. It is submitted that in the instant case, the mother's consent to the adoption of the twins by persons of a different religious faith was not the type of parental action which so affected the children's welfare as to warrant the intervention by the state under its police power.[11]

The second aspect of this problem deals with the "establishment of religion" clause of the First Amendment which the Supreme Court has said means at least this:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which will aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*"[12]

Thus, a state may not permit religious teachers of various faiths to use its classrooms, during school hours, to teach religion to children who are compelled by law to attend school;[13] nor may the state condition probation of a delinquent child on church attendance,[14] because "the First Amendment has erected a wall between Church and State which must be kept high and impregnable."[15]

However, government need not be hostile to religion. Thus, it has been held constitutional for a state to reimburse parents of public, private, and parochial school children for bus transportation to and from school;[16] to release children from public school to attend religious in-

[10] People v. Pierce, 176 N. Y. 201, 68 N. E. 243 (1903) (criminal prosecution against a member of the Christian Science faith for not providing necessary medical treatment of his minor daughter).

[11] See PFEFFER, CHURCH, STATE AND FREEDOM 587 (Boston: Beacon Press, 1953).

[12] Everson v. Board of Education, 330 U. S. 1, 15 (1946).

[13] McCollum v. Board of Education, 333 U. S. 203 (1948).

[14] Jones v. Commonwealth, 185 Va. 355, 38 S. E. 2d 444 (1946).

[15] McCollum v. Board of Education, 333 U. S. 203, 211 (1948).

[16] Everson v. Board of Education, 330 U. S. 1 (1946). The Court held that the statute did no more than to provide a program for getting all children, regardless of religion, safely to and from schools.

structions in their various faiths off school property;[17] and to permit the reading of verses from the Old Testament and the reciting of the Lord's Prayer to public school children for the purpose of teaching them piety, justice, and truth.[18]

It is submitted that religion should be one of the factors taken into consideration in the determination of whether a particular person may adopt a particular child. If the child has reached the age where he has become aware of religion and religious differences, his welfare, which should be protected by the state, demands that a conflicting religious doctrine not be imposed by adoption. Clearly this would not effect the establishment of a religion, because all religions would be treated alike. However, if, as in the *Goldman* case, the child has not reached the age of religious awareness, it would seem that little or no emphasis should be placed on the religious aspect of the child's welfare.[19] In the principal case the court held that even though the children had not been baptized[20] and were too young to choose a religion, their religion was Catholic.[21]

[17] Zorach v. Clauson, 343 U. S. 306 (1952); Lewis v. Spaulding, 193 Misc. 857, 85 N. Y. S. 2d 682 (Sup. Ct. 1948).

[18] Doremus v. Board of Education, 7 N.J. Super. 442, 71 A. 2d 732 (1950), *aff'd*, 5 N. J. 435, 75 A. 2d 880 (1950), *appeal dismissed*, 342 U. S. 429 (1952).

[19] In the *Goldman* case the court said: "The petitioners have dark complexions and dark hair. The twins are blond, with large blue eyes and flaxen hair." Petitions of Goldman, — Mass. —, —, 121 N. E. 2d. 843, 844 (1954). It might be argued that because of the difference in physical characteristics, it would be in the best interest of the children that they be adopted by parents with similar characteristics. On the other hand, there is a good argument against taking the twins away from the petitioners after the twins had been in the petitioners' home for three years.

[20] "A custom has grown up that where a child is once baptized or entered in any prescribed manner into a church, that the child is to be treated as belonging to that church so long as he is a minor. There is no foundation in law for such a position. The English cases have held that it is for the father to determine the religious education of a child during his minority. American law generally * * * recognzes both parents as joint guardans of their children. Where they agree as to the religious education of their children, no question arises, even if such agreement includes a change of adherence from one religion to another during the child's minority. * * * The rights of parents in regard to their minor children has long been recognized, but there is no right in any church to compel continued adherence. Where the parents disagree as to the religious education of their children, the court must consider not only whether there was an admission of the child to any church, but the entire situation. It is important to discover whether there was an antenuptial agreement, whether the child's admission to the church was with the knowledge and consent of both parents, the extent to which the child has received any form of religious education, whether the child has reached years of discretion and, if so, what preference the child feels * * * and finally in which environment the particular child is most likely to develop fully and happily." *In re* Vardinakis, 160 Misc. 13, 289 N. Y. Supp. 355, 359 (1936).

The stress placed upon baptism raises a possibles constitutional objection in that it tends to "favor claims of custody of children by adherents of those religions in which faith is determined by baptism as compared with those which view the child's faith as purely derivative until the child is able to understand and accept church doctrines." Note, 65 HARV. L. REV. 694, 695 (1952).

[21] It will be recalled that the statute in question said: "In the event that there is a *dispute* as to the religion of the child, its religion shall be deemed to be that

In conclusion, it is submitted that the statute in question does not violate the constitutional prohibition against the establishment of religion. However, it would seem that, in the instant case, the statute interferes with the mother's constitutional right to determine her children's religion and that the state should not be allowed to assert that the welfare of the twins necessitated state interference with that religious liberty.

HERBERT S. FALK, JR.

Contempt of Court—Failure to Comply With Court Order to Produce Properties—Inability as Defense

When an individual has failed to comply with a court order requiring him to produce properties, and the court seeks to hold him in contempt, will his professed inability to obey the court order purge him of this contempt? Such a case was recently before the North Carolina Supreme Court, involving an appellant who had been ordered to produce the records of his grocery business. He explained that he was unable to obey the court order since the only records he ever prepared were income tax returns which he no longer possessed, and cash register receipts which he threw away after rats had gnawed them. The Supreme Court held the appellant had been improperly cited for contempt since his uncontradicted testimony showed that he was unable to comply with the trial court's order.[1]

It is generally held that a contemner's inability to comply with a court order is sufficient to purge him of contempt, if he is without fault, but it is often added that the contemner's inability is no defense where caused by his own "contumacious" acts.[2] The general rule seems quite

of its mother." (Emphasis added) The court said: "We do not attempt to discuss the philosophy underlying the concept that a child too young to understand any religion, even imperfectly, nevertheless may have a religion. We have no doubt that the statute was intended to apply to such children, and that in such instances the words 'religious faith * * * of the child' mean the religious faith of the parents, or in case of 'dispute' the faith of the mother." Petitions of Goldman, — Mass. —, —, 121 N. E. 2d 843, 846 (1954).

[1] Galyon v. Stutts, 241 N. C. 120, 84 S. E. 2d 822 (1954). This able opinion by Mr. Justice Johnson, after defining direct and indirect criminal and civil contempts, restates the necessity of an order to show cause in all contempt proceedings except those for direct criminal contempts.

