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Notes and Comments

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Admiralty—Condition of Unseaworthiness Arising After the Commencement of the Voyage.

Whether a seaman may recover compensatory damages for injuries sustained by reason of a condition of unseaworthiness arising after the commencement of the voyage is a question recently decided by the United States Supreme Court.[1] In *Mitchell v. Trawler Racer, Inc.*,[2] the petitioner was a crew member on the respondent's vessel, which had docked after returning from a fishing voyage and on that same day unloaded her cargo of fish spawn. As a result of the bags of spawn being handed over the side rail of the ship, the rail became covered with a slippery substance known as fish gurry. When the unloading was complete, the petitioner prepared to go ashore. He stepped onto the rail in order to reach a ladder on the pier, slipped and fell with resulting injuries.

Suit was brought on the law side of the United States District Court for the District of Massachusetts,[3] plaintiff asking for compensatory damages, as well as maintenance and cure, upon alternative theories: (1) The Jones Act[4] for negligence, and (2) the unseaworthiness of the vessel. The trial court charged that in order for the mariner to be successful on either theory, the jury must find that the respondent shipowner had actual or constructive notice of the condition of the railing on which the seaman slipped. The jury awarded maintenance and cure but found for the shipowner on both counts of compensatory damages.[5]

The petitioner appealed urging as error the district court's charge that notice of the condition of unseaworthiness was required to make the owner liable. The court of appeals, however, affirmed, holding

[1] The question was discussed and deliberately left open in Dixon v. United States, 219 F.2d 10 (2d Cir. 1955)

[2] 362 U.S. 539 (1960)

[3] The suit was brought on the law side of the court on the basis of Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952), which interpreted the jurisdictional provisions of 28 U.S.C. § 1331 (1949) as allowing a complainant to bring his suit on the law side of the court if his cause of action arose under the general maritime law. This case was subsequently overruled by the Supreme Court in Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). The court of appeals, however, dismissed Trawler Racer's objection to the jurisdiction of the lower court by reason of the "pendant" doctrine which allows action on the law side where two counts are contained in one complaint and one could have been brought on the law side of the court.

[4] 41 Stat. 1007 (1929), 46 U.S.C. § 688 (1958).

[5] Mitchell v. Trawler Racer, Inc., 167 F. Supp. 434 (D. Mass. 1958).

that the rule of absolute liability for unseaworthiness depended upon conditions existing *at the commencement of the voyage.*[6]

The Supreme Court granted certiorari and by a 6 to 3 decision reversed both lower courts and remanded the case to the district court for a new trial on the issue of unseaworthiness. Relying upon *Seas Shipping Co. v. Sieracki*[7] and *Alaska S.S. Co. v. Petterson*[8] the Court held that the duty to provide a seaworthy ship is present at all times, and that it makes no difference whether the condition arises before or after the commencement of the voyage or whether the condition be permanent or temporary.[9] The Court stated that the liability of a shipowner to provide a seaworthy ship

> is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character.... It is a form of absolute duty owing to all within the range of its humanitarian policy.[10]

The three dissenting members of the Court, led by Justice Frankfurter in an elaborate twenty-page opinion, said that the whole doctrine of unseaworthiness as it is applied to seamen is unfounded.[11]

Apparently the doctrine of unseaworthiness was first formulated[12] in 1816 by Lord Eldon in *Douglas v. Scougall.*[13] In that case the insurer was sought to be held for the loss of the cargo, but the court held that the owner must bear the responsibility for the unseaworthy condition of his ship which caused the loss when such condition existed at the commencement of the voyage. The first English case involving the doctrine in a personal injury situation was *Couch v. Steel*[14] which held that the doctrine did not apply in such a case. In 1876, twenty-

[6] Mitchell v. Trawler Racer, Inc., 265 F.2d 426 (1st Cir. 1959). The court said that none of the cases concerned a temporary condition of unseaworthiness which had arisen without negligence during the voyage of a ship unquestionably seaworthy at the outset.

[7] 328 U.S. 85 (1946). The Court held that a shipowner was liable to a stevedore who was injured while working on board ship by the falling of a boom which was caused by the faulty condition of a shackle.

[8] 347 U.S. 396 (1954). The facts of this case were essentially the same as those in the *Sieracki* case *supra* note 7, and the decision rested upon the holding thereof.

[9] 362 U.S. at 539.

[10] 362 U.S. at 549, quoting from Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946).

[11] The majority of the Court declined to re-examine the historical basis for the doctrine. 362 U.S. at 550.

[12] "The ancient code imposed no duty upon the shipowner and master to take pains to provide a staunch ship for the benefit of the mariners." Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers,* 39 CORNELL L.Q. 381, 387 (1954).

[13] 4 Dow 269, 3 Eng. Rep. 1161 (1816).

[14] 3 El. & B. 402; 118 Eng. Rep. 1193 (1854).

three years after *Couch v. Steel,* The Merchant Shipping Act[15] was enacted by Parliament, imposing the duty of due diligence upon the shipowner to see that the vessel was seaworthy at the inception of the voyage and that the ship be maintained in a seaworthy condition during the voyage. Following this act, the House of Lords in *Hedley v. Pinkney & Sons S.S. Co.* held that the failure to use available stanchions and rails as a result of which a seaman was thrown overboard and drowned did not render the vessel unseaworthy within the meaning of the statute.[16]

The doctrine had a similar origin in the United States. In 1869 the Supreme Court in *The Northern Belle*[17] held that the shipowner's duty to provide and maintain a seaworthy ship for the voyage was absolute and that liability for cargo damage resulting from an unseaworthy vessel must be borne by the owner of that vessel and not his insurer.

Some earlier American cases dealing with seaman's injuries imposed liability on the shipowner to the extent that there was negligence by the owner, master, or mate to provide proper equipment or to correct dangerous conditions aboard ship after reasonable notice of the existence of such conditions.[18] In another line of cases the mariner was allowed recovery on the basis of "unseaworthiness," but the standard imposed by this doctrine at that time was no greater than due diligence.[19]

The right of seamen to recover for injuries caused by unseaworthiness was first declared in *The Osceola*[20] in 1903, where the Supreme Court said that the duty of a shipowner to provide a seaworthy ship for his crew is absolute.[21] This statement was dictum, however, be-

[15] The Merchant Shipping Act, 1876, 39 & 40 Vict., c. 80, provides "that the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same."

[16] [1894] A.C. 222 (Scot.). The House of Lords in fact held that the failure to use this equipment, while not resulting in unseaworthiness, did constitute negligence on the part of those in charge of the management of the vessel but that under the fellow servant rule no cause of action existed against the owner by reason of the master's negligence.

[17] 76 U.S. (9 Wall.) 526 (1869).

[18] The Julia Fowler, 49 Fed. 277 (S.D.N.Y. 1892); The Frank and Willie, 45 Fed. 494 (S.D.N.Y. 1891); The A. Heaton, 43 Fed. 592 (C.C.D. Mass. 1890); Olson v. Flavel, 34 Fed. 477 (D. Ore. 1888); The Noddleburn, 28 Fed. 855 (D. Ore. 1886); The Edith Godden, 23 Fed. 43 (S.D.N.Y. 1885); Halverson v. Nisen, 11 Fed. Cas. 310 (No. 5970) (D. Cal. 1876); Brown v. The D. S. Cage, 4 Fed. Cas. 367 (No. 2002) (C.C.E.D. Tex. 1872).

[19] The Robert C. McQuillen, 91 Fed. 685 (D. Conn. 1899); The Lizzie Frank, 31 Fed. 477 (S.D. Ala. 1887).

[20] 189 U.S. 158 (1903).

