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CASE NOTES

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ADOPTION OF WIFE AS CHILD—Legality of for Inheritance Purposes.—The testatrix's will set up a trust for her son for life to go to "his heirs at law" according to Law of Descent and Distribution in force at time of his death. A codicil provided that if the son died without "heirs", the estate was to be divided between certain specified charities. Before the death of the testatrix, her son married and following the death of testatrix, the son, being without children, adopted his wife as "child and heir at law". This suit was brought to determine whether the adopted heir, the natural heirs, or the contingent remaindermen were entitled to the trust corpus of $64,000. The Circuit Court upheld the validity of the adoption upon reviewing Kentucky adoption statutes which provided that "any adult person . . . may petition . . . to adopt a child or another adult." HELD: Affirmed. The Court of Appeals by a 4-3 decision set aside the defenses of fraud and violation of public policy as inadequate, thus enabling the wife-daughter to inherit. *Bedinger v. Graybill,* — Ky. —, 302 S. W. 2d 594 (1957).

Since the English Courts had an inordinately high regard for blood lineage, adoption was unknown to the common law and exists in this country only by virtue of statutes. *Hockaday v. Lynn,* 200 Mo. 456, 98 S. W. 585 (1906); *Driggers v. Jolley,* 219 S. C. 31, 64 S. E. 2d 19 (1951). However, adoption is of ancient origin. Genesis 41:50, 52; 48:5, 14-20; Exodus 2:10. The history of adoption shows its use not only to create a parent-child relationship, *In Re Reichel,* 148 Minn. 433, 182 N. W. 517, 16 A. L. R. 1016 (1921); but also purely to enable one to inherit as adoptee. *Greene v. Fitzpatrick,* 220 Ky. 590, 295 S. W. 896 (1927); *Collamore v. Learned,* 171 Mass. 99, 50 N. E. 518 (1898). Adoption statutes fall into three general classes when denoting who may be adopted:

1. "Minor child". No question as to the adoption of an adult can arise here. *McCollister v. Yard,* 90 Iowa 621, 57 N. W. 447 (1894); *Appeal of Ritchie,* 155 Neb. 824, 53 N. W. 2d 753 (1952).

2. "Child". That only minors can be adopted under such statute is not necessarily conclusive since that word has two generally understood meanings: one signifying minority and the other a parent-child relationship. A majority of the jurisdictions construe "child" as permitting adoption of an adult. *State ex rel. Buerk v. Calhoun,* 330 Mo. 1172, 52 S. W. 2d 742, 83 A. L. R. 1393 (1932). The minority view confines the meaning of "child" to minor. *In Re Taggart,* 190 Cal. 493, 213 Pac. 504, 27 A. L. R. 1360 (1923).

3. "Adult". These statutes clearly contemplate the adoption of an

adult. *E. g.,* KRS 405.390; IOWA CODE 600.1 (1954). If adoption of an adult is valid, is an adoption of one's wife as a child against public policy as creating an incestuous relation? Incest relates only to blood relations. *State v. Lee,* 196 Miss. 311, 17 So. 2d 277, 151 A. L. R. 1143 (1944); *State v. Youst,* 75 Ohio App. 381, 59 N. E. 2d 167 (1943). Even if an adopted child were included in the incest statutes, adoption of an adult purely for inheritance purposes effects no change in either the social or domestic relationship; therefore such adopted adult would be excluded from the incest statute. *Green v. Fitzpatrick,* 220 Ky. 590, 295 S. W. 896 (1927).

