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Recent Cases

RECENT CASES

COURT-APPOINTED COUNSEL: *The Commonwealth's Attorney as counsel for the defense*

The Supreme Court of Appeals of Virginia was recently confronted with the question of the propriety of appointing a Commonwealth's Attorney from one county to defend a person charged with a crime in another county. After advocating what it felt was the best answer to this question, the Court unblushingly reached an opposite holding. In *Yates* v. *Peyton*,[1] the Circuit Court of Cumberland County appointed the Commonwealth's Attorney of Powhatan County to represent the petitioner, who had been indicted on three charges of statutory burglary and one charge of possessing burglary tools. Sometime after the petitioner was convicted of these four charges and sentenced to a total of ten years in prison, the Powhatan Commonwealth's Attorney served a warrant upon the petitioner which charged him with grand larceny in Powhatan County. It is not clear whether there was any action pending against the petitioner in Powhatan County at the time the Commonwealth's Attorney defended him in Cumberland County. It is clear, however, that after the filing of the indictment in Powhatan County, three terms of court were allowed to pass without the petitioner being brought to trial, and the case was automatically dismissed.

With this set of facts before it, the Supreme Court of Appeals reviewed the petitioner's contention that he was denied his constitutional right to the effective assistance of counsel at the trial. In reaching the conclusion (which it did not follow) the Court referred to Council Opinion

1. 207 Va. 91, 147 S.E. 2d 767 (1966).

No. 2 of the Virginia State Bar Opinions of 1965. That opinion pointed out that the question was not answered by any provision of the Constitution of Virginia or of the Code of Virginia or by any opinion of the Supreme Court of Appeals of Virginia or of the Attorney General of Virginia. The committee which investigated the problem suggested that Commonwealth's Attorneys should under no circumstances be appointed to act as defense counsel in criminal cases. But while it flatly condemned the practice, the committee went on to say that it was a matter for the legislature to remedy. The Supreme Court of Appeals also condemned the practice, and, in effect, left the situation unchanged. While affirming the petitioner's conviction, the Court suggested that the practice of appointing a Commonwealth's Attorney to defend an indigent person charged with a crime is bad and should be discontinued.

In evaluating the practice, the Supreme Court of Appeals did not really present reasons for its opinion that the practice should or should not be continued. Several reasons for ending the practice were discussed in *Goodson* v. *Peyton*.[2] In that case, the Commonwealth's Attorney for Cumberland County was appointed to represent a defendant in a criminal case in the Circuit Court of Powhatan County. While it affirmed the defendant's conviction, the court gave several reasons for advocating a blanket prohibition of the practice in the future. First, the Commonwealth's Attorney is an official of the Commonwealth. The defendant he represents may be injured by his aversion to attacking laws, interpretations, practices, and conduct which it is his duty to defend and uphold in his own county. Second, there is always the possibility of a need for a change of venue to the county wherein the Commonwealth's Attorney holds his office.

2. 351 F. 2d 905 (4th Cir. 1965).

The third reason discussed by the Fourth Circuit Court of Appeals is the one which cuts most deeply into the defendant's constitutional right to adequate counsel, and yet is a factor which is almost impossible to measure. This is the possibility that the defendant did not confide in his attorney because he knew he was a state prosecutor. The defendant may keep information to himself for fear of implicating himself in a crime in the county in which his lawyer is Commonwealth's Attorney, or he may simply not trust a man who normally is on the other side of the fence.

The Fourth Circuit Court of Appeals in *Goodson* gave three convincing reasons for ending this practice. Although the Supreme Court of Appeals of Virginia decided *Yates* at a later date than *Goodson,* it passed the problem on to the legislature. Perhaps it would be best for this practice to be prohibited by the General Assembly. But unless and until such legislative action is taken, the Supreme Court of Appeals of Virginia should refuse to affirm the convictions of defendants who were represented by court-appointed lawyers who are also Commonwealth's Attorneys.

ROBERT L. GUTTERMAN

EVIDENCE: *Tacit admissions in criminal trials*

In *Baughan* v. *Commonwealth,*[1] the Supreme Court of Appeals of Virginia held that the defendant's failure to deny an accusation made in his presence was admissible at his criminal trial as a tacit admission of guilt. Both the incriminating statement and the defendant's silence are treated as circumstances from which a jury

1. 206 Va. 28, 141 S.E. 2d 750 (1965), 51 VA. L. REV. 1417 (1966), 79 A.L.R. 2d 890.

may infer that he acquiesced in the truth of the accusation. This decision was in line with the rule followed in a majority of states and supported by leading authorities.[2] In holding that tacit admissions are admissible, *Baughan* reaffirmed several earlier Virginia decisions.[3]

The evidence in the case indicates that police officers apprehended Handy leaving Baughan's home with a bottle of whiskey. When questioned, Handy claimed that Baughan had sold the whiskey to him. Thereupon, the officers obtained a search warrant and returned to Baughan's home with Handy. After knocking at the door for approximately fifteen minutes, the officers and Handy were admitted into the house. Handy accused Baughan of having sold the whiskey to him and having kept several other bottles in a cabinet which then stood empty. Baughan did not protest or deny the accusations. A search subsequently turned up several bottles of whiskey. Baughan was then arrested for selling liquor illegally.

