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NOTES AND COMMENTS

Constitutional Law—Fourteenth Amendment—Trespass Prosecution Not Discrimination by State

Defendant Negroes entered the portion of an ice cream parlor reserved for whites. The building was separated by a partition, and had separate doors marked "White" and "Colored." They requested service; the owner refused to give them service and asked them to leave. The Negroes declined to leave, saying they could not do so "without doing damage to the Constitution."

Defendants were arrested and convicted of criminal trespass.[1] They claimed that separation by color for service was a violation of their rights guaranteed by the fourteenth amendment to the Constitution of the United States.

The North Carolina Supreme Court, speaking through Justice Rodman, concluded[2] that: (1) the appellants had been correctly convicted because the discriminatory action involved was merely private conduct, and not state action of the character forbidden by the fourteenth amendment; (2) the occupier of land may accept or reject anyone on his premises for whatever whim suits his fancy; (3) the right of a private enterprise operator to select the clientele he will serve and to make the selection based on race if he so desires has been repeatedly recognized by the courts of the nation; and (4) the fact that the proprietor paid a license tax, the license containing no restrictions on whom could be served, cannot be construed to justify a trespass.

The court had ample authority for concluding that the fourteenth amendment precludes discriminative state action but not purely private action[3] in the field of private enterprise, although inroads are being made on private discrimination.[4] But was the court correct in con-

[1] N.C. GEN. STAT. § 14-134 (1953).

[2] State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

[3] "Since the decision of this court in the Civil Rights Cases, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3 (1883).

[4] A rail carrier may not transfer a Negro from a Pullman to a second-class car, even though an Arkansas statute required it, because the Interstate Commerce Act forbids it and Congress has pre-empted the field. Mitchell v. United States, 313 U.S. 80 (1941). Following several cases holding that state statutes regulating party primaries were state action, and therefore Negroes might vote therein, South Carolina repealed all of its primary election laws and the defendant contended that the political party was a private organization and not subject to the prohibitions of the

cluding that this was private discrimination rather than state action?[5]

Even if one might conclude, or assume arguendo, that this was state action, it does not necessarily follow that it was of a character precluded by the fourteenth amendment. What is necessary is state action *plus* a violation of one of the clauses set out in section one of the amendment.[6]

Shelley v. Kraemer[7] declares that judicial enforcement of privately drawn racially restrictive covenants is state action violating the fourteenth amendment. The Negroes in that case contended that all three clauses of the amendment were violated. The decision rested on a violation of equal protection of the laws, the Court finding "it unnecessary to consider whether petitioners have also been deprived of property

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Constitution against state action. The court held that party officials were subject to the limitations of the fourteenth and fifteenth amendments. "Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise." Rice v. Elmore, 165 F.2d 387, 391 (4th Cir. 1947). *Cf.* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541, *cert. denied*, 339 U.S. 981 (1949), where the court held that a private housing corporation could discriminate on the basis of color in selecting its tenants, even though the city and state aided the corporation by condemning the land for the project and giving it tax advantages, because the aid extended and the control exercised were insufficient to constitute state action.

After the *Dorsey* case, the New York legislature passed an act, N.Y. CIVIL RIGHTS LAW § 18-a, to provide against racial discrimination in the selection of tenants for privately owned, but publicly-assisted, housing accommodations. This law was held constitutional in New York State Comm'n v. Pelham Hall Apartments, Inc., 170 N.Y.S.2d 750 (1958), on the grounds that private property rights are subject to be regulated by the exercise of police power legislation, and that the state had the right either to leave abstention from racial discrimination in housing accommodations to the conscience of the individual, or to forbid racial discrimination in housing.

[5] "But the present cases . . . do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined." Shelley v. Kraemer, 334 U.S. 1, 12 (1948).

"That the actions of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Id.* at 14.

"[J]udical action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." *Id.* at 20.

[6] U.S. CONST. amend. XIV, § 1. "That Amendment prohibits the respective states from making laws abridging the privileges or immunities of citizens of the United States or denying to any person within the jurisdiction of a state the equal protection of the laws." Collins v. Hardyman, 341 U.S. 651, 664 (1951). "It is State action of a particular character that is prohibited. . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws." Civil Rights Cases, 109 U.S. 3, 11 (1883).

[7] 334 U.S. 1 (1948).

without due process of law or denied privileges and immunities of citizens of the United States."[8] However, the Court noted that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property,"[9] citing congressional civil rights legislation[10] as a source of the rights. Thus, although the Court does not say so, it would seem that the privileges and immunities clause was also violated, because the privilege or right to own property was specifically negated by the state action. Was the due process clause also violated in *Shelley v. Kraemer?* That question admits of more doubt, but the Negroes were being ordered by the state courts to move away from the restricted property they had already purchased, and that could easily be held a deprivation of property without due process. Was there also deprivation of liberty without due process? Normally when the word "liberty" is preceded by the word "life," as in the fifth and fourteenth amendments, one thinks in terms of gallows and prison. Yet, in *Bolling v. Sharpe,*[11] a District of Columbia case in which the fourteenth amendment was not applicable, the Court took the attitude that school segregation was a deprivation of liberty under the fifth amendment. So, perhaps in the *Kraemer* case there was also a deprivation of liberty.

Assuming that arresting and convicting defendants constituted state action in the principal case, it is still necessary to determine if any of the three clauses of the fourteenth amendment were violated by such state action.

It would seem that the privileges and immunities clause was not violated, because unlike the right to own property, which is defined by statute,[12] there is no specific right or privilege to enter the premises of another and remain after being asked to depart.[13] In fact, the civil and

[8] *Id.* at 23. [9] *Ibid.*

[10] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 14 STAT. 27 (1866), 42 U.S.C. § 1982 (1952).

[11] 347 U.S. 497 (1954).

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective . . . . [T]hus it [segregation] imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." *Id.* at 499-500.

[12] 14 STAT. 27 (1866), 42 U.S.C. § 1982 (1952).

[13] "At common law, a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased." Madden v. Queens County Jockey Club, 296 N.Y. 249, 253, 72 N.E.2d 697, 698 (1947).

criminal laws of trespass and real property laws put the privilege of peaceful possession in the owner.

Was this deprivation of liberty or property without due process of law? Again it seems that this question must be answered in terms of rights. The defendants were deprived of property by fines, but the fines were imposed for violating a non-discriminatory statute applicable to everyone. Was there substantive due process? If there was a right in the defendants to be on the premises, the deprivation was without due process; if there was no right, then the deprivation was with due process.

Was there equal protection of the laws? In the *Kraemer* case it was contended that since the laws applied to everyone alike, there was no denial of equal protection. The Court said that this contention would not bear scrutiny. The reason is that the fourteenth amendment guarantees personal rights to the individual, and to deny another class of persons these same rights is not equal protection, but indiscriminate imposition of inequalities. Therein lies the key difference in the principal case and *Kraemer;* in the former there existed no right in the defendants to occupy the premises after being asked to depart, and in the latter there exists a right to own property which may not be negated by state action. The contrary argument is that, in substance, the proprietor has elected segregation; that by arresting the defendants, the state has made the action of the individual its own action, adopting[14] his motives and rules; and that this is a type of state action precluded by the fourteenth amendment. The North Carolina court answers this argument by saying in effect that it does not look to the motive or reasoning of the possessor, but only to the wrongful disturbance of his possession.

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"A franchise is a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right. It creates a privilege where none existed before." *Id.* at 255, 72 N.E.2d at 699.

"A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of public welfare. The grant of the license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the licensee under obligation to the public." *Ibid.*

The licensee is not an administrative agency of the state simply because he pays a tax or fee for his license. Madden v. Queens County Jockey Club, *supra.*

Plaintiff Negro was refused service at a restaurant in Washington solely because of color. She failed to state a cause of action under the fourteenth amendment, because it applies only to state action and not to one who acts as a private individual. However, a cause was stated under the Civil Rights Act of the State of Washington. Powell v. Utz, 87 F. Supp. 811 (E.D. Wash. 1949).

[14] See Smith v. Allwright, 321 U.S. 649 (1944).

Constitutional Law—Uniform Act to Secure Compulsory Attendance of Out-of-State Witnesses

In a recent case,[1] a judge of the Court of General Sessions of New York had a certificate filed in a Florida circuit court recommending that a certain person be taken into custody and delivered to an officer of the State of New York. This was requested in order to compel his attendance as a witness before a New York grand jury investigating a possible conspiracy to steal labor union funds. The certificate was filed in accordance with a Florida law[2] which provided two alternative methods for compelling a witness within the state to attend a criminal proceeding in another state. Under this law the witness could be placed in the custody of officers from another state, or the Florida court could issue a subpoena ordering him to appear before the out-of-state proceedings. In the principal case the person sought as a witness was a resident of Illinois, a state not having such a statute, and was at the time a visitor in Florida. The Florida court held that the statute was repugnant to the Federal Constitution and refused to take this person into custody. On appeal the state supreme court affirmed.

The Florida court based its decision primarily on two grounds. The first reason advanced was that the statute violated the right of free ingress and egress among the states. The court affirmed that this was a privilege of national citizenship and thereby protected under the privileges and immunities clause of the fourteenth amendment against infringement by state action.[3] Secondly, the court stated that article IV, section 2 of the Constitution guarantees that citizens of each state are vouchsafed the privileges and immunities appurtenant to citizens of all other states. It seems the court was inferring that, when a person has the right to be immune from rendition in the state in which he resides, another state could not deprive him of this immunity even though he voluntarily left the former state and came within the jurisdiction of another state. Although the question was not presented by the facts, the court went on to say that the alternative provision which provided only for a subpoena ordering the witness to appear at the out-of-state proceeding was also unconstitutional. The court's basis for this ruling was "that the courts of this state are without power to issue process effective beyond the borders of this state."[4]

[1] Application of the People of the State of New York, 100 So. 2d 149 (Fla. 1958).

[2] FLA. STAT. ANN. § 942.02 (1941).

[3] Twining v. New Jersey, 211 U.S. 78, 97 (1908). Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

[4] Application of the People of the State of New York, 100 So. 2d 149, 155 (Fla. 1958).

The Florida law in question was modeled after the Uniform Act which was adopted by the Interstate Crime Commission in 1936.[5] This act was designed to prevent state borders from becoming effective barriers for those who would avoid their public duty as material witnesses simply because of personal inconvenience or a desire to circumvent the administration of criminal justice.

The origin of this type legislation in the United States may be traced back as far as 1792. In that year New Hampshire passed an act[6] under which a person within the state, certified as a material witness in a criminal proceeding, could be summoned to attend trial in any court of another state. Subsequently, similar laws were enacted by all the New England states,[7] and in 1902 New York passed a comparable statute.[8] In general these statutes were of an awkward nature and applied only to border states. In 1923 the National Conference of Commissioners on Uniform State Laws took cognizance of the great need for effective state legislation in this area, and in 1931 the Conference adopted a draft of "An Act to Secure the Compulsory Attendance of Non-Resident Witnesses in Criminal Cases."[9]

The early state statutes and the draft adopted by the Conference on Uniform State Laws provided for compulsory attendance only when a criminal prosecution was already pending.[10] There was no provision for grand jury investigations. Neither was there any provision for the arrest and delivery of unwilling witnesses to secure their attendance. Both the foregoing provisions were incorporated into the Uniform Act passed by the Interstate Crime Commission.[11] Today, the Uniform Act, which is reciprocal, has been made law in forty-three states.[12] Surprisingly, there have been very few cases dealing with the constitution-

[5] UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHIN OR WITHOUT A STATE IN CRIMINAL PROCEEDINGS (hereinafter called the "Uniform Act").

[6] N.H. Laws 1792, at 251-252.

[7] Me. Laws 1855, c. 184; Mass. Laws 1873, c. 319; Vt. Acts 1878, No. 43; Conn. Acts 1903, c. 87; R.I. Laws 1907, c. 1462.

[8] Laws of New York 1902, c. 94. A draft later approved by the National Conference of Commissioners on Uniform State Laws was basically a restatement of this New York law.

[9] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS, HANDBOOK at 122, 417-23 (1931).

[10] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS, HANDBOOK at 333 (1936).

[11] INTERSTATE CRIME COMMISSION, HANDBOOK ON INTERSTATE CRIME CONTROL at 31-33 (1949). 9 U.L.A. at 32-34 (1942). Also, under the earlier draft adopted by the Commissioners on Uniform State Laws, the radius of rendition was limited to 1,000 miles. The new Uniform Act contains no limitation as to distance. For a discussion of the mechanics of the Uniform Act as well as the operation of earlier legislation, see Note, 19 N.C.L. REV. 391 (1941).

[12] All states except Alabama, Georgia, Illinois, Iowa, and Michigan. See N.C. GEN. STAT. §§ 8-65 to -70 (1953).

ality of such legislation. The principal case dramatically brings into issue the validity of this act, especially with respect to the two added provisions described above.

In 1904 the first case arose testing the early New York law.[13] The court declared it to be a violation of due process and unconstitutional. However, this decision was admittedly made in haste and without proper research.[14] Seven years later, in *Massachusetts v. Klaus*,[15] the New York court overruled this earlier holding. The majority of the court held the statute to be valid and rejected arguments of unconstitutionality based on due process, the privileges and immunities clause, and the alleged invalid extraterritorial operation of the law. For a number of years this decision stood unquestioned as the leading case on the subject.