[2] Tucker v. Commonwealth *ex rel.* Attorney General, 299 Ky. 820, 827, 187 S. W. 2d 291, 294 (1945): "Defendants [contemners] are correct and are sustained by authorities cited that the inability of the contemner, without fault on his own part, to obey the order holding him in contempt is sufficient to purge him of the contempt charged. 12 Am. Jur. § 72, p. 438 (1938); Rudd v. Rudd, 184 Ky. 400, 214 S. W. 791; Allen v. Woodward, 111 Tex. 457, 239 S. W. 602, 22 A. L. R. 1253. But where the contemner 'has voluntarily or contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt.'" *Accord:* McCormick

inclusive, but cases interpreting the contemner's "fault" or "contumacious" acts reveal that these are important exceptions.

The contemner's "fault" has been made his plea of inability to comply with a court order unavailing not only where his inability was the result of "fraud or sharp practice,"[3] but also where he acted negligently. Thus the courts hold in contempt the innocent fiduciary who fails to produce trust funds in obedience to a court order, although he is unable to comply because he negligently made an improper distribution of the funds,[4] explaining that the law imposes a special duty on the fiduciary that magnifies his negligence.[5] Even in the absence of any relationship of confidence or trust an individual has been held in contempt where his inability resulted from his failure to exercise "due diligence."[6] However, this does not appear to be a majority view. "Contumacious" acts are equated with action voluntarily bringing about the contemner's disability to comply with a court order,[7] as where neither a police officer nor a club owner could explain how slot machines disappeared from their custody,[8] and, of course, inability so caused is no defense in contempt proceedings based on a failure to comply with the order.

In the North Carolina case of In re *Haywood,*[9] a trial court ordered an attorney to turn over funds to his client which he had admittedly received for the client, but upon the lawyer's affidavit that he was totally insolvent, explaining that he had been "mad drunk" for eighteen months

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v. Sixth Judicial District Court, 67 Nev. 318, 218 P. 2d 939 (1950); Bradshaw v. Bradshaw, 23 Tenn. App. 359, 133 S. W. 2d 617 (1939).

For statement of the rule without mention of any exceptions as to the contemner's fault or "contumacious" acts, see: U. S. v. Bryan, 339 U. S. 323 (1950); Armijo v. Armijo, 29 N. M. 15, 217 Pac. 623 (1923).

For an application of the rule absent contemner's fault or "contumacious" acts, see In re Scarborough Will, 139 N. C. 423, 51 S. E. 931 (1905), where the contemner purged himself of contempt for failure to comply with a court order to produce a will by proving that the will was in the hands of a judicial officer who would not turn it over to the contemner.

[3] *See* Maglich v. Maglich, 61 N. E. 2d 507, 508 (Ohio 1945).

[4] Society of the Divine Word v. Martin, 240 Idaho 1084, 38 N. W. 2d 619 (1949); Rudd v. Rudd, 184 Ky. 400, 214 S. W. 791 (1919); Messmore's Estate, 293 Pa. 63, 141 Atl. 724 (1928).

[5] Messmore's Estate, 293 Pa. 63, 69, 141 Atl. 724, 726 (1928): "Although not charged with fraud arising malo animo, appellant [contemner] is guilty of maladministration of trust funds, and this is a species of fraud. He is, therefore, not in the position of one who pleads inability to pay because of poverty which came upon him through no fault of his own. The law is not lenient to those in the position of the appellant. . . .."

[6] Brown v. Clark, 260 P. 2d 544, 547 (Utah 1953) (Inability to produce a child placed in the contemner's custody resulted when the contemner negligently allowed the child's father to take him from the contemner.). It is elsewhere stated that the contemner's inability must not be caused by "his own neglect or misconduct." Hembree v. Hembree, 208 Ky. 658, 660, 271 S. W. 1100, 1101 (1925).

[7] See quotation from Tucker v. Commonwealth *ex rel.* Attorney General, 299 Ky. 820, 827, 187 S. W. 2d 291, 294 (1945), footnote 2 *supra.*

[8] Tucker v. Commonwealth *ex rel.* Attorney General, 299 Ky. 820, 187 S. W. 2d 291 (1945).

[9] 66 N. C. 1 (1872).

and didn't know what had happened to the money—except that he had not applied it to his own use, the court held he could not be adjudged in contempt for failing to deliver these funds to his client. Although the North Carolina Supreme Court has not spelled out what "fault" and "contumacious" acts causing the contemner's inability will defeat his plea of inability, it can be assumed that the law forbids a contemner to render himself unable to obey a court order by fraudulent conduct. Therefore, it logically follows from the *Haywood* case that in North Carolina a plea of inability is a complete defense unless caused by fraud, when proved to the court's satisfaction. *Quaere* whether the court would take such an extreme view if presently faced with a case involving gross misconduct.

Where the contemner raises his inability in defense to contempt proceedings, it is sometimes held that the contempt order must specifically answer this plea by finding that the contemner wrongfully or "contumaciously" made himself unable to comply with the court order.[10]

Once the court has evidence before it showing a court order, as well as the contemner's failure to comply with it and the contemner's plea of inability, according to the weight of authority the burden of proof is on the contemner.[11] Other jurisdictions reach much the same result by saying the complainant has thus established a prima facie case.[12] Alabama is a notable exception to this outlook since its courts have indicated that the burden of proof is on the complainant in this fact situation.[13] Similarly, the burden of proof is always on the complainant in the Oregon courts, but proof of the court order and failure to comply with it is said to make a prima facie case which throws upon the contemner the burden of going forward with the evidence.[14]

[10] White v. Adolph, 305 Ill. App. 76, 80, 26 N. E. 2d 993, 994 (1940): "We believe, therefore, that while it may have been perfectly proper for the court to find the appellant [contemner] guilty of contempt, before he could imprison the appellant, he should have found that such a failure to pay amounted to a wilful and contumacious refusal to obey the order of the court." *Accord:* Adams v. Rakowski, 319 Ill. App. 556, 49 N. E. 2d 733 (1943). *See* Maglich v. Maglich, 61 N.E. 2d 504, 508 (Ohio 1945).

[11] Wilson v. Wilson, 45 N.M. 224, 229, 114 P. 2d 737, 740 (1941): "'The burden . . . was upon the appellant [contemner] to affirmatively show his inability to make the payments required of him.' The almost universal rule is to this effect." *Accord:* Orr v. Orr, 141 Fla. 112, 192 So. 466 (1939); Lusty v. Lusty, 70 Idaho 382, 219 P. 2d 280 (1950); Hays v. Hays, 216 Ind. 62, 22 N. E. 2d 971 (1939); Meisner v. Meisner, 220 Minn. 559, 20 N. W. 2d 486 (1945); McCormick v. Sixth Judicial District Court for Humboldt County, 67 Nev. 318, 218 P. 2d 939 (1950); Hodous v. Hodous, 76 N.D. 392, 36 N. W. 2d 554 (1949); Bradshaw v. Bradsaw, 23 Tenn. App. 359, 133 S. W. 2d 617 (1939); De Younge v. De Younge, 103 Utah 410, 135 P. 2d 905 (1943).