[21] The Cyrus, 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789), appears to be the first American case to require the shipowner to provide a seaworthy vessel for his crew. It should be noted, however, that a breach of the obligation merely permitted the seaman to leave the ship's service without forfeiture of wages or

cause the holding was that no recovery could be had for mere operating negligence, *i.e.*, an improvident order given by the master. This dictum was not followed in a subsequent lower court decision in 1905.[22] In 1922, however, the Supreme Court gave new life to the dictum of *The Osceola* by its opinion in *Carlisle Packing Co. v. Sandanger*[23] where it was stated *obiter* that a seaman may recover for injuries sustained through the unseaworthy condition of the ship. Thus dictum was compounded with dictum and so stood the law of unseaworthiness until 1944, when the Supreme Court decided *Mahnich v. Southern S.S. Co.*[24] In that case there is a clear holding that the owner's duty to provide a seaworthy ship does not depend upon negligence.[25]

More recently the doctrine of unseaworthiness has been held to embrace more than mere physical defectiveness of the ship or equipment. In *Boudoin v. Lykes Bros. S.S. Co.*[26] a seaman was assaulted by a man of a savage and vicious nature, a man whose very presence on board ship rendered it a perilous place. The victim was allowed to recover from the shipowner on the ground that the ship was unseaworthy because of the presence of the vicious attacker.

The underlying premise in the *Boudoin* case was that the vicious seaman was of that nature from the beginning of the voyage. If it be assumed that the assailant had developed his propensity for vicious conduct *after* the voyage had begun, then the question arises under the *Mitchell* decision whether the shipowner would be liable to the victim for unseaworthiness. The holding itself in the principal case would seem to require an affirmative answer,[27] yet there is language in the Court's opinion to suggest that the owner would not be held liable in the freak accident situation.[28]

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being subject to prosecution for desertion. "As late as 1832, Circuit Judge Story viewed the obligation of the vessel and shipowner to a mariner injured in its service as limited to maintenance and cure, with the possible exception of the unusual case where the mariner might have received his injuries in defending the vessel against some extraordinary peril." Tetreault, *supra* note 12, at 384.

[22] The Henry B. Fiske, 141 Fed. 188 (D. Mass. 1905).

[23] 259 U.S. 255 (1922).

[24] 321 U.S. 96 (1944).

[25] In the *Mahnich* case a seaman was injured while at sea by falling from a staging which gave way when a piece of defective rope supporting the staging broke. The Court in a 7 to 2 decision (Justices Frankfurter and Roberts dissenting) allowed the seaman to recover on the doctrine of unseaworthiness and this despite the fact that a sound rope was on board.

[26] 348 U.S. 336 (1955), 33 TEXAS L. REV. 1081.

[27] The Court held that a shipowner is liable for injuries suffered by a seaman through the unseaworthy condition which arose after the commencement of the voyage.

[28] "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every peril of the sea, but a vessel reasonably suitable for her intended service." 362 U.S. at 550.

While the Court's statement was perhaps intended to provide the Court some escape from holding against the shipowner in every injury case remotely connected with either the ship or its personnel, it remains open to some doubt how far the holding in *Mitchell* will be taken to impose its newly found duty of the shipowner to provide a seaworthy ship *at all times*. To use another example, a ship at sea encounters a severe storm the force of which weakens the mast, thereby rendering the ship unseaworthy. Subsequently while the ship is limping into port where she can be repaired, the mast topples, striking and injuring a seaman. If the shipowner incurs liability in such a case, it is difficult to see how his duty to provide the requisite seaworthy ship can be fulfilled while his ship is yet at sea and beyond the reach of harbor repair facilities.

The dissent in *Mitchell* took the view that the Court's decision virtually made the shipowner an insurer of the seaman, whereas the doctrine of unseaworthiness originated in both English and American courts as a means of protecting marine cargo insurance carriers from undue risks.

It is submitted that the dissenting opinion is the sounder, for it recognizes that the doctrine of unseaworthiness was called into existence for one reason—the encouragement of marine insurance. It also recognizes that the doctrine has undergone its expansion since that time through some dubious judicial precedent. And with the decision in the principal case it is seen that perhaps the last vestige of the historical doctrine of unseaworthiness has been cast off—that element which required the shipowner to make his ship safe for the impending voyage while the ship is yet in port. The shipowner is now liable without fault before,[29] during,[30] and after[31] the voyage to a seaman (or one doing a seaman's work) injured aboard his ship.

HOWARD A. KNOX, JR.

Domestic Relations—Basis of the Award of Alimony Pendente Lite in North Carolina.

Alimony pendente lite may be awarded to any married woman upon her application to the court with notice to her husband during any proceeding for absolute divorce, divorce from bed and board, or alimony without divorce.[1] She may receive the award whether she be the plaintiff or the defendant in the principal action.[2] If the wife is

[29] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
[30] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).
[31] Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

[1] N.C. GEN. STAT. § 50-15 (1950); N.C. GEN. STAT. § 50-16 (Supp. 1959).
[2] Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953); Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918); Webber v. Webber, 79 N.C. 572 (1878).

merely defending the action brought by her husband and asking for no affirmative relief, she may receive alimony pendente lite "upon a proper showing."[3] In order for the wife to be eligible for the award when she is seeking an absolute divorce, divorce from bed and board, or alimony without divorce, she must set forth sufficient facts (1) to entitle her to a divorce, either absolute or from bed and board,[4] and (2) to establish that she does not have adequate means of support during the trial.[5] Having found these facts in her favor, the court may then order her husband to pay her "such alimony during the pendency of the suit as appears to [it] ... just and proper, having regard to the circumstances of the parties."[6]

The amount of the award is within the sound discretion of the court, and there will be no reversal on appeal unless there is a gross abuse of discretion.[7] There are, however, two factors that weigh upon the exercise of the trial court's discretion—one the provision of a statute and the other a judicial decision. G.S. § 50-14 provides that alimony awarded upon divorce from bed and board shall not exceed one-third of the net income of the party against whom the judgment is rendered.

[3] Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953); the court does not say what will constitute a "proper showing." Briggs v. Briggs, 215 N.C. 78, 1 S.E.2d 118 (1939), and Holloway v. Holloway, 214 N.C. 662, 200 S.E. 436 (1939), indicate that the trial court need merely find that the wife's denial is filed in good faith and that she is without adequate means of support.

[4] The court need not determine the type divorce to which she would be entitled. Little v. Little, 63 N.C. 22 (1868).

[5] It would appear that where the wife has ample means for her support she will not be granted alimony pendente lite. Oliver v. Oliver, 219 N.C. 299, 13 S.E.2d 549 (1941). *But see* Mercer v. Mercer, 253 N.C. 164, 116 S.E.2d 443 (1960), where an award of $1000 plus $500 a month to a wife who had a separate estate of $47,500 and an income of $6400 was sustained. The husband's estate was valued at several hundred thousand dollars. (These figures were before the trial court but are not in the report.) The court stated that under G.S. § 50-16 "the fact that she has a separate estate of her own does not necessarily defeat her right to [alimony pendente lite] ...." *Id.* at 170, 116 S.E.2d at 448. *Accord*: Rowland v. Rowland, 253 N.C. 328, 116 S.E.2d 795 (1960). When the court at the pendente lite stage examines the quality of the support due the wife according to the means of the husband, as would be done in a permanent alimony situation, rather than looking to her *needs* in excess of the amount she alone can provide, it would appear that the literal meaning of G.S. § 50-15 is being ignored. G.S. § 50-15 requires that before an award of alimony pendente lite be given the wife the trial court must find that "she has not sufficient means whereon to subsist during the prosecution of the suit." But in *Rowland* and *Mercer* the awards were made under G.S. § 50-16. That statute has no explicit requirement of such a finding and only requires that the award be reasonable subsistence having regard to the circumstances of both parties. Apparently G.S. § 50-15 and G.S. § 50-16 are not to be construed in pari materia.

[6] N.C. GEN. STAT. § 50-15 (1950) N.C. GEN. STAT. § 50-16 (Supp. 1959) uses substantially the same language and the court has not drawn a distinction (except as suggested in note 5, *supra*). Under G.S. § 50-16 adultery on the part of the wife bars all relief except counsel fees, whereas this result is questionable under G.S. § 50-15. Bolin v. Bolin, 242 N.C. 642, 89 S.E.2d 303 (1955) (G.S. § 50-15); Williams v. Williams, 230 N.C. 660, 55 S.E.2d 195 (1949) (G.S. § 50-16); Lawrence v Lawrence, 226 N.C. 221, 37 S.E.2d 496 (1946) (G.S. § 50-15).

[7] Hennis v. Hennis, 180 N.C. 606, 105 S.E. 274 (1920).