In most jurisdictions it seems clear that a child may inherit from his adoptive parents. 4 VERNIER, AMERICAN FAMILY LAWS § 262 (1936). An adopted child is included within the designation of an heir or heir at law and may inherit through, as well as from, the adoptive parent unless the contrary intention is shown from the language of the will. *Major v. Kammer,* — Ky. —, 258 S. W. 2d 506 (1953); *Blackwell v. Bowman,* 150 Ohio 34, 80 N. E. 2d 493 (1948). However while adoption statutes denoting status of persons are to be used in aid of the construction of a will, this cannot be allowed to control or defeat the testator's true intent. *Brock v. Dorman,* 339 Mo. 611, 98 S. W. 2d 672 (1936); *Lichter v. Thiers,* 139 Wis. 481, 121 N. W. 153 (1909). Generally when a provision is made in a will for children of some person other than the testator, an adopted child is presumed not to be included. *Comer v. Comer,* 195 Ga. 79, 23 S. E. 2d 420, 144 A. L. R. 664 (1942); *In Re Miller's Trust,* — Mont. —, 323 P. 2d 885 (1957). Adoption subsequent to the testator's death raises a grave presumption that the adoptee is not to be included. *Mooney v. Tolles,* 111 Conn. 1, 149 Atl. 515, 70 A. L. R. 608 (1930); *Rhode Island Hospital Trust Co. v. Sack,* 79 R. I. 493, 90 A. 2d 436 (1952). Since the decision in each case is based upon a will with its own peculiar provisions and expressions, the will must be viewed as a whole in the light of the surrounding circumstances. *Nicherson v. Hoover,* 70 Ind. App. 343, 115 N. E. 588 (1917)

Under the broad and liberal adoption statutes of Kentucky this situation may fall within the literal interpretation of the statute; yet to uphold the validity of the adoption for inheritance purposes would seem to thwart the testatrix's intention. To say that the testatrix contemplated the possible adoption of children and to say that she contemplated her son adopting his wife as a child are two different propositions. Even the court had not anticipated the latter until the instant case. The testatrix made the codicil thirteen days before the

marriage of her son, apparently with the event in mind. She had ample opportunity to provide specifically for the wife if she had so desired. However the equities of the particular case may have played an important part in helping the court reach this decision. This exact problem would not even arise in Kentucky today because of an amendment to the statute, K R S 391.010 (1958) in 1956, enabling the spouse to inherit before grandparents and descendants. The natural heirs in the instant case were only cousins. In South Carolina under the wording of the present adoption statutes, and with no cases strictly in point, seemingly only a minor can be adopted and then such adopted child can inherit only from his adoptive parents, and not through them.

DOROTHY COBB.

AUTOMOBILE – Guest Passenger Statute – Protest by Guest Changes Status to Involuntary Passenger. – Plaintiff, lacking knowledge of the reckless propensities of the defendant, accepted an invitation to ride with him. Shortly after the trip commenced, defendant began to drive improperly. Plaintiff protested and demanded permission to leave the car, but the protests and demands, though loudly and frequently reiterated, were ignored by defendant. An accident subsequently occurred and plaintiff was injured. Action ensued and the court allowed plaintiff to recover. HELD. Affirmed. The plaintiff's demands terminated her status as a guest within the meaning of the local guest statute, which bars recovery of all guests except on a showing of the driver's gross negligence. She thereby became an involuntary passenger to whom the defendant became liable upon a showing of slight or ordinary negligence. *Andrews v. Kirk,* 106 So. 2d 110 (Fla. 1958).

The purpose and effect of the motor vehicle guest statute is to relieve the host-owner or -operator of a vehicle from liability to a gratuitous rider for injuries caused by the host's simple or ordinary negligence. *Berman v. Berman,* 110 Conn. 169, 147 A. 568 (1929); *Koger v. Hollahan,* 144 Fla. 779, 198 So. 685, 131 A. L. R. 886 (1940); *Manser v. Eder,* 263 Mich. 107, 248 N. W. 563 (1933). The term guest or passenger as used in these statutes signifies one who rides with another, who confers no benefit on the driver other than the pleasure of his company and who exercises no degree of control or management over the vehicle in which he is riding. *Peery v. Mershon,* 149 Fla. 395, 5 So. 2d 694 (1942); *Holtsinger v. Scarbrough,* 69 Ga. App. 117, 24 S. E. 2d 869 (1943). To permit re-