[12] *Ex parte* Resner, 67 Cal. App. 2d 806, 155 P. 2d 667 (1945); State *ex rel.* Houtchens v. District Court for Ravalli County, 122 Mont. 76, 199 P. 2d 272 (1948).

[13] Robertson v. State, 20 Ala. App. 514, 104 So. 561, 575 (1925); *Ex parte* Gunnels, 25 Ala. App. 577, 151 So. 605 (1933).

[14] State *ex rel.* Matheny, 188 Ore. 502, 216 P. 2d 270 (1950); State *ex rel.* Blackwell v. Blackwell, 181 Ore. 157, 179 P. 2d 278 (1947).

The North Carolina Supreme Court has recently said that the burden to "establish facts" is on the contemner when he seeks to purge himself,[15] but earlier statements by the court explained that a contempt proceeding is properly begun by proof of facts constituting a prima facie case which made it encumbent upon the contemner to answer, without specifying upon whom the burdens of proof or going forward rested.[16] Under these decisions it appears that the procedure in North Carolina is not greatly different from that of most other jurisdictions, because the complainant must first prove a court order and failure to obey it whereupon the contemner must satisfy the court of his inability to comply.[17]

There are conflicting views as to the intensity of the evidence required to adjudge an individual in contempt for failure to comply with a court order, and it is variously held: the evidence must be beyond a reasonable doubt;[18] a mere preponderance of the evidence is insufficient;[19] the evidence need be only of the greater weight.[20]

A requisite to a valid contempt citation in North Carolina[21] and in some other jurisdictions[22] is the appearance in the contempt order of a finding upon proper facts that the contemner was able to comply with the court order he disobeyed.

The most delicate problem arising in the application of the foregoing rules of evidence is the effect to be given the contemner's sworn testimony or affidavit that he is unable to comply with the court order. If

[15] Hart Cotton Mills, Inc. v. Abrams, 231 N. C. 431, 439, 57 S. E. 2d 803, 809 (1950): "The respondents [contemners] having sought to purge themselves, the burden was on them to establish facts sufficient for that purpose."

[16] *In re* Walker, 82 N. C. 96, 97 (1880): "In cases of alleged contempt out of the presence of the Court the practice is to have a foundation laid by facts shown forth, by affidavit or otherwise, constituting a *prima facie* case, and then by a rule to put the accused to show cause against the attachment by an answer denying the alleged facts of which he had notice in the rule or on the record, or excusing his conduct, or, where the gravamen of the charge rested on intention, by a disavowal of the imputed purpose." See *In re* Moore, 63 N. C. 396 (1896).

[17] For a case where the contemner did not satisfy the court of his inability after admitting the court order and failure to comply, see Smith v. Smith, 92 N. C. 304 (1885).

[18] Robertson v. State, 20 Ala. App. 514, 104 So. 561 (1925).

[19] *Ex parte* Lande, 96 Cal. App. 2d 926, 216 P. 2d 909 (1950).

[20] State *ex rel.* Attorney General v. Blackwell, 181 Ore. 157, 179 P. 2d 278 (1947).

[21] Contempt order was reversed because record failed to include facts showing ability to comply with court order: Berry v. Berry, 215 N. C. 339, 1 S. E. 2d 871 (1939); Vaughn v. Vaughn, 213 N. C. 189, 195 S. E. 351 (1938).

[22] Loy v. Loy, 32 Tenn. App. 470, 479, 222 S. W. 2d 873, 878 (1949): "A judgment of contempt must contain an affirmative finding of defendant's [contemner's] ability to pay." *Accord: Ex parte* Cardella, 47 Cal. App. 2d 329, 117 P. 2d 908 (1941) (Record failed to include facts revealing ability to comply, although it did recite such a finding.); Kinner v. Steg, 74 Idaho 382, 262 P. 2d 994 (1953); *In re* Burns, 83 Mont. 200, 271 Pac. 439 (1928); Osterweil v. Osterweil, 133 N. J. Eq. 36, 29 A. 2d 868 (1943); De Younge v. De Younge, 103 Utah 410, 135 P. 2d 905 (1943).

the testimony is uncontroverted some courts rule that it is controlling,[23] as did the court in the principal case,[24] and the contemner's affidavit has even been held conclusive where the complainant had filed an affidavit contradicting the contemner's testimony.[25] However, where the contemner fails to make a complete revelation of the circumstances causing his inability,[26] or even without this justification,[27] a contra view maintains that the court need not accept the contemner's uncontroverted testimony but may hold him in contempt. Of course, where there is conflicting evidence the issue of the contemner's inability is for the court to determine.[28]

In the situation where the contemner says he is unable to comply with a court order, there is an obvious analogy to cases involving contempts for false swearing, for in both situations the court is required to decide whether a witness's testimony is true. Although such a comparison is not often made, at least one court has punished a contemner for false swearing rather than disobedience to a court order when he untruthfully explained his inability to the court,[29] thus indicating that

[23] Banks v. Banks, 188 Ga. 181, 182, 3 S.E. 2d 717, 718 (1939): "If the evidence is uncontroverted that he [the contemner] is unable to comply with the order . . . by reason of . . . inability, it is error to adjudge him in contempt." *Accord:* Hansbrough v. State *ex rel.* Pittman, 193 Miss. 467, 10 So. 2d 171 (1942); Lakewood Trust Co. v. Lawshane Co., Inc., 102 N. J. Eq. 270, 140 Atl. 334 (1928).

In Robertson v. Johnson, 210 Mo. App. 585, 243 S. W. 215 (1922), it was said that the contemner's uncontroverted statement of inability made a prima facie case for him in defense.

Compare the quotation from Lester v. Lester, 63 Ga. 356, 359 (1879), note 38 *infra.*

[24] *Accord:* Lamm v. Lamm, 229 N. C. 248, 49 S. E. 2d 403 (1948).

[25] Laff v. Laff, 161 Minn. 122, 200 N. W. 936 (1924).

[26] Huddleston v. Huddleston, 189 Ga. 228, 5 S. E. 2d 896 (1939) (Contemner failed to offer information as to an automobile that he owned.); Ekblad v. Ekblad, 207 Minn. 346, 291 N. W. 511 (1940) (Contemner produced no evidence as to cost or records concerning contracts alleged to be in his possession.); Armijo v. Armijo, 29 N. M. 15, 217 Pac. 623 (1923) (Contemner did not show the value of real property that he owned.).