However, in 1940 an inferior court of Pennsylvania held the new Uniform Act to be unconstitutional.[16] Three reasons were advanced as the basis for this decision: (1) that the law abridged the privilege of ingress and egress among the states, (2) that it denied citizens of a state the privileges and immunities of the state in which they reside, and (3) that the authority of one state may not be extended beyond its own borders. This case did not reach a court of last resort.

In re Cooper,[17] in 1941, was the first case testing the Uniform Act which reached a state supreme court. In this decision the Supreme Court of New Jersey declared the Uniform Act to be constitutional, holding that a person certified as a material witness for the defense in a pending criminal case could be taken into custody and delivered to officials of another state to assure his attendance. In so holding, the court rejected objections based on due process. The privileges and immunities clause was not raised as an objection in this case. The New Jersey court reaffirmed this decision in 1954 and upheld the validity of the act as applied to witnesses desired by a grand jury.[18]

[13] *In re* Commonwealth of Pennsylvania, 45 Misc. 46, 90 N.Y. Supp. 808 (Sup. Ct. 1904).

[14] "As the moving party has requested, and the circumstances call for, an immediate decision of this motion, I have had no time to prepare more than this brief expression of my impressions." *Ibid.*

[15] 145 App. Div. 798, 130 N.Y. Supp. 713 (1st Dep't 1911). Here, in a five to four decision, the court gave an excellent discussion of all the aspects of this type legislation.

[16] *In re* People of New York, 103 LEGAL INTELL. 1055 (Phila. County Ct. of Quarter Sess. Dec. 6, 1940). This was the first case to pass on the merits of the Uniform Act. The title of the act had been modified as the result of a New Jersey decision in 1936. People of New York v. Parker, 16 N.J. Misc. 471, 1 A.2d 54 (Cir. Ct. 1936).

[17] 127 N.J.L. 312, 22 A.2d 532 (Sup. Ct. 1941).

[18] *In re* Saperstein, 30 N.J. Super. 373, 104 A.2d 842 (App. Div. 1954). The court held in this case that the witness, in addition to being compelled to attend, could be made to produce books and records.

In the principal case the court appears to emphasize the fact that the person sought was not charged with a crime and that no criminal action was then pending. The court also states "that the right of ingress and egress is not absolute, for instance, the Fourteenth Amendment does not limit exercise by the state of the police power to protect the health, morals and general welfare of the people."[19] Perhaps the Florida court would include within this police power the authority to grant rendition of material witnesses if there is a criminal proceeding already pending.

The police power of every state unquestionably includes the authority to require persons within the state's borders to testify at grand jury investigations within that state. This is a fundamental principle of both English and American common law.[20] When this is done there is a definite infringement of a person's right of egress from the state. Today, it is difficult to see the value of a distinction which permits compulsory attendance before a grand jury in the state in which a person is located when he is summoned, and which disallows rendition for testimony before a grand jury in another state. The terms of the Uniform Act specify that a person shall not be summoned if "undue hardship" would be involved in the trip.[21] In the realm of the police power, legislative judgment has been accorded great weight unless it was clearly beyond the bounds of constitutionality. Should not the legislature be allowed to exercise this power so as to include the investigation of crime, which is the necessary forerunner of criminal prosecution?

The traditional interpretation which the courts have made regarding the application of article IV, section 2 of the Constitution has been that this section prohibits discrimination by a state in favor of its own citizens and against citizens of other states.[22] Certainly the language of the Uniform Act applies equally to all those within the state's borders.[23] There is no discrimination. The power of a state over people within its borders is plenary with respect to the police power. If the

[19] Application of the People of the State of New York, 100 So. 2d 149, 157 (Fla. 1958).

[20] Blair v. United States, 250 U.S. 273 (1919).

[21] UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHIN AND WITHOUT A STATE IN CRIMINAL PROCEEDINGS § 2.

[22] Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939). In this decision it was stated that this clause does not import that a citizen of one state carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of citizenship in his state, but that in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy. The Court added that the section prevents a state from discriminating against citizens of other states in favor of its own.

[23] The language of the act specifies only "that a person being within this state is a material witness. . . ." UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHIN AND WITHOUT THE STATE IN CRIMINAL PROCEEDINGS § 2.

power exists anywhere to compel witnesses to proceed from one state to another to testify, it must be in the state in which the witness is present.

One of the primary objections to the Uniform Act is based on its so-called extraterritorial effect, *i.e.*, the witness is compelled to appear before a proceeding outside the territorial jurisdiction of the court which issues the order. It is submitted that this objection may be overcome by following the rationale of courts acting in equity when faced with similar problems.[24] Modern cases have established that in many situations a court of equity may require certain things to be done beyond the court's territorial jurisdiction.[25] The problem which arises when one is required to perform an act in another state is essentially one of enforcement. The court is not acting entirely extra-territorially, because at the time the witness is subpoenaed he is within the territorial jurisdiction of the court.

The future validity of the Uniform Act is certainly placed in jeopardy by the decision in the principal case. Should other states choose to follow this ruling, it may be almost impossible, as a practical matter, to obtain the testimony of a witness who lives outside the state or who has fled to another state to avoid giving testimony. The Federal Fugitive Felon Law,[26] passed in 1934, was intended to provide some relief in this area in the absence of appropriate state legislation. This law made it a felony to travel in interstate or foreign commerce in order to avoid giving testimony in any criminal proceeding. While this law is certainly beneficial, it fails to provide an adequate solution to the problem. Obviously it would be completely ineffective as to any witness who had never entered the state conducting the prosecution or investigation. Unless the states themselves are allowed to enforce comprehensive legislation, there appears to be no effective means of securing testimony from unwilling witnesses outside a state.[27]

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[24] Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494 (1930).

[25] *Ibid.* It has been recognized that in certain circumstances a court acting in equity may (1) restrain proceedings instituted in a foreign tribunal, (2) decree a conveyance of foreign lands, and (3) restrain or compel the doing of some act outside the territorial limits of the state.

[26] 18 U.S.C. § 1073 (1952).

[27] At the time of this writing, certiorari has been granted by the United States Supreme Court. Application of the People of the State of New York v. O'Neill, 356 U.S. 972 (1958). Also, motion made by the National Conference of Commissioners on Uniform State Laws for leave to file brief as amicus curiae has been granted. Application of the People of the State of New York v. O'Neill, 79 S. Ct. 19 (1958).

Damages—Medical Expenses of Wife—Right of Husband to Recover from Tort-feasor

The Supreme Court of Georgia recently held[1] the application of a survival statute[2] authorizing the recovery of medical, hospital, and funeral expenses by the personal representative of a person killed by crime or negligence, unconstitutional as to defendant. Decedent was survived by her husband who had a common law cause of action[3] against the tort-feasor for medical and funeral expenses incurred as a result of the injury unless the wife had so acted as to make her separate estate liable for these expenses. The court held that the statute did not repeal the husband's cause of action. Thus both the husband, in his own right, and the administrator, by that statute, could maintain an action to recover the same items of damages which, if permitted, would subject the defendant to double liability. The court held that such a result would violate the due process clause of both the state and the Federal Constitutions.

What then is the law in respect to the rights and liabilities of husbands and wives for medical expenses[4] incurred by reason of the personal injury to the wife?[5]

At the common law, a wife in her own right had very few legally enforceable rights and liabilities. Upon her marriage all the wife's real property came under the control of her husband,[6] and all her personal property became, in effect, an outright gift to him;[7] furthermore, she was under a contractual disability.[8] All her earnings,[9] as well as any damages recovered for injury to her person,[10] accrued to the husband. It was the husband's duty, however, to support his wife and to provide

[1] Complete Auto Transit, Inc. v. Floyd, 104 S.E.2d 208 (Ga. 1958).

[2] GA. ANN. CODE § 105-1310 (1956).

[3] Georgia R.R. and Banking Co. v. Tice, 124 Ga. 459, 52 S.E. 916 (1905); Lewis v. Atlanta, 77 Ga. 756 (1886); Wrightsville & Tennille R.R. v. Vaughan, 9 Ga. App. 371, 71 S.E. 691 (1911).

[4] Funeral expenses will not be considered in this Note. Partly because of varied statutory provisions, the law governing them generally varies from the rules as to medical expenses. See, *e.g.*, N.C. GEN. STAT. § 28-1 (1950).

[5] It will be assumed in this Note that the husband and wife are living together since, otherwise, the rights and liabilities of each spouse are governed by the type and terms of their particular separation or divorce.

[6] *In re* Giant Portland Cement Co., 21 A.2d 697 (Del. Ch. 1941); Blood v. Hunt, 97 Fla. 551, 121 So. 886 (1929); Turner v. Heinberg, 30 Ind. App. 615, 65 N.W. 294 (1902).

[7] Woodworth v. Sweet, 51 N.Y. 8 (1865); Caffey v. Kelley, 45 N.C. 48 (1852).

[8] Jones v. Hamell, 110 Ga. 373, 35 S.E. 690 (1900); Stephens v. Hicks, 156 N.C. 239, 72 S.E. 313 (1911); Brown v. Brown, 121 N.C. 8, 27 S.E. 998 (1897).

[9] Mock v. Neffer, 148 Ga. 25, 95 S.E. 673 (1918); Syme v. Riddle, 88 N.C. 463 (1883); Kee v. Vasser, 37 N.C. 553 (1843).

[10] He must, however, take possession of them. Anderson v. Anderson, 74 Ky. (11 Bush) 327 (1875); Southworth v. Packard, 7 Mass. 95 (1810).

her with the necessities of life[11] which, among other things, included medical care.[12] Therefore, the expense of any reasonable and necessary medical services rendered to the wife was a debt of her husband, whether he assented to the services or not.[13] Since the liability was his, the common law gave him a cause of action, in his own right, to recover medical expenses proximately caused by the wrongful injury of his wife by a third person.[14] This cause of action was separate and distinct from the cause of action for personal injuries to the wife which includes such items of damages as pain and suffering. If the wife died, all the rights arising in her and enforceable for her expired except where preserved by statute; however, the right to recover the expenses incurred prior to her death, being in the husband alone, did not expire.[15]

With the advance of civilization, and especially since the middle of the nineteenth century, women have emerged from an inferior status and gained equality with men in many respects. By statutes and by constitutional provisions married women have been granted in all[16] states some or all of the following rights:[17] to hold their own separate property with little or no control by their husbands; to contract in their own right; to retain their own earnings; and to sue and be sued alone. However, a husband in all jurisdictions is still under the duty to support his wife and to provide her with the necessities of life[18] which, of course, include medical care. The resulting rule is, therefore, that a wife *may* contract for medical services and charge them against her separate estate; however, there must be an express contract to that effect by the wife, or there must be facts and circumstances clearly showing that she intended to bind her separate estate alone; otherwise, when medical services are furnished the wife, the debt is upon the husband.[19] If he refuses to pay

[11] Kenyon v. Brightwell, 120 Ga. 606, 48 S.E. 124 (1904); Lyons v. Schanbacher, 316 Ill. 569, 147 N.E. 440 (1925); Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915).

[12] Ematurdo v. Gordon, 100 Conn. 163, 123 Atl. 14 (1923); Fincher v. Davis, 108 S.E. 905 (Ga. App. 1921); Bowen v. Daugherty, *supra* note 11.

[13] Cothran v. Lee, 24 Ala. 380 (1854).

[14] Waller v. First Sav. & Trust Co., 103 Fla. 1025, 138 So. 780 (1931); Thibeault v. Poole, 283 Mass. 480, 186 N.E. 632 (1933); Berger v. Jacobs, 21 Mich. 215 (1870); Richmond R.R. & Elec. Co. v. Bowles, 92 Va. 738, 24 S.E. 388 (1896); Wheeling v. Trowbridge, 5 W. Va. 353 (1872).

[15] Hyatt v. Adams, 16 Mich. 180 (1867).

[16] MADDEN, PERSONS AND DOMESTIC RELATIONS 111 (1931).

[17] See, *e.g.*, N.C. CONST. art. X, § 6 (secures the property of married women to them); N.C. GEN. STAT. § 52-2 (1950) (authorizes married women to contract); and N.C. GEN. STAT. § 52-10 (1950) (authorizes married women to retain their own earnings and damages for personal injury).

[18] *E.g.*, Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915). See also numerous cases cited in 41 C.J.S., *Husband and Wife* § 15, p. 404, n. 91 (1944) and 26 AM. JUR., *Husband and Wife* § 337, p. 934, n. 16 (1940).

[19] Public Util. Corp. v. Oliver, 64 F.2d 60 (8th Cir. 1933); Kenyon v. Vogel, 250 Mass. 341, 145 N.E. 462 (1924); Galtney v. Wood, 149 Miss. 56, 115 So. 117 (1928); Bowen v. Daugherty, *supra* note 18; Hudock v. Youngstown, 164

the creditor, and she pays, she may then sue her husband and recover the amount so paid out by showing that the goods or services were reasonable and necessary and that she expected him to assume liability.[20]

Some jurisdictions allow creditors who have supplied necessities to the wife to recover from the wife, or her estate, if the husband is found to be insolvent.[21] Others view the solvency of either party immaterial, and a creditor must take his luck against the one on whom the liability lies under the facts.[22] All jurisdictions allow recovery of medical expenses either by the person who is liable to the creditor for them, or by the person who has in fact paid for them.[23] A few states have statutes[24] making the husband and wife jointly or severally liable to creditors for goods and services, including medical expenses, necessary for the support of the family. But it seems that as between the husband and wife, the husband is still primarily liable for necessities.[25] Since the wife may be held liable for these necessities, she has accordingly been given the right to recover her own medical expenses.[26]

In North Carolina the common law is still in effect except where provided otherwise by statute.[27] Since a husband must support his wife and provide her with necessities, his right to recover medical expenses caused by the wrongful injury of his wife seems to be still existent.[28]

Ohio St. 493, 132 N.E.2d 108 (1956); Lanzo v. Swift, 40 S.E.2d 811 (W. Va. 1946). See also, Annot., 66 A.L.R. 1189 (1930).