covery by an injured guest, the host's conduct must have been intentional, grossly negligent, wilfull, wanton, heedless, or reckless, depending on the language of the particular statute. *Koger v. Hollahan,* 144 Fla. 779, 198 So. 685, 131 A. L. R. 886 (1940); *Lee v. Lott,* 50 Ga. App. 39, 177 S. E. 92 (1934) (Interpreted S. C. guest statute, CODE OF LAWS OF SOUTH CAROLINA, 1952, § 46-801; *Taylor v. Taug,* 17 Wash. 2d 533, 136 P. 2d 176 (1943)). Most courts hold that these statutes, which are in derogation of the common law rule, should be strictly construed, *Rocha v. Hulen,* 6 Cal. App. 2d 245, 44 P. 2d 478 (1935); *Miller v. Fairley,* 141 Ohio St. 327, 48 N. E. 2d 217 (1943), and that their meaning should not be extended beyond the reason for their enactment. *Jackson v. Edwards,* 144 Fla. 187, 197 So. 883 (1940). The relationship of guest and host ordinarily contemplates an invitation and an acceptance, *Rocha v. Hulen, supra,* followed by an overt act which manifests an intention to proceed with the journey. *Taylor v. Taug, supra.* It follows that one forced to ride against his will cannot be said to be riding as a guest. *Fuller v. Thrun,* 109 Ind. App. 407, 31 N. E. 2d 670 (1941). To determine if an injured person is a guest at the time of the injury, the decisive inquiry is whether or not the accident occurred incidental to the original gratuitous undertaking. *Ethier v. Audette,* 307 Mass. 111, 29 N. E. 2d 707 (1940); *Donahue v. Kelly,* 306 Mass. 511, 29 N. E. 2d 10 (1940); *Ruel v. Langelier,* 229 Mass. 240, 12 N. E. 2d 735 (1938). A mere protest against the manner of operation is insufficient to terminate the host-guest relationship. *Wachtel v. Block,* 43 Ga. App. 156, 160 S. E. 97 (1931); *La Plante v. Rosseau,* 91 N. H. 330, 18 A. 2d 777 (1941). A protest coupled with a request for permission to leave the car as a matter of convenience is also insufficient. *Vance v. Grohe,* 223 Iowa 1109, 274 N. W. 902, 116 A. L. R. 332 (1937). But when the passenger protests against the manner in which the car is being operated and demands exit, and the driver ignores such demands, the host-guest relationship is terminated. *Anderson v. Williams,* 95 Ga. App. 684, 98 S. E. 2d 579 (1957); *Blanchard v. Ogletree,* 41 Ga. App. 4, 152 S. E. 116 (1929); *contra, Akins v. Hemphill,* 33 Wash. 2d 735, 207 P. 2d 195 (1949); *Taylor v. Taug,* 17 Wash. 2d 533, 136 P. 2d 176 (1943).

To extend the meaning of a statute beyond the reason for its enactment can result in a wholesale perversion of justice. The guest statutes were designed to limit the liability of the host to one who is riding with him as a guest. A guest is merely the recipient of the voluntary hospitality of the host and does not obligate himself to go the entire contemplated journey. He is entitled to be allowed to

leave the automobile upon demand, and to have his guest-host relationship with the driver then and there terminated, as the court held in the instant case. By adopting any other view, a court would be saying in effect that a person must sit idly by and submit to the hazard of injury or death until the driver voluntarily releases him. Grave consequences would follow the adoption of any such rule of law.

KARL L. KENYON.

AUTOMOBILE INSURANCE—Automatic Coverage for Newly Acquired Automobile—Interpretation of Condition of Notification.—Plaintiff, a guest passenger, brought an action against the defendant automobile owner and his liability insurance carrier for injuries sustained as a result of the owner's negligence. The defendant owner had traded cars on October 31. The accident occurred on November 30, and notice of the accident involving the new car was given on December 1 or 2. The defendant's liability policy contained a provision for "Automatic Insurance . . . for a Newly Acquired Automobile . . . if the named insured notifies the company within thirty days following the date of its delivery . . . ." On appeal from summary judgment for the defendant, HELD: Reversed and remanded to determine whether the automobile was a replacement automobile within the terms of the policy. The requirement that notice of the newly acquired automobile be given within thirty days was a "condition subsequent" and "[i]f an accident occurred within the thirty day notice period the automobile will be deemed covered by such insurance irrespective of whether notice has been given or not." *Offerdahl v. Glasser,* 5 Wis. 2d 498, 93 N. W. 2d 362 (1958).

