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Notes and Comments

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Admiralty—Last Clear Chance in Collision

The famous case of *Davies v. Mann*[1] gave birth to the doctrine of last clear chance by holding that if one party in the exercise of reasonable care has the last opportunity to avoid the harm, the other party's prior negligence is not a proximate cause of the result. This doctrine has in most common-law jurisdictions allowed plaintiffs to avoid the harshness of the bar of contributory negligence, and has shifted the burden of the loss to the defendant although both parties were at fault.[2]

Whether this common-law doctrine is applicable in admiralty collision cases has never been decided by the United States Supreme Court. However, two recent district court decisions serve to point out the conflict existing among the lower federal courts. In *Williamson v. The Carolina*[3] the libelant moored his vessel in an unseaworthy manner so that the displacement waves of the respondent's tug and barge caused her to be tossed about with resultant damage. Respondent was at fault in failing to maintain a proper lookout. The court rejected libelant's contention that respondent, since its negligence was subsequent in time to that of libelant's, should bear the total loss. The admiralty rule of divided damages, the court reasoned, was more equitable where there was equal fault of both parties.

In *Arundel Corp. v. The City of Calcutta*[4] the libelant's scow collided with respondent's anchored vessel and sank. The court, assuming that respondent's vessel was improperly anchored and therefore at fault, held the libelant solely responsible for the loss, on the theory that it, being cognizant of the anchored vessel's position, had the last clear chance to avoid the collision.[5]

The divergence of opinion illustrated by the two principal cases is not resolved by an examination of the history of last clear chance in admiralty. *Steam Dredge No. 1*[6] is apparently the first admiralty case in the United States dealing with last clear chance. There the First Circuit reviewed several Supreme Court decisions[7] in which the facts

[1] 10 M.& W. 546 (1842).

[2] See PROSSER, TORTS § 52 (2d ed. 1955); Annots., 92 A.L.R. 47 (1934), 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947). See also Note, 36 N.C.L. REV. 545 (1958).

[3] 158 F. Supp. 417 (E.D.N.C. 1958). [4] 172 F. Supp. 593 (E.D.N.Y. 1958).

[5] Note that here the respondent or defendant successfully utilized last clear chance, traditionally a plaintiff's defense to contributory negligence, to avoid liability.

[6] 134 Fed. 161 (1st Cir. 1904) (not a collision case).

[7] The New York, 175 U.S. 187 (1899); The America, 92 U.S. (2 Otto) 432 (1875); Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1874); The John Fraser, 62 U.S. (21 How.) 184 (1858). Other early Supreme Court cases involving successive faults where both vessels were held liable are: The North Star, 106 U.S. (16 Otto) 17 (1882); The Continental, 81 U.S. (14 Wall.) 345 (1871).

would have warranted an application of the doctrine, but in which it was not mentioned, and concluded that the doctrine of *Davies v. Mann* should not be applied in maritime law. Later the Seventh Circuit in *The Norman B. Ream*[8] stated that the doctrine of last clear chance was created to mitigate the common-law principle that contributory negligence is a bar to recovery, and did not apply in this country in admiralty, since under martime law contributory negligence effects only a division of damages.

The position taken by *Steam Dredge No. 1* and *The Norman B. Ream* was weakened by The *Perseverance*.[9] There a vessel was at fault for being improperly anchored; a tug was at fault in not steering clear of the anchored vessel. The tug was held solely liable, the anchored vessel's fault being considered as a mere *condition* rather than a contributing *cause* of the collision.[10] The court stated: "The situation *is similar to* that often comprised within the formula that a wrongdoer is solely liable if he has a 'last clear chance' of avoiding the damage."[11] Eight years later the Second Circuit applied last clear chance by name in *The Cornelius Vanderbilt*[12] and *The Sanday*.[13] Neither case cited *Steam Dredge No. 1* or *The Norman B. Ream,* nor did either case discuss the doctrine's applicability to admiralty libels—the court apparently assuming that it was applicable. From an overall survey it appears that the Second,[14] Third,[15] and Fifth[16] Circuits and a district court[17] of the Ninth Circuit have adopted last clear chance, while the First[18] and Seventh Circuits[19] and a district court[20] of the Fourth Circuit have rejected it.

[8] 252 Fed. 409 (7th Cir. 1918) (dictum).

[9] 63 F.2d 788 (2d Cir. 1933).

[10] It is often held that the antecedent fault of one vessel is not a contributing cause if it merely creates a condition or situation which makes it possible for the subsequent fault of the other vessel to bring about collision. See, *e.g.,* Cornell Co. v. Phoenix Co., 233 U.S. 593 (1914); The Syosset, 71 F.2d 666 (2d Cir. 1934); The Socony No. 19, 29 F.2d 20 (2d Cir. 1928).

[11] 63 F.2d at 790 (emphasis is added to point out that the court did not consider itself as applying last clear chance except by analogy).

[12] 120 F.2d 766 (2d Cir. 1941). [13] 122 F.2d 325 (2d Cir. 1941).

[14] Kosnac v. The Norcuba, 243 F.2d 890 (2d Cir. 1957); The Cedar Cliff, 149 F.2d 964 (2d Cir. 1945); Southern Transp. Co. v. Dauntless Towing Line, 140 F.2d 215 (2d Cir. 1944); The Sanday, 122 F.2d 325 (2d Cir. 1941); The Cornelius Vanderbilt, 120 F.2d 766 (2d Cir. 1941); Arundel Corp. v. The City of Calcutta, 172 F. Supp. 593 (E.D.N.Y. 1958); *In re* Adams' Petition, 125 F. Supp. 110 (S.D.N.Y. 1954); Manhattan Lighterage Corp. v. United States, 103 F. Supp. 274 (S.D.N.Y. 1951).

[15] P. Dougherty Co. v. United States, 207 F.2d 626 (3d Cir. 1952).

[16] Crawford v. Indian Towing Co., 240 F.2d 308 (5th Cir. 1957); Richmond v. The Connie C. Cenac, 157 F. Supp. 397 (E.D. La. 1957), *aff'd sub nom.* Cenac Towing Co. v. Richmond, 265 F.2d 466 (5th Cir. 1959).

[17] Hertz v. Consolidated Fisheries, Inc., 105 F. Supp. 948 (N.D. Cal. 1952).

[18] Steam Dredge No. 1, 134 Fed. 161 (1st Cir. 1904) (not a collision case).

[19] The Norman B. Ream, 252 Fed. 409 (7th Cir. 1918) (dictum).

[20] Williamson v. The Carolina, 158 F. Supp. 417 (E.D.N.C. 1958). *But cf.* Curtis Bay Towing Co. v. Mansfield, 207 F.2d 859 (4th Cir. 1953), where, in an action under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1953), the

In attempting to determine what should be the position of the admiralty courts in relation to the doctrine of last clear chance, certain basic maritime principles of liability and recoverable damages must be examined. Liability in admiralty collision law is, as at common law, based on fault.[21] The effect of dual fault in admiralty, however, is entirely different from its effect at common law. If only one vessel is at fault that vessel must bear the entire loss,[22] but if both vessels are deemed at fault the divided damages rule of American admiralty law comes into play, *i.e.*, each vessel bears half the total loss.[23] This rule is qualified by the "major-minor fault" principle: if one vessel is grossly negligent and the other at fault only to a minor degree, the minor fault is held not to be a contributing cause of the accident and the entire loss is borne by the vessel grossly at fault[24] The result is in many cases the same as would be reached under last clear chance, but the rule differs from last clear chance in that it is limited to instances where it would be unjust to divide the damages because of the gross fault of one vessel and in that it is not dependent upon one fault preceding the other.

Many of the standards imposed upon the mariner are statutory,[25] and one who violates a statutory duty before a collision is faced with the rule of *The Pennsylvania*.[26] That rule creates a legal presumption of fault that may be overcome only by showing not only that the violation *did not* but that it *could not* have been a cause of the collision. Modifying this rule slightly is the doctrine as to errors *in extremis*. This doctrine provides that when a vessel, through no fault of her own, is placed in a position where collision is seemingly imminent, she will not be held at fault for action taken in violation of the statutory rules or the standards of due care in navigation, when the fault can be explained as resulting from the extremity in which she was placed.[27]

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court allowed the issue of last clear chance to go to the jury. The court cited no authority, nor did it discuss the doctrine's applicability to a maritime cause of action.

[21] The Java, 81 U.S. (14 Wall.) 189 (1872).

[22] The Clara, 102 U.S. (12 Otto) 200 (1880); Oaksmith v. Garner, 205 F.2d 262 (9th Cir. 1953).

[23] The North Star, 106 U.S. (16 Otto) 17 (1882); The Catherine, 58 U.S. (17 How.) 170 (1855).

[24] The Victory, 168 U.S. 410 (1897); The Oregon, 158 U.S. 186 (1895); The City of New York, 147 U.S. 72 (1893); The Great Republic, 90 U.S. (23 Wall.) 20 (1874).

[25] International Rules, 33 U.S.C. §§ 144-47d (1953); Inland Rules, 33 U.S.C. §§ 151-232 (1953); Great Lakes Rules, 33 U.S.C. §§ 241-95 (1953); Western Rivers Rules, 33 U.S.C. §§ 301-56 (1953). See GILMORE & BLACK, ADMIRALTY § 7-3 (1957).

[26] 86 U.S. (19 Wall.) 125 (1874); Merritt-Chapman & Scott Corp. v. Cornell S.S. Co., 265 F.2d 537 (2d Cir. 1959). See also GILMORE & BLACK, ADMIRALTY § 7-5 (1957); GRIFFIN, COLLISION § 201 (1949).

[27] The Genesee Chief, 53 U.S. (12 How.) 443 (1852); Pacific-Atlantic S.S. Co. v. United States, 175 F.2d 632 (4th Cir. 1949); The Stifinder, 275 Fed. 271 (2d Cir. 1921). See also GILMORE & BLACK, ADMIRALTY § 7-3 (1957).

If the admiralty courts were to accept completely the principles of last clear chance in collision cases, the effect would be in many instances a nullification of these basic maritime principles. In cases where there is substantial fault on the part of both vessels, but one is subsequent in time to the other, the loss, rather than being divided, would be borne by the last wrongdoer. In this connection it is submitted that the need for last clear chance in the common law is not present in the maritime law. The doctrine of last clear chance was designed to mitigate the harshness of the bar of contributory negligence. In admiralty contributory negligence has never, as a rule,[28] barred recovery,[29] By division of damages the maritime law has evolved its own equitable adjustment between the parties.

The rule of *The Pennsylvania,* which in many instances requires at least a division of damages,[30] apparently would be made ineffective, with the result that the subsequent wrongdoer would bear the total loss regardless of any breach of a statutory duty by the other vessel. Since the doctrine of last clear chance tends to place liability on the last wrongdoer, it is possible as a practical matter that a vessel making the last error could be held liable even though her action properly should be classified under existing admiralty law as a reasonable error in judgment while *in extremis* and thus excusable.

A view of the overall picture seems to indicate that the doctrine of last clear chance has no real foundation or place in admiralty law. It would seem to conflict with some basic maritime principles, while other admiralty rules, when justice dictates, can be applied to reach the same result.[31] It is submitted that an adoption of this common-law doctrine by the American maritime courts would result in no real advance, but rather a regression from the more desirable measures of liability currently employed.[32]

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[28] See discussion of "major-minor fault" rule at text, footnote 24 *supra,* and discussion in note 10 *supra.* As was stated in Cenac Towing Co. v. Richmond, 265 F.2d 466, 471 (5th Cir. 1959): "Each case stands on its own. Call it anything: a condition, a remote cause, a non-contributing fault, the last clear chance; if, in the circumstances of the particular case, the respondent's fault is slight in comparison with the libellant's or if there was a clear cleavage between respondent's fault and the collision, an admiralty court will evaluate the respective degrees of fault and exonerate the respondent."

[29] The Max Morris, 137 U.S. 1 (1890).

[30] See Lie v. San Francisco & Portland S.S. Co., 243 U.S. 291 (1917); Merritt-Chapman & Scott Corp. v. Cornell S.S. Co., 265 F.2d 537 (2d Cir. 1959).

[31] See discussion of "major-minor fault" rule in text at note 24 *supra,* and discussion in note 10 *supra.*

[32] Presumably if a collision libel is brought in a state court, that court will be bound to apply maritime law. See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); Southport Transit Co. v. Avondale Marine Ways, Inc., 234 F.2d 947 (5th Cir. 1956); Intagliata v. Shipowners & Merchants Towboat Co., 26 Cal. 2d 365, 159 P.2d 1 (1945).

Compromise and Settlement—Insurance—Liability Carrier's Settlement as a Bar to Insured's Suit

The standard automobile liability insurance policy provides that the insurer shall defend any suit against the insured for personal injury or property damage caused by accident and arising out of the ownership, maintenance or use of the automobile. In addition the policy stipulates that the insurer may make such investigation and settlement of any claim or suit as it deems expedient. Two recent North Carolina decisions have limited the effect of such settlements[1] made by the insurance company.