[20] Cantiello v Cantiello, 136 Conn. 685, 74 A.2d 119 (1950); Kosanke v. Kosanke, 137 Minn. 115, 162 N.W. 1060 (1917).

[21] *In re* Chevalier, 90 N.Y.S.2d 788 (Surr. Ct. 1949); *In re* Wilson's Estate, 160 Okla. 23, 15 P.2d 825 (1932).

[22] Grasser v. Anderson, 273 N.W. 63 (Wis. 1937).

[23] Professor McCormick states the general rule: "Under modern statutes, which confer on the wife the power to bind her separate estate by contract, the husband's duty to support and care nevertheless continues, and he may still recover for the cost already incurred for her treatment, and she may not recover for this, unless she has actually paid for such expense or has personally contracted to do so, in such a manner as to bind her separate estate." McCORMICK, DAMAGES 333-34 (1935). See also MADDEN, PERSONS AND DOMESTIC RELATIONS 158-63 (1931). *Contra,* Woodward v. Des Moines, 182 Iowa 1102, 165 N.W. 313 (1917); Floyd v. Miller, 190 Va. 303, 57 S.E.2d 114 (1950) (4-3 decision) where wives were allowed to recover medical expenses paid by their husbands due to wording of statutes there involved.

[24] *E.g.,* COLO. REV. STAT. ANN. § 43-1-10 (1953); CONN. GEN. STAT. § 7308 (1949); ILL. ANN. STAT. ch. 68, § 15 (Smith-Hurd 1936); MINN. STAT. ANN. § 519.05 (1947). As a typical example, see IOWA CODE ANN. § 597.14 (1950): "The reasonable and necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or severally."

[25] *In re* Kosanke's Estate, 137 Minn. 115, 162 N.W. 1060 (1917).

[26] West Chicago St. Ry. v. Carr, 170 Ill. 748, 48 N.E. 992 (1897).

[27] N.C. GEN. STAT. § 4-1 (1953).

[28] No North Carolina case since the passage of N.C. GEN. STAT. §§ 52-2, -10, *infra* notes 29 and 30, has been found squarely holding that a husband may recover his direct expenses for the wrongful injury of the wife. However, the following cases indicate the court's recognition of the husband's right: Jyachosky v. Wensil, 240 N.C. 217, 81 S.E.2d 644 (1954); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

However, the court's apparent interpretation of the controlling statutes, G.S. §§ 52-2[29] and -10,[30] seems to have caused a rather liberal rule to obtain in allowing wives to recover their medical expenses in personal injury actions.

The first case arising after the passage of G.S. § 52-2 involving the issue of medical expenses of the wife was *Bowen v. Daugherty*.[31] This was an action by the administrator of deceased wife seeking permission to sell land in order to pay decedent's medical and funeral bills. Refusing such permission, the court held that the statute did not remove the husband's common law liability to support his wife and provide her with necessities; and in absence of an express promise, or evidence tending to show that credit was given to her, or facts or circumstances making her exclusively or primarily liable, the debt was upon him. There is a dictum[32] to the effect that if the husband, in such cases, were insolvent the court might allow a creditor to reach the wife or her estate.

In *McDaniel v. Trent Mills, Inc.*,[33] the *wife* was suing tort-feasor for medical expenses she allegedly incurred as a result of her husband's injuries. The lower court sustained the defendant's demurrer, and the supreme court reversed, holding that she had stated a cause of action for expenses incurred by her and expended out of her separate estate made necessary by her husband's injuries.

In *Helmstetler v. Duke Power Co.*,[34] the husband sued for consequential damages, not including medical expenses, due to the defendant's negligent injury of his wife. The court decided that the husband had lost his rights for consequential damages by virtue of G.S. § 52-10, which authorized a wife to sue for "any damages for personal injuries or other tort sustained by her." In defining the term "damages" under that statute, the court stated that medical expenses were, *inter alia,* included therein; however, a wife's medical expenses were not at issue in any of the cases cited[35] as authority for the definition, and thus, they

[29] "Subject to the provisions of § 52-12, regulating contracts of wife with husband affecting corpus or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried . . . ." N.C. GEN. STAT. § 52-2 (1950). This act, known as the Martin Act, was passed in 1911.

[30] "The earnings of a married woman by virtue of any contract for her personal service, and damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried." N.C. GEN. STAT. § 52-10 (1950). This act was passed in 1913.

[31] 168 N.C. 242, 84 S.E. 265 (1915).

[32] *Id.* at 245, 84 S.E. at 267.

[33] 197 N.C. 342, 148 S.E. 440 (1929).

[34] 224 N.C. 821, 32 S.E.2d 611 (1945).

[35] Ledford v. Valley River Lumber Co., 183 N.C. 614, 112 S.E. 421 (1922); Kirkpatrick v. Crutchfield, 178 N.C. 348, 100 S.E. 602 (1919); Price v. Charlotte Elec. Ry., 160 N.C. 450, 76 S.E. 502 (1913).

fail to support the unqualified listing of that item as proper damages in the wife's action. Later, in *Jyachosky v. Wensil*,[36] the *Helmstetler* case was cited as authority for the statement that "ordinarily, such [medical] expenses are proper elements of damages in a wife's tort action."[37]

If medical expenses are now a proper element of damages in the wife's suit against tort-feasor, what has happened to the husband's common law right to recover for these medical expenses? In the *Bowen* case it was held that a husband was liable for the medical services to his wife, absent her assumption of the debt. In *McDaniel v. Trent Mills, Inc.*, a *wife*, on whom no liability attaches by law, was allowed to recover the medical expenses of her spouse by virtue of having paid them. Surely, then, a husband, who is by law primarily liable for his wife's medical expenses, may recover them from the tort-feasor absent her sole assumption of the debt as considered in the *Bowen* case. But has the court said otherwise by its definition in the *Helmstetler* case? Or perhaps did the court make an over-generalization there? Taking this definition declared by the court strictly, in North Carolina a married woman in her personal injury action can recover her medical expenses, unless, as intimated in *Helmstetler*,[38] the husband sues and alleges he was required to spend his own funds. *If* the state of the law is that a married woman may recover by merely alleging[39] and proving that medical expenses were incurred without the requirement that she allege and prove that she either paid them out of her separate funds, or incurred the liability on her own credit, then one of two possibilities has occurred: (1) defendants in such cases are subject to double liability, or (2) the husband has lost his common law right to recover the medical expenses from the tort-feasor.

The first possibility was rendered unconstitutional as to the defendant in the principal case because double liability was imposed by

[36] 240 N.C. 217, 81 S.E.2d 644 (1954).

[37] *Id.* at 227, 81 S.E.2d at 651.

[38] "It is not alleged that the plaintiff has expended any of his own funds in consequence of the injuries negligently inflicted upon his wife. *McDaniel v. Trent Mills*, supra." 224 N.C. at 825, 32 S.E.2d at 614. If the liability to the medical creditor is on the husband then the determination of the wife's right to recover should not depend on whether the husband has sued.

[39] *E.g.*, In the *Jyachosky* case the complaint read: "11. As a result of the accident the plaintiff [a married woman] has incurred medical expenses in excess of $1,500.00, and is informed and believes that the injuries will continue to require medical treatment and will result in the incurring of additional medical expense as long as plaintiff lives." Transcript of Record, p. 5, Jyachosky v. Wensil, 240 N.C. 217, 81 S.E.2d 644 (1954).

It has been held that a married woman must allege the facts showing why she, and not her husband, is entitled to the reovery of medical expenses in order to introduce evidence on them. Wrightsville & T.R. Co. v. Vaughan, 9 Ga. App. 371, 71 S.E. 691 (1917); Brown v. Bell, 247 Mass. 437, 142 N.E. 93 (1924).

statute.[40] In *Jyachosky* the court said that the defendant was protected from a double recovery by the fact that the husband of the plaintiff testified that the money used to pay the medical bills was, in effect, hers, thus having estopped himself from claiming otherwise should he later attempt to sue. If the husband should refrain from any participation in his wife's action, and the defendant paid damages for which the husband may later prove himself entitled, what is there to prevent the husband from recovering also?

The second possibility, the abrogation of the husband's common law right to recover the wife's medical expenses from the tort-feasor, is manifestly unfair to husbands since the primary liability for these medical expenses still remains on him. Consequently, the medical creditor, who has not been a party[41] to the case of "wife v. tort-feasor," can sue the husband. Thus it would seem that the husband has a liability without the concurrent right to indemnify himself from the wrong-doer.

Of course, no serious problem as to who gets the recovery, or who pays the medical bill arises in the normal situation where the husband and wife are living together harmoniously; however, the situation could be quite different. For instance, the wife having recovered a substantial judgment may decide this is the chance to leave husband, an uncommon but not unheard of possibility. Or if the wife has died, an administrator may be appointed and allowed to recover from the tort-feasor, regardless of whether the husband has paid or is liable for the medical bills. When it is remembered that personal injury recoveries are a general asset of the decedent's estate[42] and that medical debts are in the sixth order of priority,[43] then the husband may have a legitimate concern if the estate

[40] If the *Helmstetler* definition is strictly followed, namely, that the right to recover medical expenses is in the wife, then the North Carolina court may find itself faced with the same problem that was faced by the Georgia court in the principal case. That is, there exists in the wife a statutory cause of action for medical expenses while at the same time the husband's common law right for these same damages is evidently unaffected. Thus, it is submitted that the application of N.C. GEN. STAT. § 52-10 (1950), as construed in *Helmstetler*, would be unconstitutional as applied to the tort-feasor when sued for medical expenses.

[41] The medical creditor may, however, avail himself of a lien. N.C. GEN. STAT. §§ 44-49, -50 (1950), provide that a lien may be placed by a medical creditor upon any recovery for personal injury where the person so recovering is indebted for the medical services and supplies. G.S. § 44-49 requires that the lien be filed in the clerk of the court's office within 30 days after the filing of the suit in order to be valid. G.S. § 44-50 provides for cases of out of court settlement, but the writer believes it is of doubtful value in that the statutory duty is directed at the person receiving the settlement. Obviously, the statute was intended to assist medical creditors to collect from the poor and from those whose practice of paying their debts is in doubt. If the medical creditor cannot be on hand immediately after the settlement with such persons, he is likely never to see the money. The writer suggests that if the statutory duty were shifted to the person or corporation making the settlement, the statute would be more effective.

[42] Hoke v. Atlantic Greyhound Corp., 220 N.C. 332, 38 S.E.2d 105 (1946).

[43] N.C. GEN. STAT. § 28-105 (1950).

is not amply solvent to cover the other debts. To be deprived of his recourse against the tort-feasor in such cases could be a grave financial blow to the husband. On the other hand, if the husband and the wife both are allowed separate recoveries for the same medical expenses, the defendant is forced to pay twice.

No North Carolina case has been found which is decisive on the point discussed in this Note, and while trends suggesting contrary possibilities have been explored, it is submitted that the North Carolina position is that *only* when the injured plaintiff-wife has paid the medical bills with her own funds, or is solely liable therefor, may she recover them from the tort-feasor; otherwise, the husband on whom the liability falls may recover.

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Evidence—Admissibility in Federal Prosecution Where Procured by State Authorized Wire Tapping

In *Benanti v. United States*,[1] the Supreme Court of the United States reversed the Court of Appeals for the Second Circuit[2] and held that evidence obtained as the result of state authorized wire tapping by New York law enforcement officers, even though without participation by federal officials, was inadmissible in federal courts.[3]

In the Supreme Court the Government attempted to justify admission of the evidence on the basis of *Schwartz v. Texas*[4] and by drawing an analogy to fourth amendment cases in which evidence illegally procured by state officers acting in their own behalf and without federal participation was admissible in federal prosecutions.[5]

In the *Schwartz* case the Supreme Court held that evidence obtained by wire tapping by state officials was admissible in state courts. The Court in the *Benanti* case distinguished the *Schwartz* case on the ground that in the latter "due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect."[6] In the *Benanti* case

[1] 355 U.S. 96 (1957).
[2] Benanti v. United States, 244 F.2d 389 (2d Cir. 1957).
[3] The wire tapping was by state officials who had obtained a warrant in accordance with state law authorizing the wire tapping. The petitioner was suspected of violating the New York narcotics laws. When the state officers made their arrest, they found the petitioner was not transporting narcotics in violation of state law, but was transporting nontaxed alcohol in violation of federal law. Evidence of this violation was turned over to federal authorities who began this prosecution. Although the New York police were acting pursuant to state law, N.Y. CONST. art. 1, § 12; N.Y. CODE CRIM. PROC. § 813-a (1942), both the court of appeals and the Supreme Court found they violated section 605 of the Federal Communications Act, 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1952).
[4] 344 U.S. 199 (1952).
[5] 355 U.S. at 101.
[6] *Ibid.*

the state's side of the federal-state conflict was not as compelling as in *Schwartz,* for in *Benanti* the problem was whether in a federal prosecution a state statute required the Court to refuse to implement the prohibition of a federal law. Since it had been held in an earlier case[7] that section 605 was applicable to intrastate as well as to interstate communications and since section 605 is not limited to federal agents, but also applies to state officials,[8] the state law authorizing wire tapping was manifestly contrary to controlling federal law.[9] In the *Schwartz* case the Court was not faced with the relatively simpler problem of a conflict between state and federal legislation in a field in which Congress was authorized to act, but with the problem of the effect to be given to violation of a federal statute in state proceedings. Although admitting a violation of section 605 occurred in the state tribunal,[10] the Court held that section 605 would not be construed to bar the evidence in the absence of a clear intent on the part of Congress to impose a rule of evidence upon state courts. In so holding the Court avoided a construction of the statute which would have raised the constitutional question of whether Congress had the authority under the commerce clause to invade the police power of the states in determining the admissibility of evidence in state courts.[11] Since the *Benanti* case involved a federal prosecution and, therefore, did not present the same grave problem in federal-state relations, the Court did not hesitate to distinguish it from the *Schwartz* case.