In *Baughan,* the court relied upon the test laid down in *Owens* v. *Commonwealth*[4] which required (1) that the accused must have heard the statement and understood that it incriminated him; (2) that he must have had an opportunity to deny; and (3) that the statement, under the circumstances, must have naturally called for a reply. The court in *Owens* recognized that tacit admissions must be received in evidence with caution. The three requirements were, therefore, a means of limiting the use of tacit admissions in criminal trials.

In spite of these safeguards, several arguments remain

2. *Sparf* v. *United States,* 156 U. S. 51, 56 (1895) (dictum); *Commonwealth* v. *Vallone,* 32 A. 2d 889 (Pa. 1943); 4 WIGMORE, EVIDENCE § 1071 (3d ed. 1940); MCCORMICK, EVIDENCE § 247; UNIFORM RULES OF EVIDENCE 63 (8).
3. *Tillman* v. *Commonwealth,* 185 Va. 46, 37 S.E. 2d 768 (1946); *Owens* v. *Commonwealth,* 186 Va. 689, 43 S.E. 2d 895 (1947); *James* v. *Commonwealth,* 192 Va. 713, 66 S.E. 2d 513 (1951).
4. *Supra* note 3.

for excluding defendant's failure to deny accusations in all situations. The three major objections are: (1) that it violates the hearsay rule,[5] (2) that it amounts to a deprivation of the defendant's privilege against self-incrimination,[6] and (3) that it is unreliable as proof of either acquiescence in the truth of an accusation or consciousness of guilt.[7]

The courts almost universally reject the hearsay argument when the *Owens* test is met.[8] The statement of the accuser is not introduced for its truthful content, but merely as a circumstance which, when considered with the defendant's failure to deny, allows an inference that the defendant has admitted the truth of the statement or has demonstrated a guilty conscience. An innocent man, it is said, would obviously denly a false charge made in his presence.[9]

Most states have also rejected the self-incrimination argument. Relying upon a literal interpretation of the language set forth in state constitutions or statutes (before *Malloy* v. *Hogan*[10]) or in the Fifth Amendment of the Federal Constitution, it is held that the privilege does not apply to police interrogations, but only to testimonial compulsion in judicial proceedings.[11] In *Owens*, the Virginia court expressly rejected the argument that the defendant's privilege guaranteed by the Virginia Constitution[12] was violated.[13] However, the prevailing rule today in federal courts (with the exception of the courts of the District of Columbia) is that tacit admissions should be

5. *Baughan, supra* note 1, at 33.
6. *Owens, supra* note 3, at 695.
7. *Vallone, supra* note 2 (dissent).
8. Annot., 79 A.L.R. 2d 890 (1961).
9. *People* v. *Smith*, 25 Ill. 2d 219, 184 N.E. 2d 841 (1962).
10. 378 U. S. 1 (1963).
11. 8 WIGMORE, EVIDENCE § 2251 (3d ed. 1940).
12. VA. CONST. § 8.
13. *Supra* note 3, at 700.

excluded.[14] In *Helton* v. *United States,*[15] the court said that the protection of the Fifth Amendment does not begin with the trial.

> History tells us that it was the preliminary inquisition, prior to trial on the merits, which gave rise to the abuses, which resulted in the recognition of the privilege against self-incrimination. Under our law it is not the function of police officers to determine for the benefit of the jury whether or not a person under arrest on suspicion of crime has given a sufficient explanation, or any explanation at all.[16]

The existence of the privilege also renders defendant's silence ambivalent at the very least because an assertion of the privilege or silence is legally consistent with innocence.[17] Whether the privilege extends to police interrogation or not, the commonly-held belief that one has a constitutional right to remain silent[18] would make defendant's silence under the circumstances an unreliable proof of acquiescence in the truth of the accusation.