In *Beauchamp v. Clark*,[2] an action for personal injuries, plaintiff, while driving his father's truck, collided with defendant's vehicle. Plaintiff protested and denied fault when his father's insurance company informed him that it intended to settle with defendant because its investigation had indicated that plaintiff was at fault. Insurer, nowithstanding, settled with defendant. Subsequently, in this action defendant pleaded the settlement in bar. The court held that in the absence of evidence that plaintiff ratified or assented to the settlement it could not bar his action because the insurer had no authority under the settlement provisions of the policy to compromise his cause of action. The court noted that plaintiff was not the policy-holder, that he was not aware of the policy or its provisions when he drove the truck, and that he had in no way assented to the settlement.

This decision left some doubt as to the effect of the settlement where the insured vehicle owner objected to, or was unaware of, the settlement. In *Lampley v. Bell*[3] plaintiff policy-holder first learned of his liability carrier's settlement with defendant from the allegations of defendant's answer. Plaintiff had told his adjuster, prior to the settlement, that he intended to pursue his claim against the other driver. The trial court held that the insurance policy constituted a binding contract between plaintiff and his insurer which gave the insurer the right and power to settle with defendant on behalf of the plaintiff and that plaintiff was bound thereby. The North Carolina Supreme Court reversed, holding that although plaintiff was a party to the insurance contract, the insurer had no more authority to compromise his claims against the defendant than the insurance carrier had to settle on behalf of the plaintiff in the *Beauchamp* case.

[1] "Settlement" as used in the text refers to a settlement made by an insurance company under an automobile liability policy. "A completed compromise and settlement fairly made between persons legally competent to contract and having the authority to do so with respect to the subject matter of the compromise, and supported by sufficient consideration, operates as a merger of, and bars all right to recover on, the claim or right of action included therein, as would a judgment duly entered between said persons." Beauchamp v. Clark, 250 N.C. 132, 139, 108 S.E.2d 535, 539 (1959).

[2] 250 N.C. 132, 108 S.E.2d 535 (1959). [3] 250 N.C. 713, 110 S.E.2d 316 (1959).

Beauchamp and *Lampley* presented two distinctly different problems arising under the settlement provisions of an automobile liability insurance policy. In *Beauchamp* plaintiff was insured under the terms of the policy, but he was not a party to the contract of insurance. In *Lampley* plaintiff was the insured policy-holder, a party to the contract. *Lampley* points out that the holding in *Beauchamp* was not based upon the absence of privity of contract between plaintiff and the insurer. The reasoning behind both cases is that the settlement provisions in the insurance policy do not grant the insurer the authority to execute a settlement on behalf of the insured and bind him thereby, where the insurer makes the settlement and procures releases either without the knowledge or consent of the insured or over the protest of the insured, unless he has ratified the settlement. It is not apparent which party has the burden of proof. It could be argued that the cases indicate that the defendant would have the burden of showing consent, knowledge, or ratification;[4] but the plaintiff in *Beauchamp* undertook to prove that he objected to the settlement and in *Lampley* that the settlement was made without his knowledge.

An earlier decision shows what happens when plaintiff, having undertaken to prove absence of knowledge or consent, fails to establish it. In *Cannon v. Parker*[5] plaintiff, the trustee in bankruptcy for the policy-holder, was seeking property damages arising out of a collision between the policy-holder's truck and defendant's automobile. Plaintiff alleged in his reply that he first learned of his liability carrier's settlement from the allegations of defendant's answer. On trial plaintiff, for reasons not apparent, introduced his insurance policy and the release obtained thereunder, but failed to introduce evidence that he was unaware of the settlement, whereupon defendant demurred *ore tenus* to the evidence. *Held,* the settlement bound the plaintiff under the evidence before the court. The court explicitly did not reach the question of the validity of the reply because the plaintiff had failed to offer proof on the issue. The court gave no indication that it considered the release as having been executed under the terms of the policy. There was nothing in the record to show that it was. Thus, the court, apparently relying on the fact that the release showed on its face that the policyholder, and not the insurer, had paid a certain sum of money to the defendant and had obtained his release, held that the plaintiff's action was barred.

[4] The language of these cases and the cases which they cite is subject to two interpretations: (i) that the settlement provisions in the policy create a presumption that the release is binding on the policy-holder and the burden is on the policy-holder to show lack of consent or knowledge, or that he objected to it; or (ii) that the policy provisions do not in themselves give the insurer the authority to settle the policy-holder's claims and the defendant must show knowledge, consent or ratification on the part of the insured.

[5] 249 N.C. 279, 106 S.E.2d 229 (1958).

In *Beauchamp* and *Lampley* the defendants were precluded from using the settlements as a defense. Suppose that the defendants had counterclaimed after the settlements were found not to bar the plaintiffs. Could the *plaintiffs* use the settlements as a defense to the counterclaims? The appellee's brief in *Lampley* presented this question,[6] but since the matter was not in issue it was not answered.[7] An analysis of the consideration involved in the settlement between the defendant and the insurance company would tend to indicate that the plaintiff could use the settlement as a defense. A release executed for a money payment may take either of two forms. The only express release may be from the payee to the payor; or there may be an express agreement that each releases the other. The legal effect of either form is the same as between parties to the release. The court will regard the release as it would a judgment and prevent the releasee from later asserting his claim against the releasor.[8] In *Beauchamp* and *Lampley* the bargain took the first form, that of a unilateral release. It is to be remembered that in those cases the parties were not dealing with each other. One of them, the plaintiff, was represented by his insurance company, which under the circumstances had no authority to defeat any claim the plaintiff might have had against the defendant. The defendant, on the other hand, represented himself. Undoubtedly, he had the authority to give up any claim he might have had against the plaintiff—indeed this was the very thing for which the insurer was bargaining. Thus the defendant gave up his claim against the plaintiff in consideration not for plaintiff's releasing *him* plus a cash settlement in lieu of damages, but for the cash settlement alone. Therefore, since the defendant had received all to which he was legally entitled under the circumstances, it would seem that he would be bound by his promise—namely, to forego suing the plaintiff. Consequently, the plaintiff should be able to defeat the defendant's counterclaim. The defendant could have avoided this result if he had made sure that the plaintiff joined in the settlement agreement.

It is submitted that the court reached the correct result in the principal cases. North Carolina is in line with the weight of authority,[9] and, as pointed out in *Lampley*,[10] there now seems to be no contrary authority. The opposite result in effect would have established the insurer as an arbitration board with sweeping jurisdiction and authority.

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[6] Brief for Appellee, pp. 7-9.

[7] The author has been unable to find any case in which this problem was considered.

[8] Snyder v. Kenan Oil Co., 235 N.C. 119, 68 S.E.2d 805 (1952).

[9] See, *e.g.*, Fikes v. Johnson, 220 Ark. 448, 248 S.W.2d 362 (1952); Hurley v. McMillan, 268 S.W.2d 229 (Tex. Civ. App. 1954); Birkholz v. Cheese Makers Mut. Cas. Co., 274 Wis. 190, 79 N.W.2d 665 (1956); Annot., 32 A.L.R.2d 937 (1953).

[10] 250 N.C. 713, 715, 110 S.E.2d 316, 318 (1959).

Criminal Procedure—Waiver of Indictment Precluded When Offense Charged Under Lindberg Act

In *Smith v. United States*[1] the petitioner and his companions had escaped from a Florida jail and had seized an automobile, forcing its owner to accompany them to Alabama where he was released unharmed. Petitioner waived indictment and was charged by information that he did "knowingly transport in interstate commerce . . . a person . . . who had been unlawfully seized, kidnapped, abucted and carried away . . . ."[2] The information did not allege whether the victim had been released harmed or unharmed. The accused was convicted and sentenced to imprisonment pursuant to the Lindberg Act.[3] This act provides that punishment shall be: (1) by death if the kidnapped person has *not been liberated unharmed* and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed. On appeal the Fifth Circuit Court of Appeals affirmed.[4] After granting certiorari the United States Supreme Court ruled that indictment could not be waived, and the case was reversed and remanded with instructions to dismiss the information.[5] In a six-to-three decision the Court held that indictment was required because the statutory offense is sufficiently broad to justify a capital verdict and hence the trial must proceed on this basis, even though the evidence later establishes that such a verdict cannot be sustained because the victim was liberated unharmed. The majority stated that although the imposition of the death penalty will depend upon the proof introduced at trial, that circumstance does not alter the fact that the offense is one which *may* be punished by death.

In all capital offenses indictment is mandatory under the fifth amendment to the Constitution of the United States which provides that "no person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a grand jury . . . ." This policy has been incorporated into Federal Rule of Criminal Procedure 7(a) which states: "An offense which *may* be punished by death *shall be* prosecuted by indictment." (Emphasis added.) In the principal case the majority based their decision on the premise that kidnapping under the statute is a capital offense whether or not there is an allegation that "the kidnapped person has not been liberated unharmed."[6]

Prior to the principal case the Third Circuit Court of Appeals had held that kidnapping was not a capital offense when the indictment failed to allege that the victim was not liberated unharmed.[7] However,

[1] 360 U.S. 1 (1959). [2] *Id.* at 7. [3] 18 U.S.C. § 1201 (1950).
[4] Smith v. United States, 250 F.2d 842 (5th Cir. 1957). On an earlier appeal conviction had been set aside on the ground that the trial court had denied defendant due process. Smith v. United States, 238 F.2d 925 (5th Cir. 1956).
[5] 360 U.S. 1 (1959). [6] 360 U.S. at 8.
[7] United States v. Parker, 103 F.2d 857, 861 (3d Cir. 1939).

the decisions of the Second Circuit were in conflict with this view, and the Supreme Court in the principal case cited with apparent approval the dictum in *United States v. Parrino*,[8] to the effect that the allegation that the victim was not released unharmed goes only to the punishment and is not part of the offense and that a defendant has no right to be informed beforehand of the punishment the Government seeks. When viewed in the light of this dictum the present position of the court appears to be that an allegation in the indictment that the victim was "not released unharmed" is not necessary to allow either the introduction of evidence of harm or the jury's recommendation of the death penalty. Such a rule would seem to place the defendant in danger of being prejudicially surprised at the trial.[9] The Court in the principal case states that the defendant's procedural safeguards against such surprise are discovery and a bill of particulars.[10]

This ruling may present serious problems to the defendant in the conduct of his defense. If evidence of harm were admitted under an indictment which did not allege harm, then it would appear that the heretofore well-defined requirements of definiteness, exactitude and certainty in an indictment[11] are not satisfied. In a similar situation, for example, it has been held that where the degree of larceny, and consequently the severity of punishment, depends upon the value of the property stolen, then the value of such property must be alleged and proved.[12] Certainly there is doubt that such an indictment as would be permitted by the principal decision provides the defendant with sufficient information to enable him to prepare his defense.[13] He will not be able to ascertain from it whether the prosecution will seek to establish the fact that he did not liberate the victim unharmed, and thus he will not know the full extent of his jeopardy until the trial. Certainly the attorney who must conduct the defense is in danger of being surprised. Even if defendant is aware that he has harmed the victim it is often difficult to persuade a criminal defendant to be frank with his counsel.

Where can a defendant finding himself in such a position look for protection from surprise? The court has said that this protection will be discovery,[14] but it is doubtful that discovery will provide the defendant with the information he seeks. It is clear from the legislative

[8] 180 F.2d 613, 615 (2d Cir. 1950).
[9] 360 U.S. at 12 (separate opinion).
[10] *Id.* at 10.
[11] "If the indictment leaves the defendant in fair doubt as to the offense charged, it fails to meet the test that an indictment should 'leave no doubt in the minds of the accused and the court of the exact offense intended to be charged'." Bratton v. United States, 73 F.2d 795, 797 (10th Cir. 1934).
[12] Cartwright v. United States, 146 F.2d 133 (5th Cir. 1944).
[13] 360 U.S. at 16-17 (separate opinion).
[14] *Id.* at 10.

history[15] of the Federal Rules that the grand jury minutes cannot be reached by a defendant under Rule 16.[16] Rule 16 is of no help in reaching the statements of government witnesses, except in the comparatively rare case where such statements have been seized or obtained by process. The rule itself provides that the motion for discovery may be made "at any time after the filing of the indictment or information"; thus the defendant has no right to discovery prior to indictment. The use of this rule is made even less effective if discovery is denied by the trial court because there can be no interlocutory appeal from such denial.[17]

The other provision for discovery is Federal Rule 17(c) which provides for discovery before trial through subpoena. The written statements of witnesses are considered as "papers and documents"[18] within the language of this rule and thus are seemingly available to the defendant. However, the Court of Appeals of the District of Columbia is the only court which has permitted defendants to reach the statements of witnesses under this rule.[19] The majority of courts[20] have denied defendants this opportunity because such statements are not evidentiary until the witness has testified in court, and there is always the possibility that the witness will not be called at the trial.

A more liberal construction of Federal Rules 16 and 17(c) would be prevented by a recent statute,[21] the language of which specifies:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.* (Emphasis added.)

This statute make no distinction between capital and noncapital offenses. Therefore, if defendant must rely on discovery or inspection for his protection he will not know that he may be on trial for his life

[15] Orfield, *Discovery and Inspection in Federal Criminal Procedure,* 59 W. VA. L. REV. 221 (1957).