While at least one case has indicated that this one-third limitation is not binding upon the trial court on the question of alimony pendente lite,[8] our court has also said that due regard must be given to this expression of legislative intent.[9] Further, *Davidson v. Davidson*[10] holds that the award shall not exceed the net income that "is or should be derived"[11] from the estate or labor of the party ordered to pay alimony pendente lite.

In determining the amount of the award, a significant problem is that of the husband's ability to pay; this factor has been the subject of two recent cases before the North Carolina Supreme Court.[12]

In *Conrad v. Conrad*[13] plaintiff wife, who was seeking alimony without divorce, moved for alimony pendente lite. The substance of the evidence concerning the husband's ability to pay was that as an insurance salesman his net income during prior years had been $10,756.16 in 1956, $15,357.94 in 1957, $8,477 in 1958 and $3,916.43 for the first eight months of 1959. Defendant husband explained his decline in income by a reduction in commissions paid by one of his largest accounts and an unfavorable ruling by the local insurance board. It was not contended that the defendant had assets other than his income capacity.[14] The trial court found that the defendant was capable of earning $16,000 a year and awarded the wife $600 a month alimony pendente lite and $1,000 counsel fees. The Supreme Court reversed. The court stated that the award is to be based on current earnings, not upon earnings for some prior year, and that before an award may be based upon earning capacity the trial court should find that the husband was failing to exercise his capacity to earn because of a disregard of his marital obligation to provide a resonable support for his wife.

To support its requirement of a finding that the husband has disregarded his support obligations the court cited *Davidson v. Davidson*.[15] In the *Davidson* case the trial court had awarded alimony pendente lite which exceeded the net income of the defendant. Although the court conceded that the award may be based on the income capacity

[8] Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922).
[9] Kiser. v. Kiser, 203 N.C. 428, 166 S.E. 304 (1932); Davidson v. Davidson, 189 N.C. 625, 127 S.E. 682 (1925).
[10] 189 N.C. 625, 127 S.E. 682 (1925).
[11] *Id.* at 628, 127 S.E. at 683.
[12] Conrad v. Conrad, 252 N.C. 412, 113 S.E. 2d 912 (1960); Sguros v. Sguros, 252 N.C. 408, 114 S.E.2d 79 (1960).
[13] 252 N.C. 412, 113 S.E. 2d 912 (1960).
[14] *Cf.* Muse v. Muse, 84 N.C. 35 (1879), where an award of three dollars a month based on income capacity alone was sustained, there being no evidence of any other asset belonging to the husband.
[15] 189 N.C. 625, 127 S.E. 682 (1925).

of the husband,[16] it reversed the trial court and the case was remanded for additional evidence concerning the value of the husband's "entire estate, and the net annual income that is or should be derived from his estate or labor."[17] The court further stated that the ultimate object of the proceedings was to award such alimony pendente lite as was "just and proper having regard to the circumstances of the parties."[18] If there was any doubt after *Davidson* as to whether the "circumstances of the parties" provision required a finding that the husband had disregarded his support obligations in order to sustain an award based on the husband's earning capacity instead of his present earnings, there should certainly be none after *Conrad*.

The husband's ability to pay arose in a different context in *Sguros v. Sguros*,[19] the second of these two recent cases. Plaintiff wife was seeking alimony without divorce and moved for alimony pendente lite. Defendant husband had a Ph.D. degree in bacteriology and at the time the action was instituted was employed as a tobacco research technician at an annual salary of $10,740. He had an additional income from a Naval Reserve unit of about $1,000 a year. He had, however, resigned from these positions and accepted a professorship at a salary of $8,000 a year. He filed an affidavit stating that the opportunities for advancement in his field were greater as a university teacher than as a research technician. There was no finding that there was any other reason for his change of positions. The trial court awarded alimony pendente lite based on an annual income of $11,800. On appeal the supreme court said, "Under the circumstances here disclosed, we hold he had the right, so long as he acted in good faith, to accept the professorship at Miami even though at a reduction in salary. The court should have fixed the monthly payments on the basis of a salary of $8,000."[20]

The requirement that the husband must act in good faith in changing jobs could present a difficult question for the trial court to decide.[21]

[16] "The allowance may be based on the husband's earnings, or his earning capacity, although he is not possessed of money or property." Davidson v. Davidson, 189 N.C. 625, 628, 127 S.E. 682, 683 (1925), quoting *Corpus Juris*.

[17] 189 N.C. at 627, 127 S.E. at 683.

[18] *Id.* at 628, 127 S.E. at 683.

[19] 252 N.C. 408, 114 S.E.2d 79 (1960).

[20] *Id.* at 411, 114 S.E.2d at 82.

[21] If, for example, the husband were a baseball player who had for a long time been considering entering the sporting goods business and retiring from active sports and if he refused an offer of $100,000 for another year's play and entered business for $25,000 a year during the pendency of divorce proceedings, nothing else appearing, Sguros would require that the court award alimony based on the $25,000 job. When, however, the husband's decision to change jobs occurs apparently concurrently with the divorce proceedings, then it is open to question whether the same result would follow. *Conrad* and *Sguros* are not clear as to whether there is a presumption of good faith on the part of the husband. The problem of the husband's earning capacity, his good faith, etc., also arises in connection with the modification of permanent alimony decrees. See generally, Annot., 18 A.L.R.2d 10 (1951).

In *Sguros* the husband's change in jobs was presented in the most favorable light. He was a professional man seeking advancement and entering a highly respected new career. The appellate record indicates that the issue of good faith was not strongly contested.[22] There was no evidence offered to dispute his motive. But in future cases the question might arise whether the change in jobs would have been made had domestic harmony continued. If it were shown that the husband would not have changed jobs but for the discord, then perhaps an award based upon earning capacity would be sustained.

It is submitted that *Conrad* and *Sguros* are consistent and reasonable. Both require that the intent of the husband be examined before an award of alimony pendente lite may be based upon the husband's earning capacity.[23] In both the basic issue is the same, *i.e.,* Is the husband by changing jobs and reducing his income primarily motivated by a desire to avoid his support obligations? If this issue is answered affirmatively, the wife may be awarded alimony pendente lite based upon the husband's earning capacity; otherwise the award must be based upon his present earnings. This appears to be a reasonable result, for the husband should not be absolutely prohibited from changing jobs. And, at the same time, the wife's right to support should not be infringed when the husband does change jobs primarily for the purpose of reducing his income and thereby the amount of support.[24]

G. DUDLEY HUMPHREY, JR.

Evidence—Inadmissibility of State-Seized Evidence in Federal Criminal Prosecutions—Silver Platter Doctrine.

In *Elkins v. United States*[1] defendants were indicted in a United States district court in Oregon for violating and for conspiracy to violate the Federal Communications Act. Before trial the defendants moved to suppress as evidence several recordings and a recording machine which had been seized by state officers and turned over to federal officials. The state officers had seized the evidence during a search

[22] See Brief for Appellee, p. 21.

[23] "The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband is *honestly engaged* in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Sguros v. Sguros, ante,* 408. To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband was failing to exercise his capacity to earn *because of a disregard* of his marital obligation to provide reasonable support for his wife...." Conrad v. Conrad, 252 N.C. 412, 418, 113 S.E.2d 912, 916 (1960). (Emphasis added.)

[24] The same reasoning applies where a reduction in the husband's income has occurred without a change in jobs.

[1] 364 U.S. 206 (1960).

which, two Oregon state courts had found, was unreasonable. The district judge assumed without deciding that the search and seizure were unlawful but relied on the "silver platter"[2] doctrine and denied the motion to suppress. At the trial the articles were admitted in evidence, and the defendants were convicted. The Court of Appeals for the Ninth Circuit affirmed the convictions.[3] Upon granting certiorari, the Supreme Court set aside the judgment of the court of appeals and remanded the case to the district court. The Court held that evidence was inadmissible in a federal criminal trial over the defendant's timely objection[4] if it had been obtained by state officers during a search which, if conducted by federal officers, would have been unreasonable under the fourth amendment.