[27] Meisner v. Meisner, 220 Minn. 559, 20 N. W. 2d 486 (1945).

[28] State *ex rel.* Houtchins v. District Court for Ravalli County, 122 Mont. 76, 199 P. 2d 272 (1948) (Contemner showed he was unable to make alimony payments pursuant to court decree because he was unemployed and without property, but other evidence revealed that the contemner was young and able to earn income; held in contempt.); Bradshaw v. Bradshaw, 23 Tenn. App. 359, 133 S. W. 2d 617 (1939) (Contemner said he was unable to make alimony payments as ordered because he had to support dependents, but it was proved that he had a job or received unemployment insurance; held in contempt.); Razall v. Razall, 242 Wis. 121, 7 N. W. 2d 417 (1943) (Conflicting evidence as to contemner's sickness causing his inability to comply; held not in contempt.).

[29] Eykelboom v. People, 71 Colo. 318, 325, 206 Pac. 388, 390 (1922). Here the contemner, an officer in a business in receivership, was ordered to produce letters concerning the business, but said he was unable to comply because the letters had "disappeared." In affirming a judgment of contempt the court said: "The falsity of that justification appears from his own testimony. . . . It is the law that a court has the right to punish as a contempt manifest perjury committed in its presence, where the court knows, judicially and beyond doubt, that the testimony is false."

the analogy is not inappropriate.[30] It is hardly necessary to indicate that the jurisdictions are not in accord on this subject.[31] One extreme maintains that a single judge cannot find testimony to be false when the witness denies the falsity of his statements.[32] A more frequently applied rule holds that a court may adjudge a witness in contempt for false swearing only when he admits his guilt, or the court through personal observation or judicial notice knows that the testimony is false,[33] and some courts add requirements that the false answer must have a directly obstructive effect and be pertinent to the issues.[34] Another view

[30] See Robertson v. Johnson, 210 Mo. App. 585, 243 S. W. 215 (1922), where despite court order the contemner failed to produce a diamond ring, explaining that she had lost it at the theater, and the court held her uncontroverted statement prima facie purged her of contempt, stating: "To find her guilty of contempt under those circumstances was equivalent to finding her guilty of perjury."

[31] *Ex parte* Holbrook, 133 Me. 276, 284, 177 Atl. 418, 422 (1935): "Innumerable citations might be added, but these suffice to illustrate the various positions taken by the courts concerning the question under discussion. They may be divided into four groups: The first holding that perjury always constitutes contempt and may be punished as such; the second, that certain other definite factors must accompany perjury in order to make it a basis for contempt charges; the third, that it is only when the presiding justice has judicial notice of the falsity of the testimony that he may regard it as contempt and inflict summary punishment; and the fourth, that a single justice is entirely without authority to make a finding that perjury has been committed in any case under any circumstances and, on the basis of such a finding, punish for contempt."

[32] People v. Richman, 222 Ill. App. 147 (1929); *Ex parte* Holbrook, 133 Me. 276, 177 Atl. 418 (1935); *Ex parte* Creasy, 243 Mo. 679, 148 S. W. 914 (1912); State v. Illario, 10 N. J. Super. 475, 77 A. 2d 483 (1950) (Recognizing an exception in special circumstances.).

[33] *Ex parte* Blache, 40 Cal. App. 2d 687, 105 P. 2d 635 (1940) (judicial knowledge); Wilder v. Sampson, 279 Ky. 103, 129 S. W. 2d 1022 (1939) (judicial knowledge); McInnis v. State, 202 Miss. 715, 32 So. 2d 444 (1947) (personal or judicial knowledge); Lopez v. Maes, 38 N. M. 524, 37 P. 2d 240 (1934) (judicial knowledge).

The requirement that the court must have judicial knowledge of the falsity of the contemner's testimony was carried to the extreme in Russell v. Field, 192 Ky. 262, 232 S. W. 475 (1921), when the contemner by signed affidavit had admitted his testimony was false but the appellate court said it was not within the judicial knowledge of the trial court, reversing a judgment of contempt. A contrary result was reached in People v. Katelhut, 322 Ill. App. 693, 54 N. E. 2d 590 (1944), where the contemner admitted his false testimony and it was held that the trial court need not have personal knowledge of the falsity in such a case.

[34] A frequently quoted statement of this view appears in Hegelaw v. State, 24 Ohio. App. 103, —, 155 N. E. 620, 621 (1927): "To justify a finding of guilty of contempt . . . the following elements must subsist: (1) That the alleged false answer had an obstructive effect. (2) Judicial knowledge of the falsity of the testimony. (3) The question must be pertinent to the issue." *Accord:* Hunder v. Gordon, 111 Colo. 234, 140 P. 2d 622 (1943); State *ex rel.* Luban v. Coleman, 138 Fla. 555, 189 So. 713 (1939).

Compare the rigid requirements set out in People v. Hille, 192 Ill. App. 141, 147 (1915): ". . . it must appear beyond a reasonable doubt from the personal knowledge of the court, or be admissions from the lips of the defendant himself in open court, and in the presence of the court, and from no other source whatsoever, that (1) the representations so made were false and untrue when made; (2) that the defendant knew of their falsity when he made them; and (3) that he made them knowing their falsity and with a wilful and malevolent intention of assailing the dignity of the court or of interfering with its procedure and the due administration of justice.

indicates that a witness may be held in contempt if all the evidence indicates his testimony is inherently false,[35] and the federal rule is similar to this, but requires that the perjury actually obstruct the court.[36]

Similar to the principal case are proceedings in bankruptcy or receivership where a contemner is ordered to turn over business records, property or money, and he attempts to excuse his failure to comply by showing that he does not possess the articles he is ordered to produce. The United States Supreme Court has said that the trial court has power to determine whether there is a present ability to comply with its order and may discount denials which it finds "incredible in context."[37] Our highest court indicates that a plea of inability "is given credit after demonstration that a period in prison does not produce the goods,"[38] a procedure that bears some similarity to medieval trial by ordeal. After applying this rule, one state court found that a denial of the possession of inventory records was "incredible in context" since the contemner had previously said he possessed the records.[39] Earlier cases in state courts held the contemner's explanation insufficient where he said he lost a roll of bills worth $18,000 while "bird hunting in Norfolk County [Virginia],"[40] or that important letters had simply "disappeared."[41] While these cases did not restrict their holdings to contempts arising in insolvency proceedings, other courts have said that there is a duty on the contemner making a plea of inability to disclose completely his

[35] Re Gitkin 164 Fed. 71 (E. D. Pa. 1908); Crumnal v. K. L. R. Realty Corporation, 265 App. Div. 22, 37 N. Y. S. 2d 645 (1942) (Court said it was clear from all evidence that contemner's testimony was false.). *See Ex parte* Blache, 40 Cal. App. 2d 687, ——, 105 P. 2d 635, 637 (1940); Hunder v. Gordon, 111 Colo. 234, 240, 140 P. 2d 622, 624 (1943).