[16] FED. R. CRIM. P. 16: "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit defendant to inspect . . . books, papers . . . obtained from or belonging to defendant or obtained from others by seizure or by process . . . ."

[17] Cogen v. United States, 278 U.S. 221 (1929).

[18] Fryer v. United States, 207 F.2d 134, 136-37 (D.C. Cir. 1953).

[19] *Ibid. Contra,* United States v. Carter, 15 F.R.D. 367 (D.D.C. 1954) (a non-capital case).

[20] United States v. Echeles, 222 F.2d 144, 152 (7th Cir. 1955); United States v. Kiamie, 18 F.R.D. 421, 424 (S.D.N.Y. 1955); United States v. Brown, 17 F.R.D. 286, 287-88 (N.D. Ill. 1955); United States v. Bryson, 16 F.R.D. 431, 437 (N.D. Cal. 1954). The foregoing cases were all concerned with non-capital offenses. However, the same rationale would apply in either case; there is no more advance certainty that a given witness will be called in a capital case than in a non-capital case.

[21] 18 U.S.C. § 3500 (1958).

until the Government witness has testified that the victim was "not liberated unharmed." In a case[22] decided recently by the Second Circuit Court of Appeals the statute was construed to prohibit a defendant from reaching the statements of witnesses until those witnesses had testified. Fourteen days after the principal case was decided this construction was affirmed by a divided United States Supreme Court.[23]

The opportunity of inspection during the trial would be of little value to the defendant. Cross-examination, impeachment and rebuttal depend on careful investigation and preparation, and continuances during the trial are usually too short to allow this.[24] Kidnapping cases may present complex issues that require extensive investigation and research before trial, and the defendant who is not aware of all the problems he will face until after the testimony of prosecution witnesses will be seriously prejudiced.

The last safeguard recommended by the court in the principal case was the use of a bill of particulars.[25] There is no doubt that a bill may be obtained in this situation.[26] However, since a bill of particulars is required only to set out with certainty the offense charged,[27] it will not aid the defendant here, because under the Court's view of the nature and elements of kidnapping the specific information the defendant seeks is not an element of the offense. *United States v. Parrino*,[28] cited in the principal case, stated that the matter of harm goes only to the punishment and does not affect the nature of the crime. Therefore, it does not appear that the Government would be required, in a bill of particulars or otherwise, to make known the punishment it intends to seek or the requirements for such punishment that it intends to prove. Although it is true that the evidence must conform to the bill,[29] it would be inconsistent to say that evidence of harm not alleged in the bill is inadmissible for this reason, since the courts have held that such evidence may be introduced when harm is not alleged in the indictment.

The holding in the principal case presents a problem to the defendant when the prosecution has no intention of alleging or proving that the victim was harmed, as would appear to be the situation in the principal case. By the majority opinion, this defendant would be subject to the

[22] United States v. Lev, 258 F.2d 9 (2d Cir. 1958).
[23] Lev v. United States, 360 U.S. 470 (1959).
[24] ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 330 (1947).
[25] 360 U.S. at 10.
[26] "A bill should only be required where the charges of an indictment are so general that they do not advise defendant of the specific acts of which he is accused." United States v. Rosenwasser Bros., 255 Fed. 233, 234 (E.D.N.Y. 1919).
[27] "The fundamental purpose of a bill of particulars is to apprise the defendant or the *crime charged* with sufficient particularity to enable him to properly prepare a defense to such *charge* . . . ." United States v. Macleod Bureau, 6 F.R.D. 590, 592 (D. Mass. 1947). (Emphasis added.)
[28] 180 F.2d 613, 615 (2d Cir. 1950).
[29] Braatelien v. United States, 147 F.2d 888 (8th Cir. 1945).

same confinement and delay that would be entailed had the prosecution sought the death penalty. The purpose of Federal Rule of Criminal Procedure 7(a), which provides for waiver of indictment in non-capital cases, was to avoid keeping just such a defendant languishing in jail getting no credit toward his sentence, while he awaits grand jury action.[30]

Also the Government's position in a case where the victim has been released unharmed has been weakened by the principal decision. It would seem that the Government must now grant the defendant all the safeguards to which a defendant in a capital case is entitled even though a capital penalty is not sought and cannot be obtained. This is contrary to the congressional intent expressed in the Federal Rules which provide such safeguards only when a defendant is on trial for his life. These rules require the Government, in a capital case, to furnish to the defendant a list of veniremen and witnesses to be produced on the trial. Since this list must be given three days prior to trial, the additional burden of deciding and making known in advance what witnesses will be called at the trial is placed on the Government.[31] Defendant will also be entitled to twenty pre-emptory challenges as against ten granted a defendant in a non-capital case.[32]

North Carolina law requires a precise and comprehensive indictment in all cases.[33] The problem raised in the *Smith* case does not arise in North Carolina because our kidnapping statute[34] does not have the aggravation provision found in the federal statute. A similar situation *is* presented in North Carolina by the burglary statute[35] which provides for different degrees of burglary and a graduated scale of punishment, depending upon the degree alleged and proved. If the state seeks the death penalty it must allege in the indictment that the dwelling was in the actual occupation of a person at the time of the crime. Without such averment the indictment is sufficient only for burglary in the second degree regardless of the proof at trial.[36]

It is submitted that, although the decision in the principal case was beneficial to the defendant at bar, it has weakened the procedural safeguards protecting defendants generally.[37] Discovery and bills of particulars are at this time, and will continue to be, inadequate safeguards so long as harm, when it exists, is held not to be an element of the offense of kidnapping under the Lindberg Act. Defendant's ability to prepare his defense will be greatly impaired if he must wait until the Government has rested its case before he can know the full degree of

[30] 360 U.S. at 14-15 (separate opinion).
[31] 18 U.S.C. § 3432 (1958). [32] FED. R. CRIM. P. 24(b).
[33] State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Albarty, 238 N.C. 130, 76 S.E.2d 381 (1953).
[34] N.C. GEN. STAT. § 14-39 (1953). [35] N.C. GEN. STAT. § 14-51 (1953).
[36] State v. Fleming, 107 N.C. 905, 12 S.E. 131 (1890).
[37] 360 U.S. at 12 (separate opinion).

jeopardy to which his actions have exposed him. Perhaps the cause of justice would have been better served by an adoption of the approach of the Fifth Circuit Court of Appeals to the same case.[38] That court held: (1) since the victim was released unharmed the offense could not be punishable by death and the defendant could waive indictment, (2) that prosecution by information will be deemed a waiver of the Government's right to ask for the death penalty or for the jury to recommend it, and (3) that, whether waiver is allowed or whether the prosecution is to be by indictment, no evidence of harm can be introduced unless such harm is previously alleged so that the defendant will be made completely aware of the gravity of the charge he faces.

W. TRAVIS PORTER

Eminent Domain—Interest As an Element of Just Compensation

North Carolina recognizes the right of every property owner to receive just compensation for property taken from him under the power of eminent domain.[1] When land is taken under this power, the owner is entitled to receive an amount equal to the value of the land on the date of the taking.[2] If payment is made later than the date of the taking, then, when made it must include some additional sum as compensation for the delay,[3] because the condemnee has had neither the legal right to possession or use of his property nor the use of the money owed him for the deprivation during this interval.[4] Failure to compensate for the resulting loss would be unconstitutional.[5] Interest on the principal sum from the date of the taking is used as a measuring stick for computing the condemnee's damages resulting from delay in payment.[6] This right

[38] Smith v. United States, 238 F.2d 925, 929-30 (5th Cir. 1956).

[1] DeBruhl v. Highway Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958); Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939); Johnston v. Rankin, 70 N.C. 550 (1874); see generally Comment, 35 N.C.L. REV. 296 (1957).

[2] Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924); Braswell v. Highway Comm'n, 250 N.C. 508, 108 S.E.2d 912 (1959); Western Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 363 (1927).

[3] United States v. 25.4 Acres of Land, 82 F. Supp. 394 (E.D.N.Y. 1949); Abernathy v. South & W. Ry., 159 N.C. 340, 74 S.E. 890 (1912).

[4] United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938); United States v. Northern Pac. Ry., 51 F. Supp. 749 (E.D. Wash. 1943); Arkansas-Missouri Power Co. v. Hamlin, 288 S.W.2d 14 (Mo. App. 1956); Balkey v. Commonwealth, 394 Pa. 166, 146 A.2d 297 (1958).

[5] United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947); Bergen County Sewer Authority v. Little Ferry, 15 N.J. Super. 43, 83 A.2d 4 (1951); *In re* Bronx River Parkway, 284 N.Y. 48, 29 N.E.2d 465 (1940); Annot., 36 A.L.R.2d 337, 428 (1954).

[6] "The concept of just compensation is comprehensive and includes all elements . . . . The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.'" Jacobs v. United States, 290 U.S. 13 (1933).

to interest is not dependent on statutory provision or an express agreement between the parties, but is an integral part of the just compensation due the owner.[7]

The federal courts and a great majority of the state courts allow this interest as a matter of strict constitutional right.[8] It is usually considered either as payment for damages caused by detention of the compensation[9] or as payment necessary to produce a full equivalent of the value of an award paid contemporaneously with the taking. There seems to be no valid distinction between the two, since both are based on the principle of remuneration for loss suffered during the interim.[10]

North Carolina refuses to allow interest when the owner is permitted to remain in possession and reap benefit from use of the land during the interim period.[11] Thus in *Yancey v. Highway Comm'n*[12] where the petitioners were permitted to harvest crops from the land for two years after the date of the original appropriation, the court held that they were not entitled, as a matter of law, to have interest on the amount of compensation fixed by the jury. In *DeBruhl v. Highway Comm'n*,[13] however, where the condemnee was completely deprived of possession and derived no benefit during the interim, the court held that he was entitled, as a matter of law, to have the jury award interest on the fair market value of the condemned property from the date of the taking. *Yancey* was not overruled; it was expressly distinguished on the ground that the owner in *Yancey* had derived benefit during the interim and consequently had suffered no compensable loss from the delay in payment.[14] The *DeBruhl* decision was expressly followed in *Winston-Salem v. Wells*[15] where interest was again allowed as a matter of law.

It can be argued that the petitioners in *Yancey* did not receive just compensation. Even if the owner is not completely deprived of possession at the time of condemnation his tenure is rendered precarious. All

[7] Shoshone Tribe v. United States, 299 U.S. 476 (1937); Danforth v. United States, 102 F.2d 5 (8th Cir. 1939); see generally 29 C.J.S. *Eminent Domain* § 333(a) (1941); MILLS, EMINENT DOMAIN § 175 (1879).

[8] Kieselbach v. United States, 317 U.S. 399 (1943); United States v. New York, 186 F.2d 418 (2d Cir. 1951); Stubbs v. United States, 21 F. Supp. 1007 (M.D.N.C. 1938); Gravity Drainage Dist. No. 1 v. Key, 99 So. 2d 82 (La. 1958); Harrison v. Louisiana, 11 So. 2d 612 (La. 1942); Sowma v. State, 121 N.Y.S.2d 465 (1953); see generally Annot., 36 A.L.R.2d 337, 428-35 (1954).

[9] See, *e.g.*, DeBruhl v. Highway Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958).

[10] See JAHR, EMINENT DOMAIN § 176 (1953); 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 5 (2d ed. 1953); 29 C.J.S. *Eminent Domain* § 176(a) (1941).

[11] Abernathy v. South & W. Ry., 159 N.C. 340, 74 S.E. 890 (1912). Right of way was condemned over property on which rental houses were located, but plaintiff had continued to rent the houses. The court held that the jury could have given interest as part of the damages if the circumstances had warranted, but since no decrease in rent was shown interest was not warranted.

[12] 221 N.C. 185, 19 S.E.2d 489 (1942).

[13] 247 N.C. 671, 102 S.E.2d 229 (1958).

[14] *Id.* at 684, 102 S.E.2d at 238.

[15] 249 N.C. 148, 105 S.E.2d 435 (1959).

rights in this property can be exercised only under doubt and uncertainty as to their duration. It is submitted that it is not necessary for the court either to allow or disallow interest depending upon whether or not the owner has remained in possession and reaped benefit. It would seem to be a better rule for the court to allow interest, as a matter of law, in every case where payment is delayed. In cases where the landowner has received benefit from retained possession after the date of appropriation, the court could simply set off the value he has derived from such retention against the amount of interest allowed as a matter of law. This rule would facilitate uniformity in the court's decisions and would guarantee to the owner the just compensation to which he is entitled, while preventing any over-compensation to which the owner has no constitutional right. There is supporting authority for this method in both North Carolina[16] and other jurisdictions.[17]

Suppose that in a condemnation proceeding the court awards a judgment which includes compensation for delay in payment, *i.e.*, interest, in addition to an amount equivalent to the value of the land at the date of the taking. If this judgment is not paid forthwith, is the condemnee entitled to interest on the judgment? Where the condemnor is not a governmental entity, North Carolina allows him to recover interest on the judgment by statute.[18] However, where the condemnor is the state or an agency of the state the cases are not in agreement as to whether or not interest on the judgment should be allowed. A brief survey of the cases in this jurisdiction which have dealt with this issue will serve to indicate an apparent inconsistency in result when the condemnor is the state or a state agency.

