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THE SOUTH CAROLINA VALUED POLICY STATUTE AND THE APPORTIONMENT OF PROCEEDS FROM THE INSURANCE OF LIMITED INTERESTS IN REAL ESTATE

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Introduction

There has always been a considerable dilemma involved in insurance law when the named insured recovers an amount in excess of the value of his ownership interest in the "thing" insured.[1] On the one hand, the view which is traditional with the courts is that the insured has made a personal contract of indemnity with the insurer, and therefore only he should benefit from the contract. But on the other hand, it is recognized that in the eyes of most people, insurance stands in the place of the thing destroyed, and, therefore, the argument is made that anyone who had an interest in the property destroyed has an interest in the proceeds of the insurance also. Yet, it has always been very difficult to assimilate these notions of what the rights of third persons should be with traditional modes of legal thinking. Therefore, in every state there is a body of law dealing with apportionment of insurance proceeds. This paper will deal with the law of South Carolina.

It should be noted, however, that this problem arises only when the insured has recovered more than the value of his interest in the property insured.[2] In 1943, New York prescribed a new form of fire insurance policy, the 1943 New York Standard Fire Insurance Policy,[3] which purported to limit the recovery of the insured to the value of the insured's interest, regardless of the face amount of the policy. Thus the question arises: could an occasion ever occur when this policy is used where it would be necessary to apportion the proceeds?

This paper, therefore, considers two problems. First, in what circumstances could the named insured recover more

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1. Comment, 19 U. CHI. L. REV. 112 (1951).
2. Comment, 48 NW. U. L. REV. 354, 370 (1953).
3. N. Y. INSURANCE LAW § 168; PATTERSON, INSURANCE 760 (3rd ed. 1955).

than the value of his interest in the property? Second, if there are circumstances in which he could recover more than the value of his interest, how should the proceeds be apportioned between the named insured and third persons who are interested in the property insured but who are not parties to the insurance contract?

In order to answer these questions, the writer has first examined the South Carolina valued policy statute[4] and compared the two insurance forms[5] in use during the period when most of the decisions involving the valued policy statute were rendered. Then, the paper considers the effect of the valued policy statute on the 1943 "interest" policy. And finally, concluding that the valued policy statute precludes the insurance companies from taking advantage of the "interest" limitation in the policy form, this paper discusses four basic property relationships, *viz.*, life tenant-remainderman, mortgagor-mortgagee, vendor-vendee, and lessor-lessee, and the extent to which apportionment of proceeds is permitted to persons in those relationships by the South Carolina Supreme Court.

The New York Standard Fire Policy Forms: 1917 and 1943

In order to understand the South Carolina valued policy statute and the decisions interpreting it, the two standard insurance policy forms which were in use when most of the decisions were rendered should first be compared. Most of the cases involving the valued policy statute also involve the 1917 New York Standard Fire Policy Form. This standard form was first used in New York in 1917. Under this policy, the named insured was insured "to the extent of the actual cash value . . . of the property," "to an amount not exceeding ______________ Dollars."[6] There was a further provision that if the interest of the insured were less than "unconditional and sole ownership," or if the subject matter were a building not owned by the insured in fee simple, the policy would be void.[7] Although a waiver could be attached to the policy waiving the condition of sole ownership,[8] no provision was in the standard form itself permitting the insurance of divided or limited interests, nor was there any provision limiting lia-

4. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 37-154. This statute is reproduced in the Appendix to this paper.
5. 1917 New York Standard Form and 1943 New York Standard Form.
6. PATTERSON, INSURANCE 781 (1st ed. 1932).
7. PATTERSON, INSURANCE 782 (1st ed. 1932).
8. Comment, 48 NW. U. L. REV. 354, 355 (1953).

bility to the value of a limited interest in case the waiver was attached. Thus, when property was insured, the assured or person taking out the policy, had to be the owner of all the "interests" in the property. The "interest" of the insured and the "property" insured were synonymous. This is the most important thing to remember about this policy form for the purpose of this paper: in case of a total loss, the question could never be raised that the recovery of the insured should be less than the face value of the policy, because if the value of the interest of the insured were less than the face value of the policy, the policy was void and there could be no recovery at all; and if the company had waived this provision there was nothing in the policy form which limited the liability of the insurer to the value of the interest of the insured.[9]

Another feature of this policy, sometimes designated the "res" policy, was that it resulted in considerable overinsurance. This was because of the reluctance of courts in many states to find that the policy was void for lack of unconditional and sole ownership.[10] Courts would either find that the clause did not apply, or that the ownership interest of the insured satisfied the policy provision. There was a tendency of courts to interpret the policy liberally, against the insurance company. The result was that frequently when property was insured, the insurer had to pay amounts in excess of the value of the interest of the insured.[11]

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9. *But see* Brant v. Dixie Fire Ins. Co. of Greensboro, 179 S. C. 55, 183 S. E. 587 (1935). Dictum in this case indicates that a mortgagee who had insured mortgaged property in the amount of $1,000 could recover no more than his mortgage debt. It is not stated in the opinion whether the policy was a "res" policy. Perhaps the dictum of the Court can be explained by the reluctance of the Court to permit a windfall to the mortgagee. The policy was not treated as a valued policy, and *quaere* whether the dictum would state good law if it were not so easy to determine the value of the insured's interest in the property.

Cases of this type in South Carolina and other jurisdictions are characterized in Comment, 48 NW. U. L. REV. 354, 355 (1953), as attempts by the courts to limit recovery to the insured's insurable interest in cases where by the strict terms of the contract, there should be no recovery at all. The limitation of liability would, therefore, seem to be something difficult for an insurer to raise in litigation, but a factor nevertheless present in negotiations for settlement.

10. *E. g.*, Perkins v. Century Ins. Co., 303 Mich. 679, 7 N. W. 2d 106 (1942); Scott v. Liverpool & London & Globe Ins. Co., 102 S. C. 115, 86 S. E. 484 (1915).

11. But see note 9 *supra*, and a few cases decided prior to the 1917 New York Standard Form, *e. g.*, Ulmer v. Phoenix Fire Ins. Co., 61 S. C. 459, 39 S. E. 712 (1901) (discussed *infra*, p. 253 *et seq.*) and Simmons & Bishop v. American Fire Ins. Co., 94 S. C. 366, 77 S. E. 1108 (1913).

These disadvantages eventually led to the adoption of the 1943 New York Standard Fire Policy Form. It was approved by the South Carolina Insurance Commissioner for use in South Carolina in 1944.[12]

The approach of the 1943 policy form was different from the approach of the 1917 form. The insurer, under the 1943 form, insured "____(named insured)____ . . . to the extent of the actual cash value of the property at the time of the loss, but not exceeding . . . *nor in any event for more than the interest of the insured.*"[13] (Emphasis added.) Thus, it was the "interest" of the insured which was protected, not the "thing" itself. This permitted the insurance of a large range of interests, less than sole and unconditional ownership, which was possible under the old policy form only by a special waiver. And it also purported to limit recovery of the insured to the value of the insured's interest in the property, although as will be seen later in this paper, it was not successful when the policy was construed as a "valued" policy. This policy is known as the "interest" policy.

It must be observed that under this policy, in contrast to the "res" policy, there is every opportunity for the insurer to raise and the court to consider whether the recovery of the insured should be the full face amount of the policy, assuming a total loss. This is because if the insurer claims that the insured's interest is less than the value on the face of the policy, it has a defense by the terms of the policy itself, thus forcing the court to determine the value of the insured's limited interest. Under the "interest" form, every policy potentially involves a decision as to the value of the insured's "interest"; whereas under the "res" form, few cases involved a decision as to the value of the insured's "interest". Now that we have examined the policy forms which form the background for most of the litigation concerning the valued policy statute, let us now proceed to the statute itself and the decisions interpreting it.