[36] U. S. v. McGovern, 60 F. 2d 880 (2d Cir. 1932). *Ex parte* Hudgings, 249 U. S. 378 (1919), makes clear the requirement that false testimony must obstruct the court before it is punishable as contempt. See Maggio v. Zeitz, 333 U. S. 56 (1948), note 37 *infra*, and discussion of the Maggio case in the text *infra*.

[37] Maggio v. Zeitz, 333 U. S. 56, 76 (1948).

[38] *Id.* at 76. An earlier, similar statement is found in Lester v. Lester, 63 Ga. 356, 359 (1879): "We cannot say that the judge, under the circumstances, abused his authority in not accepting the respondent's answer as satisfactory, and in ordering an attachment for contempt. The attachment will bring the actual resources of the respondent to a practical and decisive test. Pressure is a great concentrator and developer of force. Under the stress of an attachment, even the vision of the respondent himself may be cleared and brightented [*sic.*], so that he will discern ways and means which were once hidden from him, or seen obscurely. It is a great help to a thing to feel that it must be done, and that there is no evading it. Harsh as was the old remedy of imprisonment for debt, it had this wholesome effect in many cases, and was, so far, a beneficial instrumentality. While the imprisonment which impends over the respondent is not for debt, it can be prevented by the same means as if it were; that is, by payment."

[39] Dishinger v. Bon Aire Catering, Inc., 336 Ill. App. 557, 84 N. E. 2d 562 (1949) (receivership).

[40] Drake v. National Bank of Commerce of Norfolk, 168 Va. 230, 190 S. E. 302 (1937) (Money was insurance proceeds paid to a business in receivership.).

[41] Eykelboom v. People, 71 Colo. 318, 206 Pac. 388 (1922) (Letters were connected with business which had gone into recievership.) See note 29 *supra*.

financial condition when it is peculiarly within his knowledge,[42] thus revealing added justification for the insolvency decisions.

The typical case where inability is raised as a defense involves the husband who fails to make alimony or support payments.[43] He may prove his inability to comply by showing that he is without money, owns no property and does not receive sufficient income to make the ordered payments to hs wife due to sickness,[44] injury[45] or business difficulties.[46] In some jurisdictions it is not necessary to justify the inadequacy of the husband's income, for these courts evidently secure to the divorced husband the "unalienable right to starve to death" when it is said they are without power to compel an individual to work.[47] There is authority very much in conflict with this view, adjudging the husband in contempt when he failed to take the highest paying job available, but accepted employment which paid a lower salary but offered an interest in the capital,[48] or paid the husband in the form of free room and board.[49]

Certainly a court order to produce evidence is not "an invitation to a game of hare and hounds" but an implement necessary to the administration of justice; on the other hand, the colorful observation that "the devil himself knoweth not the mind of man" indicates that courts are properly reluctant to determine summarily the truth of a contemner's testimony. Granting the propriety of broad powers in the court to protect its processes against those who do not respect them, the writer believes some protection should be afforded the individual. Accordingly, where an individual has failed to comply with a court order but professes his inability to obey it, it is suggested that the better policy under constitutional safeguards would require that there be evidence tendered to the court, or facts within the court's personal knowledge, showing the individual's testimony to be untrue, or that his inability resulted from his own misconduct or "contumacious" acts.

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[42] State *ex rel.* Blackwell v. Blackwell, 181 Ore. 157, 164, 179 P. 2d 278, 281 (1947): "The financial condition of defendant was a matter peculiarly within his own knowledge, and, when charged with failure to comply with the decree of the court as to payment of money, it was incumbent upon him, if seeking to excuse his failure to make payments, to make a full and complete disclosure of the facts showing his inability to pay." See Laff v. Laff, 161 Minn. 122, 200 N. W. 936 (1924).

[43] In *Ex parte* Risner, 67 Cal. App. 2d 806, 155 P. 2d 667 (1945), a contempt judgment was upheld in habeas corpus proceedings, where a *wife* had failed to comply with a court decree ordering her to make alimony payments to her *husband.* Is this a straw in the wind?

[44] Razall v. Razall, 242 Wis. 121, 7 N. W. 2d 417 (1943).

[45] Caffrey v. Caffrey, 4 F. 2d 952 (D. C. Cir. 1925).

[46] Chong v. Chong, 35 Hawaii 541 (1940).

[47] *Id.* at 544: "This conclusion is in harmony with the authorities which do not recognize the right of a court in cases of this kind to control a man's economic ventures, although insistent that if he is able he shall obey the orders of the court."

[48] Osmers v. Osmers, 114 Utah 216, 198 P. 2d 233 (1948).

[49] State *ex rel.* Houtchens v. District Court for Ravalli County, 122 Mont. 76, 199 P. 2d 272 (1948).

Torts—Insulating Negligence in North Carolina

"Any effort to reconcile the North Carolina law on the subject of insulating negligence seems futile."[1] A study of the North Carolina cases on this subject at best leads one to agree with the somewhat kinder criticism of Chief Justice Stacy that the problem "is usually fraught with some knottiness."[2]

The practicing attorney faces the problem of insulating negligence when his client has received injury at the hands of two negligent parties. The first party (hereafter referred to as the first tortfeasor) in most cases has by his nonfeasance created a possible danger to the plaintiff, *e.g.,* emission of proper safeguards to warn of obstructions in the road. In other cases the first tortfeasor may have caused injury to the plaintiff as a result of his active negligence, *e.g.,* excessive speed. The second negligent party (hereafter referred to as the "insulator") is invariably guilty of active negligence and his negligence is second in point of time.

In a typical fact situation, the first tortfeasor abandons a stalled vehicle on the highway at night, without adequate flares. The insulator, with plaintiff as a passenger, travels at an excessive rate of speed and fails to see the stalled vehicle in time to avoid a collision. Even though both parties are negligent and both therefore wrong the plaintiff, the probable result in North Carolina would be insulation of the negligence of the first tortfeasor by the negligence of the insulator, and consequent release of the first tortfeasor from liability to the plaintiff. Thus, unfortunately for the injured plaintiff, a party contributing to his injury is relieved of liability.

It would of couse be unrealistic to expect the law to be so well defined that an attorney could look at a set of facts and tell at a glance whether the court will rule that the negligence of the first tortfeasor is insulated, but it is contended that an attorney should be able to predict with reasonable certainty which rationale the court will pursue. Therefore, it is the purpose of this note to resolve to some degree of predictability the course of reasoning which the court will follow in a given set of operative facts.