The third objection has found favor with more courts than the preceding two. In a recent New Jersey decision,[19] the doctrine of assenting silence was said to be out of touch with what the behaviorist sciences have taught us in recent years. Defendant may be prompted to remain silent by factors other than a guilty conscience. For example, he may believe that "silence in the face of police questioning is the safest course to follow and that it is

14. Comment, 31 U. CHI. L. REV. 556 (1964).
15. 221 F. 2d 338 (5th Cir. 1955).
16. *Id.* at 350.
17. *Grunewald* v. *United States,* 353 U. S. 391, 422 (1957); 8 WIGMORE § 2251; Noonan, *Inferences from the Invocation of the Privilege,* 41 VA. L. REV. 311 (1955).
18. 79 HARV. L. REV. 935 (1966); 11 DE PAUL L. REV. 307, 317 (1962).
19. *State* v. *Garcia,* 83 N. J. Super. 345, 199 A. 2d 860 (1964).

the wise man who refuses to enter into a debate with his accusers—regardless of whether he is guilty or innocent."[20] Admittedly, silence may indicate a consciousness of guilt. "Equally, it may indicate fright, contempt, ignorance, or simply cautious reluctance to do verbal battle without counsel."[21]

The courts have been anything but consistent where tacit admissions of one under arrest are concerned. In *Plymale* v. *Commonwealth*,[22] the court held that defendant's silence was inadmissible because he had been advised of his right to remain silent. In a California case,[23] defendant's silence was held to be inadmissible because he had *not* been advised of his right to remain silent.

Since *Baughan*, however, the rule regarding tacit admissions has been changed by a brief footnote in *Miranda* v. *Arizona*.[26] In footnote 37, the Court said:

> In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

The immediate effect of such a rule is that the defendant's privilege begins to operate during police custodial interrogation (thereby excluding evidence of his failure to deny accusations during that period) rather than dur-

20. 79 HARV. L. REV. 935 (1966).
21. Comment, 15 SYRACUSE L. REV. 590, 592 (1962); *cf.* Brody, *Admissions Implied from Silence, Evasion and Equivocation in Massachusetts*, 42 B. U. L. REV. 46 (1962); Gaynor, *The Admission in Evidence of Statements Made in the Presence of the Defendant*, 48 J. CRIM. L., C. & P. S. 193 (1957).
22. 195 Va. 582, 79 S.E. 2d 610 (1954).
23. *People* v. *Dykes*, 52 Cal. Rptr. 537 (1966).
24. 384 U. S. 436 (1966).

ing the period following arrest. "Arrest" and "custody" are not synonymous. The *Miranda* Court said that an individual must be advised of his right to remain silent and to have counsel when he is "first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way."[25] This is a much broader concept than the notion of arrest in Virginia. In *Owens,* for example, the defendant was subjected to extensive police questioning during which he failed to deny an accusation made by his accomplice. "Not until after [Owens] had remained silent, in the face of Vaughan's accusation was the accused arrested."[26] Applying the *Miranda* rule, evidence of Owens' failure to deny the accusation would not be admissible.

A Pennsylvania case decided in October, 1966, recognized the effect of *Miranda* on its rule regarding tacit admissions.[27] In that case, the defendant while in the custody of police failed to protest when his accomplice accused him of committing murder. Because *Miranda* is not retroactive,[28] the rule did not apply in that particular case. The court said, nevertheless, that the rule in the future was that the admission into evidence of a tacit admission so taints the proceedings that defendant is deprived of a fair trial by federal constitutional standards.

There is some question whether *Miranda* applies to the facts of *Baughan.* The accusation was made in defendant's home by Handy. Was this within the purview of *Miranda?* One writer has suggested that it is.[29] He cites a California case holding that a woman who confessed to

25. *Id.* at 477.

26. *Supra* note 3, at 704.

28. *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

27. *Commonwealth ex. rel. Shadd* v. *Myers,* 423 Pa. 82, 223 A. 2d 296 (1966).

29. Graham, *What Is* Custodial Interrogation?: *California's Anticipatory Application of* Miranda v. Arizona, 14 U.C.L.A. L. Rev. (1966).

police in her apartment was "in custody."[30] One may recall, however, that *Miranda* expressly allowed field investigations without the restrictions imposed on custodial interrogations.[31] Although interrogations in the police station apparently come within the *Miranda* rule, it does not necessarily follow that all interrogations carried on in the field are non-custodial. Regardless of the interpretation of "custodial interrogation," it seems inescapable that the privilege will be extended to any situation in which an accusation is made. To hold otherwise would allow for the manufacture of evidence by police; the very evil sought to be eliminated by the rule enunciated in footnote 37 of *Miranda* would still exist without a substantial basis for limiting the privilege to situations in which the accused was in custody.

Furthermore, the logic of *Escobedo* v. *Illinois*[32] suggests that the privilege against self-incrimination would indeed apply even where the accusation was made before the accused was "in custody." The very nature of the statement made to the defendant or in his presence demonstrates that the process is no longer investigatory but is now accusatory.