Valued Policy Statute of South Carolina

Before discussing the valued policy statute of South Carolina[14] and the cases decided under it, it is perhaps necessary first to explain the difference between a "valued" and an

12. C. C. H. INS. L. REP. 2005.
13. PATTERSON, CASES 760 (3rd ed. 1955).
14. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 37-154.

"open" policy of fire insurance. In the early case of *Cox, Maitland & Co. v. Charleston F. and M. Insurance Co.*,[15] Judge John Belton O'Neall defined a "valued" policy as a policy "where the value of the subject matter is agreed upon, by the parties" and an "open" policy as one in which "it is not estimated at any particular amount or rate." Many years later, in *Riggs v. Home Mutual Fire Protection Association*,[16] the Court defined a "valued" policy as "one in which the amount payable in case of loss is fixed by the terms of the policy itself, as where property is insured, valued at or 'worth' a specified amount." An "open" policy was defined as one in which "the amount of the liability is left 'open,' to be determined according to the actual loss, either by agreement of the parties, or upon proof in compliance with its terms."

The valued policy statute of South Carolina provides as follows:

> No company writing fire insurance policies, doing business in this State, shall issue a policy for more than the value stated in the policy or the value of the property to be insured, the amount of insurance to be fixed by the insurer and insured at or before the time of issuing the policy. In case of total loss by fire the insured shall be entitled to recover the full amount of insurance and in case of a partial loss the insured shall be entitled to recover the actual amount of the loss, but in no event more than the amount of the insurance stated in the contract. But if two or more policies are written upon the same property they shall be deemed and held to be contributive insurance and if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insurer and the insured, each company shall, in the event of total or partial loss, be liable for its pro rata share of insurance. Nothing in this section shall be held to apply to insurance on chattel or personal property.

Valued policy statutes were passed in many states, beginning in Wisconsin in 1874,[17] in order to prevent the possibility of overinsurance and also to prevent uncertainty as to the amount of recovery in case of loss. According to the theory of the valued policy statutes, the insurer would be

15. 3 Rich. 331, 332 (S. C. 1832).
16. 61 S. C. 448, 458, 39 S. E. 614, 618 (1901).
17. See PATTERSON, ESSENTIALS OF INSURANCE LAW 118 (1935).

bound by the value placed on the property by the insurance contract and would not be able to contest such a valuation. Insurance agents, paid by commission, had frequently been tempted to persuade unwary persons to insure their property for a greater value than it had, thus encouraging overinsurance. It was thought that if the insurer were required to be bound by the valuation put on the property by the insurance contract, and if the insurer were thus not allowed to allege that the property was overvalued, the insurance companies would be more careful in the selection of insurance agents and would guard more effectively against overinsurance.[18] The success of valued policy statutes in eliminating overinsurance is considered doubtful.[19]

Another policy of the statute, however, apparently more successful than the first, was the prevention of uncertainty of recovery. It was considered inequitable for an insurer to collect premiums based on a high valuation of the property, then when the property was destroyed, defend on the ground that the property was overvalued. To prevent this, and thereby to make certain the amount of the insured's recovery in case of loss, the valued policy statutes were passed.[20]

The South Carolina General Assembly passed the valued policy statute quoted above in 1896. One of the first cases to come before the Court concerning its interpretation was a case prior to the adoption of the "res" policy.[21] It was *Ulmer v. Phoenix Fire Ins. Co.*[22] In that case a building contractor insured a building which he had contracted to erect. The insurance was "against all direct loss or damages by fire . . . to an amount not exceeding $450." Later the building was totally destroyed by fire. In a suit on the policy, Mr. Ulmer, the contractor, recovered only $82.92, being the amount still

18. See Reilly v. Franklin Fire Ins. Co., 43 Wis. 449, 455-456, 28 Am. Rep. 552, 555 (1877); Dean, *Valued Policy Laws I*, in YALE READINGS ON INSURANCE 293-298 (1914).
19. Heald, *Valued Policy Laws II*, in YALE READINGS ON INSURANCE 298-303 (1914).
20. See Aetna Ins. Co. v. Norris Bros., Inc., 109 F. 2d 172, 174 (4th Cir. 1940); Parnell v. Orient Ins. Co., 126 S. C. 198, 199, 119 S. E. 191 (1923); Bruner v. Automobile Ins. Co. of Hartford, 165 S. C. 421, 426, 164 S. E. 134, 135 (1932).
21. The policy quoted in the opinion seems to be the New York Standard Fire Policy (Original), effective in 1887 in New York. This form is found in PATTERSON, INSURANCE 786 (1st ed. 1932). Although the language is somewhat different from the 1917 policy form, it is a "res" policy in that there is no limitation on the insurer's liability to the value of the interest of the insured.
22. 61 S. C. 459, 39 S. E. 712 (1901).

to be paid him by the owner for whom he was building and also a small amount for extra work. In other words, the insured recovered the value of his "interest" in the building. The plaintiff appealed, alleging that the policy, by virtue of the valued policy statute,[23] was a "valued" policy and that he was entitled to recover the entire $450. The Supreme Court, speaking through Mr. Chief Justice McIver, rejected this view. It pointed out that the policy did not have the attached slip, "usual" since passage of the valued policy statute, which stated the agreed value of the property; that there was nothing in the policy to show that the property was valued at $450; and that therefore the plaintiff could recover only the amount of his loss, *viz.*, the amount due him under the contract, plus compensation for extra work. Thus the Court interpreted the statute as permitting a valued policy, if there was in fact a stated and agreed valuation of the property in the policy. A reading of the statutory provisions[24] would indicate that this is a logical result because there seems to be nothing in the statute which requires only valued policies to be issued, nor is there anything which would seem to require that a statement of the amount of insurance constituted a valuation of the property. However, if this result had been followed strictly, the purpose of the valued policy statute to encourage certainty of recovery would have been thwarted. It should also be noted that the Court seems to assume that in a valued policy, it is the physical object insured which is valued, not the property interest of the person taking out the policy.

The principles for which the *Ulmer* case stands have virtually passed out of existence in South Carolina.[25] As indicated, this writer thinks that *Ulmer* stands for two propositions. The first is that a valued policy is one which has a stated valuation of the object insured, separate from the amount of the insurance. However, by 1955, in *Hunt v. Gen-*

23. The valued policy statute in effect when the case was decided (1901) differed somewhat in wording from the valued policy statute now in effect. See 61 S. C. at 463, 39 S. E. at 713. But the two statutes are substantively the same except for recovery in case of partial loss.

24. 61 S. C. at 463, 39 S. E. 713.

25. So far as this writer can determine, it has been cited only once since it was decided, in Sammons & Bishop v. American Fire Ins. Co., 94 S. C. 366, 77 S. E. 1108 (1913). And it was cited in that case only for the proposition that a building contractor had an insurable interest in the house he is building.

eral Ins. Company of America,[26] the Court treated a policy which apparently carried no separately stated valuation of the property as a valued policy, the "value" being the face amount of the insurance in the policy. And there was no discussion on this point at all.

The second proposition, somewhat related to the first, is that the "property" which is valued in a valued policy is not the same as the "interest" of the insured, but instead is the physical object sought to be protected. But by 1955, again in the *Hunt* case, the Court's holding was based on the view that the "interest" of the insured and the "property" valued were the same.

The transition between the two cases is difficult to follow. Much of the language of the cases is consistent with both *Ulmer* and *Hunt.* As to the problem of what constitutes a valued policy, many cases can be found in the South Carolina Reports which deal with insurance policies which carry a stated valuation of the subject matter insured, separate and distinct from the face amount of the policy.[27] However, *Riggs v. Home Mutual Fire Protection Assn.,*[28] decided in the same term as *Ulmer,* indicates that a policy is valued if the property is "insured . . . at" a specified amount. Apart from this case, this writer has been able to find no case which deals explicitly with the problem of what is required to make a policy a valued policy.