Cases of Passive Negligence on the Part of the First Tortfeasor and Active Negligence on the Part of the Insulator

Clearly the most lenient case for the plaintiff who is attempting to hold the first tortfeasor for damages was the early case of *White v. Carolina Realty Co.*,[3] where the first tortfeasor's truck was negligently

[1] Cronenberg v. United States, 123 F. Supp. 693, 699 (E. D. N. C. 1954).
[2] Butner v. Spease, 217 N. C. 82, 85, 6 S. E. 2d 808, 810 (1940).
[3] 182 N. C. 536, 109 S. E. 564 (1921).

parked at an intersection. There was evidence of fog and also evidence of negligence on the part of the alleged insulator, who, with plaintiff a passenger, collided with the first tortfeasor's truck. The court held that the first tortfeasor could not be released from liability "if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant . . . because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause be attributable to another or others."[4] This case is often quoted and was held controlling in two early cases.[5] Although the court has ceased to be this liberal, it has required that the trial court must charge the jury that the second actor's negligence must totally supersede the negligence of the first tortfeasor as the proximate cause of injury in order to insulate, relying on the *White* case as the authority.[6]

It is submitted that the court reached the logical result in the *White* case in that it would not allow "two wrongs to make a right" by refusing to release the first tortfeasor from liability to the plaintiff. However, on facts similar to the *White* case—(1) the evidence revealing that the first tortfeasor has by his nonfeasance created a possible danger to the plaintiff, and (2) there being no evidence that ths peril was recognized by the insulator or any other party similarly situated as the insulator—the court has in the majority of the later cases insulated the first tortfeasor's passive negligence and deemed the insulator's conduct active negligence subsequently operating. To understand this position it is necessary to review the line of decisions giving rise to this rationale.

In *Herman v. Atlantc Coast Line R.R.*,[7] where the plaintiff's evidence of the speed of the insulator's automobile revealed that his negligence was gross and palpable, the court introduced the works of Wharton on *Negligence*[8] as being pertinent: "I am negligent on a particular subject matter. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a

[4] *Id.* at 538, 109 S. E. at 565.

[5] Earwood v. Southern Ry., 192 N. C. 27, 30, 133 S. E. 180, 181 (1926) (evidence of excessive speed of first tortfeasor's locomotive and evidence of no warning signals at railroad crossing; insulator, with plaintiff a passenger, guilty of excessive speed); Albritton v. Hill, 190 N. C. 429, 431, 130 S. E. 5, 6 (1925) (first tortfeasor left culvert open, unguarded, and without warning lights; insulator, with plaintiff a passenger, guilty of excessive speed).

[6] Rattley v. Powell, 223 N. C. 134, 136, 25 S. E. 2d 448, 450 (1943); Hanes v. Southern Public Utilities Co., 191 N. C. 13, 19, 131 S. E. 402, 405 (1926).

[7] 197 N. C. 718, 150 S. E. 361 (1929) (First tortfeasor was a railroad company. There was omission of warning signals at crossing. Insulator's car, with plaintiff a passenger skidded 90 feet before the collision and plaintiff's own witness testified it "hit and reared up like a bucking horse.")

[8] WHARTON, NEGLIGENCE 138 (1874).

nonconductor and insulates my negligence. . . ."[9] The court also quoted from the opinion of Justice Strong in the leading United States Supreme Court case of *Milwaukee and St. Paul Ry. v. Kellogg*[10] as applying the same rule, seemingly emphasizing Justice Strong's requirement of a definite causal connection, without comment on his oft-quoted requirement that the injury "ought to have been foreseen in the light of the attending circumstances."[11] In *Hinnant v. Atlantic Coast Line R. R.*,[12] the *Herman* case was cited as standing for the rule that the first tortfeasor is not required to foresee the negligence of the insulator where the latter's negligence in palpable and gross.[13] Subsequently, the *Herman* and *Hinnant* cases were used as authority for the cryptic statement, "In any event, the negligence of the defendant [first tortfeasor] if any, was only passive, while that of the driver of the automobile [insulator] was active, and must be regarded as the sole, proximate cause of the plaintiff's intestate's death."[14] The court in *Haney v. Lincolnton*[15] gave Wharton and Justice Strong as the authorities on insulating negligence without extra comment and actually decided the case with the statement: "This doctrine of insulating the conduct of one, even when it amounts to inactive negligence, by the intervention of the active negligence of a responsible third party, has been applied in a number of cases,"[16] and cited the above line of cases. The *Haney* case set the stage for the pat decisions that where the negligence of the first tortfeasor was passive and would have done no injury to the plaintiff but for the subsequent active act of the insulator, the first tortfeasor's negligence is insulated. In these cases, the court quotes from Wharton and Strong, but gives only cursory reference, if any, to the latter authority's requirement of foreseeability.[17]

[9] Herman v. Atlantic Coast Line R. R., *supra* note 7 at 719, 150 S. E. at 362.
[10] 94 U. S. 469, 475 (1876).
[11] *Ibid.*
[12] 202 N. C. 489, 493, 163 S. E. 555, 557 (1932) (first tortfeasor a railroad company; visible railroad crossing sign at top of hill; no warning signals of approaching train; insulator, with plaintiff a passenger, guilty of excessive speed).
[13] Rattley v. Powell, 223 N. C. 134, 136, 25 S. E. 2d 448, 450 (1943) expressly overruled any inference that might be drawn from the *Herman* case, *supra* note 7, that the negligence of the insulator *must be* palpable and gross in order to insulate the first tortfeasor's negligence.
[14] Baker v. Atlantic Coast Line R. R., 205 N. C. 329, 333, 171 S.E. 342, 344 (1933) (first tortfeasor a railroad company, negligence consisted of failure to light stone pillar in middle of underpass beneath railroad's tracks; insulator asleep at wheel with plaintiff a passenger).
[15] 207 N. C. 282, 176 S. E. 573 (1934) (first tortfeasor a municipality, negligently failed to light intersection to show where street ended; insulator, with plaintiff a passenger, failed to make proper turn and went into ravine at end of street); Note, 13 N. C. L. Rev. 245 (1935).
[16] *Id.* at 287, 176 S. E. at 576.
[17] Goodwin v. Nixon, 236 N. C. 632, 642, 74 S. E. 2d 24, 31 (1953); Clark v. Lambeth, 235 N. C. 578, 584, 70 S. E. 2d 828, 832 (1952); Smith v. Sink, 211 N. C. 725, 728, 192 S. E. 108, 109 (1937).