In dealing with the question of admissibility of relevant evidence obtained by an unreasonable search and seizure the courts are confronted with the problem of balancing conflicting social policies.[5] If the courts make use of all relevant evidence without regard to the manner in which it is obtained, it is said that the criminal law can be more effectively enforced.[6] On the other hand, it is argued that exclusion of evidence obtained during an unreasonable search is the only practical method of deterring such police illegality.[7] The Court in the principal case indicated its awareness of this problem and stated that limitations on the process of discovering truth in federal trials should be imposed only when other considerations outweigh the general need for disclosure of all relevant evidence.[8]

In two prior decisions the Court had implied that protection against unreasonable searches and seizures was more important than suppressing crime by illegal methods.

[2] The "silver platter" label was coined in Lustig v. United States, 338 U.S. 74 (1949). There the Court said, "[A] search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." *Id.* at 78-79.

[3] Elkins v. United States, 266 F.2d 588 (9th Cir. 1959).

[4] "The motion [to surpress] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." FED. R. CRIM. P. 41(e).

[5] "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice." People v. Defore, 242 N.Y. 13, 24-25, 150 N.E. 585, 589 (1926).

[6] See Nardone v. United States, 302 U.S. 379, 387 (1937) (dissenting opinion); Waite, *Public Policy and the Arrest of Felons,* 31 MICH. L. REV. 749, 763-66 (1933).

[7] See Weeks v. United States, 232 U.S. 383, 393 (1914); Irvine v. California, 347 U.S. 128, 151 (1954) (dissenting opinion); Wolf v. Colorado, 338 U.S. 25, 40, 41 (1949) (dissenting opinions).

[8] 364 U.S. at 216.

A unanimous Court in *Weeks v. United States*[9] held that evidence obtained by federal officers during an unreasonable search and seizure in violation of the fourth amendment was inadmissible in a federal criminal prosecution. However, the Court refused to exclude evidence obtained by state officers using methods contrary to the fourth amendment because "the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies."[10] The *Weeks* rule was extended by subsequent decisions to exclude evidence in federal prosecutions where federal agents participated with state officers in an unreasonable search and seizure[11] or where the state officers acted solely on behalf of the United States.[12]

In *Wolf v. Colorado*[13] the Court held that in a state criminal prosecution the due process clause of the fourteenth amendment did not require the exclusion of evidence obtained by an unreasonable search and seizeure even though such evidence would be excluded in federal prosecutions. However, the Court said, "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[14] Thus the Court recognized that the federal constitution embraces a right of privacy enforceable against the states and their agencies. But the Court, granting that exclusion may be an effecive remedy against arbitrary intrusion, said that the requirements of due process were fulfilled if a state consistently applied other remedies[15] to enforce this basic right.

Because of the continued adherence to the rule that evidence unconstitutionally obtained by state officers was admissible in federal prosecutions,[16] an anomalous situation was created by the Court's decision

[9] 232 U.S. 383 (1914).

[10] *Id.* at 398.

[11] Byars v. United States, 273 U.S. 28 (1927).

[12] Gambino v. United States, 275 U.S. 310 (1927). In this case liquor seized by state officers after an unlawful search of the defendants' automobile was admitted as evidence against the defendants in federal court where they were tried for violation of the National Prohibition Act. The Court held it was error to admit the evidence. At the time of the search and seizure there was no suggestion that the defendants were committing any state offense; therefore, the state officers had acted solely on behalf of the United States.

[13] 338 U.S. 25 (1949). For a discussion of this case, see Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1 (1950).

[14] 338 U.S. at 27.

[15] For example, the victim of an illegal search may have a tort action for damages against the searching officer. The state may dismiss the offending officer or prosecute him in a criminal proceeding. In this respect, see Wolf v. Colorado, 338 U.S. 25, at 30-32 n.1 (1949).

[16] "My view that the Supreme Court has not overruled the Weeks decision... is further reinforced by the fact that seven United States Circuit Courts of Ap-

in *Benanti v. United States*.[17] In *Benanti* the Court held that evidence obtained by state officers in violation of section 605 of the Federal Communications Act[18] was inadmissible in federal courts even though it was obtained without assistance from federal officers.[19] Thus prior to the principal case the courts excluded evidence obtained solely by state officers in violation of a federal statute but admitted evidence which they seized in violation of the Constitution. It would seem that more effect was given to the statute than to the Constitution. The Court in *Elkins* recognized this anomaly and stated that it would be logically impossible to justify such a policy.[20]

In the principal case the Court gave several reasons for its decision. First, exclusion is the only effective way to compel respect for the constitutional guaranty of freedom from unreasonable searches and seizures. Second, the new rule will avoid needless conflict between state and federal courts because the federal courts will no longer admit evidence illegally seized by state officers and thereby frustrate the attempt of the states having the exclusionary rule to preserve constitutional guaranties. Third, the new rule will encourage free and open cooperation between state and federal law enforcement officers. The Court stated that the old rule "implicitly invites federal officers to withdraw from such association" since participation by a federal officer in an unreasonable search conducted by state officers renders evidence so obtained inadmissible in the federal courts. Fourth, the imperative of judicial integrity requires that the federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Lastly, the Court concluded that the *Wolf* decision had removed the "foundation" or "doctrinal underpinning" of the *Weeks* admissibility rule. The Court stated that the basis of the rule admitting state-seized evidence was that "unreasonable state searches and seizures"[21] did not

peals and several United States District Courts in the other circuits...have continued to adhere to it since and notwithstanding the Wolf decision." United States v. Blackman, 183 F. Supp. 545, 547 (D.D.C. 1960) (Pine, J.).

[17] 355 U.S. 96 (1957), 37 N.C.L. REV. 88 (1958).

[18] "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person...." 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

[19] The Court construed § 605 as requiring the exclusion of evidence obtained by wire tapping even though the section contains no reference to the admissibility of such evidence. The first case holding wiretap evidence to be inadmissible in federal court was Nardone v. United States, 302 U.S. 379 (1937). However, in that case the tap was made by federal officers.

[20] 364 U.S. at 215.

[21] It seems that the Court used the phrase "unreasonable search and seizure" to mean unreasonable when compared with the standards of the fourth amendment. *Weeks* founded the admissibility rule on the fact that conduct of state officers did not violate the fourth amendment even though the same conduct on the part of federal officers would amount to an unreasonable search and seizure.

violate the federal constitution. Then the determination in *Wolf* that the fourteenth amendment prohibits "arbitrary intrusion by the police" was interpreted by the Court as meaning the amendment prohibits "unreasonable searches and seizures by state officers."

Implicit in this conclusion—that *Wolf* removed the foundation of the admissibility rule—is the assumption that conduct of state officers violates the fourteenth amendment if the same conduct on the part of federal officers would violate the fourth amendment. This was clearly pointed out by Mr. Justice Frankfurter in his dissenting opinion, and he stated that the majority was guilty of a "complete misconception of the *Wolf* Case."[22]

It is important to note that the only question before the Court in *Elkins* was the admissibility of evidence. No constitutional question was necessarily involved. The majority stated, "What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts...."[23] In the exercise of this power the Court, in reviewing convictions in the federal courts, is not confined to the ascertainment of constitutional validity but may establish civilized standards of procedure and evidence.[24] Therefore, it would seem that the Court in the principal case could have reached the same result without reference to the constitutional question raised by the *Wolf* decision—whether every "unreasonable search" which violates the fourth amendment is also an "arbitrary intrusion" which violates the fourteenth amendment.

The Court in *Elkins* referred to the experience of the states in adopting the exclusionary rule and noted that their movement toward this rule has been hesitant but seemingly unrelenting. The Court also stated that its decision would not affect the freedom of the states to develop and apply their own sanctions.[25] At the present time about one-half of the states have adopted the exclusionary rule.[26] North Carolina ad-

[22] "The identity of the protection of the Due Process Clause against arbitrary searches with the scope of the protection of the Fourth Amendment is something the Court assumes for the first time today. It assumes this without explication in reason or in reliance upon authority, and entirely without regard for the essential difference, which has always been recognized by this Court, between the particularities of the first eight Amendments and the fundamental nature of what constitutes due process." 364 U.S. at 239-40 (dissenting opinion). "The scope and effect of these two constitutional provisions cannot be equated, as the Court would have it." *Id.* at 238. The significance of Mr. Justice Frankfurter's statement that the majority is guilty of a complete misconception of *Wolf* is more apparent when it is recalled that he wrote the majority opinion in *Wolf*.