As to the problem of whether the "property" valued is something different from the "interest" of the insured, this writer has also been able to find no other case which explicitly deals with this question, although some of the language in the cases is consistent with the *Ulmer* view that "property" and "interest" are different. However, before the adoption of the "interest" policy, there was at least one case which seemed to indicate that the "interest" of the insured was the "property" which was valued.[29]

26. 227 S. C. 125, 87 S. E. 2d 34 (1955).

27. Parnell v. Orient Ins. Co., 126 S. C. 198, 119 S. E. 191 (1923); Columbia Real Estate & Trust Co. v. Royal Exchange Assurance, 132 S. C. 427, 128 S. E. 865 (1924); Walker v. Queen Ins. Co., 136 S. C. 144, 134 S. E. 263 (1925); Aiken v. Home Ins. Co., 137 S. C. 248, 134 S. E. 870 (1925); Bruner v. Automobile Ins. Co. of Hartford, 165 S. C. 421, 164 S. E. 134 (1932); Fowler v. Merchants' Fire Assurance Corp., 172 S. C. 66, 172 S. E. 781 (1933); Murdaugh v. Traders & Mechanics Ins. Co., 218 S. C. 299, 62 S. E. 2d 723 (1950).

28. 61 S. C. 448, 458, 39 S. E. 614, 618 (1901).

29. See Milhous v. Globe & Rutgers Fire Ins. Co., 161 S. C. 96, 159 S. E. 506 (1931).

The reason that this question of the meaning of "property" in the statute did not arise, *i. e.*, whether "property" meant "interest" of the insured, was that, except for a few rare instances when the Court acted to prevent a windfall,[30] there was never an opportunity for the Court to consider this question prior to the adoption of the 1943 "interest" form in 1944. This was because, as explained earlier, the 1917 policy form permitted only the insurance of the full interest, and no insurance of limited interests was permitted. If the "interest" of the insured were less than sole and unconditional ownership, *i. e.*, if the "interest" were less than co-extensive with the valuation of the property itself, the policy was declared null and void. The result of this was that when the "property" was valued by an agreement between the insurer and the insured, this value was final regardless of the actual value of the insured's interest. Thus, unless the insurer challenged the policy altogether as being void, which was often unsuccessful,[31] there was no opportunity for the insurer to resist payment of the entire amount of the insurance on the grounds of a limited interest. Therefore, the question of how to value a limited interest when there was an agreed value placed on the "property" to be insured never arose in South Carolina until after 1944.

It is true that under the older policy form it was possible to add a rider which permitted the insurance of limited interests. Thus, it was possible to a limited extent for persons with less than unconditional and sole ownership to insure their interests. But still if the policy were issued to one with less than sole and unconditional ownership, the insurance company could not limit its liability to the value of the limited interest. It had no provision in the policy so limiting its liability. It had waived the condition by which it could defend on the ground that the policy was completely null and void. And it had no other alternative than to pay the entire amount of the insurance. Thus again there was no opportunity for the courts to pass on the question of whether the "property" which is valued in a valued policy is the same as the "interest" of the insured.

This was the situation during the interval between *Ulmer* and *Hunt*, most of which was prior to the adoption of the

30. See notes 9 and 11 *supra*.
31. Comment, 48 NW. U. L. REV. 354, 359 (1953).

1943 policy form in 1944. Apart from the *Ulmer* case, the decisions had not touched squarely on the problems which were to be raised by the 1943 policy form, *viz.*, whether a policy without a separate valuation of the property is a valued policy; and whether the "property" valued is the same as the "interest" of the insured. Before these questions were answered, it was impossible to know to what extent the 1943 policy form would be successful in achieving the object for which it was adopted, which was to limit the liability of the insurer to the value of the insured's interest.

But although it was difficult to determine just what effect the valued policy statute would have on the "interest" policy, one thing was certain. In South Carolina, contrary to the situation in other states, where policies are adopted by statute, the valued policy statute clearly takes precedence over a policy form approved by the Insurance Commissioner.

It would seem that two possible approaches could have been taken by the Court with regard to the new policy form. The first approach the Court could have adopted was to have gone back to the *Ulmer* case and revived the distinction between the "property" insured (meaning tangible physical object) and the "interest" insured (meaning insurable interest). If the Court had taken this approach, it would have permitted a valuation to be placed on the property, and would have used this as a basis for calculation of the exact value of the interest of the insured and therefore would have permitted recovery of no more than this ascertained interest of the insured. This approach was taken in earlier cases by the Louisiana Supreme Court[32] and the Ohio Appellate Court.[33]

But the course the Court did take in fact in the *Hunt* case was foreshadowed by dicta of earlier cases.[34] The Court took the "property" as meaning the "interest" of the insured, so that the insurer, despite the words of the 1943 Standard Form, can not contest the valuation placed on the interest by the policy itself. One of these cases was the 1950 Supreme

32. Lighting Fixture Supply Co. v. Pacific Fire Ins. Co., 176 La. 499, 146 So. 38 (1932); Chambers v. North British and Mercantile Ins. Co., 175 So. 95 (La. App. 1937); Lyles v. National Liberty Ins. Co., 182 So. 181 (La. App. 1938).

33. Summer v. Stark County Patron's Mutual Ins. Co., 63 Ohio App. 369, 26 N. E. 2d 1021 (1940).

34. See Milhous v. Globe & Rutgers Fire Ins. Co., 161 S. C. 96, 159 S. E. 506 (1931); Murdaugh v. Traders and Mechanics Ins. Co., 218 S. C. 299, 62 S. E. 2d 723 (1950).

Court case of *Murdaugh v. Traders and Mechanics Ins. Co.*[35] That case dealt with whether or not two insurance policies had been written on the same "property" in order to bring the contributive insurance provision of the "valued policy" statute into operation. The Court held that "property" as used here meant the same thing as "interest" of the insured, and since the second policy was written on the mortgagee's interest, the mortgagor could recover in full for the loss of his interest.

The Court finally ruled squarely on the question of the effect of the valued policy statute on the "interest" policy in the case of *Hunt v. General Ins. Company of America.*[36] This case involved insurance procured by life tenants in the amount of $8,000. The remainderman also insured with the same company for $3,000. A partial loss occurred. All parties stipulated after the loss that the building was worth $11,000 and the loss amounted to $1,290.45. The life tenants and remainderman could not agree on how to apportion the proceeds of insurance. The remainderman sued the insurer. The insurer then tried to interplead both the life tenants and the remainderman in the same suit. This interpleader suit was dismissed. Then the life tenants sued the insurer. The trial judge awarded the remainderman, in an initial trial, $922.67, that being the proportion of the total loss represented by what the trial judge calculated to be the remainder interest. Then the trial judge awarded the life tenants a recovery for the full amount of $1,290.45. The insurer appealed the second award. The Supreme Court, speaking through Mr. Chief Justice Baker, held that the stipulation as to the value of the building made after the loss had no effect whatever as to this policy because the policy was a "valued" policy, fixing the "valuation of their [life tenants'] interest in the residence at $8,000."[37] It admitted that a case of overinsurance was presented, but held that because of the valued policy statute, the insurance company was bound by the valuation made. Thus it permitted a recovery in full of the amount of the loss to the life tenants. In a final paragraph, the Court pointed out that it was not concerned with the policy or recovery of the remainderman.

35. 218 S. C. 299, 62 S. E. 2d 723 (1950).
36. 227 S. C. 125, 87 S. E. 2d 34 (1955).
37. 227 S. C. at 129, 87 S. E. 2d at 36.

Mr. Justice Oxner dissented.[38] His dissent is based on the assumption made in the *Ulmer* case, although that case is not cited, that there is a difference between the "property" and the "interest" of the insured, to which the recovery is limited by an "interest" policy. Therefore, Justice Oxner would have limited the life tenants to the proportion of the total loss represented by their life interest in the property or $367.78.