Three cases which fall into this category but where the foreseeability rationale was applied can possibly be distinguished upon the facts. In *Beach v. Patton,*[18] the plaintiff was standing on the shoulder of the road when hit by the insulator. There the court reasoned that "to hold that the defendant Riddick [first tortfeasor] owed the duty to plaintiff's intestate to foresee that a third person would operate a car in such a negligent manner as to be compelled to drive out onto the shoulder of the highway in order to avoid a collision with a car [first tortfeasor's] *parked on the opposite side thereof,* [italics supplied] and thereby strike a person standing on the shoulder would not only 'practically stretch foresight into omniscience' . . . but would, in effect, require the anticipation of 'whatsoever shall come to pass.' We apprehend that the legal principles by which individuals are held liable for their negligent acts impose no such far-seeing and all-inclusive duty."[19] In the other two cases where the theory of the *Haney* case was not applied,[20] the first tortfeasor had clearly by his nonfeasance created a hazard. There were no lights or warnings of any kind and no conclusive evidence that other persons similarly situated as the insulator had seen the hazard. It was held that injury under such circumstances was foreseeable and the first tortfeasor was not released from liability. It is suggested that the facts of these two cases were such that injury was not merely foreseeable but was most probable.

The court has invariably approved insulation where the circumstances reveal that a person similarly situated as the insulator has recognized the possible danger, and the insulator, for such reasons as failure to keep a proper lookout, negligently attempting to pass, or excessive speed, failed to recognize the danger in time to avoid the collision. In the leading case on this type of collision, *Powers v. Sternberg,*[21] Chief Justice Stacy drew on a Pennsylvania case[22] for his authority: "Where a second actor has become aware of the existence of a potential danger created by the original tortfeasor, and thereafter by an independent act of negligence, brings about an accident, the first tortfeasor is relieved of liability, because the condition created by him was merely a circum-

[18] 208 N. C. 134, 179 S. E. 446 (1935).

[19] *Id.* at 136, 179 S. E. at 448.

[20] Price v. City of Monroe, 234 N. C. 666, 6 S. E. 2d 283 (1951) (first tortfeasor had no lights whatsoever to warn of open ditch across city street; insulator, with plaintiff a passenger, guilty of failure to keep a proper lookout); Gold. v. Kiker, 216 N. C. 511, 5 S. E. 2d 548 (1939) (first tortfeasor a construction company; omission of duty to warn by lights that bridge was 4 feet narrower than highway; insulator, with plaintiff a passenger, guilty of failure to keep a proper lookout).

[21] 213 N. C. 41, 195 S. E. 88 (1938) (The first tortfeasor's truck was parked partially in the insulator's line of traffic. The road was icy and there were several other cars parked off the highway on the shoulder of the road. The insulator, with plaintiff a passenger, was guilty of excessive speed.)

[22] Kline v. Moyer and Albert, 325 Pa. 357, 364, 191 Atl. 43, 46 (1937).

stance of the accident and not its proximate cause."[23] This requirement does not seem to be one of actual awareness but constructive knowledge is sufficient—"Every appearance indicated that he was running into a zone of danger which he [the insulator] must have seen. Others saw it, if he did not."[24] Therefore, "His was not the 'normal response' of a reasonably prudent man to the circumstances as they appeared."[25] The ultimate issue in these cases seems to be the court's interpretation of the duty owed to the plaintiff. If the evidence reveals that the danger created by the first tortfeasor has been recognized by a person in a similar position as the insulator, then the first tortfeasor's duty to the plaintiff is fullfilled because the insulator is in a sense contructively aware of the danger and can cause injury to the plaintiff only by an independent act of negligence.[26]

Where it is clear that the insulator has become *actually* aware of the potential danger caused by the first tortfeasor and has then negligently gone forward into the recognized zone of danger, the court has sustained a demurrer,[27] or entered a nonsuit on the pleadings,[28] even before the *Sternberg* case.

Where there was no evidence of gross negligence on the part of the insulator or no evidence that a person similarly situated as the insulator recognized the possible peril, or no evidence that the insulator recognized the danger and then negligently went forward into the zone of danger, the court has applied the doctrine of concurrent negligence. This was the view taken by a federal court in North Carolina,[29] relying on the following principle from *Caulder v. Gresham:*[30] "Where the second actor does not become apprised of such danger until his own negligence added

[23] Powers v. Sternberg, 213 N. C. 41, 44, 195 S. E. 88, 90 (1938).
[24] *Id.* at 43, 195 S. E. at 89.
[25] *Id.* at 44, 195 S. E. at 90.
[26] Smith v. Grubb, 238 N. C. 665, 78 S. E. 2d 598 (1953); McLaney v. Motor Freight Inc., 236 N. C. 714, 74 S. E. 2d 36 (1953) (The first tortfeasor's truck was parked in insulator's line of traffic. Insulator, with plaintiff a passenger, was following a preceding vehicle too closely and failed to see the parked truck after the preceding vehicle pulled out to the left to avoid hitting the parked truck.); Reeves v. Staley, 220 N. C. 573, 584, 18 S. E. 2d 239, 247 (1942) ("Further, the evidence shows that every appearance indicates that Saxton [insulator] was running his Ford into a zone of danger which he should have seen, and which others similarly situated did see, if he did not, and that he failed to see the obvious."); Murray v. Atlantic Coast Line R.R., 218 N. C. 392, 11 S.E. 2d 326 (1940).
[27] Peoples v. Fulk, 220 N. C. 635, 18 S. E. 2d 147 (1942).
[28] George v. Atlanta and Charlotte Airline Ry., 207 N. C. 457, 177 S. E. 324 (1934) (The complaint alleged in effect that upon observing the oncoming locomotive, the insulator then negligently attempted to cross the tracks.); Ballinger v. Thomas, 195 N. C. 517, 142 S. E. 761 (1928).
[29] Cronenberg v. United States, 123 F. Supp. 693, 699 (E. D. N. C. 1954) (First tortfeasor parked mail truck in insulator's line of traffic with improper flares. Insulator, with plaintiff a passenger, did not see the mail truck in time to avoid colliding with it. There was no conclusive evidence of excessve speed on the part of the insulator.)
[30] 224 N. C. 402, 404, 30 S. E. 2d 312, 313 (1944).

to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tortfeasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

Cases of Active Negligence on the Part of Both the First Tortfeasor and the Insulator