The decision in *Benanti* is particularly significant in that the lower federal courts in cases arising under the fourth amendment have admitted evidence illegally obtained by state and other nonfederal officials acting in their own behalf and turned over to federal authorities when the latter did not participate in the wrongdoing.[12]

[7] Weiss v. United States, 308 U.S. 321 (1939).

[8] See Schwartz v. Texas, 344 U.S. 199 (1952), involving state law enforcement officers, and in which the Court acknowledged that the divulgence of the wire tapping by these state officials was a violation of Section 605.

[9] 355 U.S. at 105, where the Court stated: "[W]e find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section. . . ." In *In re* Telephone Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958), it was held that any future applications for orders authorizing interceptions of telephone messages within New York would be denied on the ground that *Benanti* held such orders to be contrary to federal law.

[10] 344 U.S. at 201.

[11] See Adams v. New York, 192 U.S. 585, 599 (1904), where the Court said: "[I]t is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government." See also Scott, *Federal Restrictions on Evidence in State Criminal Cases,* 34 MINN. L. REV. 489, 507-08 (1950).

[12] Jones v. United States, 217 F.2d 381 (8th Cir. 1954); Jaroshuk v. United States, 201 F.2d 52 (9th Cir. 1953). See Harno, *Evidence Obtained by Illegal Search and Seizure,* 19 ILL. L. REV. 303 (1925).

The fourth amendment of the United States Constitution prohibits unreasonable searches and seizures.[13] The Supreme Court has taken the position that evidence secured in violation of the fourth amendment is not admissible in federal courts if federal officers participated in the illegal search and seizure.[14] Exclusion of such evidence rests upon a court created rule of evidence designed to implement this amendment's prohibition.[15] In the *Benanti* case the Court, citing *Lustig v. United States,*[16] stated that the question of whether evidence illegally obtained by state officials is admissible in the federal courts is an open one in the Supreme Court.[17] Although this question has not been decided by the Supreme Court, the Court has on several occasions used language indicating that evidence secured by state officers would be admissible;[18] and in *Burdeau v. McDowell*[19] the Court held that evidence secured in an illegal search by a private detective was admissible in a federal prosecution. As previously stated, the lower federal courts, to which the question has been presented on several occasions, have generally admitted the evidence.[20]

The lower court realized that wire tapping did not involve a violation of the fourth amendment and that evidence secured by wire tapping was admissible until passage of the Federal Communications Act.[21] However, the court of appeals, believing there should be no distinction between the policy as to state procured evidence in violation of the fourth amendment and that procured by state officers in violation of the Federal Communications Act, held the evidence was admissible.[22]

[13] U.S. CONST. amend. IV.

[14] Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921).

[15] Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (concurring opinion). See Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence,* 15 So. CALIF. L. REV. 60 (1941).

[16] 338 U.S. 74 (1949).

[17] 355 U.S. at 102, n. 10.

[18] See, *e.g.,* Byars v. United States, 273 U.S. 28 (1927), where the Court said: "[W]e do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *Id.* at 33.

[19] 256 U.S. 465 (1921).

[20] See note 12 *supra.*

[21] Olmstead v. United States, 277 U.S. 438 (1928). In the *Olmstead* case the defendant contended that wire tapping was an unreasonable search and seizure and that evidence so obtained by federal officials was not admissible in the federal courts. The Court rejected this contention on the ground that the fourth amendment was not violated unless there was a search or seizure of one's person or papers or an actual physical invasion of one's home. It was not until several years after the *Olmstead* decision that Congress enacted the Federal Communications Act, 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1952). The pertinent part of the statute is as follows: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

[22] Benanti v. United States, 244 F.2d 389, 393 (2d Cir. 1957).

On appeal the Supreme Court found that it was neither appropriate nor necessary to delve into an analogy between the Communications Act and the fourth amendment and decided the case solely on the basis of the statute.[23]

The plain meaning of the statute[24] supports the decision of the Supreme Court and justifies the refusal to admit evidence secured by wire tapping regardless of the policy in the lower federal courts in fourth amendment cases. Whereas the United States Constitution protects individuals only from illegal searches and seizures conducted by federal officials and not from such acts by state officials,[25] except in instances where the latter are guilty of such gross misconduct as to deprive the aggrieved party of due process,[26] the Communications Act by its express terms makes no distinction between federal and state officials. Another factor calling for a reversal of the conviction was that at the very moment the state official "divulged" the "existence" of the wire tapping to the jury he violated the Communications Act.[27] The conviction, said the Court, was "brought about in part by a violation of federal law, in this case in federal court."[28] Accordingly, the Court held that the express prohibition in the statute was a bar to the conviction.

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[23] 355 U.S. at 102.

[24] See note 21 *supra*.

[25] Wolf v. Colorado, 338 U.S. 25 (1949), where the Court stated: "[T]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again . . . ." *Id.* at 26.

[26] The Court has made the following statement as to the limitations imposed on the states by the fourteenth amendment: "[T]his clause extracts from the States . . . all that is 'implicit in the concept of ordered liberty'." *Id.* at 27.

[27] After pointing out that section 605 contains an express prohibition against the divulgence of the existence of an interception, the Court said: "[D]isclosure of the *existence* of the communication was the prejudicial error that was not overcome." 355 U.S. at 101, n. 6. On the basis of this statement it would seem that the primary reason for forbidding the evidence secured by the wire tapping was revelation of the existence of the interception in court. But the Court explicitly reserved what conclusion it would have reached had the divulgence been out of court. "The first divulgence appearing on the record occurred in court, but we do not mean to imply that an out-of-court violation of the statute would not also lead to the invalidation of a subsequent conviction." *Id.* at 102, n. 9. Apparently a divulgence out of court would also lead to a reversal of any conviction. In *Benanti* the Court said that evidence acquired by wire tapping should not be used at all. This could be construed as meaning that regardless of where the violation occurs, the Court will implement the prohibition of the Federal Communications Act by excluding such evidence. This would not be a new step, since as stated previously, this is the policy as to evidence secured by federal officials in violation of the fourth amendment. However, since the Communications Act is not limited only to federal officials as is the fourth amendment, evidence obtained in violation of the former would probably be excluded regardless of who violated the statute.

[28] *Id.* at 102.

Life Insurance—Effect of Homicide Exclusion in Double Indemnity Clause

The recent case of *Goldberg v. United Life and Acc. Ins. Co.*[1] indicates a trend toward a new interpretation and construction of double indemnity clauses in life insurance policies. The facts were as follows: the insured and another gentleman were observed in discussion in a social club; the insured apparently addressed harsh and profane words to his companion; the companion thereupon struck the insured with his fist; the insured fell backward, striking his head on a concrete floor and suffering a concussion from which he died a short time later.

The defendant company earlier had issued to the insured certain life insurance policies containing double indemnity clauses.[2] Plaintiff, the wife of the insured, had been named beneficiary. The defendant company immediately paid to the plaintiff the total face value of the policies, but refused to pay double indemnity, basing its refusal on two grounds: (1) the insured did not meet his death by accidental means within the coverage of the policies, and (2) the insured's death resulted from "homicide," a cause of death expressly excluded from the double indemnity insuring agreements.

As to the defendant's first ground, the court conceded, without deciding, that the evidence was sufficient to show prima facie that the insured met his death through accidental means within the insuring provisions of the policy. Of necessity, in every case which turns on exclusions from a double indemnity provision the court must reach this conclusion, since there can be no recovery of double indemnity in any event if death does not result from accidental means. Although this presents a problem of real significance in many fact situations, the better reasoned authorities apparently would support the court's conclusion on this set of facts.[3]

[1] 248 N.C. 86, 102 S.E.2d 521 (1958).

[2] The pertinent stipulation read: "The United Life and Accident Insurance Company . . . promises to pay Double Indemnity . . . in the event that such death should result directly and independently of all other causes from bodily injury effected solely through external, violent, and accidental means . . . *provided such death shall not have resulted from homicide* . . . ." (Emphasis added.)

[3] To determine whether a death results solely from accidental means, the situation must be considered from the viewpoint of the one killed. Releford v. Reserve Life Ins. Co., 154 Tex. 228, 276 S.W.2d 517 (1955). The assailant can act intentionally and the death still result solely from accidental means. Black v. Massachusetts Acc. Co., 57 R.I. 237, 189 Atl. 3 (1937). Although an injury may be intentionally inflicted by another, nevertheless, if the injury was not naturally to be foreseen by the insured, death results from accidental means within the meaning of a double indemnity provision. Mutual Life Ins. Co. v. Distretti, 159 Tenn. 138, 17 S.W.2d 11 (1929). But, "where the insured is the aggressor in a personal encounter and commits an assault upon another with demonstration of violence and knows, or under the circumstances should reasonably anticipate, that he will be in danger of great bodily harm as the natural and probable consequence of his act

However, the court affirmed a dismissal of the plaintiff's complaint on the second ground, holding that the evidence disclosed conclusively that the insured met his death by "homicide" within the meaning of the exclusion in the policy. This was true despite the fact that the companion, in striking the blow, had no intent to kill.

Technically, the decision is correct when considered in view of the broad legal definition of the word "homicide"—the killing of one human being by another human being.[4] Nevertheless, the court in this decision seemingly has gone further than any other reported American case, although a careful analysis of the reported decisions will disclose a trend toward construing the provision "homicide" liberally in favor of insurance companies.

The situation most obviously included as a homicide is the one in which the insured is the victim of a felonious intentional killing amounting to first degree murder. The insurance company, of course, is not liable in such a situation.[5] Also, where the insured is killed incident to the commission of a felony the courts seem to agree that death results from "homicide" within the meaning of the policy exclusion.[6] Such a killing is first degree murder under the felony-murder rule. However, where the killing is done by an insane person, the courts early developed

. . . , his injury or death may not be regarded as caused by accidental means." Scarborough v. World Ins. Co., 244 N.C. 502, 505, 94 S.E.2d 558, 561 (1956). However, "even where it appears the insured is the aggressor in an altercation, his ensuing death may be held as [resulting from accidental means] . . . provided it also appears the insured was in such mental condition that he could not reasonably anticipate he would be in danger of great bodily harm as a probable consequence of his acts." Newton v. Colonial Life and Acc. Ins. Co., 149 F. Supp. 113, 115 (E.D.N.C. 1957).

It would seem clear that in the principal case the insured would not have had reason to anticipate that death would result from his calling his companion a vile name. Death would not be the natural and probable consequence of that act. Thus, death can be said to have resulted solely from accidental means.

[4] Black v. Massachusetts Acc. Co., *supra* note 3. "Homicide includes both intentional and unintentional killing. It is justifiable when committed by an officer in the discharge of duty . . . excusable when committed accidentally or in self defense, felonious when committed maliciously . . . or negligently as in manslaughter." Great So. Life Ins. Co. v. Akins, 105 S.W.2d 902, 904 (Tex. Civ. App. 1937). See also State v. Williams, 231 N.C. 214, 56 S.E.2d 574 (1949); State v. Satterfield, 198 N.C. 682, 153 S.E. 155 (1930); State v. Horton, 139 N.C. 588, 51 S.E. 945 (1905); State v. Turnage, 138 N.C. 566, 49 S.E. 913 (1905).

[5] United Life and Acc. Ins. Co. v. Willoughby, 182 F.2d 113 (4th Cir. 1950) (insured killed when his house was intentionally dynamited); Lloyd v. Unity Life Ins. Co., 225 La. 585, 73 So. 2d 470 (1954) (insured stabbed by assailant); Great So. Life Ins. Co. v. Cherry, 24 S.W.2d 512 (Tex. Civ. App. 1930) (insured intentionally murdered without provocation).