The provision for "automatic" coverage in the instant case is typical of that found in many automobile insurance policies. Most of the cases turn on the determination as to whether or not the automobile for which coverage is sought falls within the definitions and terms of policy coverage. See Annot., 34 A. L. R. 2d 936 (1952). The automatic coverage provision is for the benefit of the insured. Mindful of the fact that cars are constantly traded, replaced, and substituted, the obvious purpose is to provide continuous insurance in the use and maintenance of newly acquired automobiles. *Western Cas. and Surety Co. v. Lund,* 234 F. 2d 916 (10th Cir. 1956); *Home Mut. Ins. Co. v. Rose,* 150 F. 2d 201 (8th Cir. 1945). The requirement of notice is for the benefit of the insurer, to inform the company

of the identity and character of the vehicle to be covered, to enable it to exercise the rights reserved in the policy and to ascertain whether the insured has complied with the obligations thereunder. *Mitcham v. Travelers Ins. Co.*, 127 F. 2d 27 (4th Cir. 1945). The cases generally agree that if an accident occurs after the designated notice period and before notice has been given, there is no coverage. *Mitcham v. Travelers Indemnity Co., supra; Maryland Cas. Co. v. Toney*, 178 Va. 196, 16 S. E. 2d 34; 5A AM. JUR., *Automobile Insurance* § 84 (1956). *But see Portland Cement Co. v. Southern Surety Co.*, 225 Mo. App. 712, 39 S. W. 2d 434 (1931). The difficulty arises when the accident occurs within the notice period but prior to the giving of notice. The minority view is expressed in *Jamison v. Phoenix Indemnity Co.*, 40 F. Supp. 87, 89 (D. N. J. 1941): "There is automatic coverage from the date of acquisition of the new car only in the event that notice is given the insurer within 10 days." The dissent in the instant case expressed the same view, 93 N. W. 2d 362, 364: "The words requiring notice are free from ambiguity and mean what they say. Coverage is extended if the notice is given as required, but not otherwise." Most cases, however, hold that the insurer is liable for an accident occurring during the notice period irrespective of notice. *Western Cas. and Surety Co. v. Lund, supra; Inland Mut. Ins. Co. v. Stallings*, 162 F. Supp. 713 (D. Md. 1958). *General Ins. Co. of Amer. v. Western Fire and Cas. Co.*, 241 F. 2d 289 (5th Cir. 1957), *cert. denied*, 354 U. S. 909 (1957), states: "The insurance automatically attaches on acquisition of a new vehicle subject only to being defeated by failure to give notice within thirty days. The intervention of an accident after acquisition but before reporting does not vitiate the insurance." The language of these cases indicates that, with regard to coverage during the notice period, it is immaterial whether notice of the new acquisition is ever given. It should be noted, however, that in most of these cases the notice, although given after the accident, has nevertheless been given within the notice period.

The case under discussion in quoting from 34 A. L. R. 2d 936, 944 (1952), and 5A AM. JUR., *Automobile Insurance* § 84, 83 (1956), states that the majority view is ". . .[t]he requirement of notice is a condition subsequent rather than a condition precedent to extended coverage, that such coverage is automatically effected upon delivery . . . and remains in effect until the end of the specified period, irrespective of whether notice has been given or not." This is expressed also in *Williams v. Standard Acc. Ins. Co.*, 158 Cal. App. 506, 322 P. 2d 1026 (1958), and the leading case of *Birch v. Harbor*

Ins. Co., 126 Cal. App. 2d 714, 272 P. 2d 784 (1954): "The requirement of notice is a condition subsequent which must be completed in order to keep such coverage in effect beyond that period."

The instant case reflects the result achieved by the majority view. Although it might be argued that the requirement of notice is a condition precedent rather than subsequent, it seems that the court has chosen the latter term for procedural purposes in order to place the burden of proving non-performance upon the insurer. It has thus, in line with the majority, interpreted the provision so as to afford truly automatic insurance during the notice period. The fact remains, however, that to extend coverage to an accident occurring after the period, notice must be given prior to such accident.