A typical example of the cases where both parties are actively negligent is where the first tortfeasor is traveling at excesive speed and the insulator suddenly comes out of a side road without stopping at a stop sign. The court is more apt to emphasize the foreseeability aspect of insulating negligence in such situations. The leading case on the requisite of foreseeability is *Harton v. Forest City Telephone Co.*[31] where the "test . . . is whether the intervening act and resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."[32] This test plus the application of Justice Strong's ruling in the *Kellogg* case resulted in the holding of *Butner v. Spease:*[33] "It does not appear that the collision . . . was the natural and probable consequence of Butner's [first tortfeasor] negligence, or wrongful act, or that it ought to have been foreseen in the exercise of reasonable prevision or in the light of the attending circumstances."[34] In the *Butner* case the insulator suddenly turned across the path of the automobile of the first tortfeasor, whose negligence consisted of excessive speed. The *Butner* case has also been relied upon for *overruling* the requirement that the insulator's negligent conduct must be palpable and gross, "the test is not to be found merely in the degree of negligence of the intervening agency, but in its character—whether it is of such extraordinary nature as to be unforeseeable."[35]

This foreseeability doctrine was applied again in *Warner v. Lazarus,*[36] "In the light of the circumstances disclosed by this record, we do not think the driver of the Lazarus car [first tortfeasor] 'ought to have foreseen in the exercise of reasonable prevision' that the plaintiff or some other person might be injured as a result and probable consequence of her act in slowing down her car."[37]

[31] 141 N. C. 455, 54 S. E. 299 (1906).
[32] *Id.* at 463, 54 S. E. at 302.
[33] 217 N. C. 82, 6 S. E. 2d 808 (1940).
[34] *Id.* at 89, 6 S. E. 2d at 812.
[35] Rattley v. Powell, 223 N. C. 134, 136, 25 S. E. 2d 448, 450 (1943). See note 13 *supra.*
[36] 229 N. C. 27, 47 S. E. 2d 496 (1948) (The first tortfeasor slowed down rapidly as she approached a parked car where plaintiff was changing a tire. The plaintiff and his car were completely off the highway. The insulator was following the first tortfeasor. The insulator's regular brakes were defective and he applied his handbrakes to avoid hitting the first tortfeasor, thus skidding off the highway into the plaintiff.)
[37] *Id.* at 31, 47 S. E. 2d at 499, relying on *Butner v. Spease, supra* note 33;

It can be said that, as to the collision between two active tortfeasors, the court will very probably rely upon the foreseeability doctrine of *Butner v. Spease* and insulate the negligence of the first tortfeasor if the negligence of the insulator is so extraordinary as to be unforeseeable, or if the negligence of the first tortfeasor would not reasonably of itself tend to bring harm to the plaintiff or others.

Where the negligence of the first tortfeasor has continued to be a causal factor in the ultimate injury to the plaintiff, *i.e.,* beyond the point of the original collision (between the two tortfeasors), the court has arrived at refreshing consistency in holding that the first tortfeasor is not relieved from liability to the plaintiff,[38] reasoning that "the superseding act must so intervene as to exclude the negligence of the defendant [first tortfeasor] as one of the proximate causes of the injury."[39] Therefore if it can be shown that the first tortfeasor's negligence, *i.e.,* excessive speed, failure of brakes or other essential safeguards, was the proximate factor in the first tortfeasor failure to avert further injury to the plaintiff after the initial collision, it is reasonably safe to assume that the first tortfeasor's liability to the plaintiff will not be insulated.

It is submitted that the court's variance in rationale will not permit an ascertainable rule which will apply to every situation in determining insulation,[40] although it does reach a reasonable degree of consistency when the decisions are viewed in the light of similar factual situations. In the cases of passive negligence on the part of the first tortfeasor and active negligence on the part of the insulator, the court will very probably insulate the passive negligent act, relying upon either (1) the reasoning of the *Haney* decision that the passive negligence would have done

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accord, Loving v. Whitton, 241 N. C. 273, 84 S. E. 2d 919 (1955) (First tortfeasor did not have to foresee that the insulator would fail to stop at stop sign.); *cf.* Hollifield v. Everhart, 237 N. C. 313, 74 S. E. 2d 706 (1953) (failure to frame adequate causal relationship in the complaint).

[38] Alridge v. Hasty, 240 N. C. 353, 82 S. E. 2d 331 (1954) (The insulator turned across the path of the first tortfeasor's vehicle. After the initial impact, the first tortfeasor's vehicle because of excessive speed veered across the road, travelled down a ditch, jumped an embankment and struck the plaintiff.); Dickson v. Queen City Coach Co. and Chappell v. Queen City Coach Co., 233 N. C. 167, 63 S. E. 2d 297 (1951) (After the initial impact, the first tortfeasor's bus, with plaintiffs as passengers, veered across the highway and down an eight foot embankment. There was evidence that the driver could have stopped the bus by proper application of the hand brake.); *accord,* Riggs v. Akers Motor Lines and Breeze v. Akers Motor Lines, 233 N. C. 160, 63 S. E. 2d 197 (1951); Mangum v. Atlantic Coast Line R. R., 188 N. C. 689, 125 S. E. 549 (1924).

[39] Riggs v. Akers Motor Lines and Breeze v. Akers Motor Lines, *supra* note 38 at 165, 63 S. E. 2d at 200.

[40] Blair, *Automobile Accidents in North Carolina,* 23 N. C. L. REV. 223, 242 (1945) attributes to Justice Seawell this observation about North Carolina's experience in the field of insulating negligence: "the vacillation of the court . . . reminded him of the man who said his prayer was 'Lord, give me this day my daily opinion and forgive me the one I had yesterday.'"

no injury to the plaintiff but for the subsequent active and independent act of the insulator, or (2) the constructive knowledge requirement of *Powers v. Sternberg*. Where both the first tortfeasor and the insulator are guilty of active negligence, the court very probably apply the foreseeability reasoning of *Butner v. Spease* and insulate the first tortfeasor's active negligent conduct if the act of the insulator is so extraordinary as to be unforeseeable.

And yet, why the different tests for determining liability? Is it not just as logical that a party parking his car on the highway without lights should be charged with a duty to foresee that an injury might occur as it is to charge a party guilty of excessive speed with the duty of foreseeability?

We proceed upon two well founded principles of law; one, foreseeability is an essential element in determining proximate cause; and, two, a negligent actor is liable for injury where his negligence is one of the proximate causes of such injury. The court says, in effect, that in order for the first tortfeasor to be relieved of liability to the plaintiff, his negligence must be insulated as to the proximate cause of the injury. We, therefore, arrive at the logical conclusion that in order for the first tortfeasor's negligence to be insulated as a proximate causal factor in the injury to the plaintiff, the alleged insulating act must be an unforeseeable act. Yet our review of the decisions has shown the foreseeability principle omitted in some cases, paid mere lip service in others, and emphasized as the test primarily where both the first tortfeasor and the insulator are actively negligent, but even then confined, in the main, to cases where the acts of the insulator were of extraordinary nature.

It is submitted, therefore, that the requisite of foreseeability should be the test in *all* cases of insulating negligence.

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