The *Hunt* case has two strange aspects about it. In the first place, one would assume that in view of the *Murdaugh* case, the separate interests here of the life tenants and remainderman are separately insurable and are to be valued separately. Therefore, under the valued policy statute, each party could have recovered in full up to the valuation of the interest placed on the property by the policies. In other words, if the life tenants can recover the full $1,290 because they can recover in full up to $8,000, it would seem that the remainderman could recover up to her valued interest of $3,000. The Court indicated that it was not foreclosing that possibility and had the remainderman appealed, she might have recovered the full amount. The only difficulty with this is that the $1,290 was fixed by *all* parties as the *physical loss*, not the loss of each separate interest. Thus to reach the result that would seem indicated by the case, one has to assume that the $1,290 represented the loss of each interest instead of the physical damage to the building. It should be remembered that this was a partial loss, not a total loss.[39]

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38. 227 S. C. at 134, 87 S. E. 2d at 38.

39. Prior to an amendment of the valued policy statute in 1947, recovery in case of a partial loss was the fixed or stated value of the property, less salvage value, but in no event more than the amount of the insurance. Bruner v. Automobile Ins. Co. of Hartford, 165 S. C. 421, 164 S. E. 34 (1932); Fowler v. Merchants Fire Assurance Corp., 172 S. C. 66, 172 S. E. 781 (1933). These cases were decided under the wording of the statute which read, "the insured shall be entitled to recover . . . a proportionate amount in case of partial loss." CODE OF LAWS OF SOUTH CAROLINA, 1932 § 7977.

The present statute reads "in case of a partial loss the insured shall be entitled to recover the actual amount of the loss, but in no event more than the amount of the insurance stated in the contract." CODE OF LAWS OF SOUTH CAROLINA, 1952 § 37-154. This amendment to the statute would apparently be intended to take partial loss out from under the valued policy statute altogether. But the decision in the *Hunt* case does not so hold and treats the post-1947 statute as if it made no change in previously existing law. A partial loss is as much under the valued policy statute by this decision as a total loss. This case has been criticized on this point. See 7 S. C. L. Q. 665 (1955); 8 S. C. L. Q. 45 (1955).

In the instant case, the "actual amount of the loss" was fixed at $1,290, and therefore recovery in that amount was permitted. Presumably, the remainderman could also have recovered $1,290, as her policy

But the unexplainable feature of the opinion is this. The opinion quoted large portions from the trial judge's decree. In fact, it incorporated practically the entire decree as the opinion of the court. Yet the trial judge, when he had the situation before him in the first instance, as the Supreme Court did not, refused to follow the logic of a full recovery to the life tenants, for he granted only a partial recovery to the remainderman. In other words, the trial judge seems not to have been consistent in allowing a full recovery to the life tenants and only a partial recovery to the remainderman, if the basis for the full recovery is what this writer believes it to be, and what seems to him to be indicated by the decision of the Supreme Court. One explanation is possible, however. Perhaps the trial judge valued the loss to the remainderman's interest as only $922, and the loss to the life tenants' interest as $1,290. These valuations would seem more in accord with the valuations placed on the interests by the insurance company ($3,000 for the remainderman and $8,000 for the life tenants). Furthermore, since the remainderman was the mother of the life tenants, and the life tenants held for the life of their mother who was also their grantor, it is reasonable that the interest of the life tenants would be greater than that of the remainderman.

The other difficulty with this case is what should be done with the proceeds. This problem will be taken up in a subsequent part of this paper.[40]

Perhaps it is to a certain extent moot to discuss which approach should have been taken by the Court, but in view of the fact that the majority of American courts have not passed on the question,[41] perhaps a few remarks will be helpful. Mr. Justice Oxner's views have much to recommend themselves. As pointed out earlier, his approach is taken in Louisiana, and by the Ohio Appellate Court.[42] Furthermore, the statute and the policy provisions themselves seem, on their face, to require this result.[43] The statute speaks only of "property" and it may be contended that "property" means to most people

would have been a valued policy too, unless the trial judge's result can be supported on the ground that in case of partial loss, recovery is limited to the "actual amount" of the loss to the insured's interest, and that in the trial judge's opinion this was only $922. See text at p. 260 *infra*.

40. P. 263 *infra*.
41. See Comment, 48 NW. U. L. REV. 354, 359 (1953).
42. See notes 32 and 33 *supra*.
43. See the text of the statute in Appendix.

and probably to the legislative draftsmen the physical object insured. Furthermore, there has traditionally been a policy in the law against wagering, and not permitting an insurer to contest the overinsurance encourages what is technically a wagering contract. Other arguments might be made that the policy provisions of the contract require insurance only on the interest of the insured,[44] and that an interpretation to permit the insurer to limit liability to that interest will, in the long run, reduce insurance rates.

In opposition to these arguments are those which bolster the view taken by the majority of the Court. In the first place there is the policy of the valued policy statute itself, the need not necessarily for prevention of overinsurance as for certainty in the amount of recovery. To permit the insurer to refuse to pay full recovery because of a limited interest, might be very disadvantageous to the insured, and the fact that the insured has been paying a full premium for complete coverage will not put equity on the side of the insurer, especially when the insurer's agent knew of the limited interest. It may well be asked what harm there is to the insurer when the overinsurance possibility might be investigated by the agent, and the company has been collecting premiums based on the larger amount of insurance.[45]

Furthermore, although one may recognize that most people think of "property" as the physical object insured, this is not its meaning in a legal sense. The word "property" in a legal sense means very little unless it describes a relation between a physical object and the rights of a person in that object. Therefore, it seems to this writer that the word "property" as used in the statute should mean only the interest of the assured in the physical object, and that the Supreme Court was clearly right in the *Murdaugh* case in so holding.

Thus it seems that since there is a "value policy statute" in South Carolina, the decision of the majority of the Supreme Court in the *Hunt* case is correct in that it executes the policy of the statute better than the opinion of Mr. Justice Oxner. One may debate the advantages and disadvantages of the

44. The insurer may well argue that not to limit recovery to the value of the insured's interest is in effect imposing on the parties a contract different from the one which they entered into. But it may well be questioned, in view of the fact that the contract is a printed form required by the Insurance Commissioner to be used, to what extent there was, in fact, a meeting of the minds as to this point.

45. See Comment, 48 NW. U. L. REV. 354, 363 (1953).

statute,[46] but given the existence of the statute, it seems the duty of the Court to enforce the policy of the statute in the face of an insurance contract provision which would abrogate it. And, as between the insurer and the insured, the equities seem to this writer to be on the side of the insured in cases of overinsurance, despite the "public policy" against wagering. The public policy against wagering[47] was developed in part at least to protect the insurer against the risk of an insured burning his property and collecting more than his loss. In view of the fact that the insurer himself has agreed, however, on a valuation of the property insured, it does not seem proper to let him claim, after a loss, that the property was overvalued.

In conclusion, therefore, it seems that the South Carolina Supreme Court has adopted the view that when a valuation is made in an insurance policy, such a valuation is a valuation of the interest of the insured in the tangible physical object.[48] When a partial loss occurs, the insured is able to recover the amount of the loss up to the value of the interest as agreed. And when there is a total loss, the insured can recover the full amount of the agreed valuation. The insurer is not permitted to object that the insured's interest is worth in fact less than the amount agreed upon in the policy.[49]

The next question that arises is what happens to the proceeds in the hands of the insured and what rights do third persons, with interests also in the tangible physical object insured, have with respect to the proceeds? This will be taken up in the next section.

Apportionment of Proceeds

The problem of apportionment of proceeds can never occur except when the insured has recovered an amount which is

46. See Excerpt from *31st Massachusetts Insurance Report* in YALE READINGS IN INSURANCE at 303 (1914).

47. See, *e. g.*, Abraham v. New York Underwriters Ins. Co., 187 S. C. 70, 78, 196 S. E. 531, 534 (1938).

48. Even after the *Hunt* case it should not be readily assumed that if a case were presented of as obvious an overinsurance as was presented in Brant v. Dixie Fire Ins. Co. of Greensboro, 179 S. C. 55, 183 S. E. 587 (1935), the Court would permit a full recovery. Probably, in the case of the insurance of a mortgagee's financial interest, the insurer would take precautions to have the amount of insurance decrease with the decrease in the mortgage debt.