C. THOMAS COFIELD.

CRIMINAL PROCEDURE – Federal Rules of Criminal Procedure – Questioning of Defendant Before Arraignment. – Appellant and accomplice were convicted of robbery in the U. S. District Court for the District of Columbia. Approximately 30 minutes after his arrest, the appellant confessed. Thereafter appellant and accomplice were booked, photographed, and fingerprinted, and, about 30 minutes after his confession, appellant was taken before a United States commissioner and arraigned. At the trial appellant objected to testimony regarding his oral confession, arguing that it was obtained during an unnecessary delay between his arrest and arraignment. The trial court found no unnecessary delay and held the testimony admissible. On appeal, HELD: Affirmed. Where approximately one hour had elapsed between commencement of interview of appellant by police officers and his arrival before the arraigning authority, there was no such unnecessary delay between arrest and arraignment as would render his oral confession inadmissible. *Heideman v. United States*, 259 F. 2d 943 (D. C. Cir. 1958).

In a society where the respect for the dignity of all men is central, safeguards must be provided to protect the innocent from the overzealous application of the law enforcement processes. *McNabb v. United States*, 318 U. S. 332 (1943). It was recognized in England over 100 years ago that a constable arresting a person was bound to take him before a magistrate as soon as he reasonably could. *Wright v. Court*, 4 B. & C. 596, 107 Eng. Rep. 1182 (K. B. 1825). Under the common law in this country when a defendant is arrested, it is the duty of the arresting officer to bring him without delay before

the court. *Commonwealth v. DiStasio,* 249 Mass. 273, 1 N. E. 2d 189 (1936); *Tubbs v. Tukey,* 3 Cush. 438, 50 Am. Dec. 744 (Mass. 1849). Federal legislation in 1894 tended to provide protection from undue delay between arrest and presentation before a judicial officer: "It shall be the duty of a marshal who may arrest a person . . . to take the defendant before the nearest US Commissioner." 28 STAT. 416 (1894). FBI officers authorized to make arrests were also required to take the person arrested "immediately" before a commissioner for arraignment, 48 STAT. 1008 (1934), and any conviction resting solely on a confession obtained during an unnecessary delay in flagrant disregard of the rules of procedure cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of the law. *McNabb v. United States, supra.* In order to simplify the procedure, Congress passed legislation which provided: "An officer making an arrest . . . shall take arrested person without unnecessary delay before the nearest available commissioner . . . ." CRIMINAL RULE 5(a), 62 STAT. 819, 18 U. S. C. § 3060 (1952). The purpose of this legislation is to protect and safeguard the individual's rights without hampering effective and intelligent law enforcement. *Mallory v. United States,* 354 U. S. 449 (1957). It also prevents the use of that reprehensible practice known as the "third degree" in obtaining confessions. *McNabb v. United States, supra; Smith v. United States,* 187 F. 2d 192 (D. C. Cir. 1950). Detention for the purpose of exacting or coercing a confession is deemed unreasonable and prohibited by statute, *Mallory v. United States, supra; Upshaw v. United States,* 335 U. S. 410 (1948), and any confession obtained during illegal detention is inadmissible in the Federal courts, *Carignan v. United States,* 341 U. S. 934 (1950); *Garner v. United States,* 174 F. 2d 499 (D. C. Cir. 1949). But this rule does not call for mechanical and automatic obedience. *Mallory v. United States, supra.* It is recognized that in some instances the circumstances may dictate that there be some delay between arrest and arraignment. *Garner v. United States, supra; Akowskey v. United States,* 158 F. 2d 649 (D. C. Cir. 1946). By the phrase "take without unnecessary delay", CRIMINAL RULE 5(a), *supra,* the statute contemplates necessary delay, therefore, to say that defendant must be taken without any delay would be to ignore completely the term "unnecessary". *Trilling v. United States,* 260 F. 2d 677 (D. C. Cir. 1958); *Garner v. United States, supra.* In addition, every citizen has a right to insist that the police make some definite inquiry before he is arraigned. *Metoyer v. United States,* 250 F. 2d 30 (D. C. Cir. 1957). Therefore, an hour's lapse between arrest and arraignment

is not a violation of CRIMINAL RULE 5(a). *Heideman v. United States,* 259 F. 2d 943 (D. C. Cir. 1958).