[6] McLendon v. Carolina Life Ins. Co., 71 Ga. App. 557, 31 S.E.2d 429 (1944) (insured beaten to death by a robber); Langvin v. Rockford Life Ins. Co., 338 Ill. App. 499, 88 N.E.2d 111 (1949) (insured beaten to death by burglars); John Hancock Mut. Life Ins. Co. v. Tabb, 273 Ky. 649, 117 S.W.2d 587 (1938) (insured's head smashed by robber); Wozniak v. John Hancock Mut. Life Ins. Co., 288 Mich. 612, 286 N.W. 99 (1939) (insured shot while resisting robbery of filling station); Black v. Massachusetts Acc. Co., 57 R.I. 237, 189 Atl. 3 (1937) (insured killed in robbery attempt).

an exception to the rule of non-liability of an insurance company.[7] These decisions are based on the theory that the word "homicide" as used in the policy was not intended to be given its broad meaning by the parties, but was intended to include intentional homicide only.[8] This would exclude murders by insane persons[9] since they cannot be said to possess the requisite intent.[10]

Many courts in cases not involving insane persons have held that the term "homicide" as used in these policies must be construed as meaning only intentional homicides.[11] The case most nearly *contra* to the decision in the principal case is *Seaboard Life Ins. Co. v. Murphy*.[12] In that case the assailant, thinking the insured had insulted him, made a harsh remark to him. The insured did not intend to strike the assailant but assumed such an attitude of defense that the assailant might reasonably have thought he had such intent. The assailant struck the insured with his fist causing him to fall backward and to crush his head on a cement floor. The court held that death resulted solely through external, violent, and accidental means and did not ensue as a result of "homicide." The court felt that the term as used in the policy embraced only intentional killings. In the *Seaboard* case the assailant did not intend to kill the insured and employed no means reasonably calculated to cause death. The assailant was guilty at most of simple assault.[13] This case is not readily distinguishable from the principal case.

[7] Great So. Life Ins. Co. v. Campbell, 148 Miss. 173, 114 So. 262 (1927) (insured shot by insane person without any provocation or legal justification); Day v. Interstate Life and Acc. Co., 163 Tenn. 190, 42 S.W.2d 208 (1931) (insured killed by insane man with axe); Texas Life Ins. Co. v. Plunkett, 75 S.W.2d 313 (Tex. Civ. App. 1934) (insured shot by insane man).

[8] "The courts generally hold that the word 'intentional' must be read into the contract, and the company is exempt from liability only where the homicide was an intentional one." Day v. Interstate Life and Acc. Co., 163 Tenn. 190, 192, 42 S.W.2d 208, 208 (1931).

[9] The possibility of such a construction has led some insurance companies to adopt a more inclusive wording. The life policy in Great So. Life Ins. Co. v. Akins, 105 S.W.2d 902 (Tex. Civ. App. 1937), had a clause providing for double indemnity for death resulting from accidental means except where death resulted from "intentional or *unintentional* homicide due to the act of a sane or *insane* person." (Emphasis added.)

[10] Cases cited note 7 *supra*. In cases turning on a "homicide" exclusion, the courts make no mention of the fact that an insane person may intend to do the very act which causes death and yet not have the requisite intent to kill necessary for a criminal conviction. Such a distinction has been drawn where the exclusion was for "injuries intentionally inflicted by another person." Deloache v. Carolina Life Ins. Co., 104 S.E.2d 875 (S.C. 1958). However, this would seem to be a definite minority view. See 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 482 (1941).

[11] See, *e.g.*, Walters v. Great Nat'l Life Ins. Co., 132 Tex. 454, 124 S.W.2d 850 (1939).

[12] 134 Tex. 165, 132 S.W.2d 393 (1939).

[13] This would be true in Texas, at least. See, *e.g.*, Flournog v. State, 124 Tex. Crim. 395, 63 S.W.2d 558 (1933).

The case most nearly in accord with the decision in the principal case, and the one relied upon by the North Carolina court, is *United Life and Acc. Ins. Co. v. Prostic*.[14] There the insured died of heart failure resulting from a beating inflicted by robbers. The facts were such as to raise the inference that death was not intended by the robbers. The court denied recovery on the ground that death resulted from "homicide" within the meaning of the exclusion from the double indemnity clause. It was decided that the word "homicide" could not reasonably be restricted to mean only intentional killings, for this would eliminate many manslaughters and also many first and second degree murders; especially under the felony-murder rule or where death was substantially likely to follow from the course of action pursued.

This case is distinguishable from the principal case in that in the *Prostic* case the killing clearly would be first degree murder under the felony-murder rule. In the principal case the companion had no intent to kill the insured, the felony-murder rule would not be applicable, and it would seem, at most, that he might be guilty of involuntary manslaughter.

Perhaps the strongest ground of attack upon the decision in the principal case is its disregard of certain fundamental principles of insurance contract construction. It is said that an insurance contract should be interpreted according to its plain meaning[15]—even that meaning accorded to the words by the man on the street.[16] It is submitted that, among laymen, an accidental killing amounting at most to involuntary manslaughter is not generally considered "homicide." Also, where provisions are uncertain or ambiguous they should be interpreted most favorably to the insured and construed most strongly against the insurer.[17]

[14] 169 Md. 535, 182 Atl. 421 (1936).

[15] Wozniak v. John Hancock Mut. Life Ins. Co., 288 Mich. 612, 286 N.W. 99 (1939).

[16] Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947); Hartford Acc. and Indemnity Co. v. Casualty Underwriters, Inc., 130 F. Supp. 56 (D.C. Minn. 1955); Weissman v. Metropolitan Life Ins. Co., 112 F. Supp. 420 (S.D. Cal. 1953); Lingo v. Gulf Life Ins. Co., 32 Ala. App. 525, 27 So. 2d 697, *cert. denied*, 248 Ala. 367, 27 So. 2d 700 (1946); Arenson v. National Automobile and Cas. Ins. Co., 45 Cal. 2d 81, 286 P.2d 816 (1955); Johnson v. New Amsterdam Cas. Co., 234 N.C. 25, 65 S.E.2d 347 (1951).

[17] Mah See v. North Am. Acc. Ins. Co., 190 Cal. 421, 213 Pac. 42 (1923); McLendon v. Carolina Life Ins. Co., 71 Ga. App. 557, 31 S.E.2d 429 (1944); Langvin v. Rockford Life Ins. Co., 338 Ill. App. 499, 88 N.E.2d 111 (1949); Hooper v. State Mut. Life Assurance Co., 318 Mich. 384, 28 N.W.2d 331 (1947); Wozniak v. John Hancock Mut. Life Ins. Co., 288 Mich. 612, 286 N.W. 99 (1939); Barker v. Iowa Mut. Ins. Co., 241 N.C. 397, 85 S.E.2d 305 (1955); General Acc., Fire, and Life Assurance Corp. v. Hymes, 77 Okla. 20, 185 Pac. 1085 (1919). However, there is a definite argument *contra*, that where a word has a clear and well recognized legal meaning, it should not be perverted merely to benefit the insured. Langvin v. Rockford Life Ins. Co., *supra;* McLendon v. Carolina Life

However, the North Carolina decision, whatever one may think of it on its facts, poses an even more serious question: will the construction of the word "homicide" be extended to include *negligent* killings of one human being by another? An example of such a situation would be where death is caused by the negligent operation of an automobile. The technical legal definition of the word clearly would include such an extension.[18] It would be but a short step from the present North Carolina decision to a holding that there was a "homicide" where death resulted from *gross* negligence in a situation amounting to involuntary manslaughter. The Maryland court has suggested that the definition of "homicide" not be extended to include deaths resulting from negligent acts, but that it should be restricted to deaths resulting from voluntary acts. Should the North Carolina court refuse to follow the Maryland view, but choose instead to extend the definition of "homicide" to include death resulting from negligence, a double indemnity clause would be worthless in a large number of cases. Carried to its furthest extreme, only those persons dying from such natural causes as flood or lightning would be able to recover double indemnity. Whether this would be a desirable consequence or not, the public and the legal profession are entitled to be made aware of the dangers involved. It would seem that if insurance companies desire to be absolved from liability where death results from unintentional or negligent homicides, they should so specify in their policies.[19] Perhaps definitive legislation is needed in this area.

THOMAS W. WARLICK

Taxation—Estate Tax—Charities—Gifts to Bar Associations

Testator bequeathed $5,000 to the Rhode Island Bar Association to be used "for the advancement and upholding of those standards of the profession which are assumed by the members upon their admission to the Bar, and for the prosecution and punishment of those members who

Ins. Co., *supra;* Wozniak v. John Hancock Mut. Life Ins. Co., *supra.* Compare in connection with both points of view this statement: "A policy of insurance and every clause and part thereof is the contract, and, like all contracts, should be construed so as to effectuate the real purpose and intention of the parties, giving to the language employed, when unambiguous, its ordinary and usually accepted meaning." Frontier Mortgage Corp. v. Heft, 146 Md. 1, 12, 125 Atl. 772, 776 (1924).

[18] "An intention to kill the victim is not, of course, an essential of homicide in its ordinary and usually accepted meaning. There are accidental homicides, and homicides by misadventure, or involuntary manslaughter, as they are sometimes called, in which there is no intention to kill or harm at all." United Life and Acc. Ins. Co. v. Prostic, 169 Md. 535, 538, 182 Atl. 421, 422 (1936).

[19] See note 9 *supra.*

violate their obligations to the court and to the public."[1] His executor sought to recover the federal estate tax assessed on the transfer, alleging that the Commissioner of Internal Revenue erroneously refused to allow a deduction under section 812(d) of the Internal Revenue Code of 1939[2] as a transfer for charitable purposes. The district court held that it was immaterial whether the Association was organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes because the testator had manifested a clear intention to create an express trust to be used for the limited purposes specified. In deciding that these purposes were charitable,[3] the court pointed out that the proper operation of our judicial system as well as the safeguarding of personal and property rights depends upon the maintenance of high ethical standards by the legal profession. In the absence of evidence that a substantial part of the activities of the Association involved the attempt to influence legislation, such a gift in trust qualified for the charitable deduction under the estate tax statute.[4]

[1] Rhode Island Hospital Trust Co. v. United States, 159 F. Supp. 204, 205 (D.R.I. 1958).

[2] Int. Rev. Code of 1939, § 812(d), as amended, 61 STAT. 6 (1947) (now INT. REV. CODE OF 1954, § 2055). Pertinent provisions are the following: "§ 812. Net estate

"For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

". . . .

"(d) Transfers for public, charitable, and religious uses. The amount of all bequests, legacies, devises, or transfers . . . to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, or to a trustee or trustees . . . but only if such contributions or gifts are to be used by such trustee or trustees . . . exclusively for religious, charitable, scientific, literary, or educational purposes . . . and no substantial part of the activities of such trustee or trustees . . . is carrying on propaganda, or otherwise attempting, to influence legislation . . . ."

[3] There are obvious difficulties in attempting to define the term "charity." ZOLLMANN, CHARITIES §§ 185, 187 (1924). The court selected as a guide the definition of a charitable gift used in United States v. Proprietors of Social Law Library, 102 F.2d 481, 483 (1st Cir. 1939), viz., "any gift not inconsistent with existing laws, which is promotive of science, or tends to the education or enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for public convenience . . . . Missouri Historical Soc'y v. Academy of Science, 94 Mo. 459, 466, 8 S.W. 346, 348 (1888)."

[4] Rhode Island Hospital Trust Co. v. United States, 159 F. Supp. 204 (D.R.I. 1958). *Accord, In re* Estate of Quinlan, 233 Minn. 35, 45 N.W.2d 807 (1951). Here a bequest to a foundation was held to be exempt from a state inheritance tax. The court determined that it was the testatrix's intent to create a trust for charitable purposes; therefore the status of the foundation was immaterial. *But see* Alfred A. Cook, 30 B.T.A. 292 (1934). Here a contribution to the Association of the Bar of the City of New York to be used by a special investigating committee was held not to be deductible for federal income tax purposes. The Association had intervened in a grand jury investigation of alleged irregularities in the administration of the bankruptcy laws. As a result of the investigation, procedural

In determining the nature of the legal interest created, the court resorted to local law in accordance with the rule that state law is binding as to what legal interests are created, while the federal revenue acts govern what interests, so created, shall be taxed.[5] Rhode Island follows the general rule that no particular words are necessary to create an express charitable trust and that the absence of the words "trust" or "trustee" is immaterial. It is sufficient if there is a manifestation of an intention that the property should be held subject to a legal obligation to devote it to purposes which are charitable.[6] In concluding that this was a gift to the members of the Association as trustees, the court recognized the distinction between the public, which is the real beneficiary of a charitable trust, and the human beings who are the mere conduits of the social benefits to the public.[7]

It has been asserted that deductions are allowed under the federal estate tax provisions when the object of the charity would likewise be a proper object for the expenditure of the proceeds of taxation; whereas formerly, charity was considered almost anything which tended to promote the well being of mankind.[8] When such bequests are devoted to objectives which otherwise would be accomplished at public expense, their deduction from taxation is not a matter of grace but an act of justice.[9] Furthermore the purpose of the deduction provisions is to encourage gifts for such objectives.[10] The maintenance of the standards of the legal profession and the prosecution and punishment of those members who violate their professional obligations are proper subjects for the expenditure of public money.[11] Therefore a gift in trust for such purposes should qualify for the charitable deduction.

Earlier, in *Dulles v. Johnson*,[12] a district court held that an absolute bequest to three New York bar associations was not deductible for federal estate tax purposes. In this case the court determined that

reforms were instituted and disciplinary action taken against certain attorneys. The petitioner's claim that his contribution was a gift to a trust fund was rejected on the grounds that the committee was neither a trust nor a fund, and that the Association was not a tax exempt charitable organization under provisions of section 23(n) (2) of the Revenue Act of 1928, 45 STAT. 791.