City of Durham v. Davis[19] appears to have been the first case dealing with the issue of interest on a judgment rendered in condemnation proceedings against the state or a state agency. In this case the court awarded the condemnee interest from the rendition of the judgment. In so doing it cited no authorities and apparently took the view that interest on a judgment should be awarded as a matter of course. The court obviously was not impressed with the fact that the condemnor-city

[16] *Cf.* Miller v. City of Asheville, 112 N.C. 759, 16 S.E. 762 (1893). In this case instruction to the jury, that it should allow interest on such sum as it might assess as damages from the time of the condemnation, but should take into consideration the use made of and benefit received by the plaintiffs from the land after such date against the damages, was held to be correct.

[17] United States v. Holden, 268 Fed. 223 (D.C.N.Y. 1920); Application of Great Lakes Pipe Line Co., 168 Kan. 100, 211 P.2d 70 (1949); Pattison v. Buffalo, R. & P. Ry., 268 Pa. 555, 112 Atl. 101 (1920); West v. Milwaukee, L.S. & W. Ry., 56 Wis. 318, 14 N.W. 392 (1882); see generally 2 LEWIS, EMINENT DOMAIN § 499 (2d ed. 1900); MILLS, EMINENT DOMAIN § 175 (1879).

[18] N.C. GEN. STAT. § 24-5 (1953). "[T]he amount of any judgment . . . rendered or adjudged in any kind of action . . . shall bear interest till paid."

[19] 171 N.C. 305, 88 S.E. 433 (1916).

was a governmental entity.[20] Some twenty-six years later, however, in *Yancey v. Highway Comm'n*[21] interest on a judgment against an agency of the state, previously rendered in the first *Yancey* case, heretofore discussed, was denied. The court in reaching this decision relied on the established principle that "the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid."[22] The next case of importance was *Highway Comm'n v. Privett*[23] which expressly recognized *Yancey second* as controlling and did not allow interest.

In the recent case of *Board of Educ. v. McMillan*[24] the court, relying on *City of Durham v. Davis,* allowed interest on the judgment. The majority opinion did not mention *Yancey second* or *Privett* but again seemed to allow interest as a matter of course. Justice Parker in his concurring opinion, on the other hand, felt that the instant case had disemboweled the *Yancey second* decision without expressly referring to it. He advocated administering "the *coup de grace* to the Yancey decision by specifically overruling it."[25] He stated that "the decision is wrong, and does violence to Article I, § 17, of the State Constitution, and to the 14th Amendment to the United States Constitution."[26]

It is submitted that *McMillan* does, in fact, overrule *Yancey second* as the concurring opinion suggests. Even assuming that *Yancey second* and *Privett* can be distinguished from *Davis* and *McMillan* on the ground that the condemnors in the former cases were agencies of the state[27] while in the latter the condemnors were municipal corporations,[28]

[20] Municipal corporations such as counties and incorporated cities and towns are instrumentalities of the state for the more convenient administration of local government. See Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Gaud v. Walker, 214 S.C. 451, 53 S.E.2d 316 (1949).

[21] 222 N.C. 106, 22 S.E.2d 256 (1942) (Hereafter referred to as *Yancey second*).

[22] *Id.* at 109, 22 S.E.2d at 259, quoting United States v. North Carolina, 136 U.S. 211, 219 (1890). The court held that N.C. Gen. Stat. § 24-5 was not applicable because the state is not bound by a statute unless expressly mentioned therein.

This freedom from liability for interest is based on the principle of sovereignty. United States v. North American Transp. & Trading Co., 253 U.S. 330 (1920). Sovereignty in this interpretation is a carry-over from the common law idea that "the King can do no wrong" and as such is also the basis for the principle of sovereign immunity from suit, absent consent. See generally Borchard, *Theories of Governmental Responsibility in Tort,* 36 YALE L.J. 1 (1926).

[23] 246 N.C. 501, 99 S.E.2d 61 (1957).

[24] 250 N.C. 485, 108 S.E.2d 895 (1959).

[25] *Id.* at 492, 108 S.E.2d at 900. [26] 250 N.C. at 492, 108 S.E.2d at 900.

[27] The State Highway Commission is not a municipal corporation but an agency of the state created for the purpose of exercising administrative and governmental functions. See Independence Trust Co. v. Porter & Boyd, Inc., 190 N.C. 680, 130 S.E. 547 (1925).

[28] A school district is a municipal corporation. See Perry v. Commissioners of Franklin County, 148 N.C. 521, 62 S.E. 608 (1908); Smith v. School Trustees, 141 N.C. 143, 53 S.E. 524 (1906).

The suggested distinction would not seem to constitute an adequate basis for denying interest on judgments against the state and allowing it as against a municipal corporation, because a city theoretically enjoys the same immunity from suit, absent consent, as does the state. See Note, 36 N.C.L. REV. 97 n. 4 (1957).

Yancey second and *Privett* should fall on constitutional grounds. The 14th Amendment to the United States Constitution guarantees that a state cannot take private property for public use without awarding just compensation.[29] North Carolina recognizes this right to just compensation as an integral part of the law of the land and declares that law of the land and due process are synonymous.[30] Interest, as compensation for delay in payment, is an essential element of just compensation.[31] It is contended that there is no substantial difference between delay in payment of the principal sum due the owner of condemned land and delay in payment of the judgment rendered on that sum, delay in either case being simply a description of the interval existing between the date of the taking and the date of payment. Consequently, interest on the judgment until final payment, compensating for this delay, is constitutionally guaranteed. The general rule that a state or state agency is not required to pay interest should, therefore, be held inapplicable to liabilities arising from the exercise of the power of eminent domain.[32]

RICHARD S. JONES, JR.

Insurance—Insurer's Liability for Death or Loss Resulting from Violation of Law

A felon flees the scene of a burglary with the police in hot pursuit. In the chase his wife's car is wrecked and he is injured. Under the wife's accident insurance policy covering the driver and containing no exception for injuries sustained in violation of law, may he recover his medical expenses? The Supreme Court of Michigan, in *Davis v. Detroit Auto. Inter-Ins. Exch.*,[1] said that he could. Recovery was allowed in the absence of a provision in the policy excepting the risk and in the absence of proof that the policy had been obtained in contemplation of the commission of a felony. The court further stated that this construction would not encourage crime or be contrary to public policy.

A vigorous dissent argued that generally one may not recover when the crime involved is one of moral turpitude. Since the policy provided

[29] Slattery Co. v. United States, 231 F.2d 37 (5th Cir. 1956); Creasy v. Stevens, 160 F. Supp. 404 (W.D. Pa. 1958); Riden v. Philadelphia, B. & W.R.R., 182 Md. 336, 35 A.2d 99 (1943); Spaugh v. City of Winston-Salem, 234 N.C. 708, 68 S.E.2d 838 (1952); Board of Educ. v. Campbells Creek R.R., 138 W. Va. 473, 76 S.E.2d 271 (1953); see generally 18 AM. JUR. *Eminent Domain* § 4 (1938).

[30] E.T. & W.N.C. Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958); Sale v. Highway Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955); Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

[31] Seaboard Air Line Ry. v. United States, 261 U.S. 299 (1923); see generally 1 ORGEL, *op. cit. supra* note 10, § 6.

[32] See United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947); Smyth v. United States, 302 U.S. 329 (1937); Highway Comm'n v. Stupenti, 222 Ark. 9, 257 S.W.2d 37 (1953); Sholars v. Highway Comm'n, 6 So. 2d 153 (La. App. 1942).

[1] 356 Mich. 454, 96 N.W.2d 760 (1959).

payment "to and for each person who sustains bodily injury," the recovery here was for the felon, and this was *not* a case involving an innocent beneficiary. Noting the distinction between conduct which is malum in se (wrong by its very nature) and that which is malum prohibitum (wrong only because prohibited), the dissent rejected the majority's reliance on *Bowman v. Preferred Risk Mut. Ins. Co.*[2] as precedent. That case allowed recovery under a policy containing no exclusionary clause, but there the conduct was clearly not a crime of moral turpitude. The insured had committed a simple trespass on another's automobile. Perhaps the strongest reason presented for denying recovery was that if the policy had expressly purported to cover such a risk, it would have been void on the grounds of public policy.

The two lines of thought set out by the majority and the dissent in the principal case illustrate the inconsistencies of the law in this area.[3]

In many cases recovery has been denied entirely on the ground that the loss was not within the terms of the policy. Such cases are, for the most part, excluded from this discussion unless they throw some light on the weight given by a particular court to circumstances outside of the policy itself.

It has been held that death resulting from execution for murder does not avoid the insurer's liability under a life policy with an incontestability clause, notwithstanding the argument that such payment would be contrary to public policy.[4] Recovery has been allowed where the insured was killed by two peace officers while he was committing a robbery, on the ground, *inter alia,* that death is the thing insured against, and the risk includes human foibles.[5] The beneficiary has been allowed recovery where the insured was killed: by police, while attempting a hold-up;[6] by his intended murder and robbery victim;[7] by a homeowner, while attempting to flee from a burglary;[8] by a fire he set deliberately to collect on a fire insurance policy;[9] when his car overturned while he was fleeing from police officers who had attempted to stop him

[2] 348 Mich. 531, 83 N.W.2d 434 (1957).

[3] There is one class of cases about which there is very little disagreement. The great weight of authority today allows recovery by a beneficiary when the insured commits suicide and the policy makes no exclusionary reference thereto. 2 RICHARDS, INSURANCE § 240 (1952).

[4] John Hancock Mut. Life Ins. Co. v. Tarrance, 244 F.2d 86 (6th Cir. 1957).

[5] Home State Life Ins. Co. v. Russell, 175 Okla. 492, 53 P.2d 562 (1936).

[6] Domico v. Metropolitan Life Ins. Co., 191 Minn. 215, 253 N.W. 538 (1934).

[7] McDonald v. Order of Triple Alliance, 57 Mo. App. 87, 90 (1894), where the court said, "[T]he insurer takes the subject insured, with his flesh, blood, and passions."

[8] Jordan v. Logia Supreme De La Alianza Hispano-Americana, 23 Ariz. 584, 206 Pac. 162 (1922).

[9] Taylor v. John Hancock Mut. Life Ins. Co., 11 Ill. 2d 227, 142 N.E.2d 5 (1957).

for questioning;[10] by adulterated boot-leg whiskey;[11] and by complications resulting from submission to an abortion.[12]

Almost every court allowing recovery has to deal with the argument that recovery would be against public policy. Judgment for the plaintiff thus usually involves a finding that recovery is not repulsive to public policy. There are several more positive grounds generally relied upon by courts allowing recovery. Many courts find that since there is no exclusion clause in the policy, there is no reason to read into the policy what the insurer did not write into it.[13] Where the plaintiff is an innocent beneficiary, many courts reason that recovery does not violate the maxim that no man should be allowed to benefit from his own wrong-doing and, further, that an innocent beneficiary ought not suffer for another's wrong.[14] In tne *Bowman* case, relied upon by the majority in the principal case, the Michigan court justified the plaintiff's recovery on the grounds that the crime involved was very minor—a misdemeanor at most—and as such should not be a bar to the insured's claim. It has also been argued that recovery will not act as an inducement to crime.[15]

Courts have refused recovery where the insured died from blood poisoning contracted by the use of a hypodermic, possession of which was a statutory misdemeanor[16] and where the insured was legally executed for murder.[17] A frequent justification for denying the insurer's liability is that recovery would be against public policy.[18] Directly related to this is the argument that what the policy could not expressly insure against, it cannot impliedly insure against.[19] It is stated or at least implicit in all of these cases that for recovery to be denied the death or injury must be the proximate result of the insured's violation of the law.

The first North Carolina case in this area, *Spruill v. North Carolina Mut. Life Ins. Co.*,[20] held that the insurer's liability was not avoided by the fact that the insured was a run-away slave, killed while resisting

[10] Metropolitan Life Ins. Co. v. Henkel, 234 F.2d 69 (4th Cir. 1956).
[11] Zurich Gen. Acc. & Liab. Ins. Co. v. Flickinger, 33 F.2d 853 (4th Cir. 1929).
[12] Payne v. Louisiana Indus. Life Ins. Co., 33 So. 2d 444 (La. 1948).
[13] See, *e.g.*, Home State Life Ins. Co. v. Russell, 175 Okla. 492, 53 P.2d 562 (1936).
[14] See, *e.g.*, Taylor v. John Hancock Mut. Life Ins. Co., 11 Ill. 2d. 227, 142 N.E.2d 5 (1957).
[15] Home State Life Ins. Co. v. Russell, 175 Okla. 492, 53 P.2d 562, 563 (1936). "It is not to be presumed that policy holders as a class, or any appreciable number of them, will go out and seek death in unlawful pursuits in order to mature their policies."
[16] Townsend v. Commercial Travelers Mut. Acc. Ass'n, 188 App. Div. 370, 177 N.Y. Supp. 68 (1919).
[17] Simmons v. United States, 120 F. Supp. 641 (M.D. Pa. 1954).
[18] Acme Fin. Co. v. National Ins. Co., 188 Colo. 445, 195 P.2d 728 (1948).
[19] Townsend v. Commercial Travelers Mut. Acc. Ass'n, 188 App. Div. 370, 177 N.Y. Supp. 68 (1919).
[20] 46 N.C. 126 (1853).

apprehension by a posse. The court interpreted the exclusion from liability for death "by the hands of justice" to mean "by some judicial sentence for the commission of some felony" and allowed recovery by the beneficiary.