The decision in the principal case is sound. The court in exercising its function to protect the innocent as well as to punish the guilty has been and should be strict in the interpretation of the rules of procedure. It is of the very essence in a democratic society that one arrested of a crime be taken without unnecessary delay before a court official where he can learn of his rights and the crime of which he is charged. To give the law enforcement branch of government the power to hold one before arraignment in order to extract a confession or question him extensively would be to resort to a medieval method of law enforcement. Not only would it completely disregard the functions and duties of the court to advise the individual of his rights, but it would also deprive the individual of his rights under our democratic system of government. On the other hand, it would be just as fatal to the rights of free men to require that they be taken automatically and without any preliminary police investigation before court officials and arraigned. If arraignment of all potential suspects is required before any preliminary investigation whatsoever is made, then the letter of the law is used to reduce an important and genuine right to absurdity. Every citizen has the right to insist that the police make some inquiry into his guilt or innocence prior to his arraignment. If the courts deny a citizen this right, they destroy a right which is fundamental and basic to all men under our system of government.

O. HARRY BOZARDT, JR.

INSURANCE — Wagering Contracts — Insured Carrying Several Health Policies. — Insured was injured on April 29, 1957, and incurred medical bills of $1,077. An action was brought to recover $1,000 under a "Hospital Expense Policy" issued twenty days prior to the accident. Insurer prayed judgment for the rescission of the policy on the grounds that the obtaining of this and numerous other policies constituted a wagering contract which is contrary to public policy. It appears that one policy was issued in 1952, another in 1954, and that insured purchased eight additional policies between March 25, 1957, and May 1, 1957. It was calculated that the insured would receive approximately $745 per week should he become hospitalized, whereas his gross weekly income amounted to only $65. Upon solicitation by the agent of the insurer, plaintiff

alleged that he informed the agent that he had all the insurance that he needed, whereupon he was informed by the agent that he could never have too much insurance. Insured further testified that he informed the agent that he had several other policies. The trial judge directed verdict for the insurer. A new trial was denied and plaintiff appealed. HELD: Reversed and remanded for new trial on other points not discussed on appeal. Obtaining numerous hospital insurance policies is not a wagering contract where none of the policies contained clause prohibiting additional hospital insurance. *Batchelor v. American Health Insurance Company,*..... S. C....., 107 S. E. 2d 36 (1959).

An insurance policy is nothing but a contract between the insured and the insurer, and in the absence of any fraud in connection with the execution and delivery of the policy, both the insurer and the insured are bound by the terms thereof. *Op. Atty. Gen.* 103 (1915). A policy constitutes a contract, the provisions of which are binding unless they have been waived or annulled for lawful reasons. *Orenstein v. New Jersey Ins. Co. of Newark, N. J.,* 131 S. C. 498, 127 S. E. 570 (1925). Courts should not annul contracts on doubtful grounds of public policy. In such matters it is better that the legislature should first speak. *Ellison v. Independent Life & Accident Insurance Company,* 216 S. C. 475, 58 S. E. 2d 890 (1950); *Crosswell v. Association,* 51 S. C. 103, 28 S. E. 200 (1897). A wager policy has been defined as a pretended insurance where the insured has no actual interest in the thing injured and can sustain no loss by the happening of the misfortunes which have been insured against. 29 AM. JUR. 290, *Insurance* § 319. A person cannot take out a valid enforceable insurance contract for his own benefit on the life of one in which he has no insurable interest, such contract being a mere wagering contract and contrary to public policy. *Henderson v. Life Ins. Co. of Virginia,* 176 S. C. 100, 179 S. E. 680 (1935). Every person has an insurable interest in his own life and may lawfully procure insurance thereon for the benefit of any other person whose interest he desires to promote, regardless of whether or not such person has an insurable interest in his life. *Bynum v. Prudential Ins. Co. of America,* 77 F. Supp. 56 (1948); *Warren v. Pilgrim Health & Life Ins. Co.,* 217 S. C. 453, 60 S. E. 2d 891 (1950). The insured has an unlimited insurable interest in his own life which is sufficient to support the policy; and contracts of this character are not contrary to public policy. 44 CORPUS JURIS SECUNDUM 899, *Insurance* § 202. The insurer may validly provide against over insurance, or require notice of any additional insurance taken. 5 APPLE-