[23] 364 U.S. at 216. This power of supervision is embodied in FED. R. CRIM. P. 26.

[24] McNabb v. United States, 318 U.S. 332, 340 (1943).

[25] This would seem to suppress any idea that the next step by the Court will be to overrule *Wolf* and apply the exclusionary rule to state prosecutions.

[26] See Elkins v. United States, 364 U.S. 206, 224-25 (1960) (app.).

mitted evidence obtained during an illegal search until 1953[27] when the exclusionary rule was adopted by statute.[28]

Although the Court's consideration of the question of constitutionality of state searches and seizures could have best been avoided by adhering to the policy of deciding a case on other than constitutional grounds if at all possible,[29] its pronouncement of a rule of evidence seems sound. The uniformity achieved in federal criminal prosecutions by applying the same rule regardless of whether the search is by state or federal officers is wholly desirable.

G. MARLIN EVANS

Torts—Res Ipsa Loquitur—Unexplained Automobile Accidents.

In *Lane v. Dorney*[1] the North Carolina Supreme Court held that the doctrine of *res ipsa loquitur* was not applicable to unexplained single-car automobile accidents. The plaintiff relied on *Etheridge v. Etheridge*[2] as holding that *res ipsa* was applicable to such accidents. The court stated, however, that the doctrine was not applied in *Etheridge.*

In *Etheridge* the defendant was driving along a dirt road at a moderate rate of speed. As the defendant crossed an intersection his car swerved to the right, ran into a ditch, and turned over. The defendant offered testimony that he was not able to turn the car back toward the center of the road for some unknown reason and that his brakes did not seem to take hold. The court held that the evidence was sufficient to withstand a nonsuit. Though the words *"res ipsa loquitur"* were not used, the court stated the applicable rule to be as follows:

> When a thing which caused an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care.... The rule has found limited application in automobile cases. It applies when the accident is one which

[27] State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949); State v. Simmons, 183 N.C. 684, 110 S.E. 591 (1922); State v. Wallace, 162 N.C. 623, 78 S.E. 1 (1913).

[28] N.C. GEN. STAT. § 15-27 (1953); N.C. GEN. STAT. § 15-27.1 (Supp. 1959). For a discussion of the use of illegally obtained evidence in state courts, see Note, 33 N.C.L. REV. 100 (1954).

[29] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Ashwander v. TVA, 297 U.S. 288, 347 (1936) (concurring opinion).

[1] 250 N.C. 15, 108 S.E.2d 55 (1959).
[2] 222 N.C. 616, 24 S.E.2d 477 (1943).

> does not happen in the ordinary course of events where reasonable care is used, and *the cause of the accident or the loss of control resulting in the accident,* such as an obstruction in the road, a flat tire, or skidding, *does not affirmatively appear.*[3]

This portion of the *Etheridge* opinion has been cited and relied upon by the North Carolina court in other unexplained automobile accident cases in which the jury was allowed to decide the question of negligence.[4] In addition *Etheridge* has apparently been interpreted by the bar of North Carolina as applying *res ipsa.*[5] And furthermore, the language used in *Etheridge* is quite similar to the classic definition of *res ipsa loquitur,* enunciated in *Scott v. London & St. Katherine Docks Co.*[6] In view of the similarity of the rules enunciated in *Etheridge* and *London Docks,* it is not difficult to understand how it was "mistakenly" thought that *res ipsa* was applied by the court in *Etheridge.*[7]

The facts before the court in *Lane v. Dorney* are as follows: Mr. Dorney was driving the automobile on a clear night, accompanied by Mr. Lane in the front seat and Mrs. Lane and Mrs. Dorney in the back seat. Mr. Dorney was in good health, and his vehicle was in good mechanical condition. The highway was hard surfaced, eighteen feet wide, and had dirt shoulders three feet wide. The surface was dry and free from defects. No other travelers were using the highway at the time and place of the accident. As the vehicle was proceeding downhill on a long, sweeping curve to the left, it ran off the road to the right over an embankment, apparently jumped a stream, and was completely demolished. Mr. Dorney and Mr. Lane were killed. A tire track was discovered on the right shoulder leading over to the embankment; there was no evidence to suggest that the vehicle had left the road at any place other than as indicated by the tire mark. Mrs. Dorney, the only witness, testified as follows:

[3] *Id.* at 619, 24 S.E.2d at 479-80. (Emphasis added.)

[4] Edwards v. Cross, 233 N.C. 354, 64 S.E.2d 6 (1951); Wyrick v. Ballard Co., 224 N.C. 301, 29 S.E.2d 900 (1944); Boone v. Matheny, 224 N.C. 250, 29 S.E.2d 687 (1944).

[5] Affidavits from disinterested attorneys show their belief that the *Lane* decision was a departure from the rule of *Etheridge* as to the application of *res ipsa* to unexplained single-car collisions. Petition to Rehear, p. 23, Lane v. Dorney, 252 N.C. 90, 113 S.E.2d 33 (1960).

[6] 3 H. & C. 596, 159 Eng. Rep. 665 (1865). "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care." *Id.* at 601, 159 Eng. Rep. at 667.

[7] "The Supreme Court of North Carolina recently applied the doctrine of *res ipsa loquitur* in a civil action for personal injuries arising out of an unexplained automobile accident." Note, 21 N.C.L. Rev. 402 (1943). It is also interesting to note that of the thirty-nine cases cited and relied upon by the court in *Etheridge,* thirty three cases expressly dealt with the applicability of *res ipsa.*

> I was not conscious of anything unusual happening on the road before... this crash. I do not know whether there was any skidding of the car before the crash.... I was not conscious of any swerving of the car while it was on the paved portion of the road. I was not conscious of the car hitting anything in the road or anything of that sort.[8]

On the first appeal of this case the court, after refusing to apply *res ipsa,* affirmed the nonsuit entered below and stated,

> Negligence is not presumed from the mere fact of injury.... There must be legal evidence of every material fact necessary to support a verdict, and the verdict "must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities."... Testing plaintiffs' evidence by these principles in determining its sufficiency to show negligence... in the operation of the automobile, the question is left in the realm of conjecture and surmise. Just what happened to bring about the "great impact" as characterized by Mrs. Dorney is pure guesswork.[9]

Had this been the final decision on the case, the result would seem to have been a reversal of *Etheridge* and a readoption of the rules requiring that negligence be established by affirmative evidence.[10] However, upon rehearing the case, the court reversed the trial court and its own prior decision and held that even though the doctrine of *res ipsa* was not applicable, there was sufficient evidence of negligence to withstand a nonsuit. The court stated:

> There was no evidence of a blowout, of blinding lights, of skidding, or of mechanical defects, or of negligence on the part of another traveler. Thus Mrs. Dorney's evidence, *though somewhat negative,* nevertheless tends to remove everything that might have influenced the movement of the car, causing it to leave the road, save and except the hands of the man at the wheel.... Why Mr. Dorney drove off the road may be "guesswork," but the fact remains *he was at the wheel and in control of the vehicle when it left the road.*[11]

In view of this decision on rehearing it is difficult to understand why the North Carolina Supreme Court was so emphatic in enunciating that *res ipsa* will not be applied in these cases.[12] The apparent

[8] Lane v. Dorney, 250 N.C. 15, 18, 108 S.E.2d 55, 57 (1959).
[9] *Id* at 21, 22, 108 S.E.2d at 59, 60.
[10] Lane v. Dorney, 250 N.C. 15, 108 S.E.2d 55 (1959); Sowers v. Marley, 235 N.C. 607, 70 S.E.2d 670 (1952); Mills v. Moore, 219 N.C. 25, 12 S.E.2d 661 (1941).
[11] 252 N.C. at 94, 113 S.E.2d at 36 (1960). (Emphasis added.)
[12] This doctrine is applied in similar cases in a number of other jurisdictions.

utilization of this doctrine in North Carolina has not met with any dissent in the past. In addition, though the court *stated* that the doctrine would not be applied, it appears that the court did in fact utilize the underlying principle of *res ipsa* in reaching its decision.