When the insured was lawfully killed in a fight in which he was the unlawful aggressor, the North Carolina Supreme Court, in *Clay v. State Ins. Co.*,[21] denied recovery for death "by accidental means." The policy excluded liability where the insured was killed while violating the law. This would seem to put the case outside the scope of this note. The court, however, stated a rule which merits mention: "[T]he true test of liability in cases of this character is whether the insured, being in the wrong, was the aggressor, under circumstances that would render a homicide likely as the result of his own misconduct."[22] The decision appeared to place very little stress on the exclusion cause, with emphasis on the stated rule as it related to death "by accidental means." At least two North Carolina cases, *Fallins v. Durham Life Ins. Co.*[23] and *Scarborough v. World Ins. Co.*,[24] both involving insurance against death by accidental means, have since decided the question of the insurer's liability on the basis of the *Clay* rule.

The next important case in which our court set down a rule in this area, *Poole v. Imperial Mut. Life & Health Ins. Co.*,[25] involved an injury insured suffered while riding without permission on a freight train, a statutory misemeanor.[26] In allowing recovery the court took notice of the fact that the policy contained no exclusion clause for violations of law. It further stated that the right of recovery should not be affected by the unlawful conduct of the plaintiff unless it was so reckless or occurred under such circumstances as to remove the injury from that classification of events called "accidents," and so withdraw it from the effects of the policy.

The next important case, *Blackwell v. National Fire Ins. Co.*,[27] a property insurance case, held that an insured could recover for damage to his automobile which resulted when he attempted to escape arrest while transporting intoxicating liquor, a misdemeanor.[28] The per curiam opinion stated several reasons for affirming the judgment for plaintiff. The policy contained no exclusion clause and the loss came within the terms of the policy. The insurance contract had no direct connection with the violation, but was merely collateral thereto. There was no

[21] 174 N.C. 642, 94 S.E. 289 (1917). [22] *Id.* at 645, 94 S.E. at 290.

[23] 247 N.C. 72, 100 S.E.2d 214 (1957). The insured was killed by an outsider, attempting to break up a fight. Citing *Clay*, the court pointed out that here there was no showing that insured was an aggressor. Recovery was allowed.

[24] 244 N.C. 502, 94 S.E.2d 558 (1956). Here the facts were nearly identical to *Clay*, in that the insured was killed in an act of unlawful aggression. Citing *Clay*, the court refused recovery to the beneficiary.

[25] 188 N.C. 468, 125 S.E. 8 (1924). [26] N.C. GEN. STAT. § 60-104 (1950).

[27] 234 N.C. 559, 67 S.E.2d 750 (1951). [28] N.C. GEN. STAT. § 18-49.3 (1953).

evidence of loss by any intentional act of the insured. This is the only North Carolina case the writer could find comparable to the principal case and it seems readily distinguishable on the basis of the felony-misdemeanor distinction. In the principal case the conduct of the insured was quite clearly malum in se, being the felony of burglary. By contrast, in the North Carolina case insured's actions were at worst a misdemeanor, and wrong only because prohibited by statute.

From the foregoing it seems safe to conclude that the decisions—considering the nation as a whole—show a lack of coherence. The courts seem inclined to make their decisions rather summarily, relying upon one or two of at least a dozen different reasons to justify the particular holding. It is suggested that there is a perspective, which none of the courts have appeared to use, that might prove helpful in clarifying this area of the law.

Anglo-American law has never been amenable to the use of rigid formulae in determining the outcome of particular cases. This proposal is in no way intended to conflict with that tradition. It is suggested, not as a pigeon-hole system of disposing of cases, but rather as a consistent perspective from which to view the circumstances in any given case.

Some of the preceding decisions have been based at least in part upon the seriousness of the violation of law involved, others upon a consideration of proper treatment of the innocent beneficiary, and still others upon the maxim that no one shall profit from his own wrong. It is urged that all three of these elements ought to be considered as crucial in the determination of any such case where the loss is within the terms of the insurance contract. These elements, in combination, create four distinct types of cases:

I. Where it is the insured himself who will benefit from the recovery, and the violation was malum in se.
II. Where the insured will benefit, and the violation was malum prohibitum.
III. Where the beneficiary will benefit from the recovery, and the violation was malum in se.
IV. Where the beneficiary will benefit, and the violation was malum prohibitum.

In Class I, the overbearing consideration ought to be that no man be allowed to profit from his own wrong when that wrong is a serious crime against society. Just as clearly, in Class IV a completely innocent beneficiary ought not to be deprived of the benefits of a policy merely because of a minor infraction of the law by another. It is Classes II and III which present the most difficult questions. Here the courts must "balance the equities" and choose consciously between two opposing social policies. To decide cases falling into Class II, the courts

must choose between withholding recovery, thereby punishing the violator, and labeling the violation as too inconsequential to merit so severe a sanction. In the opinion of this writer, the preferable choice here is to allow recovery, on the ground that by its very nature an act malum prohibitum is not so repugnant to society as to warrant denying the insured recompense for his injuries. In Class III cases the courts must determine whether the needs of society and the law will be better served by compensating an innocent beneficiary or by providing another sanction for serious crime. Again the writer would approve recovery, primarily because of the beneficiary's insulation from the wrongful act.

The principal case, viewed from this suggested perspective, becomes a questionable decision. It was the felon who was to benefit directly from the proceeds of a recovery. His crime was unquestionably malum in se. As a Class I case, it would have been better decided in favor of the defendant insurer.

A brief glance backward reveals that none of the North Carolina cases fall into Class I. Only one case, *Fallins v. Durham Life Ins. Co.*,[29] can be fitted into Class IV. That case allowed recovery to the innocent beneficiary and thus reaches the same result as the proposal. Both of the cases which fit into Class II, *Blackwell v. National Fire Ins. Co.*[30] and *Poole v. Imperial Mut. Life & Health Ins. Co.*,[31] are in harmony with the proposal. In each the violation amounted to no more than a misdemeanor. In each of them our court granted recovery to the insured in spite of his violation of the law. Two of the decisions, *Scarborough v. World Ins. Co.* [32] and *Clay v. State Ins. Co.*, [33] fit into Class III and are in conflict with the writer's proposal in that they deny recovery to an innocent beneficiary because of the gravity of the insured's conduct. While *Spruill v. North Carolina Mut. Ins. Co.*[34] might be said to fall into Class III also, the writer prefers not to attempt to categorize the morality of running away from slavery, a point long since mooted.

None of the North Carolina cases which lend themselves to the proposed analysis have been on all fours with the principal case. Considering the language used by our court in related cases, stressing the seriousness of the crime involved or the nature of the insured's conduct in general, the court, if presented with a case like the principal case, should have no difficulty following the demands of logic and the best societal policy to a conclusion contrary to that reached by the Michigan court.

BARRY T. WINSTON

[29] See note 23 *supra* and accompanying text.
[30] See note 27 *supra* and accompanying text.
[31] See note 25 *supra* and accompanying text.
[32] See note 24 *supra* and accompanying text.
[33] See note 21 *supra* and accompanying text.
[34] See note 20 *supra* and accompanying text.

Real Party in Interest—Insurance—Partially Subrogated Insurer's Standing To Sue

In *Southeastern Fire Ins. Co. v. Moore*[1] the North Carolina Supreme Court held that payment by an insurance company of the damage done to insured's car, less fifty dollars deductible under the policy terms, did not entitle the insurer to sue the third party tort-feasor in its own name. The court found that the insurer had sought "to split an indivisible cause of action" and that it was not the real party in interest. Also, the insured had received the money in the form of a "loan" repayable only in the event of his recovery from the tort-feasor, and the court intimated that this arrangement was not a payment entitling the insurer to subrogation.

Under common law rules of pleading, all actions had to be maintained in the name of the person whose legal right had been affected.[2] So, in a tort case, only the injured party himself could be the plaintiff. Subsequently, code pleading and the Federal Rules adopted real party in interest provisions embodying the practice followed in equity of allowing any person with a substantial beneficial interest in the claim to sue in his own name.[3] Under these provisions, including the North Carolina statute,[4] the following rules are applied. When an insurer pays an insured's claim on a policy it becomes subrogated pro tanto to any right of action which the insured may have against a third party responsible for the loss.[5] When the insurer has paid the entire loss sustained, the insured having no further beneficial interest in the claim, the former may sue the tort-feasor in its own name.[6] However, the rule against splitting a cause of action requires that the legal title to the right of action for the entire claim must remain in the insured when the payment by the insurer does not cover the whole loss.[7] Upon recovery, the insured holds all proceeds in excess of the previously uncompensated amount of

[1] 250 N.C. 351, 108 S.E.2d 618 (1959).

[2] CLARK, CODE PLEADING § 24 (2d ed. 1947).

[3] CLARK, *op. cit. supra* note 2, § 21; 3 MOORE, FEDERAL PRACTICE ¶ 17.03 (2d ed. 1948).

[4] N.C. GEN. STAT. § 1-57 (1953). The real party in interest must have some interest in the subject matter of the litigation, and not merely an interest in the action itself. Choate Rental Co. v. Justice, 211 N.C. 54, 188 S.E. 609 (1936).

[5] CLARK, *op. cit. supra* note 2, § 24; 3 MOORE, *op. cit. supra* note 3, ¶ 17.09; N.C. GEN. STAT. § 58-176 (1950).

[6] Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952); Service Fire Ins. Co. v. Horton Motor Lines, Inc., 225 N.C. 588, 35 S.E.2d 879 (1945); Powell & Powell, Inc. v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916); Cunningham & Hinshaw v. Seaboard Air Line Ry., 139 N.C. 427, 51 S.E. 1029 (1905); CLARK, *op. cit. supra* note 2, § 24; 3 MOORE, *op. cit. supra* note 3, ¶ 17.09.

[7] Yorkshire Ins. Co. v. United States, 171 F.2d 374 (3d Cir. 1948); Burgess v. Trevathan, *supra* note 6; Powell & Powell, Inc. v. Wake Water Co., *supra* note 6; 29 AM. JUR. *Insurance* § 1358 (1940); 46 C.J.S. *Insurance* § 1211 (1946); CLARK, *op. cit. supra* note 2, § 24; 3 MOORE, *op. cit. supra* note 3, ¶ 17.09.

his claim as trustee for the insurer.[8] The latter rule is designed to protect the tort-feasor from the inconvenience and expense of being forced to defend against more than one action for a single indivisible wrong. There remains a problem when an insurer finds it necessary or advisable to sue the tort-feasor in the company name when it has not paid the full amount of the insured's loss.[9] The question, then, is how the insurer can secure a surrender of all beneficial interest in the claim from the insured and vest the title of real party in interest in itself.

Generally, there are two methods by which this may be done. First, assignment appears to provide the surest and most practical solution to the problem. Whether an assignment to the insurer of the insured's entire right of action is made for additional consideration or not, such an assignment will enable the insurer to sue for the full amount of the loss.[10] Care must be taken in drawing an assignment without further consideration to specify that the assignment is absolute and final and that the assignor (insured) has forever parted with all beneficial interest in the claim to be litigated. This is necessary to avoid the possibility that the assignment be found to be one for collection only and thus invalid in North Carolina.[11] Another caveat should be observed if the assignment is in exchange for additional consideration. It should be made clear that the insurer is purchasing the insured's claim, and not making an additional payment pursuant to the policy. The latter would presumably constitute a payment in excess of the insurance contract

[8] Powell & Powell, Inc. v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916). *But cf.* Patitucci v. Gerhardt, 206 Wis. 358, 240 N.W. 385 (1932), where the court held that the trial judge should always join the insurer whenever the latter's existence in the case comes to the judge's attention, though it is not reversible error to fail to do so.

[9] This problem may arise where the insured has for some reason left the state after the accident and, after being informed of the need for his co-operation, fails to co-operate with the insurer. Plaintiff's attorney informed this writer that the insured in the principal case, while still within the state and legally bound by the "loan" agreement to co-operate, was reluctant to participate even to the small extent of signing the verification. Perhaps such reluctance may be appreciated when it is considered that the most the insured can realize from a recovery against the tort-feasor would be the deductible amount not covered by the insurance minus, usually, one-third which the insurer keeps for the expense of prosecuting the action. For obvious reasons it is not advisable to compel the insurer's primary witness to join in the action against his will.

[10] General Exch. Ins. Corp. v. Carp, 176 So. 145 (La. 1937).