49. Apparently, the insurer is "estopped" by the statute from protesting overvaluation of the insured's "property" (*i. e.*, "interest") even if the insurer did not know of the insured's limited interest, unless the

more than the value of his interest in the insured object.[50] When would this ever occur? First, the insured might recover more than the value of his interest if the insurer did not contest the valuation of his interest, but rather, either through ignorance of the limited interest or through a public relations policy of the insurance company, permitted the insured to recover the full amount of the policy. Second, as this writer reads the South Carolina cases under the valued policy statute, the insured can recover the full amount of the policy,[51] regardless of the true value of his interest, because by statute (and decision) the insurer may not contest the agreed valuation placed on the "property" (which means "interest") by the insurer and insured. Thus there may be many instances in which the insured could recover from the insurer an amount in excess of the value of his interest, and the problem of how to divide the proceeds becomes important.

The reason that it becomes important to decide upon a division of the proceeds stems from a solution to the second major problem raised in the writer's mind by the *Hunt case*.[52] In that case the Court found in effect that the insured's interest was worth $8,000 because of the agreed valuation, and therefore the insured could recover the full amount of the partial loss. The question raised is this: if this is the agreed

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insurer is able to show fraud or concealment on the part of the insured. Although there is no exemption in the statute for fraud, fraud or concealment is a ground for the avoidance of the policy. 1943 N. Y. Standard Fire Insurance Policy Form in PATTERSON, INSURANCE 762 (3rd ed. 1955). *Quaere* whether the insurer could, in case of fraud, not go as far as claim an avoidance of the policy, but only argue that the liability should be limited.

The holding in Metropolitan Life Ins. Co. v. Bates, 213 S. C. 269, 49 S. E. 2d 201 (1948) indicates that the Court will permit avoidance of an insurance policy only in cases where there was an intent to defraud or deceive the insurer.

50. Comment, 48 NW. U. L. REV. 354, 370 (1953).

51. In case of a partial loss, however, the insured can recover only the "actual amount of the loss." CODE OF LAWS OF SOUTH CAROLINA, 1952 § 37-154. As indicated by footnote 39, it is doubtful whether this means the "actual amount" of the loss to the tangible physical object insured or the "actual amount" of the loss to the insured's interest. The writer has been able to find no case directly in point, but it would seem that the former was meant, as this is more consistent with the purpose of the valued policy statute to insure certainty of recovery by placing the value of the insured's interest beyond question.

If the Court takes the former approach, the problem of apportionment would occur even in the case of a partial loss. But if the Court takes the latter view, the problem of apportionment would not occur since the insured would not have recovered an amount in excess of his interest.

52. See text at p. 260 *supra*.

valuation of the insured's *interest,* would any third person not a party to the insurance contract ever be able to recover part of the proceeds which represent damage to that interest? The answer, this writer thinks, is that the third person is not bound by the valuation placed on the property interest by the insured and insurer, nor is a third person bound by a decision that as between insurer and insured, the insured is recovering simply what he is entitled to, *viz.,* indemnity for damage to his interest.[53] As between insured and a third person, the insured has recovered a sum which may be well in excess of the value of the insured's interest, and then it becomes appropriate for the parties to divide the proceeds, if the third person has a right to any of the proceeds under the law.[54]

An examination of various relationships will be made and this writer will attempt the extent of the rights of a third person in proceeds recovered by an insured in excess of the value of his interest.

Life Tenant-Remainderman. The majority of American courts hold that when the life tenant insures and recovers the full proceeds of the insurance, the life tenant is under no duty to account for any part of the proceeds to the remainderman.[55] South Carolina has, however, a different rule. Two early cases set the precedents, the first of which resembled the Charles Dickens case of *Jarndyce v. Jarndyce* in time consumed and property involved.[55a] These cases were *Clyburn v. Reynolds,*[56] and *Green v. Green.*[57] Since the *Green* case involves fewer issues than the *Clyburn* case, I shall discuss it. Mrs. Lucy P. Green died in 1864 leaving a town house and lot in Columbia to her daughter, Lucy, for life, remainder in fee to Mrs. Green's four sons. Miss Green insured the premises, and the property was later completely burned. She col-

53. See 30 AM. JUR., *Judgments* §§ 223-226 (1939).
54. The fact situation which is presented by the *Hunt* case is somewhat unusual because both the life tenants and the remainderman had policies with the same company. In such a case, as indeed in any situation where all persons with interests carried insurance, it is doubtful that one who had already recovered from an insurance company can proceed against another who had recovered, for a part of the proceeds in the other's hands. The fact that the plaintiff in such a case had already recovered once might be enough to bar an action against the other insured. Such a bar might be analogous to an "estoppel."
55. Comment, 19 U. CHI. L. REV. 112, 115 (1951).
55a. See DICKENS, BLEAK HOUSE.
56. 31 S. C. 91, 9 S. E. 973 (1889).
57. 50 S. C. 514, 27 S. E. 952 (1897).

lected $3,000 from the insurance company in 1878. By very shrewd investments in a bankrupt brick factory and a defunct judgment, Miss Green converted this by the time of the suit to a $30,000 mortgage and two houses and lots. The plaintiffs, heirs at law of the original remainderman, brought a bill in equity to have a trust of the property for their benefit declared by the court. The trial judge referred the issue to a Master in Equity for a decision, and the defendant appealed to the Supreme Court the order of reference. (The defendant first answered raising new matter, which was ordered stricken by the Judge in his order of reference on motion of the plaintiffs. In the appeal from this order, the defendant tried to interpose a demurrer to the complaint, but the Supreme Court denied this motion.) The Supreme Court, speaking through Mr. Justice Pope, held that the trial judge was correct in referring the case to a Master, as the plaintiffs were entitled to a trial on the merits. The Court, citing *Clyburn v. Reynolds,* said that public policy imposed a *quasi*-trust duty on a life tenant for the benefit of the remainderman. It went on to say that when there was a duty to insure property for the benefit of another (as there was here because of the *quasi*-trust relationship), the person who had the duty to insure must hold the proceeds of the insurance in trust for the beneficiary. This means that the proceeds must be used to rebuild, or they must be put out at interest, the life tenant receiving the income for life, remainder to the remainderman. Therefore, in the instant case, there was a trust which had to be declared by the Court. The Court did not say how much of the rather large amount would be held for the remainderman.[58]

This case, raising a trust for the remainderman of the proceeds of insurance, is a rather firmly established case in South Carolina jurisprudence. However, to what extent would it be followed today under the valued policy statute and an "interest" policy? The *Hunt* case distinguished *Green's* parent, *Clyburn,* by saying that the case did not involve an "interest" policy and that there was no showing the insurer knew of the insured's limited interest when the contract was entered into.[59] Yet, if this writer reads the *Hunt* case cor-

58. It would seem that the question of how much would be impressed with a trust would depend upon ordinary principles of trust law, *i. e.,* the extent to which the accretions to the $3,000 were principal.
59. 227 S. C. at 134, 87 S. E. 2d at 38.

rectly, these two distinguishing characteristics make no difference. Even if, in the *Clyburn* and *Green* cases an "interest" policy had been involved, such a policy would not have been effective, at least after the valued policy statute, to limit the insurer's liability, and therefore the life tenant in the *Green* case could still have recovered the full amount of $3,000 and this would still have been held in trust for the remainderman. And apparently the decision in *Hunt* did not turn on the fact that the insurer had notice of a limited interest in the property.[60] Furthermore, the Court says,[61] "The insurance company paid the full amount of the policy to the life tenant, but *as between the life tenant and the remainderman,* the life tenant stood in the position of trustee to the remainderman as to his particular portion of the proceeds." [Emphasis added.] If the insurer pays the full amount of the policy to the life tenant, either because the insurer fails to defend, or because the valued policy statute defeats him, it would seem that the same fiduciary relation between the parties would exist as under the *Green* and *Clyburn* cases. For, as between the life tenant and remainderman, no binding judicial decree has established the value of the life tenant's interest. To say this is to say in effect that the statute does not place a value on the interest of the life tenant as to all the world. It only "estops" the insurer from asserting a smaller interest (or the life tenant from asserting a larger interest) and is binding only between life tenant and the insured.