Res ipsa loquitur, as applied by a majority of the states, is a *rule of probabilities* arising from circumstantial evidence.[13] The rule is used only when the cause of the accident is not affirmatively shown and it is necessary to rely upon the circumstances to determine cause.[14] If, when all the facts and circumstances surrounding an accident are considered, it is more probable that the accident resulted from negligence of the defendant than from some other cause, the issue of negligence will be submitted to the jury.[15]

In the principal case the court held that the physical facts and surrounding circumstances presented a case for the jury.[16] Concededly, circumstantial evidence may be used to establish affirmatively some particular negligent act or forbearance on the part of the defendant. For example, evidence that the automobile continued a long distance after the collision and did serious damage in the process would tend to

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For example, in a Minnesota decision a car ran off the road on a curve and overturned. The court stated that "the car left the paved road, went over the shoulder, and turned over. This made a prima facie case of negligence for plaintiff.... Such is the rule of res ipsa loquitur which is applicable." Nicol v. Geitler, 188 Minn. 69, 73, 247 N.W. 8, 10 (1933). The California court considered these facts: There was no obstruction or defect in the pavement, which was level, dry, and twenty-two feet wide. The evening was clear and there was no indication that any other vehicle had been near defendant's automobile at the time of the accident. The defendant testified that she did not know what caused the car to go off the road and collide with the tree. The court stated: "Since it cannot be successfully claimed that an automobile would ordinarily leave a . . . highway under the circumstances shown in the instant case . . . without at least some negligence on the part of the person who was in exclusive control thereof, the doctrine of res ipsa loquitur must be applied." Fiske v. Wilkie, 67 Cal. App. 2d 440, 447, 154 P.2d 725, 729 (Dist. Ct. App. 1945). See also Ralston v. Dossey, 289 Ky. 40, 157 S.W.2d 739 (1941) (auto left road in attempting to pass and turned over trying to return to the highway); Lindsey v. Williams, 260 S.W.2d 472 (Mo. 1953) (auto left highway and collided with a tree); Smith v. Kirby, 115 N.J.L. 225, 178 A. 739 (1935) (auto left highway and struck a tree); Morrow v. Hume, 131 Ohio St. 319, 3 N.E.2d 39 (1936) (auto left road and hit a telephone pole). See generally Ghiardi, *Res Ipsa Loquitur in Wisconsin,* 39 MARQ. L. REV. 361 (1956); Prosser, *Res Ipsa Loquitur in California,* 37 CALIF. L. REV. 183 (1949); Note, 37 B.U.L. REV. 213 (1957); Note, 40 VA. L. REV. 951 (1954).

[13] See PROSSER, TORTS § 43 (2d ed. 1955). See also Note, 3 UTAH L. REV. 113 (1952).

[14] Lea v. Carolina Power & Light Co., 246 N.C. 287, 98 S.E.2d 9 (1957); Payne v. Carolina Power & Light Co., 205 N.C. 32, 169 S.E. 831 (1933); Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929).

[15] Wyrick v. Ballard Co., 224 N.C. 301, 29 S.E.2d 900 (1944); McRainey v. Virginia & C. So. Ry., 168 N.C. 570, 84 S.E. 851 (1915).

[16] Note the following statement regarding the meaning of *res ipsa:* "The doctrine of *res ipsa loquitur* . . . does not mean that negligence can be assumed from the mere fact of an accident and injury, but . . . is a short way of saying that the circumstances attending upon the accident are in themselves of such a character as to justify a jury in inferring negligence as the cause of the injury." Barger v. Chelpon, 60 S.D. 66, 70, 243 N.W. 97, 98 (1932).

establish that the automobile was traveling at excessive speed.[17] Similarly, evidence that two vehicles approached each other on a street in the daytime, and one driver did not see the other vehicle, though his view was unobstructed, would tend to establish that this driver failed to maintain a proper lookout.[18] However, this is not the sole manner in which circumstantial evidence may be used. The evidence may not only be used to establish a definite negligent act on the part of the driver, but it also may be used to establish that *it was more probable* that the accident was caused by negligent conduct on the part of the defendant than by something for which he would not be responsible. The latter usage is embodied in the doctrine of *res ipsa loquitur* and, it is submitted, is the usage of circumstantial evidence adopted by the court in the principal case.

The refusal of the courts to apply *res ipsa* in a two-car accident indicates that the application of the doctrine depends upon circumstantial evidence which tends to establish negligence as the more probable cause of the accident, as distinguished from circumstantial evidence establishing a definite act of negligence. This refusal is based upon the theory that in such cases it is not more probable that one driver, rather than the other, was negligent.[19] However, if the application of *res ipsa* depended upon circumstantial evidence tending to establish a particular negligent act as the cause of the accident, the doctrine could easily be applied to multi-car accidents.

The evidence of Mrs. Dorney, though of a negative nature, was accepted by the court as affirmatively removing certain causes of the accident which, if proved by the defendant, would relieve him of liability. It is settled that testimony by a witness that he was not aware of certain events, when the witness was in a position to observe these events had they occurred, raises a positive inference that they did not occur.[20] Thus the fact that Mrs. Dorney, a passenger in the defendant's car, was not aware of any unusual happening on the road, any skidding of the car, any blinding lights of other travelers, or the car's hitting anything in the road tended to remove these factors as possible causes of the accident. This evidence, however, did not affirmatively

[17] Volksen v. Kelly, 12 N.J. Super. 202, 79 A.2d 319 (App. Div. 1951); Yokeley v. Kearns, 223 N.C. 196, 25 S.E.2d 602 (1943); 10 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE § 6560 (1955).

[18] Rounds v. Fitzgerald, 207 App. Div. 534, 202 N.Y. Supp. 595 (1924).

[19] PROSSER, TORTS § 42 (2d ed. 1955). However in an action by a third party passenger in one of the vehicles against the drivers of both vehicles, the doctrine could be applied on the theory that both drivers were more probably negligent than not, although this application is not commonly allowed. PROSSER, *op. cit. supra* at 206-07.

[20] Hill v. Norfolk So. Ry., 195 N.C. 605, 143 S.E. 129 (1928); Edwards v. Atlantic Coast Line R.R., 129 N.C. 78, 39 S.E. 730 (1901); Purnell v. Raleigh & G.R.R., 122 N.C. 832, 29 S.E. 953 (1898).

show any negligent act or forbearance on the part of the defendant which caused the accident. The evidence merely seemed to increase the probability that the accident was the result of some negligence of the driver by removing these possible non-negligent causes.

The apparent utilization of the underlying principle of *res ipsa* and a simultaneous rejection of the doctrine itself, as in the *Lane* decision, can only lead to uncertainty as to what evidence will be required to raise a question for the jury in unexplained single-car automobile accident cases. Under this decision it seems that where the plaintiff is unable to present evidence which affirmatively shows the cause of an accident, he may be able to withstand a nonsuit by producing testimony which tends to remove possible causes of the accident for which defendant would not be responsible. However, a question remains as to what possible causes must be removed before the case can be submitted to the jury. It appears that the plantiff must at least negative mechanical failure,[21] skidding,[22] blowouts,[23] negligence on the part of another traveler,[24] and sudden illness of the driver.[25]

The adoption of the doctrine of *res ipsa* and its application within the limits previously established by our court[26] would create a uniform set of rules for inferring negligence from circumstantial evidence. No such uniformity exists within the rule of *Lane v. Dorney*.

JOHN D. WARLICK, JR.

Wills—Construction—Right of Adopted Children To Take Under a Will as "Grandchildren."

Adoption through judicial proceedings, a process nonexistent under the common law, received statutory sanction in the United States more than a century ago.[1] In recent years, as adoption steadily has

[21] Ferry v. Holmes & Barnes, Ltd., 12 La. App. 3, 124 So. 848 (1929).
[22] Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929).
[23] Clodfelter v. Wells, 212 N.C. 823, 195 S.E. 11 (1938).
[24] Pridgen v. Produce Co., 199 N.C. 560, 155 S.E. 247 (1930).
[25] Cohen v. Petty, 65 F.2d 820 (D.C. Cir. 1933).
[26] "The principle does not apply: (1) when all the facts causing the accident are known and testified to by witnesses at the trial; (2) where more than one inference can be drawn from the evidence as to the cause of the injury; (3) where the existence of negligent defaut is not the more reasonable probability, and where the occurrence, without more, leaves the matter resting only in conjecture; (4) where it appears that the accident was due to a cause beyond the control of the defendant, such as the act of God or the wrongful or tortious act of a stranger; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant; (6) where the injury results from accident as defined and contemplated by law." Spring v. Doll, 197 N.C. 240, 242, 148 S.E. 251, 252-53 (1929).