[11] Federal Reserve Bank v. Whitford, 207 N.C. 267, 176 S.E. 584 (1934); Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1927); Martin v. Mask, 158 N.C. 436, 74 S.E. 343 (1912). See generally 3 MOORE, *op. cit. supra* note 3, ¶ 17.09, where Professor Moore comments that states following this rule have given substantive effect to the real party in interest provision where only procedural effect was intended by the original code-drafters. Under the Federal Rules an assignee for collection only is the real party in interest. Rosenblum v. Dingfelder, 111 F.2d 406 (2d Cir. 1940). Where such assignment is to a partial subrogee, the North Carolina rule would seem by implication to treat the respective claims of insurer and insured as *separate* causes of action. There appear to be no North Carolina cases directly in point.

and would be a violation of the anti-discrimination provision of the state's insurance laws.[12]

The other method involves the permissive splitting of a cause of action, which may be done in several ways. Generally, this can be accomplished only with the consent of the defendant. While it can be assumed that he will not consent if it would leave him liable to face prosecution in more than one suit for a single tort, it is possible to split the cause and still give him protection against multiplicity of suits.[13] The insured can give the tort-feasor a release or a covenant not to sue for the uncompensated part of the claim. By accepting the release or covenant the tort-feasor consents to the splitting, but since the insured is now barred he will have to face only one suit for the loss.[14] The consideration for the covenant or release can be any nominal amount if the tort-feasor is unwilling to pay the insured the actual amount of his uncompensated loss. It is essential that such a release clearly recite that only the part of the loss not covered by insurance is to be released. A release of the entire claim may result in a complete bar to action by either the insured or the insurer against the tort-feasor.[15] For this reason it may be safer from the standpoint of the insurer to have the insured use a covenant, which is only a bar to suit by the covenantor (insured) rather than a bar to action on the claim itself.[16]

In *Service Fire Ins. Co. v. Horton Motor Lines*,[17] a case similar to the principal one, the insurer commenced an action in its own name against the tort-feasor just prior to the running of the statute of limi-

[12] N.C. GEN. STAT. §§ 58-44.3, -198 (1950). *Quaere*, what is the difference, other than in form, between a payment in excess of the insurance contract and a purchase by insurer of insured's claim, when the net result in either case would be to vest the real party in interest title in the insurer?

[13] This is not to say, however, that the defendant cannot waive his right to this protection. This may be done by filing answers on the merits to separate complaints of the insurer and insured or simply by failing to enter a timely objection to the standing to sue of the insurer in a separate action by the latter. In failing to object the defendant impliedly consents to a splitting of the cause of action. Southern Stock Fire Ins. Co. v. Southern Ry., 179 N.C. 290, 102 S.E. 504 (1920).

[14] Powell & Powell, Inc. v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916); Hartford Fire Ins. Co. v. Wabash Ry., 74 Mo. App. 106 (1898).

[15] Fidelity Ins. Co. v. Atlantic Coast Line Ry., 165 N.C. 136, 80 S.E. 1069 (1914), held that insurer was barred from suing the tort-feasor who had paid a judgment held by the insured for the entire loss. Powell & Powell, Inc. v. Wake Water Co., *supra* note 14, held that where tort-feasor has knowledge of insurer's rights prior to settlement, such release will be effective only as to insured's uncompensated loss, unless the payment was in excess of this loss, in which case the release would be a defense pro tanto to the extent of the excess amount paid. *But see* Casualty Reciprocal Exch. v. Kansas City Pub. Serv. Co., 230 Mo. App. 468, 91 S.W.2d 227 (1936), where insurer was barred even though tort-feasor had knowledge of subrogation rights prior to the settlement with insured. *Contra*, Camden Fire Ins. Ass'n v. Bleem, 132 Misc. 22, 227 N.Y. Supp. 746 (Buffalo City Ct. 1928); Brighthope Ry. v. Rogers, 76 Va. 443 (1881). These cases held that a release of tort-feasor by insured after subrogation had occurred is ineffective as a release of insurer's claim, regardless of notice to tort-feasor.

[16] Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P.2d 783 (1945).

[17] 225 N.C. 588, 35 S.E.2d 879 (1945).

tations. The defendant demurred on the ground that the insurer was not the real party in interest. After the statutory period had expired the insurer's motion to join the insured as a party plaintiff was granted. On appeal the court sustained the overruling of the demurrer on the ground that the statute of limitations is a plea in bar and may not be raised by demurrer. Although not put in issue by the demurrer, the following questions were present: When a partially subrogated insurer institutes an action in its own name before the statute of limitations has run, does the subsequent barring of the insured's claim by the statute also leave the insurer barred? Or does the expiration of the statute period result in the insurer becoming the "only party having an enforceable claim"[18] and thus the legal real party in interest? An affirmative answer to the first question would be predicated upon the contention that the insurer was not the real party in interest before the statute ran and that the subsequent barring of the insured's claim should in no way alter that fact. Accordingly, under the doctrine of derivative rights of subrogation, the subrogee (insurer) should accede to no greater rights than those of the subrogor (insured), who would be barred by the statute. An affirmative answer to the second question perhaps could be sustained by reasoning that after the statute has run the insurer holds the only legally enforceable claim against which the tort-feasor could be forced to defend. Therefore, the defendant would be afforded the same protective rights embodied in the rule against splitting a cause of action and would not have to face a multiplicity of suits. Unfortunately, the court here did not meet this issue,[19] and it has not yet been decided in this state. Although the latter position apparently has been accepted by one federal court,[20] it would not appear safe to rely solely upon this method to vest the real-party title in a partially subrogated insurer. However, if no alternative were available, it might be argued as a last resort to avert the possibility of leaving the insurer remedyless in statute-of-limitation cases.

There is one other procedure possibly available to the insurer, that of waiver by the insured of his right in the claim. The plaintiff in the principal case endeavored to invoke this doctrine against the defendant's contention that the insurer was not the real party in interest.[21] In a sworn affidavit, the insured expressly "disavowed any interest in said

[18] *Id.* at 591, 35 S.E.2d at 881.

[19] In regard to the plaintiff-insurer's right to sue in its own name after the running of the statute, the court, through Justice Barnhill, said: "What the respective rights of the parties may be in the event it is made to appear . . . that Medlin's [the insured's] claim for damages, in part, is still outstanding and unsatisfied, but his right of action is barred by the statute of limitations, so that the plaintiff [insurer] is now the only party having an enforceable claim, must be reserved for decision at the trial below. The facts there developed will control the ruling of the court." *Ibid.*

[20] Yorkshire Ins. Co. v. United States, 171 F.2d 374 (3d Cir. 1948).

[21] 250 N.C. at 352, 108 S.E.2d at 618.

cause of action" and further declared "that she has no interest in this cause of action and that the sole remaining interest to be determined . . . is that of the Southeastern Fire Insurance Company . . . ."[22] It was argued that the following testimony of the insured in open court under oath also constituted a waiver: "I have not filed any suit in connection with this automobile accident; I do not presently have any interest in it."[23] The plaintiff contended that if the current action were allowed to proceed to judgment through reliance upon these statements by the insured, then the insured would be estopped to institute any subsequent action against the defendant. The court, while it apparently recognized the plaintiff's contention,[24] did not discuss the question of waiver in its opinion. Thus, the criteria by which the court will be guided in this area remain unknown. If this jurisdiction is to allow such a waiver at all, it is difficult to envision a more appropriate opportunity for its application than that presented by the principal case. Waiver of rights ranging from those established under ordinary contracts and tort claims to those granted by the Constitution of the United States are frequently permitted under proper circumstances.[25] There appears to be no valid reason why waiver by the insured in the situation at hand should not be allowed.

There is some language in the opinion of the principal case[26] which indicates that the court may have based its decision in part upon the "loan receipt"[27] signed by the insured. The original purpose for the use of the "loan" device by insurance companies was to prevent the real party in interest title from leaving the insured and vesting in the insurer upon full payment of the insured's loss.[28] The assumption was that the

[22] Record, p. 13.

[23] *Id.* at 19.

[24] 250 N.C. at 352, 108 S.E.2d at 618.

[25] Patton v. United States, 281 U.S. 276 (1930) (waiver of a constitutional right); Minneapolis Threshing Mach. Co. v. Hutchins, 65 Minn. 89, 67 N.W. 807 (1896) (waiver of right under a contract); People v. Brady, 257 App. Div. 1000, 13 N.Y.S.2d 789 (1939) (waiver of a right under the statute of limitations); Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948). *Cf.* N.C. GEN. STAT. § 97-10 (1946), wherein the North Carolina Workman's Compensation Act provides that if the employer of the injured employee does not sue the third party tort-feasor within six months after the date of the injury, he waives this right, and the employee may bring the action himself, although the employer will still share in the recovery.

[26] The court, through Justice Denny, quoted with approval 46 C.J.S. *Insurance* § 1209 (1946): "Insurer's rights to subrogation accrue on payment of the insurance claim; but until payment of the claim on the policy no rights to subrogation accrue. An advance by insurer of the amount of insurance to insured under an agreement reciting that the amount was received as a loan to be repaid only from such recovery as might be had from the other party is not a payment entitling the insurer to subrogation." 250 N.C. at 354, 108 S.E.2d at 620.

[27] The receipt read, in part: "Received from the Southeastern Fire Insurance Company the sum of Four Hundred Sixty-One and 96/100 Dollars ($461.96) as a loan, without interest, repayable only in the event and to the extent of any net recovery the insured may make from any person . . . liable for the loss . . . ." Record, addendum, p. 1.

[28] Annot., 157 A.L.R. 1261 (1945).

use of the insured's name would result in a more sympathetic treatment by the jury than if the insurance company itself brought the action.[29] Where the insurance covers the entire loss, the question of who is the real party in interest may depend upon whether there as been in fact a loan or a full payment.[30] However, this loan device is of very doubtful utility in the case of a claim arising under an automobile collision policy containing a deductible clause. Regardless of whether the insurer has paid or loaned the amount of the damage, less the deductible figure, the court will require the use of the insured's name as the real party in interest[31] unless one of the procedures outlined above is employed to vest this title in the insurer.

ALLAN W. MARKHAM

Torts—Insulating Negligence in North Carolina

The doctrine of insulating negligence and the task of predicting how the court will hold in an intervening negligence situation continue to be problems in North Carolina. The issue of insulation arises when one party through a negligent act or omission has created an unreasonable risk of harm to others and a second actor through a subsequent act or omission brings the risk to reality to the injury of the plaintiff. The problem is whether the two tort-feasors may be held jointly liable or whether the first tort-feasor is insulated by the later negligence of the second tort-feasor. Our court has said that the problem of insulating negligence is one of proximate cause[1] and that the test is whether the

[29] *Quaere,* whether this assumption is valid today where often there is an insurer behind the plaintiff in automobile damage suits, and most jurors are aware of this fact.

[30] In Cunningham & Hinshaw v. Seaboard Air Line Ry., 139 N.C. 427, 51 S.E. 1029 (1905), it was determined by the jury that the "loan" was in fact a full and final payment of the plaintiff-insured's claim by the insurer, thereby divesting the insured of any standing to sue on the claim. *Contra,* Sosnow, Kranz & Simcoe, Inc. v. Storatti Corp., 269 App. Div. 122, 54 N.Y.S.2d 780 (1945), where a suit in the insured's name under a similar loan agreement was permitted, as it did not prejudice the defendant, *i.e.,* it would not allow the plaintiff a double recovery nor make the defendant liable to multiple suits for the same wrong. *Accord,* McCann v. Dixie Lake & Realty Co., 44 Ga. App. 700, 162 S.E. 869 (1932).

[31] The court will not, however, raise the issue *ex mero motu* if the defendant does not object. Southern Stock Fire Ins. Co. v. Southern Ry., 179 N.C. 290, 102 S.E. 504 (1920).

[1] Montgomery v. Blades, 222 N.C. 463, 23 S.E.2d 844 (1943); Luttrell v. Carolina Mineral Co., 220 N.C. 782, 18 S.E.2d 412 (1942); Butner v. Spease, 217 N.C. 82, 6 S.E.2d 808 (1940). The generally accepted definition of proximate cause in North Carolina is that announced in Adams v. State Bd. of Educ., 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958): "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed." McIntyre v. Monarch Elevator & Mach. Co., 230 N.C. 539, 54 S.E.2d 45 (1949); Gant v. Gant, 197 N.C. 164, 148 S.E. 34 (1929); Van Dyke v. Chad-

first tort-feasor could reasonably foresee the intervening act.[2] The following discussion is broken down into types of fact situations in which the court has tended to be inconsistent and an indication of several areas in which it has tended to be consistent in cases decided since 1954.[3]

Intersection Collisions

In cases involving intersection collisions where the first tort-feasor is driving on the dominant highway and the second tort-feasor enters from a servient highway the court has applied differing tests. In *Loving v. Whitton*[4] plaintiff was a passenger in *A*'s car, which on entering from the servient highway collided with *B*'s car. Plaintiff alleged that *A* and *B* were concurrently negligent in that *A* failed to stop at a stop sign and *B* was speeding, failed to maintain a proper lookout, and failed to keep his car under control. The court sustained *B*'s demurrer, saying that reasonable unforeseeability of the intervening act is the test for insulation and that in the absence of allegations of fact that *B* observed or should have observed that *A* did not intend to stop, *B* was entitled to assume that *A* would observe the law.[5] The court also said that irrespective of his own negligence *B* could not have avoided the collision which the conduct of *A* made inevitable.[6]

In *Blalock v. Hart*,[7] a case arising on facts similar to those in the *Loving* case, the court held that there was sufficient evidence to go to the

wick-Hoskins Co., 187 N.C. 695, 122 S.E. 657 (1924); Ramsbottom v. Atlantic Coast Line R.R., 138 N.C. 39, 50 S.E. 448 (1905). As defined above, proximate cause includes actual cause and foreseeability. Traditionally and by good authority it must be determined that defendant's negligence actually caused plaintiff's injury before the question of foreseeability is reached. PROSSER, TORTS § 44 (2d ed. 1955). Actual cause is determined by either the "but for" test or the substantial factor test. Henderson v. Powell, 221 N.C. 239, 19 S.E.2d 876 (1942); PROSSER, *op. cit. supra*, § 44; RESTATEMENT, TORTS §§ 430-32 (1934).