MAN ON INSURANCE LAW AND PRACTICE 146, § 3052 (1941). Public policy does not prevent one from purchasing as many hospital expense policies as one may desire. In the absence of policy restrictions, a person having an insurable interest may insure such interest in whatever amount and in as many companies as he desires. CODE OF LAWS OF SOUTH CAROLINA, 1952, §§ 37-471.19, 37-491. The purpose of insurance is to protect the insured, who takes it out and pays for it. *Gentry v. Yorkshire Ins. Co., Limited, of York, England,* 192 S. C. 125, 5 S. E. 2d 565 (1939).

As early as 1915 the Attorney General of South Carolina stated that an insurance policy should be enforced in the same manner as any other contract entered into in the absence of fraud. South Carolina has followed the prevailing rule and consistently held that courts should not annul contracts on doubtful grounds of public policy but should leave any changes in this area to the legislative branch of the government. It is not clear how the lower court could have considered the multiple insurance coverage as a wagering contract since a wager has been defined as "one made when the insured has no insurable interest." The view taken by our Supreme Court in the principal case is clearly in accord with the majority of the courts in this country today in holding that every person has an insurable interest in his own life. By statutory enactment in South Carolina, a person having an insurable interest may purchase, in the absence of policy restrictions, as many hospital policies in whatever amount and in as many companies as he may desire. If the insurer desired to limit its liability, it could have included in its policy the provision for "pro rata" coverage with other insurers as provided by the CODE OF LAWS OF SOUTH CAROLINA, 1952, § 37-471.19. Having failed to insert this limitation in its policy, the insurer should be estopped to deny liability on grounds of similar coverage with other insurance companies. In the instant case the Supreme Court of South Carolina undoubtedly reached the correct result in accordance with the equities of the situation. The purpose of insurance is to protect the insured and it would be grossly inequitable to allow the insurer to reap the benefits of collecting premiums and escape liability when an accident or ill health occurs, especially when it has chosen to ignore the protection afforded by the statutes of this state.

ROBERT L. FOWLER.

MUNICIPAL CORPORATIONS — Negligence — Duty to Protect Informer After Threats to His Person. — The plaintiff, administrator, brought an action against the city of New York for the wrongful death of his intestate. The deceased, after seeing a fugitive's picture on an FBI flyer, supplied information to the defendant's police department which led to the arrest of Willie Sutton, a dangerous criminal. The capture was widely publicized and the plaintiff's intestate immediately received threats to his life, of which he notified the police. Three weeks later the deceased was killed on the street. The complaint is drawn upon the theory that the deceased was shot in consequence of his part in the arrest of the criminal, that the city owes a special duty to protect those persons who have thus co-operated in law enforcement, and that the city failed in its duty to the intestate by not supplying him with sufficient police protection after their knowledge of threats to his life. The Supreme Court, Special Term, granted a motion by the city dismissing the complaint and the plaintiff appealed. The Supreme Court, Appellate Division, affirmed and plaintiff appealed. HELD: Reversed. The Court of Appeals held 4 to 3 that the complaint stated a cause of action against the city for breach of its duty to exercise reasonable care for the protection of a person in decedent's situation. *Schuster v. City of New York,* 5 N. Y. 2d 75, 154 N. E. 2d 534 (1958).

"The common-law rule denying liability of municipal corporations in tort was an offshoot of the old maxim 'the king can do no wrong', and its corollary that the sovereign may not be sued without its consent." *Evans v. Berry,* 262 N. Y. 61, 186 N. E. 203, 89 A. L. R. 387 (1933); *Mullins Hospital v. Squires,* 233 S. C. 186, 104 S. E. 2d 161 (1958). In New York, however, this common-law rule has been changed by a statute which waives the state's immunity from liability in tort. N. Y. L., C. 860, § 8 (1939). This amendment has been construed by the courts to be a waiver of immunity for the city as well as the state. *McCrink v. City of New York,* 296 N. Y. 99, 71 N. E. 2d 419 (1949); *Steitz v. City of Beacon,* 295 N. Y. 51, 64 N. E. 2d 704, 163 A. L. R. 342 (1945). Even after this waiver of immunity statute, however, the courts have been reluctant to impose liability on municipal corporations. They have applied the troublesome distinction between "governmental" and "propriety" functions and have established that a municipality is answerable for the negligence of its agents in exercising a proprietory function, and liable at least for their negligent acts of commission in exercising a governmental function; but that a municipality is not liable for acts of omission in the exercise of a governmental function, such as failure