[5] Morgan v. Commissioner, 309 U.S. 78, 80 (1940).

[6] Wood v. Hartigan, 59 R.I. 333, 195 Atl. 507 (1937); Tillinghast v. Boy Scouts of America, 47 R.I. 406, 133 Atl. 662 (1926); 1 BOGERT, TRUSTS AND TRUSTEES § 45 (2d ed. 1951); 1 SCOTT, TRUSTS § 24 (2d ed. 1956).

[7] 2A BOGERT, TRUSTS AND TRUSTEES § 362 (2d ed. 1953).

[8] Rockefeller, *How to Get Maximum Benefits from Gifts and Bequests to Charity*, in 1 ESTATE TAX TECHNIQUES ¶ 447 (Lasser ed. 1955).

[9] Union & New Haven Trust Co. v. Eaton, 20 F.2d 419, 421 (D. Conn. 1927); 1 PAUL, FEDERAL ESTATE AND GIFT TAX § 12.04 (1942).

[10] Baker-Boyer Nat'l Bank v. Henricksen, 46 F. Supp. 831, 834 (W.D. Wash. 1942), *aff'd*, 139 F.2d 877 (9th Cir. 1944); Knoernschild v. Commissioner, 97 F.2d 213, 214 (7th Cir. 1938).

[11] See, *e.g.*, N.C. GEN. STAT. c. 84 (1958) (Incorporated state bar act).

[12] 155 F. Supp. 275 (S.D.N.Y. 1957).

these associations were non-charitable organizations since (1) they existed primarily for the benefit of their members, as distinguished from the public, and (2) a substantial part of their activities was aimed at attempting to influence legislation in violation of the statutory restriction.[13] The court admitted however, that many of the activities of these organizations were charitable, scientific, literary, or educational.

In the same case, the court held that a bequest to the Association of the Bar of the City of New York "for its library and for research and exposition in law, and for other legal purposes" did not qualify for the charitable deduction since, as previously determined, such an organization was non-charitable.

The court dismissed the argument that the latter bequest was a gift in trust for educational purposes because of the absence of express trust wording and a clearly limited charitable purpose. The New York courts follow the general rule that no express words are necessary to create a trust when such an intention is clearly manifested.[14] Furthermore they have been liberal in construing bequests as trusts when there is a gift for charitable uses.[15]

A gift in trust to a bar association for the preservation of the books in its law library has been held to be deductible for federal estate tax purposes as a transfer for exclusively literary and educational purposes.[16]

[13] In arriving at this conclusion, the court pointed out that the characterization of an organization by the state of its incorporation was entitled to weight in the absence of federal characterization. United States v. Proprietors of Social Law Library, 102 F.2d 481, 483 (1st Cir. 1939). The Brooklyn Bar Association, with a similarly worded certificate of incorporation, had been denied exemption from payment of a state employment tax on the grounds that it was not organized and operated exclusively for religious, charitable, scientific, or literary purposes. Smith v. Brooklyn Bar Ass'n, 266 App. Div. 1038, 44 N.Y.S.2d 620 (3d Dep't 1943), *aff'd sub nom.* Claim of Smith, 292 N.Y. 593, 55 N.E.2d 368 (1944). According to its certificate, the Association was incorporated for the purpose of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standards of integrity, honor, and courtesy in the legal profession, and cherishing the spirit of brotherhood among the members thereof.

[14] See, *e.g., In re* Babbage's Estate, 201 Misc. 750, 106 N.Y.S.2d 332 (Surr. Ct. 1951).

[15] *In re* Hendricks' Will, 1 Misc. 2d 904, 148 N.Y.S.2d 245 (Sup. Ct. 1955), *aff'd*, 3 A.D.2d 890, 161 N.Y.S.2d 855 (4th Dep't 1957); *In re* Andrejevich's Estate, 57 N.Y.S.2d 86 (Surr. Ct. 1945); In the Mattter of Durbrow, 245 N.Y. 469, 477, 157 N.E. 747, 749 (1929); Manley v. Fiske, 139 App. Div. 665, 124 N.Y. Supp. 149, 151 (1st Dep't 1910) ("a trust is almost inseparably involved with a gift for charitable uses"); Bowman v. Domestic & Foreign Missionary Soc'y, 182 N.Y. 494, 75 N.E. 535 (1905).

[16] Elizabeth L. Audenried, 26 T.C. 120 (1956). Here the court held that the status of the bar association was immaterial. Exclusion from the use of the library of members not paying their dues and nonmembers not paying a fee was held to be reasonable. Such rules were held not to affect the purpose of the library and were similar to the rules requiring the payment of tuition at tax exempt educational institutions.

A law library to which use was restricted to subscribers and certain federal court officials was held to be exempt from a federal capital stock tax as an educa-

Likewise, "research and exposition in law" could be characterized as an educational purpose. However, "for other legal purposes" does appear uncertain. It is elementary that a trust for charity and private purposes with no division of capital must fail for uncertainty.[17] Whether the term "other legal purposes" was meant to be limited to charity is a question of interpretation of the testator's intentions. If it is so limited, a charitable trust is created.[18] It is reasonable to assume that the testator intended the term "other legal purposes" to mean other purposes of the same type expressly enumerated, *i.e.,* literary and educational. By application of the *ejusdem generis* rule it would seem that a charitable trust was created and therefore that the deduction should be allowed.[19]

In *Dulles v. Johnson,* a bequest to the William Nelson Cromwell Foundation for Research of the Law and Legal History of the Colonial Period of the United States of America, a trust established by the decedent, was held to be deductible for federal estate tax purposes. In characterizing the Foundation, the court looked at the only evidence of its character available, its indenture and expenditures. After deciding that the purposes listed in the indenture were not clearly disqualifying,[20] the court stated that where a trust is involved the organization of the trust is not an important criterion. Implying that the determining factor is the actual use of the trust funds, the court held that in view of the

tional institution. United States v. Proprietors of Social Law Library, 102 F.2d 481 (1st Cir. 1939). In this case the court asserted that the public received both direct and indirect benefit from the library because attorneys using the library could subject to the widest possible examination and study all cases arising in their practice. "To permit the public to use the Social Law Library indiscriminately would greatly lessen its benefits to those qualified to obtain the greatest benefits from its use, since it must be a place devoted to study. Quiet is essential to serving its purpose. Hence the reason for excluding law students and restricting the users within reasonable limits." *Id.* at 482.

[17] Matter of Shattuck, 193 N.Y. 446, 86 N.E. 455 (1908); 2A BOGERT, TRUSTS AND TRUSTEES § 372 (2d ed. 1953); 4 SCOTT, TRUSTS § 398 (2d ed. 1956).

[18] RESTATEMENT, TRUSTS § 398, comment *d* (1935).

[19] For applications of the rule in similar situations, see Prime v. Harmon, 120 Me. 299, 113 Atl. 738 (1921) (bequest in trust for a missionary society and aid society, and "other moral and useful associations" upheld on the grounds that the other associations were meant to be of the same type as those previously named); Coffin v. Attorney General, 231 Mass. 579, 121 N.E. 397 (1919) (bequest to missions "and like good objects" held to be entirely charitable); Matter of Cunningham, 206 N.Y. 601, 100 N.E. 437 (1912) (bequest to trustees to be "applied to charitable and benevolent associations and institutions of learning" upheld on the grounds that the words "charitable and benevolent were intended to qualify the word "institutions"); Matter of Robinson, 203 N.Y. 380, 96 N.E. 925 (1911); Staines v. Burton, 17 Utah 331, 53 Pac. 1015 (1898) (bequest in trust for church members to be used for certain charitable purposes and "anything else whereby the members may be benefited" upheld on the grounds that the testator intended charitable objects by his general expression); Sutton v. Attorney General, [1884] 28 Ch. D. 464 (bequest to "charitable and deserving" objects upheld on the grounds that the words were intended to describe one class of objects, *i.e.,* charitable objects).

[20] The defendant argued that certain of the purposes listed in the indenture were aimed at influencing legislation and enhancing the prestige of the legal profession. Dulles v. Johnson, 155 F. Supp. 275, 281 (S.D.N.Y. 1957).

fact that the only expenditures of the Foundation since its establishment had been for a library, the bequest was for educational purposes.

In the light of these two decisions it would appear highly desirable for draftsmen of wills in which bequests are made to non-charitable organizations for charitable purposes to use unequivocal charitable trust terminology in order to avoid litigation and possible unfavorable tax consequences.

FRANCES H. HALL

Taxation—Sale of a Life Insurance Contract—Capital Gain or Ordinary Income?

Under a literal interpretation of the capital gain section of the 1939 Internal Revenue Code[1] an endowment or annuity contract would classify as a capital asset. Accordingly, if the owner of such a contract, having held it for more than six months, transferred it by a bona fide "sale or exchange,"[2] he would not be statutorily prevented from receiving long term capital gain treatment on his profit.[3]

This reasoning was followed by a majority of the Tax Court in the recent case of *Percy W. Phillips*,[4] where the taxpayer was allowed capital gains treatment. The transaction involved the sale by taxpayer of a life insurance endowment contract thirteen days prior to maturity. Taxpayer received $26,750 in cash for the surrender of all rights, title, and interest in the contract which at maturity had a value of $27,000. Although the majority recognized that the taxpayer's paramount motive for the transaction was to effect a tax saving,[5] they held that the endowment contract was a capital asset in taxpayer's hands, that there was a bona fide sale, that the transaction was not an "agency arrangement

[1] Int. Rev. Code of 1939, § 117, as amended, 65 STAT. 497 (1951) (now INT. REV. CODE OF 1954 § 1221). This section lists only those assets which are not capital assets. Because endowments and annuities are not listed, it follows that they must be considered capital assets.

[2] The words "sale or exchange" do not include surrender of a life insurance or annuity contract to the obligor wherein the obligee receives payment of an obligation by terms of the contract. Blum v. Higgins, 150 F.2d 471 (2d Cir. 1945); Bodine v. Commissioner, 103 F.2d 982 (3d Cir. 1939); Frank J. Cobbs, 39 B.T.A. 642 (1939).

[3] "A capital asset under Section 1221 is any property held by the taxpayer whether or not connected with his trade or business, with certain exceptions that do not embrace insurance contracts. Since an insurance contract is property, it must be a capital asset. Consequently, the capital gain provisions applying to the sale or exchange of a capital asset must be available in respect to insurance contract exchanges, and a long term capital gain should result if the exchanged insurance contract has been held for six months or more." Freyburger, *Tax Problems Relating to Life Insurance and Annuity Contracts*, 389 INS. L.J. 375, 386 (1955).

[4] P-H 1958 T.C. Rep. Dec. ¶ 30.87.

[5] It is well accepted that a taxpayer may legally minimize his taxes or avoid them completely by lawful means. Gregory v. Helvering, 293 U.S. 465 (1935).

masquerading as a sale," and that accordingly capital gain treatment should be allowed.

The Commissioner contended that the increment realized by the taxpayer represented an interest element and that even a sale or exchange within the meaning of the Internal Revenue Code would not convert this ordinary income into capital gain. The majority answered that the cash value of the contract at the end of each year is fixed by the terms of the contract and is based upon certain actuarial assumptions. These assumptions are conservatively computed to insure the solvency of the company and the soundness of its insurance protection. Frequently, because premium receipts are in excess of the amounts needed for the conduct of its business, the company will declare dividends, thus in effect reducing the cost of the contract.[6] From these considerations the court deduced that the excess of the cash value over the net cost of the policy represented not only accrued interest realized by the taxpayer on the date of sale, but also favorable actuarial experience and a rebate of unused operational expense allowance.

In less than a month after the *Phillips* decision, the United States Court of Claims, in *Arnfield v. United States*[7] denied capital gains treatment to the sale of an annuity contract.[8] There, the annuity matured three days following the taxpayer's complete assignment to a third party. The court found that this transaction was a bona fide sale within the meaning of section 117 of the 1939 Code. Admitting that all the other requisites of the capital gains section of the 1939 Code were met, the court thought the true issue to be whether taxpayer could convert ordinary income[9] into capital gain by selling the contract prior to maturity.

[6] "Amounts received as a return of premiums paid under life insurance, endowment, or annuity contracts, and the so-called 'dividend' of a mutual insurance company which may be credited against the current premium, are not subject to tax." U.S. Treas. Reg. 111, § 29.22(a)-12 (1943).

[7] CCH 1958 STAND. FED. TAX. REP. ¶ 9692.

[8] The *Arnfield* court did not cite *Phillips* although that case was handed down some sixteen days prior to *Arnfield*. Neither court cited the case of Jules J. Riengold, P-H 1941 B.T.A. Mem. Dec. ¶ 41,319, where the petitioner purchased a mature, $100,000 life insurance policy from the beneficiary in 1933 for the sum of $15,000. In 1936 the beneficiary was adjudged an incompetent, and the conservators instituted suit to avoid the 1933 sale and to recover the policy. In settlement of the suit the petitioner transferred the policy to the conservators and received a cash payment of $55,000. The court held that the insurance policy was a capital asset in the petitioner's hand and allowed capital gains treatment.