[2] In Garner v. Pittman, 237 N.C. 328, 75 S.E.2d 111 (1953), the court said that foreseeability of the intervening act is the test for whether the intervening act is such a new, independent and efficient cause as to insulate the original wrongful act. If the intervening act could not have been reasonably foreseen, the original wrongdoer is insulated. *Accord*, Moore v. Plymouth, 249 N.C. 423, 106 S.E.2d 695 (1959); Banks v. Shepard, 230 N.C. 86, 52 S.E.2d 215 (1949); Warner v. Lazarus, 229 N.C. 27, 47 S.E.2d 496 (1948); Reeves v. Staley, 220 N.C. 573, 18 S.E.2d 239 (1942); Beach v. Patton, 208 N.C. 134, 179 S.E. 446 (1935); Lineberry v. North Carolina Ry., 187 N.C. 786, 123 S.E. 1 (1924); Harton v. Forest City Tel. Co., 141 N.C. 455, 54 S.E. 299 (1906).

[3] The scope of this Note is limited to discussion of cases decided since publication of the Note on the same subject in 33 N.C.L. REV. 498 (1955).

[4] 241 N.C. 273, 84 S.E.2d 919 (1954).

[5] *Accord*, Reeves v. Staley, 220 N.C. 573, 18 S.E.2d 239 (1942).

[6] In the latter statement it appears that the court is saying that the negligence of *B* was not an actual cause of the collision. To recover plaintiff must prove: (1) that defendant was negligent; (2) that defendant's negligence actually caused plaintiff's injury; and (3) that plaintiff's injury was reasonably foreseeable. See note 1 *supra*. If the court decided that defendant's negligence was not an actual cause of the collision, it would seem that the issue of insulation should not have been reached.

[7] 239 N.C. 475, 80 S.E.2d 373 (1954).

jury as against both defendants.[8] The court said that, though there was no duty on the part of *B* to foresee negligence, he had a duty of due care which included maintaining a reasonable speed, keeping a proper lookout, and taking such action as an ordinarily prudent person would take to avoid the collision when he noticed or should have noticed that *A* was not stopping. These cases are difficult to distinguish. The court emphasizes the dominant driver's "duty of due care" in *Blalock*. Such an emphasis does not afford a logical distinction between the cases, for the question of insulation does not arise until it is established that both defendants have breached their duty of due care. It may be that the court found that *B* should have observed that *A* was not stopping. If this is true, the holding is sound, but such a finding would not seem warranted by the court's statement of facts.[9]

In *Primm v. King*,[10] arising on facts similar to those in *Loving* and *Blalock*,[11] the court refused to insulate the negligence of *B*, the dominant driver, because there was a factual showing that *B* was on actual notice that *A* was not going to stop. Thus, while *Loving* and *Primm* are clearly consistent,[12] *Blalock* conflicts with this line of cases.[13]

Rear-end Collisions

Another area in which confusion has been created by recent decisions is that of rear-end collisions. One type situation is that represented by *Potter v. Frosty Morn Meats, Inc.*,[14] where plaintiff was injured when the car in which she was a passenger collided with the rear of a truck owned by Frosty Morn which was stopped in the road.[15] Plaintiff sued defendant Potter, the driver of her car, and the trucker. After the trial court sustained the demurrer of Frosty Morn, defendant Potter filed a

[8] The evidence indicated that it was after dark (a variation from the facts in *Loving* which would seem to justify no difference in legal result), and that at the intersection involved there was something of a blind corner, but that the lights of a car approaching the intersection could be seen by the driver of a car on the intersecting highway. However, there was nothing to indicate to *B* that *A* was going to "run" the stop sign.

[9] It is arguable that it is the *Loving* decision that is erroneous, while *Blalock* reaches the correct result. In this intersection situation, both parties are negligent, and their negligence concurs to produce the result, the negligence of each being an actual cause of the injury. For discussion on whether there is ever a duty to foresee negligence, see note 32 *infra*.

[10] 249 N.C. 228, 106 S.E.2d 223 (1958).

[11] The main factual distinction other than that appearing in the text was that plaintiff was a passenger in the dominant driver's car.

[12] See discussion of these two cases in 37 N.C.L. Rev. 456 (1959).

[13] It should be further noted that the court in *Primm* cited *Blalock v. Hart*, thus relying on a case which departs from the general rule in these cases established in *Loving v. Whitton*.

[14] 242 N.C. 67, 86 S.E.2d 780 (1955).

[15] The fact situation presented by this case is ambiguous. The court took the view that the truck was parked on the road. However, the cross-complaint and the appellate briefs indicate the possibility that the truck was proceeding down the highway with Potter following, and that the truck driver stopped suddenly, causing Potter to crash into the rear of the truck. In this event the case should be controlled by Banks v. Shepard, 230 N.C. 86, 52 S.E.2d 215 (1949).

cross-action against Frosty Morn for contribution.[16] The court, in sustaining Frosty Morn's demurrer to the cross-complaint, said that it was the active negligence of defendant Potter in failing to observe the truck which proximately caused the collision. The court relied on the language in *Butner v. Spease*[17] that "if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the last wrong as proximate cause . . . ."[18] But it is submitted that parking a truck in the highway is indicative of negligence.[19] And if the trucker was negligent, the intervening act and resulting injury would seem to be foreseeable consequences of the risk created.[20]

A similar situation is presented in *Howze v. McCall*.[21] As plaintiff was proceeding along the highway, a car belonging to defendant Lyons appeared parked in plaintiff's lane. As plaintiff applied his brakes, he was struck from behind by a car driven by defendant McCall. In plaintiff's suit against both alleged tort-feasors,[22] the court sustained Lyons' demurrer, saying that, even conceding negligence on the part of defendant Lyons, there would have been no collision *but for* the intervening acts of defendant McCall. When viewed in the light of previous decisions in cases of a similar nature, the decision in *Howze* is clearly consistent with the previous holdings.[23] Despite the consistency, how-

[16] N.C. GEN. STAT. § 1-240 (1953).

[17] 217 N.C. 82, 6 S.E.2d 808 (1940) (a head-on collision case).

[18] Butner v. Spease, 217 N.C. 82, 88, 6 S.E.2d 808, 811 (1940). See also Caulder v. Gresham, 224 N.C. 402, 30 S.E.2d 312 (1944), where, on facts similar to the *Potter* case, the court stated that the rule is divided into two parts: (1) where the second actor has become aware of the existence of a potential danger created by the negligence of the first wrongdoer, and thereafter, by an independent act of negligence, brings about the accident, the first wrongdoer is relieved of liability; but (2) where the second actor does not become apprised of the danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and impose liability on both. It appears that the court has applied differing tests in differing fact situations to give rise to two lines of decisions. Likewise, in applying *Butner v. Spease*, the court has failed to recognize that the *test* for insulation as there enunciated included reasonable unforeseeability of the intervening act.

[19] N.C. GEN. STAT. § 20-161 (1953) reads as follows: "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway . . . ."

[20] See, *e.g.*, Caulder v. Gresham, 224 N.C. 402, 30 S.E.2d 312 (1944), discussed in note 18 *supra;* White v. Carolina Realty Co., 182 N.C. 536, 109 S.E.2d 564 (1921), which applies the foreseeability test and holds the first tort-feasor. *Contra,* Godwin v. Nixon, 236 N.C. 632, 74 S.E.2d 24 (1953), which though applying the foreseeability test held the result unforeseeable.

[21] 249 N.C. 250, 106 S.E.2d 236 (1958).

[22] Plaintiff alleged that Lyons was negligent in parking on the highway and in failing to warn and that McCall was negligent in following too closely, speeding, and failing to keep a proper lookout.

[23] Smith v. Grubb, 238 N.C. 665, 78 S.E.2d 598 (1953); Hollifield v. Everhart, 237 N.C. 313, 74 S.E.2d 706 (1953).

ever, the use of the "but for"[24] test in *Howze* seems questionable.[25] The question should have been whether the intervening act and plaintiff's injury were reasonably foreseeable.[26]

In contrast to the above situation, in rear-end collision cases where the acts of the two tort-feasors have been more nearly concurrent in point of time, the court has been consistent in refusing to insulate. Thus, in *Riddle v. Artis*[27] plaintiff alleged that defendant Artis skidded across the centerline and collided with his automobile and that defendant Morris negligently ran into the rear of plaintiff's automobile. The demurrer of defendant Morris, the original wrongdoer, was overruled, the court saying that in order for the doctrine of insulating negligence to apply, the intervening act must be a new and independent force which turns aside the natural course of events set in motion by the original wrongdoer "and produces a result which would not otherwise have followed and which could not have been reasonably anticipated."[28] This decision also seems to be in line with the court's holdings in previous cases of the same or similar character.[29] The use of the foreseeability test is undoubtedly correct. It is to be noted that here the original wrongdoer is not being required to foresee negligence, but he is bound to foresee that, if for any reason the plaintiff is forced to slow down, it is likely that he will not be able to stop in time to avoid hitting plaintiff's car. It is difficult to see why the court reached a different result in *Howze* from that reached here. Clearly, in both the negligence of the first tort-feasor remains active until the moment of impact. It is submitted that the court should have refused to insulate in the *Howze* case.

Where the Plaintiff Is Beyond the Zone of Immediate Danger

The reasoning of the court has also differed in cases where the plaintiff was beyond the zone of immediate danger created by the negli-

[24] For a discussion of the "but for" test see note 1 *supra*.

[25] The "but for" test is a test for actual cause, not for insulation. The court in saying, "but for the act of McCall no collision would have occurred," has only established that McCall's negligence was an actual cause of the collision, not that it was such a cause that Lyons should be insulated. Indeed, it might be said that "but for" the negligence of Lyons (in parking his car on the highway so that plaintiff had to put on his brakes) no collision would have occurred. Proximate cause is a two-pronged rule, requiring actual cause and foreseeability. For example, in Henderson v. Powell, 221 N.C. 239, 19 S.E.2d 876 (1942), the original tort-feasor argued that "but for" the intervening act no injury would have occurred and that, therefore, he should be insulated. The court rejected this, holding that there might be several causes of an injury and that, in order for one cause to insulate another cause, the second cause must be unforeseeable.

[26] See Smith v. Grubb, 238 N.C. 665, 78 S.E.2d 598 (1953), which combines the two tests.

[27] 243 N.C. 668, 91 S.E.2d 894 (1956).

[28] 243 N.C. at 671, 91 S.E.2d at 896, quoting Hall v. Coble Dairies, Inc., 234 N.C. 206, 211, 67 S.E.2d 63, 67 (1951).

[29] Barber v. Wooten, 234 N.C. 107, 66 S.E.2d 690 (1951); Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937); West v. Collins Baking Co., 208 N.C. 526, 181 S.E. 551 (1935).

gence of the two tort-feasors. In *Boone v. North Carolina R.R.*,[30] where defendant's train struck a man on the track and hurled his body against plaintiff's intestate who was twenty-five feet away, causing her death,[31] defendant's demurrer was sustained. The court said that actionable negligence does not exist unless the act proximately caused the injury and that this requires foreseeability of injury. Since a defendant is under no duty to foresee negligence on the part of another,[32] in the absence of notice to the contrary he may assume that the other will exercise ordinary care for his own safety.[33] Therefore, the negligence of the man on the track was the sole proximate cause of the death of plaintiff's intestate.

In an unusual case, *Aldridge v. Hasty*,[34] defendants Burns and Hasty were approaching one another from opposite directions on the highway when, at a point twenty feet apart, Burns turned left in front of Hasty. In swerving to the left to avoid the inevitable collision, Hasty's car went across the road, jumped a ditch and an embankment, went three hundred feet up into plaintiff's yard, struck the plaintiff and two cars in plaintiff's driveway, continued on and mired down in a plowed field one hundred feet beyond. The court, refusing to insulate Hasty, said that as to the *original* collision the negligence of Burns insulated any prior negligence of Hasty and was the sole proximate cause of the *original* collision.[35] But, it said, if Hasty was driving at such an excessive rate of speed that he could not thereafter control his car and avoid hitting the plaintiff, his negligence was a proximate cause of the plaintiff's injury. The court in *Hasty* has apparently held that plaintiff's injury could be found to be foreseeable notwithstanding the unforeseeability of the intervening act.[36] If the intervening act was unforeseeable, it would seem that there could be no foreseeable injury resulting from the

[30] 240 N.C. 152, 81 S.E.2d 380 (1954).