to provide police and fire protection. *Murrain v. Wilson Line,* 296 N. Y. 845, 72 N. E. 2d 29 (1947); *Steitz v. City of Beacon, supra.* The municipality could also avoid liability on the ground that the action was based on a duty which did not run to the plaintiff individually but was owing to the public generally. *Steitz v. City of Beacon, supra.* This, of course, conforms with the fundamental principle of tort law that one who seeks redress at law for personal injuries must show that there was a duty owed to him, a negligent violation of that duty, damage to his person, and that the injury was reasonably foreseeable. *Palsgraf v. Long Island Railroad Co.,* 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928). The duty of New York City is set forth by its charter, which clearly places the police force of the city under a broad duty to protect the general public from crimes, including homicide. New York City Charter, Sec. 435 (1938). The modern trend seems to hold a municipality liable if the plaintiff can prove a duty owed to a special group of persons of which the plaintiff is a member, and a violation of that duty. *O'Grady v. City of Fulton,* 4 N. Y. 2d 717, 148 S. E. 2d 317 (1958); *Lubelfeld v. City of New York,* 4 N. Y. 2d 445, 151 N. E. 2d 862 (1958); *Slavin v. State,* 249 App. Div. 72 (1936). Such a duty on the part of government to persons aiding in law enforcement is recognized by section 1848 of the Penal Laws, CONSOL. LAWS, C. 40, N. Y. That section creates an absolute liability against municipal corporations for damages arising from the personal injury or death of persons who at their direction aid officers in making arrests. *Riker v. City of New York,* 286 App. Div. 808, 143 N. Y. S. 2d 620 (1953); *Babington v. Yellow Taxi Corporation,* 224 App. Div. 794, 164 N. E. 726 (1928). "The remedy supplied by that section is not available to plaintiff, but the care and solicitude which it manifests toward those who aid in law enforcement dispels any inference that the public policy of the State is the other way." *Schuster v. City of New York,* 5 N. Y. 2d 75, 154 N. E. 2d 534 (1958). When it can be shown that the municipality had actual or constructive notice of the potential harm which an individual would suffer if it were negligent in performing its duty of protection, then the duty is one which is owing to the individual, and liability can be imposed for negligence. *Lubelfeld v. City of New York, supra; Slavin v. State, supra.* "The majority opinion enunciated the rule that the public owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration." *Schuster v. City of New York, supra.*

This case marks a milestone in the field of New York municipal corporation law by giving full effect to the apparent legislative purpose in the passage of the statute waiving the state's immunity from tort liability. By placing municipalities on the same level as individuals with regard to the rules governing tort liability, they must not only perform the duties imposed on them by law, but they must also act in accordance with the ordinary standards of due care. This case does not hold that municipalities are called upon to answer in damages for every loss caused by criminals. Only when persons have put themselves in a position of danger in order to aid law enforcement agencies and actual danger does exist which is known to the police authorities, does a reciprocal duty arise for the cities to use reasonable care to protect that person. The result of this case is predicated upon the well-established common-law principle that in a just society there shall be a remedy for every wrong between persons. This duty to protect persons aiding the law enforcement agencies must be upheld in order to encourage persons to co-operate with these authorities. However, not all states have a statute as broad as the New York statute which waives the immunity of municipal corporations. In South Carolina, for instance, it is well established law that except as expressly permitted by statute, municipalities are immune from liability for the negligence of their servants or agents. The statutes in South Carolina permitting recovery are few and are strictly construed by the courts. The writer's preference is in accord with the New York common-law view making municipalities subject to the same rules of tort liability as individuals. Because of the increased tendency of the modern-day municipalities to engage in much of our country's activities, the personal rights of individuals will be seriously impaired if our laws do not afford them remedies against municipalities for their torts.

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