[1] Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956). This article contains an excellent discussion of the statutory evolvement in this country of the institution of adoption. In North Carolina statutory adoption reaches back to 1873. N.C. Pub. Laws 1872-73, ch. 155.

become more prevalent, an increasing number of jurisdictions have evinced a legislative intent to produce complete legal equivalence between relationship by adoption and relationship by blood.[2] Despite this legislative trend[3] such equivalence has not uniformly been recognized. One of the principal problems arising in this respect concerns the inclusion of adopted children within general terms of designation appearing in a will.[4] In cases involving this question the result normally is dependent on the determination of one (or both) of two considerations: *first,* to what extent an adopted child can be included in a term such as "children," "issue" or "descendants" as those words are used to identify persons in relation to the adoptive parent; and *second,* whether an adopted child can be considered the "grandchild," "nephew" or "cousin" of one other than the adoptive parent.

In *Bullock v. Bullock*[5] the testator devised his farm to four of his sons, *A, B, C,* and *D,* for life, with remainder in fee simple to their children. The provision as to the ultimate takers of the fee simple estate continued,

> [B]ut in case either of my [named] sons should die without leaving children capable of inheriting said lands, then . . . the part of said land that would go to such an (sic) one, or more of them, shall be and belong to the children of the one or those who remain; it being my desire and intention . . . that after their death . . . my grandchildren shall have the use of same . . . that is, my grandchildren from my said sons. . . .[6]

The will was executed in 1936, and *B* subsequently adopted two children, one in 1949 and one in 1950. No revision of the will was made after its execution; in 1957 the testator died, survived by the four named sons. Shortly afterwards *A* died without leaving children; several months later *B* died leaving only the children whom he had adopted. The remaining life tenants, *C* and *D,* and the three natural children of *D* joined as plaintiffs in a declaratory judgment action to obtain a construction of this item of the will. The trial court held that the adopted children should inherit under the will as if they were the natural children of *B.* The record on appeal did not show whether the testator knew of the adoptions or had the capacity to change his will,

[2] *E.g.,* GA. CODE ANN. §74-414 (Supp. 1958); KY. REV. STAT. §199.520(2) (1959).

[3] For a recent comparative compilation of inheritance rights granted by the adoption statutes of each of the American jurisdictions, see Note, 25 BROOKLYN L. REV. 231, 242-46 (1959).

[4] See generally Oler, *Construction of Private Instruments Where Adopted Children Are Concerned* (pts. I and II), 43 MICH. L. REV. 705, 901 (1945). This article furnishes an exhaustive analysis of cases bearing on this point.

[5] 251 N.C. 559, 111 S.E.2d 837 (1960).

[6] *Id.* at 560, 111 S.E.2d at 839. The testator had one other son besides the four named in this item of the will.

if he had so desired, after they were effected. The supreme court, in modifying the judgment below so as to exclude the adopted children, held that the language used by the testator disclosed an intention that only natural children of the four sons should take in remainder. The appellate opinion implicitly rejected any possibility that such intent should be determined in the light of statutes establishing the rights of adopted children.[7]

It is axiomatic that the intention of the testator is controlling in the construction of his will; to this end certain fundamental rules are adhered to as a basis for the determination of this intent. Thus, it is well settled in North Carolina that the testator's intention is to be gathered from the language he employed, supplemented when necessary by a consideration of the surrounding circumstances at the time of, or after, execution of the will.[8] Therefore, if by special context or surrounding circumstances it clearly appears that the testator actually meant to include an adopted child within a term of general designation (*e.g.*, "children"), such child should take under the will without regard to the status accorded him by the applicable adoption law.[9] Conversely, where context or a preponderance of circumstances indicate that the term was used in a sense comprehending only persons who attained the required relationship by birth, an adopted child will be excluded.[10]

Difficult problems of construction arise, however, when a situation develops that the testator had not anticipated. The instant case provides a typical situation of this sort—the "grandchildren" referred to were to be identified at a future time, after the testator's death, and at the time of the will's execution no child had been adopted who could assert this relationship to the testator. With reference to this class of cases it has been said that "the only legitimate inference from the context and surrounding circumstances is that the testator . . . has no actual intention whatever in respect to the difficulty which afterwards arises by the appearance of an adopted child."[11] If the testator had no real "intention" concerning a problem that later arises, then the process of construction necessarily becomes speculative.[12] In the con-

[7] The opinion made no reference to the adoption statutes.

[8] *E.g.*, Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953); Wachovia Bank & Trust Co. v. Waddell, 237 N.C. 342, 75 S.E.2d 151 (1953); *In re* Will of Johnson, 233 N.C. 570, 65 S.E.2d 12 (1951).

[9] Kales, *Rights of Adopted Children*, 9 ILL. L. REV. 149, 158 (1914).

[10] In Estate of Pierce, 32 Cal. 2d 265, 196 P.2d 1 (1948), the evidence tended to show that the testator had made provision for the adoptive parent and his natural children upon an oral promise that the particular children in question would not be adopted. Kales, *supra* note 9, at 159.

[11] Kales, *supra* note 9, at 159.

[12] In former days common law courts applied certain rigidly fixed rules of construction and an answer was summarily found. GRAY, THE NATURE AND SOURCES OF THE LAW 174 (2d ed. 1927). Such inflexible standards have long since lost their appeal to the judiciary. 2 PAGE, WILLS § 916, at 792 (Lifetime

struction process most courts have taken the view that the adoption statutes constitute a factor to be considered in interpreting the language of the will.[13] The position taken by the North Carolina Supreme Court, however, does not completely accord with this premise; generally the adoption laws have been construed narrowly, on the ground that they were in derogation of the common law.[14] In a 1953 case, *Bradford v. Johnson*,[15] it was stated that the then existing statutes[16] dealing with inheritance rights of adopted children pertained only to intestacy, except as they served to "establish and define the parent and child relationship between the adoptive parents and the adopted child."[17] Where a donor had died testate, inclusion of adopted children within particular designations used in the will was deemed to depend solely upon ascertaining the intent of the testator, and this intent was determined without the aid of the statutes.

Subsequent to the *Bradford* case significant changes were effected in the North Carolina adoption statutes. Through a 1955 amendment[18] the legislature substantively accorded to the artificial relation the exact consequences attendant to the natural one. Thus, regarding the effect of a final order of adoption, the statute prescribes:

> The final order forthwith shall establish the relationship of parent and child . . . and . . . the child shall be entitled to inherit

ed. 1941) states, "They [rules of construction under the present approach] are more like statements of fact, which indicate the inferences of fact which the courts are inclined to draw from given states of evidence, in the absence of other evidence which justifies or requires a different inference, than they are like rules of law."

[13] *E.g.*, in Mooney v. Tolles, 111 Conn. 1, 7, 149 Atl. 515, 518 (1930), the court stated, "In the determination as to this intention several considerations are to be resorted to. One of these is the adoption statute in effect in the state at the time, it being presumed that the testatrix knew and acted in contemplation of the reciprocal rights and duties resulting from the existing statute." In Hayes v. St. Louis Union Trust Co., 280 S.W.2d 649 (Mo. 1955), it was stated that in construing wills in connection with the inclusion of adopted children the surrounding circumstances *and law* must be considered to discover the testator's intention. See Oler, *supra* note 4, at 918.

Depending on whether they elevated the adoptee to the status suggested by the particular term of designation, the statutes exerted either an exclusionary or inclusionary force. See Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942) (adoptee excluded); *In re* Holden's Trust, 207 Minn.. 211, 291 N.W. 104 (1940) (adoptee included).

[14] *E.g.*, Grimes v. Grimes, 207 N.C. 778, 178 S.E. 573 (1935). As the statutory provisions surrounding adoption in this state were expanded, much uncertainty developed—both as to procedural aspects and with regard to the legal status acquired by the adoptee. See Fairley, *Inheritance Rights Consequent to Adoptions*, 29 N.C.L. Rev. 227 (1951); Hanft, *Thwarting Adoptions*, 19 N.C.L. Rev. 127 (1941); 30 N.C.L. Rev. 276 (1952).