It is this writer's opinion, therefore, that the *Clyburn* and *Green* cases are still law in South Carolina. The doctrine was reaffirmed in *Crook v. Hartford Fire Ins. Co.*[62] and applied to the proceeds in the hands of the insurance company. However, it is only by regarding the law in the *Hunt* case as one of "statutory estoppel" that the two cases, *Green* and *Hunt* can be reconciled, since *Green* proceeds on the theory that the proceeds stand for the building and the *Hunt* case seems at first blush to assume that the proceeds stand for the insured's interest. The *Hunt* case must be taken to mean that the proceeds stand for the insured's interest only as between insurer and insured, and that as between the life tenant-insured and the remainderman, they stand for the building

60. See also note 49 *supra*.
61. 227 S. C. at 134, 87 S. E. 2d at 38.
62. 175 S. C. 42, 178 S. E. 254 (1935).

and a trust is imposed.[63]

It must be pointed out further that the foregoing discussion has been based on the assumption that there has been no requirement to insure imposed by the deed or will creating the estates, as has been suggested.[64] If such were the case, the Court would probably take the approach indicated in the mortgagor-mortgagee cases, *infra.*

Mortgagor-mortgagee. The cases dealing with a mortgagor-mortgagee situation seem to be based on concepts similar to but not exactly the same as the concepts in a life tenant-remainderman situation. It will be remembered that the *Green* case stated that as a general rule where there was a duty of one party to insure for the other, the other would have an equitable right to the proceeds received by the insured. This concept is equally applicable in the mortgage field. The case of *Swearingen v. Hartford Fire Ins. Co.*[65] first established the principle in South Carolina that where a mortgagor has a duty to insure for the benefit of the mortgagee, whether that duty is raised by the mortgage contract "or otherwise," and the mortgagor takes out insurance in his own name, the mortgagee has an equitable lien on the proceeds of the insurance. Note here the similarities and differences between the life tenant-remainderman situation and the mortgagor-mortgagee situation. In one there is a "*quasi*-trust," raised apparently regardless of any agreement to insure for the remainderman's benefit. In the other, there is an "equitable lien," which can be used apparently either against the insurance company or against the mortgagor, but which arises only when there is a covenant to insure. But both are equitable devices, raised by the Court to mitigate the rigors of the personal contract theory which would have cut the third person not a party to the contract out completely.[66]

The *Swearingen* case's enunciation of an equitable lien was actually dictum, for the holding was that on the facts, no such equitable lien was raised. And furthermore, in a subsequent case arising out of the same fact situation, *Swearingen*

63. Although there has been no decided case on the situation, the language of *Green* and *Clyburn* indicates that the same result would be reached if the remainderman was the party insuring.
64. Comment, 48 NW. U. L. REV. 354, 375 (1953).
65. 52 S. C. 309, 29 S. E. 722 (1897).
66. For an analysis of the personal contract theory see Comment, 19 U. CHI. L. REV. 112 (1951).

v. Hartford Fire Ins. Co.,[67] the Court said that the lien extends to the proceeds of an insurance policy only if the insurer has knowledge of the lien. This raises the problem of what is the result if the insurer did not have knowledge and has not paid out the proceeds.

If the object of extending the lien only to those insurers with knowledge of the lien is to protect a company that has paid without knowledge, the rule would seem fair and correct, similar to payment of the original obligor before notice of an assignment by the obligor to an assignee. And if the money has been paid to the mortgagor when there is a duty for the mortgagor to insure for the mortgagee, it would seem that the mortgagor would hold these proceeds for the benefit of the mortgagee. This result is supported by *O'Cain v. Langston*.[68] In that case the mortgagor covenanted to insure for the benefit of the mortgagee. In fact, the mortgagor's husband took out the policy, although he had no insurable interest (other than the interest of a spouse in the property of his wife which is enough, in some jurisdictions, to support an insurance policy).[69] The insurer paid the proceeds to the mortgagor's husband. (There is nothing in the opinion as to whether the insurer had knowledge of the covenant to insure.) In holding that the mortgagee could reach the proceeds in the hands of the mortgagor's husband, the Court said, "the case stands precisely as if the policy had been written in the name of [the mortgagor], and the [mortgagee] has an equitable lien on the proceeds of the policy."[70]

A statement in a case involving a life tenant-remainderman situation, *Crook v. Hartford Fire Ins. Co.*,[71] would support this view:

> While recognizing . . . that a contract of fire insurance is a personal contract between the insurer and the insured and does not run with the building insured, and is not an incident to the thing insured, the Supreme Court of this State has held that where the insured occupies the relationship of trustee, or *quasi* trustee, toward an-

67. 56 S. C. 335, 34 S. E. 449 (1899).

68. 125 S. C. 294, 118 S. E. 534 (1923).

69. *E. g.*, Kludt v. German Mutual Fire Ins. Co., 152 Wis. 637, 140 N. W. 321 (1913).

70. 125 S. C. at 297, 118 S. E. at 535.

71. 175 S. C. 42, 51, 178 S. E. 254, 258 (1935).

other, the Court will hold him accountable for the proceeds of the insurance on the ground of public policy.

Thus, if the proceeds are held by the insurer, the Court in *Swearingen* said that they were subject to a lien only if the insurer had knowledge of the covenant. Since the proceeds are subject to a lien if paid to the insured, it would seem logical that if the proceeds have been paid to no one the proceeds are subject to a lien in the hands of the insurer, even if the insurer has no knowledge of the covenant. *Crook* seems authority for this statement. Therefore the problem of knowledge becomes important only when the insurer has paid the insured, and for some reason, *e. g.*, insolvency, the mortgagee does not proceed against the insured mortgagor and sues the insurer instead.

What constitutes sufficient knowledge is not completely developed under the South Carolina cases. There is one case on the subject, however, which, though involving a mortgage of personalty, involves similar principles. *Gibbes Machinery Co. v. Niagara Fire Ins. Co.*[72] involved a situation where the insurer knew of the existence of the mortgage through its agent, but did not know that the mortgage contained a covenant to insure for the benefit of the mortgagee. The Court held that in view of the fact that the mortgage was recorded, the insurer was on constructive notice of the provision of the mortgage, and hence his payment of the proceeds subject to a lien to the mortgagor-insured was no defense.

Not only are the insurance proceeds subject to an equitable lien when there has been no change in the mortgagor's relation to the mortgage, but the equitable lien is not destroyed if the mortgagor transfers to another and the grantee assumes the mortgage. This is the case even if the original mortgagor failed to comply with his covenant to insure and the first insurance taken out was by the grantee.[73]

It should be noted that the above discussion is predicated upon a duty of the mortgagor to insure for the benefit of the mortgagee. This will probably be the usual situation, as the mortgage form currently in use in South Carolina contains a provision for the insurance of the property for the benefit

72. 119 S. C. 1, 111 S. E. 805 (1922).
73. Farmers' and Merchants' National Bank of Lake City v. Moore, 135 S. C. 391, 133 S. E. 913 (1926).

of the mortgagee.[74] Should there be no such requirement, apparently there is no equitable lien, and the Court will not raise the *quasi*-trust relationship as in the *Clyburn* and *Green* cases. It should be remembered that the Court in the *Swearingen* case held on the fact that there was no binding agreement to insure for the benefit of the mortgagee, hence there was no equitable lien. This result is further supported by the case of *Steinmeyer v. Steinmeyer*,[75] where the Court refused to impress a trust of the insurance proceeds on a donee for the benefit of the creditors of the donor. The rationale of this decision seems to be that the insurance contract is a personal contract of indemnity, that the donee had a separate insurable interest, and that since the insurance proceeds did not stand for the donated property it would be "inequitable" to refuse to permit the donee the benefit of her contract of insurance. This case is cited fairly frequently in the reports, and this writer thinks it must be regarded as settled that an insurance contract will be regarded as personal, and that a third person can not get the benefit of any proceeds, in the absence of a covenant to insure or a *quasi*-trust raised by the law.[76]

Vendor-Vendee. The law in South Carolina with respect to a vendor-vendee relationship is in considerable doubt, and no case has definitely decided how proceeds of insurance should be allocated between the vendor and vendee. This paper will simply examine what is deemed to be the general rule in the United States and the South Carolina cases which might bear on the subject.

