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Insurance - Extent of Loss and Liability of Insurer - Defense of Actions

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case.[13] Another reason is that those previously brought to trial were convicted on the authority of case law then in effect.[14] Retroactive application has extended only to those cases pending appeal when the Mapp decision was rendered.[15]

The Supreme Court, aware of the retroactive effect given to its prior decisions, failed to expressly limit the newly enunciated constitutional right to the future. In such light and based on the constitutional question involved, at least one other case has declared that *Mapp v. Ohio* applies retroactively.[16] The failure to object to the admissibility of evidence should not be a waiver of the constitutional right, for under these circumstances, justice requires a departure from the ordinary waiver rule.[17]

North Dakota has held according to the nonexclusionary rule regarding admissibility of illegally obtained evidence.[18] They must now adopt the exclusionary rule set out in *Mapp v. Ohio*. Pertaining to the question of retroactive application it is submitted that the decision of the court in the instant case is the proper interpretation.

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INSURANCE — EXTENT OF LOSS AND LIABILITY OF INSURER— DEFENSE OF ACTIONS — Defendant insurance company issued an automobile liability policy to insured and certified that the policy complied with provisions of the financial responsibility law. Subsequently plaintiff sustained losses caused by insured's negligence, and following unsuccessful negotiations with defendant, instituted proceedings against insured. Insured failed to notify defendant of the impending suit as required by the policy; subsequently plaintiff recovered a default judgment. Upon defendant's refusal to satisfy

13. **E.g.** State v. Long, 71 N.J. Super. 583, 177 A.2d 609 (1962).

14. Commonwealth v. Mancini, 198 Pa. Super. 642, 184 A.2d 279 (1962).

15. **E.g.** People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478 (1961).

16. Hurst v. People of State of Cal., 211 F. Supp. 387 (N.D. Cal. 1962): See Norton v. Shelby County, 118 U.S. 425 (1886) wherein Mr. Justice Field expressed an analogous theory: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

17. See, Sunal v. Large, 332 U.S. 174 (1947); See generally, Broeder, **The Decline and Fall of Wolf v. Colorado,** 41 Neb. L. Rev. 185, 209 (1961).

18. State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925).

the judgment, plaintiff filed garnishment proceedings against the defendant and recovered a judgment. The Maryland Court of Appeals in affirming the decision *held*, that failure of the insured to comply with the policy requirement of notifying the insurer of suits instituted against insured did not preclude recovery by plaintiff under Maryland's Financial Responsibility Act.[1] *National Indemnity Co. v. Simmons*, 230 M 234, 186 A.2d 595 (1962).

Under a voluntary liability policy the injured party's right to recover normally is subject to any defenses the company may have against the insured.[2] When an automobile liability policy is issued pursuant to and in compliance with a financial responsibility law, the insurer may be held liable to one injured notwithstanding the fact that the insured himself has lost his rights under the policy by failing to comply with its conditions.[3] Under such a statute, the view has been taken that the rights of the injured person are independent of,[4] and not simply derivative from, those of the insured.[5] Thus, failure to give notice of the suit does not constitute a defense to an action by an injured party to recover from the insurer,[6] nor does lack of co-operation by the insured alter the third party's right of recovery.[7]

The majority of states which have enacted financial responsibility laws provide that the policies issued pursuant

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1. Md. Code Ann. art. 66½ § 131(a)(6)(F) (1957). "That the liability of the insurance carrier shall become absolute whenever loss or damage included in such policy occurs, and the satisfaction by the insured person of a final judgment for such loss or damage shall not be a condition precedent to the right or obligation of the carrier to make payment on account of such loss or damage; provided that no suit shall be brought against the insurance carrier until thirty (30) days after the entry of a final judgment against the insured person for such loss or damage." **Cf.**, N.D. Cent. Code § 39-16-20(6)(a) (1960). "The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement by the insured or on his behalf and **no violation of said policy shall defeat or void said policy.**" (Emphasis added.)

2. See generally, 8 APPLEMAN, INSURANCE LAW AND PRACTICE, § 4816 (1962).

3. Royal Indem. Co. v. Olmstead, 193 F.2d 451 (9th Cir. 1951); **Cf.**, Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999 (1932).

4. Farm Bureau Auto. Ins. Co. v. Martin, 97 N.H. 196, 84 A.2d 823 (1951).

5. Prisuda v. General Cas Co. of America, 1 Wis. 2d 166, 83 N.W.2d 739 (1957).

6. Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

7. Merchants Indem. Corp. v. Peterson, 113 F.2d 4 (3rd Cir. 1940).

thereto become absolute after loss occurs.[8] Courts which have had occasion to construe *absolute* have interpreted it in context as absolute, but only up to the statutory amounts.[9] Other requisites for absolute liability are that the policy was required,[10] was certified as proof of financial responsibility,[11] and was issued by the insurer with the knowledge that it was a required and certified policy.[12]

The purpose of financial responsibility laws is to benefit and protect injured members of the public; the injured person's loss of such benefit by the insured's violation of notice and co-operation provisions would not be in accord with such purpose.[13] When an insurance policy has been issued in pursuance of a statute which forbids the operation of a motor vehicle until good and sufficient security has been given, the court should construe the statute and policy liberally in light of the legislative purpose.[14]

It is submitted that an insurer who certifies that an irresponsible motorist is protected under its policy and thus permits that motorist to obtain a license to operate an automobile indiscriminately on the state's highways should not be heard to complain of any resultant liability incurred by the fault of the insured. The insurer issues the certificate in compliance with the statute and is presumed to be cognizant of its provisions. It should realize that the type of motorist required to submit such certificate is the very one against whom the protection has been provided.

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8. **E.g.,** Ill. Stat. Ann. ch. 95½ § 7-317(f)(1) (1958); Iowa Code Ann. § 321A.21 (6) (a) (1962); Minn. Stat. Ann. § 170.40 (6) (1) (1960); Mont. Rev. Code Ann. § 53-438(f)(1) (1947); N.Y. Vehicle and Traffic Laws § 345(i)(1) (1960); S.D. Sess. Laws ch. 212 § 51(6)(a) (1957). Comparable phraseology was found in all state codes except that of Alaska, for which no financial responsibility law could be found. **Supra** note 1.

9. **Supra** note 4.

10. Sutton v. Hawkeye Cas Co., 138 F.2d 781 (6th Cir. 1943); Hartford Acc. & Indem. Co. v. Breen, 2 App. Div. 2d 271, 153 N.Y.S.2d 732 (1956); Cohen v. Metropolitan Cas. Ins. Co., 223 App. Div. 340, 252 N.Y.S. 841 (1931).

11. Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949); New Zealand Ins. Co. v. Holloway, 123 F. Supp. 642 (W.D. La. 1954); Hoosier Cas. Co. of Indianapolis, Ind. v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952).

12. Buzzone v. Hartford Acc. & Indem. Co., 23 N.J. 447, 129 A.2d 561 (1957).

13. See, Hynding v. Home Acc. Ins. Co., **supra** note 3.

14. O'Roak v. Lloyds Cas. Co., 285 Mass. 532, 189 N.E. 571 (1934).