[31] Plaintiff alleged that defendant's engineer was negligent in driving the train at seventy-five to ninety miles per hour, in failing to keep a proper lookout, and in failing to warn.

[32] As a general rule, the statement that one is not bound to foresee negligence on the part of another appears to be unsound. The very fact that the first tort-feasor in an intervening negligence situation is not always insulated weakens the axiom. See Henderson v. Powell, 221 N.C. 239, 19 S.E.2d 876 (1942); Bechtler v. Bracken, 218 N.C. 515, 11 S.E.2d 721 (1940); Gold v. Kiker, 216 N.C. 511, 5 S.E.2d 548 (1939); Harton v. Forest City Tel. Co., 141 N.C. 455, 54 S.E. 299 (1906).

[33] There is room for substantial doubt that the court decided the *Boone* case on the issue of insulation. The court seemed to consider the problem one of duty to a plaintiff off the track, and it is possible that the court decided that the defendant was not *negligent* as to plaintiff's intestate. However, in view of plaintiff's allegation that the train was proceeding at seventy-five to ninety miles per hour with the engineer failing to keep a proper lookout, it seems that the issue of insulation could properly have been decided.

[34] 240 N.C. 353, 82 S.E.2d 331 (1954).

[35] This is in accord with Butner v. Spease, 217 N.C. 82, 6 S.E.2d 808 (1940).

[36] The application of such a principle, holding the injury foreseeable notwithstanding the unforeseeability of the intervening act, has not been found in any other North Carolina cases.

act. It is submitted that the criteria of these two cases should have been the same, *i.e.*, one of reasonable foreseeability of the intervening act and reasonable foreseeability of injury to the plaintiff.

Cases Consistent With Prior Authority

In other cases a degree of consistency has been reached. In *Faircloth v. Atlantic Coast Line R.R.*[37] the court reaffirmed its prior holdings that when the driver of the automobile in which plaintiff is a passenger collides with the side of a moving train, the railroad will be insulated, despite its negligent failure to warn.[38]

The court has likewise maintained a degree of consistency in cases where the first tort-feasor has negligently failed to warn that he has, for a proper purpose, made the highway unsafe for travel. In *White v. Dickerson, Inc.*,[39] where the defendant was a construction company which failed to provide adequate warning that a bridge over a canal was out and the driver of the automobile in which the plaintiff was a passenger drove into the canal, the court refused to insulate the construction company, the original wrongdoer, holding the intervening act reasonably foreseeable.[40] It appears that there is no justification for the differences of reasoning which allow insulation in the stopped-car, rear-end collision cases but refuse insulation in a case where the first tort-feasor has failed to warn that he has made the highway unsafe for travel. In both types of cases the negligence of the first tort-feasor has continued in active operation until the injury and was an actual cause of the injury, and in both the injury which occurred was reasonably foreseeable as within the risk created.

Conclusion

It is thus apparent that there is confusion and inconsistency not only *within* but also *among* the particular types of fact situations. Throughout the entire field of insulating negligence the lack of uniformity in reasoning or tests applied is most alarming.

It is submitted that the court should adhere to the well recognized test for insulation—foreseeability of the intervening act. That such a

[37] 247 N.C. 190, 100 S.E.2d 328 (1957).

[38] Chinnis v. Atlantic Coast Line R.R., 219 N.C. 528, 14 S.E.2d 500 (1941); Herman v. Atlantic Coast Line R.R., 197 N.C. 718, 150 S.E. 361 (1929).

[39] 248 N.C. 723, 105 S.E.2d 51 (1958).

[40] In Price v. City of Monroe, 234 N.C. 666, 68 S.E.2d 283 (1951), defendant had dug a ditch across the street for the purpose of installing a new culvert; dirt was piled up on the sides but there were no signs or warning lights. Plaintiff and her husband, the driver, were proceeding along the street, and though plaintiff's husband saw the dirt, he drove into the ditch. In affirming the judgment for plaintiff the court said that the test is reasonable unforeseeability of the intervening act, and that defendant should have foreseen the damage due to lack of warning. See also Gold v. Kiker, 216 N.C. 511, 5 S.E.2d 548 (1939). It is hoped that this line of reasoning will overrule that of Haney v. Town of Lincolnton, 207 N.C. 282, 176 S.E. 573 (1934), which is *contra*.

practice would lessen the number of insulations is unquestionable, and this in itself would be a laudable result in view of the fact that in every dual negligence situation a wrongdoing defendant has actually caused harm to an innocent plaintiff. At the same time, and probably more important in the long run, exclusive use of the foreseeability test would eliminate such confusion and inconsistency as that appearing in cases since 1954.

JAMES Y. PRESTON

Trusts—United States Savings Bonds—Resulting or Constructive Trust on Proceeds in the Hands of Surviving Co-owner

In the recent case of *Tanner v. Ervin*[1] a husband and wife jointly purchased United States Savings Bonds, Series E. The bonds were issued in their names in the alternative. Subsequently they entered into a separation and property agreement wherein for a valuable consideration[2] the wife transferred her interest in the bonds to her husband. Thereafter he died with the bonds in his possession but without having changed the registration of the bonds to his name alone.

The wife brought an action against the deceased's executor claiming that under the treasury regulations[3] she, as the surviving co-owner of the bonds, was the sole owner of the bonds and their proceeds. The trial court agreed with the wife's contention that the treasury regulations were controlling.

On appeal, the North Carolina Supreme Court by a four-to-three decision reversed. The court held that while only the surviving co-owner might cash the bonds, this did not prevent a state court from directing the wife to do so and impressing the proceeds therefrom with a resulting trust for the benefit of the deceased's executor.

Although the pertinent treasury regulation states in effect that upon the death of one co-owner the surviving co-owner is alone entitled to receive the proceeds from the government, most courts that have ruled on the issue have felt free to reach what they considered the equitable disposition of the proceeds. The reasoning behind this, as the court pointed out in *Tanner v. Ervin,* is that when the bonds are cashed,

[1] 250 N.C. 602, 109 S.E.2d 460 (1959).

[2] By the property agreement the wife received two Orange Drink stores in Charlotte and the home in which she and her husband had lived; the husband received a 22,467.00 dollar savings account and two checking accounts totaling 24,367.45 dollars in addition to the bonds that had a present value of 17,323.00 dollars.

[3] "If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving coowner will be recognized as the sole and absolute owner of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor." 31 C.F.R. § 315.45 (Supp. 1945) (as amended 31 C.F.R. § 315.61 (1959)). Substantially identical provisions and regulations apply to all the bonds here under consideration.

the contract between the federal government and the purchasers is completely executed and the federal government has no further interest therein.[4] Thus notwithstanding the treasury regulations, numerous courts have ordered the registered co-owner to cash United States Savings Bonds and hold the proceeds in trust for the true owner.[5]

In the principal case the court labeled the trust imposed upon the proceeds of the bonds a *resulting* trust. A resulting trust is one which "arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the persons taking or holding the property should have the beneficial interest therein and where the inference is not rebutted and the beneficial interest is not otherwise effectively disposed of."[6]

The facts of the principal case might be interpreted as giving rise to a resulting trust on the inference that, in view of the terms of the separation agreement as a whole, neither the husband nor the wife intended her retention of the record interest in the bonds to constitute a beneficial interest.

Several courts when faced with facts similar to those in *Tanner v. Ervin* have used a constructive trust to reach the desired result.[7] A constructive trust is defined as "a remedial device of the court of equity for taking property from one who has acquired it or retains it wrongfully and vesting title in another in order to prevent unjust enrichment."[8] Although this type of trust is usually thought of as a "fraud-rectifying" trust, the element of fraud is by no means essential to it.[9] At least two

[4] *In re* Hendricksen's Estate, 156 Neb. 463, 56 N.W.2d 711 (1953); Katz v. Driscoll, 86 Cal. App. 2d 313, 322, 194 P.2d 822, 828 (1948), where the court said, "The purpose of the treasury regulations is to protect and hold the federal government immune from any attack on its performance of the contract as made in the bond. In other words, they were designed to prevent the implication of the government in any disputes concerning ownership of the bonds, protect it from any suits which might result from payment to a designated beneficiary or coowner, and, for the purpose of promoting sales, guarantee the performance of the government in strict accord with the contract."

[5] Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958); Roman v. Smith, 228 Ark. 833, 314 S.W.2d 225 (1958); Katz v. Driscoll, 86 Cal. App. 2d 313, 194 P.2d 822 (1948); Tharp v. Besozzi, 144 N.E.2d 430 (Ind. App. 1957); Henderson's Adm. v. Bewley, 264 S.W.2d 680 (Ky. 1953); Bruso v. Pinquet, 321 Mich. 630, 33 N.W.2d 100 (1948); Nelson v. Rasmussen, 164 Neb. 274, 82 N.W.2d 418 (1957); Ibey v. Ibey, 93 N.H. 434, 43 A.2d 157 (1945); see also Annot., 51 A.L.R. 2d 163 (1957).

[6] RESTATEMENT (SECOND), TRUSTS, Introductory Note § 404, at 322 (1959). For examples of resulting trusts in North Carolina see Kelly Springfield Tire Co. v. Lester, 190 N.C. 411, 130 S.E. 45 (1925); Oakhurst Land Co. v. Newell, 185 N.C. 410, 117 S.E. 341 (1923); Harris v. Harris, 178 N.C. 7, 100 S.E. 125 (1919); Norcum v. Savage, 140 N.C. 472, 53 S.E. 289 (1906); see generally Edwards and Van Hecke, *Purchase Money Resulting Trusts in North Carolina*, 9 N.C.L. REV. 177 (1931); RESTATEMENT (SECOND), TRUSTS § 440 (1959).

[7] Roman v. Smith, 228 Ark. 843, 314 S.W.2d 225 (1958); Tharp v. Besozzi, 144 N.E.2d 430 (Ind. App. 1957).

[8] BOGERT, TRUSTS, § 71 (3rd ed. 1952).

[9] Petersen v. Swan, 239 Minn. 98, 57 N.W.2d 842 (1953), which held that where a wrongdoer uses money of another to purchase United States Savings Bonds in

North Carolina cases have sanctioned constructive trusts notwithstanding the fact that no actual fraud was proved. In *Sorrell v. Sorrell*[10] the evidence tended to show a conveyance of land by an uncle to his nephew pursuant to a general scheme for working out and liquidating the indebtedness owed by the uncle. Hence the court found a confidential relationship existed between the parties and impressed a constructive trust upon the land even though there were neither allegations nor evidence of fraud. In *Crew v. Crew*[11] the plaintiff had arranged for his brother to manage his land while plaintiff was serving in the armed forces. When he returned his brother refused to give up the land. The court held that the question of whether a confidential relationship existed was one for the jury, but intimated that if one were found to exist, the mere breach of it would constitute grounds for impressing a constructive trust.

In the principal case the court could have utilized the above cases and declared a constructive trust. The wife in the principal case was in a confidential relationship with her husband and breached her property settlement agreement with him by claiming the ownership of the bond proceeds.

It should be noted, however, that the same result would have been reached had the court declared a constructive trust instead of a resulting trust. Either method would place the proceeds from the bonds in the husband's estate.[12]

In *Tanner v. Ervin* the court was faced squarely with the question: Would the wife, the registered co-owner of the bonds, be unjustly enriched if she were allowed the proceeds therefrom? The majority of the court answered affirmatively, reasoning that it would be unfair to allow the wife to retain the benefits she had previously relinquished for valuable consideration.

The dissenting members of the court thought that equity should not act to give the proceeds of the bonds to the executor of the deceased's estate because there would be no inequity to correct when the United States had discharged its contractual obligation to the registered survivor of the co-owners. They believed that the husband knew what interest he received by the separation agreement, *i.e.*, an option to have the bonds cashed and alone receive the proceeds or to have them reissued

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the name of a third person, the owner of the money is entitled to follow it into the property and enforce a constructive trust upon the property purchased. The court noted that where fraud might give rise to the establishment of a constructive trust, it need not always be shown before such a trust may be impressed.

[10] 198 N.C. 460, 152 S.E. 157 (1930).

[11] 236 N.C. 528, 73 S.E.2d 309 (1952); see also 31 N.C.L. REV. 242 (1953).

[12] Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953), and Union Nat. Bank v. Jessell, 358 Mo. 467, 215 S.W.2d 474 (1948), are illustrative cases where courts imposed a resulting trust in what might have been considered a constructive trust situation.

in his name alone; or to do neither and have the proceeds of the bonds go to the other co-owner, his wife, upon his death. The fact that he chose the latter fairly indicated to the dissenting members his desire to have his wife and business partner of many years enjoy what she helped to acquire.

It is submitted that when one considers both the strong inference that the husband did not intend his wife to take the proceeds from the bonds, and the need for preventing the wife's unjust enrichment, the majority would seem to present the more convincing argument.

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