The question to be decided is this. When there is an executory contract for the sale of real estate, and the property is insured by either the vendor or the vendee, and before the conveyance there is a destruction of the property, who is entitled to the proceeds of insurance? There are no South Carolina decisions directly on this point. If the vendor is the person who has insured the property, and the insurance is

74. Form No. 1, "Mortgage of Real Estate," published by R. L. Bryan Co., Stationers, Columbia, South Carolina.
75. 64 S. C. 413, 42 S. E. 184 (1902).
76. If the Mortgagee should insure for more than his interest, *i. e.*, the value of the mortgage debt, it is first doubtful that he would recover in full, despite the *Hunt* case, because of the *Brant* case. Second, if he should recover the full amount, there seems to be no authority in South Carolina as to whether he holds the excess above his mortgage debt for the benefit of the mortgagor, with or without an agreement.

carried in his name, as a general rule the one who bears the risk of loss seems to be entitled to the proceeds of the insurance.[77] This risk of loss may be fixed by the contract, or in the absence of contract provision it may be fixed by law. A minority view seems to hold that even where the risk of loss is on the vendee, the vendor is entitled to the proceeds of insurance.[78] The majority view's rationale is that the property has passed by the doctrine of equitable conversion to the vendee, that the insurance proceeds "stand for" the property, and that therefore the vendee, not the vendor, is entitled to them.[79] The minority retains the theory that an insurance policy is a personal contract of indemnity, in which the vendee, not being a party to the contract, has no right.[80]

When the insurance is procured by the vendee in his own name, the cases hold that the vendee is entitled to the insurance proceeds.[81] In situations where the vendor's policy has been assigned to the vendee, the vendee is entitled to the proceeds.[82] Where the vendee maintains insurance in the vendor's name, the vendor is entitled to offset the proceeds against the balance of the purchase price due.[83] Perhaps these last two situations can be explained as involving a situation where the insurance contract furnished strong evidence of an intention that the risk of loss was intended to fall on the person for whose benefit the insurance is procured, and hence fall into the category of cases where an intention of where the risk of loss was to fall was manifested by the parties to the contract.

It is this writer's opinion that the disposition of the proceeds will turn on two factors. First, if the courts adopt the view that an insurance contract is simply a personal contract of indemnity, the courts will not award the proceeds to anyone but the named insured, or his assignee regardless of risk of loss. Second, if the courts recede from this view and hold that the proceeds stand for the property destroyed, the disposition of the proceeds will depend on which party bears the risk of loss.

77. Annotation, 37 A. L. R. 1324 (1925).
78. Annotation, 37 A. L. R. 1324, 1326 (1925).
79. Millville Aerie v. Weatherby, 82 N. J. Eq. 455, 88 Atl. 847 (1913).
80. Brownell v. Board of Education, 239 N. Y. 369, 146 N. E. 630 (1925).
81. Annotation, 37 A. L. R. 1324, 1331 (1925).
82. Annotation, 37 A. L. R. 1324, 1327 (1925).
83. Annotation, 37 A. L. R. 1324, 1328 (1925).

It will be remembered that the South Carolina Court takes what might be called an intermediate view of the insurance contract.[84] The Court has several times reaffirmed its view that an insurance contract is a personal contract, but it has also held in a few instances that where there is a duty to insure for a third person, or where there is a fiduciary relation to the third person, the proceeds of the personal contract of indemnity will be held for the benefit of the third person. The question then becomes, will the South Carolina Court raise a trust for the benefit of the other party to a contract for the sale of land when one party has insured and there has been no agreement to insure? To answer this question, it is necessary first to determine which party bears the burden of the risk of loss while a contract for the sale of land is executory.

There are surprisingly few cases on this question in the one hundred and seventy-three years of reported cases in South Carolina history. One of the earliest seems to be *Huguenin v. Courtenay.*[85] This case involved a contract for the sale of a leasehold interest in a beach front lot. Prior to the conveyance, the property was partly washed away by an ocean storm. The vendor sued for specific performance on the ground that the equitable title to the leasehold interest was in the vendee and consequently the risk of loss fell on the vendee. The Court refused to grant specific performance. It found that the well established doctrine in South Carolina was that a contract for the transfer of a leasehold interest was not specifically enforceable when the subject matter was destroyed. The Court said that this was the rule after a lessor had entered into possession and *a fortiori* should be the rule if the property was destroyed before entering the land. This case, thus, did not really establish what would be the result if the vendor owned the property in the instant case in fee simple and the contract were therefore specifically enforceable.

A later case is the case of *Good v. Jarrard.*[86] This case involved a contract for the sale of a building and lot, half of the purchase price to be paid at a specified date at which time the conveyance was to be made, and half was to be paid one year later. The property was subject to a mortgage which was to be paid off when the first half of the purchase price

84. See text at p. 270 *supra*.
85. 21 S. C. 403 (1884).
86. 93 S. C. 229, 76 S. E. 698 (1912).

was paid. The building was destroyed prior to the first payment and conveyance. The vendor sued for specific performance of the contract. The Court in a 3-2 decision denied specific performance, holding that in this situation the vendor bore the risk of loss. The reasons given for the holding are numerous. Part of the opinion indicates that since at the time of the fire the plaintiff could not have delivered a fee simple title, the decree was not specifically enforceable. The Court also speaks as if the vendor were at fault in not protecting against loss by procuring fire insurance. In another part of the opinion, the decision seems to turn on the fact that the purchaser had not gone into possession.[87] The case has been cited most frequently as holding that as a general rule the vendor has the risk of loss, regardless of these other circumstances.[88] This is also the view of the holding taken by the dissenting Justices in the *Good* case itself. Mr. Justice Woods delivered a very able dissenting opinion[89] in which he showed how under the doctrine of equitable conversion the vendee was treated as owner of the property for numerous purposes in South Carolina law. He deplored the fact that the case departed from the overwhelming weight of English and American precedent. As a final note to this case Mr. Justice Cothran, dissenting, in *Davenport v. Collins*,[90] a case involving the construction of a codicil to a will, made this remark about *Good v. Jarrard*: "In view of the divergence of opinion on the question, the very able dissenting opinion of Justice Woods, and the elaborate array of authorities sustaining the dissent, appearing in a note to *McGinley v. Forrest*, 107 Neb. 309, 186 N. W. 74, 22 A. L. R. 567, the principle announced in *Good v. Jarrard* cannot be said to be firmly established in this State." It is therefore this writer's opinion that it is not settled in South Carolina which party, vendor or vendee, has the risk of loss in the absence of an agreement.