[9] Int. Rev. Code of 1939, § 22(b)(2), as amended, 67 STAT. 471 (1951) (now INT. REV. CODE OF 1954, § 72(a), (b)). This section includes in gross income amounts received over and above the contract's cost, except there is allowed a 3% exclusion per annum for annuity contracts until cost is recovered. The 1954 Code still includes the gains in gross income, but provides for a different method of computation, *viz.*, the use of an exclusion ratio to regain the cost of the contract.

The court found that the facts here fell clearly within the well established line of authority[10] holding that the proceeds received from a bona fide sale of future income rights are taxable as ordinary income and not as capital gains. It was contended that this line of authority was inapplicable because those cases dealt with the sale of a future income right, whereas, here, taxpayer sold not just the future income right but rather the entire ownership in the income producing property. This contention was summarily dismissed as being inconsistent with *Hort v. Commissioner,*[11] where the court held that a sum received by a lessor for the cancellation of a lease was taxable as ordinary income despite the fact that the lease may for other purposes be treated as "property" or "capital."

These two cases, from the facts presented, seem to be indistinguishable in principle. Each transaction involved a transfer of all rights, title, and interest in a contract which had appreciated in value over the years. Both contracts were destined to mature in the near future and upon maturity would be taxable as ordinary income. Moreover, there would not appear to be any difference in the two types of contracts involved here.[12] If, then, the cases are factually the same, why the inconsistency?

The explanation for this inconsistency lies in an understanding of the avenues of approach that may be taken in evaluating this type of transaction. One approach is to concede that the capital gains section is applicable; and whether capital gain or ordinary income treatment will be accorded the taxpayer will depend on whether the requisites of that section are met. For example, the dissent in *Phillips* argued that the profit was ordinary income because there had been no "bona fide sale or exchange" of the endowment contract. On the other hand, it can just as logically be argued, as did the court in *Arnfield,* that since section 22(b)(2) of the 1939 Code would require ordinary income treatment upon maturity of the contract, the premature sale of the contract was, in effect, a sale of future income and clearly within the *Hort* line of

[10] Commissioner v. Lake, 356 U.S. 260 (1958) (sale of oil and sulphur payment rights); Hort v. Commissioner, 313 U.S. 28 (1941) (sale of property rights in a lease by lessor to lessee); Fisher v. Commissioner, 209 F.2d 513 (6th Cir. 1954) (sale of corporate notes which were in default both as to principal and interest); Rhodes' Estate v. Commissioner, 131 F.2d 50 (6th Cir. 1942) (sale of stock dividends before they became payable); Helvering v. Smith, 90 F.2d 590 (2d Cir. 1937) (sale of partnership interest in earned fees); Charles E. Sorenson, 22 T.C. 321 (1954) (sale of stock options given as compensation by taxpayer's employer).

[11] 313 U.S. 28 (1941). It is to be noted that taxpayer (lessor) merely cancelled the lease while still retaining the fee to the property.

[12] "The problems involving the sale or taxable exchange of an annuity are basically the same as shown for other insurance contracts. The annuity contract can be considered a capital asset . . . . The basis of the annuity sold or exchanged is cost less any amounts previously recovered tax free." HERZBERG, SAVING TAXES THROUGH CAPITAL GAINS 21 (1957).

cases.[13] In other words, the result of the transaction in form looks like a capital gain while in substance it is not.

A quote from the dissent in the *Phillips* case illustrates the need for a judicial yardstick: "The conclusion which in my opinion cannot be escaped here might be different where a policy was not about to mature, or did not have a cash surrender value in an amount close to the full value at maturity, and where the taxpayer could recover his investment only through a sale to a third party."[14] The court in *Arnfield* also recognized this need when it aptly stated that "the law holds no certainty in this area."[15]

Thus by judicial admission a denial of capital gain benefits in this area is obviously left to a case by case determination, leaving no definite boundaries set for taxpayer to follow. Since the stakes are often worth the gambling, taxpayers do invent technical property devices in an effort to save taxes. Therefore it is urged that legislation be enacted whereby taxpayer will be accorded identical treatment on the proceeds of the policy whether they be obtained from a "bona fide sale or exchange" or surrender to the company. At present this area is merely a trap for the unwary.

RICHARD B. HART

Torts—Negligence—Automobiles—Owner's Liability After Leaving Ignition Key in Lock

The recent case of *Williams v. Mickens*[1] presented a question of first impression in North Carolina. The defendant parked his automobile on a public street with the key in the ignition switch and left it unattended. The automobile was subsequently stolen, and shortly thereafter was involved in a collision with the plaintiff caused by the negligence of the thief. The plaintiff sued defendant for his negligence in leaving the key in the ignition on the theory that defendant should have foreseen that a thief might steal the automobile and drive it negligently. Since there was no statute involved, the court decided the case on common law principles. The trial court granted defendant's motion for nonsuit and the supreme court affirmed. Relying on the case of *Ward v. Southern Ry.*,[2] the court said that, while they were not willing to admit

[13] Cases cited note 9 *supra*.
[14] P-H 1958 T.C. Rep. Dec. ¶ 30.87 at 502.
[15] CCH 1958 STAND. FED. TAX REP. ¶ 9692 at 151.

[1] 247 N.C. 262, 100 S.E.2d 511 (1957).
[2] 206 N.C. 530, 174 S.E. 443 (1934). (Plaintiff was killed when struck by a piece of coal thrown from defendant's car; held, assuming defendant was negligent in allowing thieves to be on the train, nevertheless, the plaintiff cannot recover since the intervening criminal assault was unforeseeable.)

that defendant's act of leaving the keys in the switch was negligent, even if such were the case, to allow recovery would do violence to the rule of proximate cause as understood and applied in this jurisdiction.[3] Thus the court was reaffirming its position taken in previous cases[4] that if between the defendant's negligent act and plaintiff's injury, there is an intervening criminal act by a third person producing the injury, and such act was not intended by the defendant and could not have been reasonably foreseen by him, the causal chain between the original negligence and the accident is broken and the defendant's act of negligence is not the proximate cause of the plaintiff's injury.

Most jurisdictions have refused to hold the car owner liable in "key-theft" cases similar to the principal case. The cases fall into two general classes: those not involving a statute or ordinance which expressly prohibits the owner or operator of a motor vehicle from leaving his key in the ignition when the vehicle is left unattended,[5] and those in which such a statute is involved.

At common law. In a majority of the cases arising in jurisdictions where there is no applicable statute the plaintiff has been denied recovery as a matter of law.[6] Various theories for such holdings have been advanced by the courts: (1) the defendant owes no duty to the plaintiff absent actual knowledge of the presence of thieves or some other circumstance that might reasonably indicate a foreseeable risk of harm to the plaintiff;[7] (2) leaving the key in the ignition was not a negligent

[3] Foreseeability of injury is a test of proximate cause. See, *e.g.*, McNair v. Richardson, 244 N.C. 65, 92 S.E.2d 459 (1956); Welling v. Charlotte, 241 N.C. 312, 85 S.E.2d 379 (1955); Boone v. North Carolina R.R., 240 N.C. 152, 81 S.E.2d 380 (1954).

[4] Ward v. Southern Ry., 206 N.C. 530, 174 S.E. 443 (1934); Chancey v. Norfolk & Western Ry., 174 N.C. 351, 93 S.E. 834 (1917); see also Note, 29 N.C.L. REV. 210 (1951).

[5] An example of such a statute is this District of Columbia traffic regulation: "Every motor vehicle shall be equipped with a lock to lock the starting lever, throttle, switch, or gear shift lever, by which the vehicle is set in motion, and no person shall allow any motor vehicle operated by him to stand unattended on any street or in any public place without first having locked the lever, throttle, or switch by which said vehicle may be set in motion." TRAFFIC AND MOTOR VEHICLE REGULATIONS FOR THE DISTRICT OF COLUMBIA § 58.

A statute of this type has no application when the automobile is parked on private property or on a private drive. R. W. Claxton, Inc., v. Schaff, 169 F.2d 303 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 871 (1948).

[6] Bennett v. Arctic Insulation, Inc., 253 F.2d 652 (9th Cir. 1958); Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Midkiff v. Watkins, 52 So. 2d 573 (La. App. 1951); Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Gower v. Lamb, 282 S.W.2d 867 (Mo. App. 1955); Reti v. Vaniska, Inc., 14 N.J. Super. 94, 81 A.2d 377 (L. 1951); Lotito v. Kyriacus, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dept. 1947), *aff'd*, 297 N.Y. 1027, 80 N.E.2d 542 (1948); Wagner v. Arthur, 73 Ohio L. Abs. 16, 134 N.E.2d 409 (1956); Teague v. Pritchard, 38 Tenn. App. 686, 279 S.W.2d 706 (1954).

[7] Bennett v. Arctic Insulation, Inc., *supra* note 6; Richards v. Stanley, *supra* note 6; Gower v. Lamb, *supra* note 6.

act;[8] (3) assuming the defendant negligent, still the intervening criminal act was sufficient to insulate the defendant's negligence and establish the intervening cause as the efficient or proximate cause of the accident.[9] In at least one jurisdiction it was held that the questions of negligence and proximate cause should be submitted to the jury, on the ground that reasonable men might differ under the circumstances of the case.[10]

Violation of a statute. When statutes have been involved in the "key-theft" cases the courts have been less consistent in their holdings. Perhaps a majority of the courts have held the defendant car owner not liable.[11] In so holding, the courts have said: (1) the purpose of the statute "was largely for the protection of the car owners themselves and as an aid in proper law enforcement in the discouragement of theft and pilferage";[12] (2) the statute expressly stated that it was not applicable in a civil action;[13] (3) even though the defendant was negligent in violating the statute, nevertheless the negligent driving of the thief was an intervening act whch caused the accident and superseded the original negligence of the defendant car owner.[14] On the other hand, there is a strong minority view to the effect that the violation of the statute by the defendant warrants the submission of the facts to the jury.[15] These courts have reasoned that the statute was passed as a public safety measure, not as a crime deterrent, and its violation is either treated as prima facie evidence of negligence[16] or as constituting negligence per se;[17] in either case the question of proximate cause is

[8] Midkiff v. Watkins, 52 So. 2d 573 (La. App. 1951).

[9] Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Reti v. Vaniska, Inc., 14 N.J. Super. 94, 81 A.2d 377 (L. 1951); Lotito v. Kyriacus, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dept. 1947), *aff'd*, 297 N.Y. 1027, 80 N.E.2d 542 (1948); Wagner v. Arthur, 73 Ohio L. Abs. 16, 134 N.E.2d 409 (1956).

[10] R. W. Claxton, Inc., v. Schaff, 169 F.2d 303 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 871 (1948); Eesley v. Dottellis, 61 A.2d 564 (D.C. Munic. Ct. 1948); Bullock v. Dahlstrom, 46 A.2d 370 (D.C. Munic. Ct. 1946). (The statute was not applicable in these cases. See note 5 *supra*.)

[11] Frank v. Ralston, 145 F. Supp. 294 (W.D. Ky. 1956); Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N.E.2d 395 (1952); Galbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560 (1948); Anderson v. Theisin, 231 Minn. 369, 43 N.W.2d 272 (1950); Permenter v. Milner Chevrolet Co., 91 So. 2d 243 (Miss. 1956).

[12] Anderson v. Theisin, 231 Minn. 369, 371, 43 N.W.2d 272, 273 (1950).

[13] Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Gower v. Lamb, 282 S.W.2d 867 (Mo. App. 1955).

[14] Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N.E.2d 395 (1952); Galbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560 (1948); Permenter v. Milner Chevrolet Co., 91 So. 2d 243 (Miss. 1956).

[15] Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74, 51 A.L.R.2d 624 (1954); Garbo v. Walker, 57 Ohio Op. 363, 71 Ohio L. Abs. 368, 129 N.E.2d 537 (1955).

[16] Ney v. Yellow Cab Co., *supra* note 15.

[17] Garbo v. Walker, 57 Ohio Op. 363, 71 Ohio L. Abs. 368, 129 N.E.2d 537 (1955).

for the jury.[18] Still a third view is that violation of the statute is a legal or proximate cause of the harm as a matter of law and the case should not go to the jury.[19]

The court in the principal case indicates the difficulty that would arise were the defendant car owner in the "key-theft" cases held liable. The court said:

> If the owner is liable for injury inflicted by the thief at the next street crossing, there appears no reason why liability should not extend to the next town, the next county, or the next state. If leaving the key in the switch creates liability, leaving it on the seat, or on the owner's desk where a thief could easily find it, would seem also to imply liability. If liability exists on the day of the theft, does it not continue to the next day, and the next? Surely, ownership of a motor vehicle does not involve such hazard.[20]

Further insight into the "key-theft" cases may be gained by an appraisal of the risks which the car owner creates by leaving his key in the ignition. In so doing, he does not assume that it will be driven. At most he creates the *risk* that it will be stolen and driven. By comparison, one who lends his car to another obviously *knows* that his car will be driven. In the "key-theft" case the risk that the car will be stolen—and by a thief who is a negligent driver—is materially less than the risk involved where an owner entrusts his car to another for the very purpose of being driven. The North Carolina court, however, has held that a bailor is not liable for a bailee's negligent driving.[21] There seems to be no logical reason for holding the owner liable in the "key-theft" cases when by analogy he has created a lesser risk that the

[18] Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74, 51 A.L.R.2d 624 (1954); Garbo v. Walker, *supra* note 17.