[15] 237 N.C. 572, 75 S.E.2d 632 (1953).

[16] N.C. Sess. Laws 1947, ch. 832; N.C. Sess. Laws 1947, ch. 879; N.C. Sess. Laws 1949, ch. 300.

[17] Bradford v. Johnson, 237 N.C. 572, 578, 75 S.E.2d 632, 636 (1953).

[18] N.C. Sess. Laws 1955, ch. 813. For comment on the provisions inserted in the adoption statutes by this chapter, see *A Survey of Statutory Changes in North Carolina in 1955*, 33 N.C.L. Rev. 513, 521-24 (1955).

> real and personal property by, from, and through the adoptive parents in accordance with the statutes of descent and distribution. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parents. . . .[19]

The second sentence of this subsection was added in its entirety; its terms seem unmistakably to give an adopted child the *status* of a child of the body of the adoptive parents and to extend this relation to the adopters' kin.[20] With this in mind, the question arises in relation to the *Bullock* case whether this change in the statutory setting should be accorded any weight in determining the testator's intention, since it occurred after the will was executed. Several factors indicate that it properly might be considered significant in ascertaining this intent. The status-conferring provisions of the amendment were given retroactive effect.[21] While it is true that the intent of the testator must be found as of the time he makes the will, if he designates a class, its membership can be the subject of subsequent legal variation.

The *Bullock* case apparently followed the rationale of *Bradford* as no reference was made to the present adoption statutes despite the broadening amendment intervening between the two decisions. The *Bullock* opinion stated that if the only designating term appearing in the instrument had been "children" of the testator's four sons, adopted children might have been permitted to take.[22] However, the use of the words

[19] N.C. GEN. STAT. § 48-23(a) (Supp. 1959).

[20] In this connection it has been held under the present law that for purposes of intestate succession adopted children bear the same relation to kindred of the adoptive parent as do natural children. Bennett v. Cain, 248 N.C. 428, 103 S.E.2d 510 (1958).

[21] N.C. Sess. Laws 1955, ch. 813, § 6. The absence of vested interests in the prospective beneficiaries eliminates constitutional obstacles. See, *e.g.*, Butterfield v. Sawyer, 187 Ill. 598, 58 N.E. 602 (1900).

[22] The court stated as a general rule: "[W]here no language showing a contrary intent appears . . . a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child, if he so desired, such adopted child will be included in the word 'children' when used to designate a class which is to take under the will." 251 N.C. at 562-63, 111 S.E.2d at 840. This statement was made on the basis of prior decisions. Wachovia Bank & Trust Co. v. Green, 239 N.C. 612, 80 S.E.2d 771 (1954); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953); Smyth v. McKissick, 222 N.C. 644, 24 S.E.2d 621 (1943). The *Smyth* case reasoned that though an adopted child was not (then) constituted by law an heir of one other than the adoptive parent, the adoption legally qualified the adoptee as the "child" of such parent.

Distinctions based on the time the adoption occurred have been criticized. Oler, *supra* note 4, at 912-14. If the testator knew and apparently approved of an adoption prior to the execution of his will, it may be validly inferred that he intended to include the adopted child. But where the devise is to a class a contrary presumption should not obtain merely because the testator dies before any adoption was accomplished.

"children capable of inheriting" and "my grandchildren" in conjunction with the term "children" was interpreted to reveal the intention that only natural children of the testator's sons should share in the devise.

By preliminary construction the words "children capable of inheriting" were equated to legitimate issue of the sons. An earlier case[23] was cited for the proposition that an adopted child is not the issue of its adoptive parents, "issue," according to its technical meaning, being said principally to denote lawfully begotten heirs of the body.[24] As opposed to this, it might have been found that use of the phrase was only a reference to a class whose membership was left to be determined at a future time.[25] It then would follow that the testator, evidencing no specific intent, had only a general intention that any child who qualified as a member of the class should be included as a beneficiary.[26]

The court, following the leaning of earlier cases from several other jurisdictions,[27] stated that "the grandchildren of a testator, nothing else appearing, does not include an adopted child of a son or daughter of the testator."[28] It could be stated with equal force that mere absence of anticipation of adoption is a neutral element, indicating only that the testator had no definite intention regarding the matter.[29] It then would be but a short step to say that the intent of the legislature to give the adopted child the same status and rights as a natural child should not be disregarded.

Questions concerning the right of adopted children to take under a will have produced a legion of cases emanating from virtually every jurisdiction, but their value as authority is slight due to the wide variations in result, depending on the date of the decision and the status

[23] Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953).

[24] Despite the strong connotation of blood relationship carried by the word "issue," it can be forcefully asserted that the prima facie meaning of the word has been altered by the present broad adoption statute. A well reasoned Minnesota opinion reached this result under a statutory provision to the effect that an adopted child should inherit from his adoptive parents or their relatives as if he were the legitimate child of such parents. *In re* Holden's Trust, 207 Minn. 211, 291 N.W. 104 (1940).

[25] See Kales, *supra* note 9, at 172.

[26] In *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958), this general reasoning was followed in holding adopted children included under a designation of "descendants." *But see* Oler, *supra* note 4, at 921.

[27] Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942); Fidelity Union Trust Co. v. Hall, 125 N.J. Eq. 419, 6 A.2d 124 (1939); Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 Atl. 102 (1932); *In re* Conant's Estate, 144 Misc. 743, 259 N.Y. Supp. 885 (Surr. Ct. 1932). Examination of these cases reveals some of the factors which courts formerly have relied upon to exclude adopted children.

A substantial number of cases have applied a judicially evolved presumption to the effect that when a will provides for a child of some person other than the testator, an adopted child will not be included unless other language specifically directs that he shall take. Annot., 70 A.L.R. 621 (1931), supplemented by 144 A.L.R. 670 (1943). *Contra, In re* Holden's Trust, 207 Minn. 211, 291 N.W. 104 (1940).

[28] 251 N.C. at 563, 111 S.E.2d at 840.

[29] *In re* Holden's Trust, 207 Minn. 211, 291 N.W. 104 (1940).

conferred on the adoptee by the particular statutory scheme. Moreover, the problems encountered in construing a will do not lend themselves readily to mere reliance on precedent, since each case brings forward a different set of circumstances.[30] It is significant, however, that the broadening of adoption laws in numerous jurisdictions has been accompanied by greatly increased reliance on the statutory policy, and the line of cases including adopted children within various designated classes has been markedly extended.[31]

The court's analysis in the *Bullock* case perpetuates an uncertainty in this area of the law that the 1955 addition to the adoption statutes apparently was designed to resolve. Naturally it is preferable, where terms of general designation are employed in a will, that the instrument state explicitly whether an adoptee is within the intendment of the expression used. If this is not done, it is submitted that the declared legislative policy in North Carolina should be treated as a strong factor in favor of the inclusion of adopted children.[32]

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[30] 2 PAGE, WILLS § 917, at 799-800 (Lifetime ed. 1941): "An attempt . . . to construe the separate phrases and clauses of the will in accordance with precedents is likely to lead at once to a total disregard of testator's intention, unless it happens that in the two wills taken each as a whole testator's intention is substantially the same, and to be carried out in the same way. Such a coincidence rarely happens except in the introductory clause and the attestation clause of a will."

[31] *E.g.*, Estate of Heard, 49 Cal. 2d 514, 319 P.2d 637 (1957); Breckinridge v. Skillman's Trustee, 330 S.W.2d 726 (Ky. 1959); Hayes v. St. Louis Union Trust Co., 280 S.W.2d 649 (Mo. 1955); St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W.2d 685 (1934); *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958); Vaughn v. Vaughn, 328 S.W.2d 326 (Civ. App. Tex. 1959).

[32] The weight this recommended constructional preference should be accorded might vary with the presence of other circumstances in a given case. The possibility of fraudulent misuse of adoption proceedings seems to influence judicial consideration of this problem. Oler, *supra* note 4, at 923-28. In this connection it should be remembered that the procedural safeguards of the statutes bring about scrutiny of all the circumstances surrounding any adoption.