If it were clear which party had the risk of loss, it might well be argued that the Court would raise a *quasi*-trust relationship for the benefit of that party, with respect to the insurance proceeds. Of course, if the contract of sale itself

87. See the various views for which this case is cited in Annotation, 27 A. L. R. 2d 446, 447, 453, 458, and 468 (1953).
88. McGinley v. Forrest, 107 Neb. 309, 186 N. W. 74, 22 A. L. R. 563 (1921).
89. 93 S. C. at 242, 76 S. E. at 703.
90. 161 S. C. 387, 442, 159 S. E. 787, 806 (1931).

settles the question of risk of loss and the contract is complied with as to procuring insurance, it will be enforced and there will be no problem. If the contract with respect to insurance is not complied with, the Court may impose something analogous to the equitable lien imposed when the mortgagor has the duty to insure for the mortgagee.[91]

If the contract says nothing with respect to the risk of loss, and the law says nothing, will there ever be a *quasi*-trust or lien imposed? The answer to this question, insofar as it has been decided at all, seems to be affirmative. In *Good v. Jarrard,* the vendor was in possession by his lessee. In enumerating nine reasons why the vendor had a duty to insure the property, the Court said:[92]

> "3. The insurable interest of the vendee was negligible, being merely the difference between the value of the land and the agreed price, while the vendor's insurable interest was sufficient to have protected her [vendor] from financial loss. *The insurance of the property would, also, have resulted in the protection of the vendee.*" (Emphasis added.)

Does this mean that if the vendor had insured the vendee would have had a right to demand specific performance and reach the proceeds?

Another dictum appears in *Milhous v. Globe & Rutgers Fire Ins. Co.*[93] In that case the vendor took out a policy with one company for $3,000 and the vendee a policy with the defendant for $1,500. The property was burned. The vendor collected on its policy. The defendant said that since the "property" was valued at $3,000 and since the vendor had collected that amount, the vendee could not collect on its policy. The Court held, however, that the valuation in the policy referred to the interest of the insured and hence the vendee could recover the full $1,500 from the insurer.[94] Mr. Justice Cothran concurred in the result, and in the course of his opinion

91. The writer has been unable to find any case in which one party was obliged by a covenant to insure, and in which the Court imposed an equitable lien on his insurance recovery when he failed to insure. But the case is analogous to the mortgagor-mortgagee situation, in which a lien was imposed.
92. 93 S. C. at 239, 76 S. E. at 702.
93. 161 S. C. 96, 159 S. E. 506 (1931).
94. This case is apparently a case where the Court held that the insurer knew of the plaintiff's limited interest and therefore was deemed to have waived the right to declare the policy null and void.

he says " . . . when the vendor is in possession, it becomes his duty to have the property insured, and . . . such insurance inures to the protection of the vendee as well as of himself. It follows therefore that the insurance taken out by the vendee in possession inures to the protection of the vendor as well as of himself."[95] It thus seems that there may well be a trust imposed or a lien on the proceeds for the benefit of the uninsured party to the executory sale of land contract not in possession, even though the insurance contract is silent as to insurance and risk of loss.[96] As yet, however, this result has not been expressed in the cases.

Landlord-Tenant. Apparently there have been no cases decided in South Carolina involving the division of proceeds of insurance between landlord and tenant. In view of this fact, this writer will state the general rule applicable in most U. S. jurisdictions and comment on to what extent he thinks it will be received in South Carolina.

If there is no agreement between landlord and tenant as to insurance, neither party can recover from the other a portion of the proceeds of the other's insurance contract. The courts, in other words, do not raise a *quasi*-trust between the landlord and tenant.[97] This rule will probably be followed in South Carolina, since the Court is somewhat reluctant to raise the kind of trust it raised in *Green* and *Clyburn*. But conceivably in some situations, for example where the tenant builds a building which is to go to the landlord at the termination of the lease, the Court might find this sufficiently analogous to a life tenant-remainderman situation as to raise a trust.

If there is an agreement to insure, the proceeds in most jurisdictions are divided between lessor and lessee in accord with the interest of each.[98] The courts, in other words, raise an equitable lien on the proceeds where there is an agreement to insure. This is opposed by a minority of jurisdictions, which

95. 161 S. C. at 104, 159 S. E. at 508.
96. This is not to say that the person who is not in possession fortuitously gets the benefit because he is not in possession. But it is to say that the Court would probably divide the proceeds according to the damages each persons sustains. In this way both the party in possession and the party out of possession would receive some benefit. If both vendor and vendee insured it is doubtful that there would be any division, as the *dicta* in the cited cases seem to be predicated on only one person insuring.
97. Annotation, 66 A. L. R. 864 (1930).
98. Annotation, 66 A. L. R. 864, 866 (1930).

hold to the personal contract rationale.[99] The South Carolina Court will probably follow the majority in this, since it is entirely consistent with the equitable lien in the case of mortgage proceeds raised when there was an agreement to insure.

Conclusion

This paper has primarily attempted to study the South Carolina law as to the apportionment of proceeds of insurance between the insured and persons who have interests in the insured subject matter but who are not parties to the insurance contract. In order to do this, it was first necessary to see if a situation could ever exist, under the presently used "interest" policy, in which the insured would recover more than the value of his interest. This was necessary because only if the insured can recover more than the value of his interest, can the problem of apportionment ever arise. It was found that, in addition to cases where the insurer chooses not to contest the overinsurance, the valued policy statute of South Carolina prevents his protesting that the property was overinsured. This result is not immediately apparent on the face of the statute, but has been reached over the years in cases involving the "res" policy, and has recently been reaffirmed in a case involving the "interest" policy.

Having concluded that the insured might, on occasion, recover more than the value of his interest, the paper then considered the law on the apportionment of proceeds in four basic property relationships, *viz.*, life tenant-remainderman, mortgagor-mortgagee, vendor-vendee, lessor-lessee.

In the life tenant-remainderman situation, when the life tenant insures, the Court imposes a trust on his recovery for the benefit of the remainderman, regardless of whether there was a requirement to insure. Perhaps the same result would have been reached if only the remainderman insures.

When the relationship is that of mortgagor-mortgagee, and there is no agreement to insure, the mortgagee can reach the proceeds of the other either in the hands of the mortgagor or in the hands of the insurer. But if there was an agreement for the mortgagor to insure for the benefit of the mortgagee, the Court gives the mortgagee an equitable lien against the proceeds if they have been paid to the mortgagor or if they are still in the hands of the insurer. But if the insurer has

99. Annotation, 66 A. L. R. 864, 866 (1930).

paid the mortgagor without notice of the lien, it is a defense. If the mortgagee insured for an amount in excess of his value, the result is doubtful.

If one party is a vendor and the other is a vendee, and there is no agreement as to insurance or risk of loss, the recovery of either one will probably be divided with the other, depending on the loss to each. And if there is an agreement to insure, the result would probably be the same as in the case of a mortgage, that is, there would be a lien to enforce the agreement.

Finally, if one party is a lessor and the other is a lessee, and there is no agreement as to insurance, each contract of insurance will probably be regarded as a personal contract of indemnity and the other interested person will have no rights under it since he is not a party to the contract. But if there is an agreement to insure, it will probably be enforced by the device of the equitable lien.

If the other interested person not a party to the insurance contract has procured insurance on his own it is doubtful that he can get any recovery from the proceeds of the first party's recovery.

Thus the South Carolina Supreme Court has persisted in regarding the insurance contract as primarily a personal contract of indemnity between the insurer and the insured. Yet in certain situations, which seem to occur when the party who is benefited either would not normally think of insuring his interest or has been lulled into not insuring by actions of the insured, the Court will impose a *quasi*-trust or an equitable lien for the benefit of a person interested in the property insured but who is not a party to the insurance contract.

APPENDIX

(Code of Laws of South Carolina)

(1952)

§ 37-154. *Maximum amounts of policies; stated valued; company contributions.*

No company writing fire insurance policies, doing business in this State, shall issue a policy for more than the value stated in the policy or the value of the property to be insured, the amount of insurance to be fixed by the insurer and insured at or before the time of issuing the policy. In case of total loss

by fire the insured shall be entitled to recover the full amount of insurance and in case of a partial loss the insured shall be entitled to recover the actual amount of the loss, but in no event more than the amount of the insurance stated in the contract. But if two or more policies are written upon the same property they shall be deemed and held to be contributive insurance and if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insurer and the insured, each company shall, in the event of a total or partial loss, be liable for its pro rata share of insurance. Nothing in this section shall be held to apply to insurance on chattels or personal property.