[19] Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944). The *Ross* case overruled Squires v. Brooks, 44 App. D.C. 320 (D.C. Cir. 1916), where the court held, on facts essentially similar and under a similar ordinance, that the defendant's negligence was not the proximate cause of the plaintiff's injury. The District of Columbia, however, has recognized that some limit must be placed on the car owner's liability. In Howard v. Swagart, 161 F.2d 651 (D.C. Cir. 1947), the thief, some twelve hours after the theft, allowed another person to borrow the car. This person negligently collided with the plaintiff's car. The court, holding for the defendant car owner, stated, "It cannot fairly be said that this court meant, by the *Ross* and *Schaff* decisions, to impose liability on the owner . . . of an unlocked car for the negligent action of every person, other than the thief, driving it subsequent to the theft." *Id.* at 655. See also Casey v. Corson and Gruman Co., 221 F.2d 51 (D.C. Cir. 1955), where the court held that the defendant's negligence in leaving his car in a private parking lot in the District of Columbia with the keys in the ignition was too remote in time, place, and circumstances to have been a proximate cause of a collision taking place in Petersburg, Virginia, in which the plaintiff was injured by the thief's negligent driving of the defendant's car. (The ordinance was not applicable.)

[20] 247 N.C. at 263, 100 S.E.2d at 513.

[21] Reich v. Cone, 180 N.C. 267, 104 S.E. 530 (1920).

car will be driven negligently than has a person who lends his car to another.[22]

The test of foreseeability has been a big factor in all of these cases.[23] It is conceded that there may be circumstances which make foreseeable the possibility of harm resulting from leaving keys in a parked car.[24] However, such circumstances are not usually present. There is usually no evidence from which a jury could properly infer that the defendant car owner could foresee that the thief would steal the car and drive it negligently.[25] It is admitted that by leaving the keys in the ignition lock of the automobile one increases the risk of theft and that in certain circumstances this might be held to have been foreseeable as a matter of law, but can it be said that it is foreseeable that a thief will be negligent?[26] Absent a statute that expressly states that the defendant car owner in this type case is to be held liable for the thief's negligence or some special circumstance which would put the owner on notice, there would seem to be no justification for holding him liable.[27]

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[22] Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954).

[23] An example of the conflict in the courts as to what is foreseeable is shown by the following inconsistent statements made by the Illinois appellate courts: "[The defendant car owner] is required by all rules of common sense and reason to know that a thief, in his effort to escape from the scene of the theft, may have no greater regard for traffic lights or traffic regulations than he had for the criminal statute making it a felony to steal the car." Ostergard v. Frisch, 333 Ill. App. 359, 368, 77 N.E.2d 537, 541 (1948); "It would seem reasonable that a car thief, in order to avoid attracting attention and arrest, would be meticulous in observing traffic laws such as speeding, running stop lights, etc." Cockrell v. Sullivan, 344 Ill. App. 620, 624, 101 N.E.2d 878, 879 (1951). In Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74, 51 A.L.R.2d 624 (1954), the Illinois Supreme Court settled the question by adopting the rule of the *Ostergard* case.

[24] Leaving the automobile illegally parked in such condition as would render it dangerous to children who are known by the owner to be exposed to the hazard, Campbell v. Model Steam Laundry, 190 N.C. 649, 130 S.E. 638 (1925); leaving an intoxicated person in an automobile with the keys in the ignition, Morris v. Bolling, 31 Tenn. App. 577, 218 S.W.2d 754 (1948); Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 18 S.E.2d 331 (1942).

[25] The New York Appellate Division held in Lotito v. Kyriacus, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dept. 1947), that even though car owners, prior to the theft of defendant's car, had been warned through the newspapers and over the radio not to leave their cars unlocked or the keys inside the car because of the commonness of such thefts, still the defendant owed no duty to the plaintiff who had been struck by the defendant's car which was being driven by the thief at the time.

[26] Kiste v. Red Cab, Inc., 122 Ind. App. 587, 596, 106 N.E.2d 395, 399 (1952). "It is our observation that in the absence of clear legislative declaration this result would not ordinarily be reached except where the surrounding circumstances clearly point to both a high probability of intervening crime, and of like pursuant negligent operation of the vehicle by the thief. We do not presume to affirm or deny that such circumstances are highly probable in the District of Columbia or the First District of the Appellate Court of Illinois. We do assert with some satisfaction that such circumstances are not reasonably foreseeable in this jurisdiction."

[27] For additional material on this subect see Annot., 51 A.L.R.2d 633 (1957) and 43 CAL. L. REV. 140 (1955).

Torts—Wrongful Death—Effect of Settlement on Allegedly Negligent Beneficiary's Right to Share in Proceeds

In re Estate of Ives[1] presented the North Carolina court with a case involving a situation unparalleled in this or apparently any other jurisdiction. The facts of the case are as follows: the deceased, while riding as a passenger in an automobile owned and driven by her son, was killed in a collision with another vehicle. Pursuant to the rights granted to it in a policy of liability insurance, the son's insurer entered into a compromise agreement with the administrator of the mother's estate for all claims which the administrator "had or might have" for the death of the intestate resulting from this collision. A release was given in which it was stated "that this settlement is the compromise of a doubtful and disputed claim, and that the payment is not to be construed as an admission of liability on the part of the persons . . . hereby released by whom liability is expressly denied."[2] Subsequently the administrator brought a proper[3] proceeding to determine if the son should be entitled to share in the distribution of the wrongful death assets.[4] Affirming the decision of the lower court, the supreme court held that in spite of the fact that there were no findings of fact that the son was at fault or that he knew of the compromise agreement, and notwithstanding the express denial of liability in the release, the son could not share in the proceeds paid by the insurer in settlement of this claim. The basis of the decision was centered around the equitable maxim that "no one will be permitted to enrich himself by his own wrong."

As a general rule this maxim is usually applied in three categories of cases wherein there appears the question of the negligent beneficiary's receiving amounts otherwise due him. In the first of these categories, where the beneficiary in a policy of life insurance has caused the death of the *cestui que vie,* the majority view is that a merely negligent beneficiary will not be precluded from taking the share due him.[5] To be precluded from sharing it must be shown not merely that the beneficiary caused the death of the *cestui que vie,* but that the death was a result of a willful or felonious act on the part of the named beneficiary.[6] Like-

[1] 248 N.C. 176, 102 S.E.2d 807 (1958).
[2] *Id.* at 179, 102 S.E.2d at 809.
[3] *In re* Stone, 173 N.C. 208, 91 S.E. 852 (1917).
[4] The court held that all amounts received under a compromise agreement in a wrongful death action are distributed as wrongful death assets. *Ibid.*
[5] Tippens v. Metropolitan Life Ins. Co., 99 F.2d 671 (5th Cir. 1938); Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 3 N.E.2d 17 (1936); PATTERSON, ESSENTIALS OF INSURANCE LAW § 35 (2d ed. 1957); RICHARDS, INSURANCE § 129 (5th ed. 1952).
[6] Anderson v. Life Ins. Co. of Virginia, 152 N.C. 1, 67 S.E. 53 (1910); Bullock v. Expressmen's Mut. Life Ins. Co., 234 N.C. 254, 67 S.E.2d 71 (1951); Neff v.

wise in the second category, cases of intestate succession, the beneficiary or distributee must, as a general rule, be guilty of something more than negligence to be precluded from taking the share due him.[7] Those jurisdictions that do allow an "ancestor murderer" to inherit justify such by a strict interpretation of the statute of descent and distribution when there is no statute in point otherwise.[8]

In the third category, actions for wrongful death, it is the North Carolina view and the majority view that the negligent beneficiary will not be allowed to share in the distribution of any wrongful death proceeds.[9] At least one case has allowed the negligent beneficiary to recover,[10] but it is to be noted that in this jurisdiction wrongful death assets are treated as assets of the decedent's estate,[11] and the theory of action in that case was that the administrator sought to recover in the right of the deceased, not for the beneficiary. An examination of the various state statutes conferring a right of action for death by wrongful act reveals that the majority of jurisdictions treat wrongful death recoveries as compensation for the decedent's next of kin, and not as general assets of the decedent's estate.

In a jurisdiction such as North Carolina, where the wrongful death assets are treated as compensation,[12] it is relatively easy to understand why the negligent beneficiary-distributee will be precluded from taking a distributive share, and yet not precluded from taking as a beneficiary in a life insurance policy or in cases of intestate succession. The apparent inconsistency is explained when it is realized that in cases of life insurance and intestate succession the negligent beneficiary is only receiving that which he would have received had the deceased died a

Massachusetts Mut. Life Ins. Co., 158 Ohio St. 45, 107 N.E.2d 100 (1952); PATTERSON, *op. cit. supra* note 5, § 35.

[7] *In re* Wolf, 88 Misc. 433, 150 N.Y.S. 738 (1914); McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956) (where widow, acquitted of second degree murder, nevertheless admitted she fired the pistol that killed intestate husband, was allowed to receive her dower); Legette v. Smith, 226 S.C. 403, 85 S.E.2d 576 (1955); Ward v. Ward, 174 Va. 331, 6 S.E.2d 664 (1940).

[8] Bird v. Plunkett, 139 Conn. 491, 95 A.2d 71 (1953). See also Notes, 26 N.C.L. REV. 232 (1948), 33 N.C.L. REV. 702 (1955).

[9] Davenport v. Patrick, 227 N.C. 686, 44 S.E.2d 203 (1947); Arnold v. Jacobs, 319 Mass. 130, 65 N.E.2d 4 (1946). See also Annot., 2 A.L.R.2d 785 (1948). A minority of jurisdictions hold that the negligence of one of the beneficiaries is a bar to the action in toto, on the doctrine that the negligence of one is imputed to the others; see, *e.g.* Peterson v. Cochran & McCluer Co., 308 Ill. App. 438, 31 N.E.2d 825 (1941).

[10] Wymore v. Mahaska County, 78 Iowa 396, 43 N.W. 264 (1889).

[11] IOWA CODE ANN. ¶ 635.9 (1950).

[12] "The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased . . . ." N.C. GEN. STAT. § 28-173 (Supp. 1957). "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." N.C. GEN. STAT. § 28-174 (1950), Lamm v. Lorbacher, 235 N.C. 728, 71 S.E.2d 49 (1952).

normal death, while in cases involving the recompense of a wrongful death the proceeds in question are those which the (potential) beneficiary would not have received had the deceased died a normal death at the time in question.

However, the instant case is unique in that it applies this principle of non-profiting by wrongdoing where there has been no judicial finding of negligence, but rather where there has been an express denial of liability agreed upon by the parties. Thus the established rule of law invoked has been extended in its applicability to a situation where there has been a wrongful death recovery from a source of funds paid in *settlement* on behalf of the allegedly negligent beneficiary to release that beneficiary from a *claim* of negligence. This extension of the old maxim appears to be well grounded in reason when one considers the presumptions of negligence arising from the case and the source of the funds from which the beneficiary seeks to partake.

One presumption of negligence seems to arise out of the amount of the settlement in relation to the face value of the insurance policy. Here the insurance company paid the administrator seventy percent of the maximum liability it could incur on the policy. From this fact it appears logical to assume that the insurer most certainly thought that its insured was at fault. As a general rule evidence of a compromise agreement is not admissible into evidence as an admission of liability and proves only that peace was brought.[13] However, the instant case does not conflict with the general rule as it did not present a question of the admissibility of evidence, but rather a question of the inferences to be drawn from facts already before the court. It would seem that a second presumption of negligence arises from the fact that during the two years that elapsed between the collision and the hearing in the supreme court, the son had made no claim against the driver of the other vehicle for damages which it is reasonable to assume that his car incurred.[14]

Considering the source of the funds as a bar to recovery, no cases could be found where the holder of a policy of automobile liability insurance collected anything under that policy where he was the driver of the automobile.[15] Furthermore, there is the fact that in North Carolina, as the administrator in a wrongful death proceeding acts for the

[13] Shipley v. Pittsburgh & L.E.R.R., 83 F. Supp. 722 (W.D. Pa. 1949); Penn Dixie Lines Inc. v. Grannick, 238 N.C. 552, 78 S.E.2d 410 (1953).

[14] 248 N.C. at 183, 102 S.E.2d at 812. However, the court apparently overlooks the fact, or fails to make mention of it, that the driver of the other vehicle had likewise brought no claim against the son alleging fault by the son.

[15] But a holder of a liability policy has recovered under that policy where he was a *passenger* in an accident involving his automobile where coverage of the policy extended to those injured by an authorized driver of the insured. Aetna Cas. and Surety Co. v. General Cas. and Surety Co., 285 App. Div. 767, 140 N.Y.S.2d 670 (1955).

benefit of the beneficiaries and not the estate of the deceased, the administrator becomes the representative of the beneficiaries in this type of action.[16] This means that if the son could be a beneficiary the administrator had to represent the son's claim, and in the principal case the administrator's claim for negligence was actually against the son himself. This begs the ridiculous question of how could the administrator have represented the son's claim against himself for his own alleged wrong.

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[16] Pearson v. National Manufacture & Stores Corp., 219 N.C. 717, 14 S.E.2d 811 (1941). "[T]he right of action created by statute for wrongful death does not constitute an asset of the estate, but belongs to the beneficiaries designated by the statute as beneficiary of the recovery, as is the law in this state, [and] the administrator in bringing the action is *pro hac vice* their representative and not the representative of the estate."