PATRICK MCSWEENEY

AUTOMOBILE INSURANCE: *Medical payments coverare construed as a separate contract*

May an injured person recover medical expenses from the tortfeasor's insurance carrier under the medical pay-

30. *People* v. *Furber,* 43 Cal. Rptr. 771 (1965); Comment, 53 CAL. L. REV. 337, 359 (1965); see also *People* v. *Wilson,* 48 Cal. Rptr. 55 (1965) (detention on the street); Analogies from federal cases suggest the same result: *Henry* v. *United States,* 361 U. S. 98, 103 (1959); *Kelley* v. *United States,* 298 F. 2d 310 (D. C. Cir. 1961).
31. *Supra* note 24, at 477.
32. 378 U. S. 478 (1964).

ments provisions of an automobile insurance contract, after having received full payment for the settlement of the tort claim?

This issue was presented to the Supreme Court of Appeals of Virginia for the first time in the case of *Moorman* v. *Nationwide Mutual Insurance Company.*[1] In this case, the plaintiff was injured while a passenger in the insured's car, which was driven by the insured's wife at the time of the accident. The tort claim against the insured's wife was settled, and Nationwide Mutual Insurance Company (Nationwide) paid the claim pursuant to its contract with the insured.

The plaintiff later filed a motion for judgment against Nationwide alleging that it had breached its contract by refusing to pay her medical expenses pursuant to "Coverage G" of the insurance contract involved, which read in part:

> Coverage G-Medical Payments
>
> To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral expenses:
>
> Division 2 — to or for any other person who sustains bodily injury, caused by accident, while occupying
>
> (a) the owned automobile, while being used by the Named Insured, by any resident of the same household or by any other person with the permission of the Named Insured . . .[2]

1. 207 Va. 244, 148 S.E. 2d 874 (1966).
2. *Id.* at 246.

On the issue of whether the plaintiff could recover under this contract after having settled the tort claim against the insured's wife, the Court stated the following:

> There is a conflict in the decisions as to whether a person injured by reason of the operation of an insured automobile may recover under both the general liability clause and the medical payments clause of the insurance policy. The interpretation and effect of medical payments clauses of such policies are not uniform. *The decisions are dependent upon the peculiar facts of the particular case, and especially on the provisions of the insurance contract.*[3]

The Court noted that Nationwide had prepared this insurance contract and had chosen to list separate and distinct coverages for which a separate and specific premium was charged. Nationwide had listed certain exclusions from the medical payments clause of the contract, but none are relevant under the stated facts. The Court added that Nationwide could have made a specific exclusion to cover such a case as this and rejected the contention that the policy as a whole showed that Nationwide did not intend to provide more than one medical payment to each injured party.

Nationwide's contention was that the plaintiff had already received payment for the medical expenses in the settlement of the tort claim, and that no intention was expressed in the policy that she should receive this amount under both the medical payments clause and by way of damages in the tort claim against the insured's wife. The Court found that the contract was not ambigious and said concerning the medical payments clause:

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3. *Id.* at 246-247 (emphasis added).

> . . . It is an absolute and unconditional agreement to assume and pay to an injured person "who sustains bodily injury caused by accident while occupying" the insured's automobile, medical expenses not exceeding $1,000.00. *Consequently, the coverages are separate and distinct, and a specific claim can arise under each coverage.*[4]

The plaintiff was allowed to recover from Nationwide for breach of contract since the plaintiff was held to be a third party beneficiary to the contract. The Court followed the rule of *Severson* v. *Milwaukee Automobile Insurance Company.*[5] That case held that the medical payments provision of the policy before the court was a separate and distinct contract on facts similar to those in *Moorman.*

Therefore, it appears that the answer to the original question is that the injured party may recover from the tortfeasor's insurance company under the medical payments clause, if that clause is found to be a separate and distinct contract to which the injured party is a third party beneficiary. The next problem is to determine what causes a given provision to be a separate and distinct contract within an automobile insurance policy. Surely, this will be the subject of future litigation in Virginia, but *Moorman* indicates that one of the considerations is whether or not the policy lists separate coverages with a specific premium for each coverage. Rather than debate the wisdom of following *Severson,* let us consider the impact that *Moorman* will have on Virginia practice.

In addition to possible litigation about whether a given policy contains a separate contract concerning medical payments, the attorneys who represent plaintiffs will find

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4. *Id.* at 247 (emphasis added).
5. 265 Wis. 488, 61 N.W. 2d 872, 42 A.L.R. 2d 976 (1953).

themselves examining the insurance policies of the defendants in automobile collision cases. The purpose of such examination will be to determine whether or not the plaintiff has a cause of action based on the policy as well as the tort action against the tortfeasor. This will be a consideration even in cases in which the tort claim has been settled or disposed of in the court, unless the statute of limitations on contract actions has already run. *Moorman* states that liability under a separate medical payments clause does not depend on the negligence of the insured, but rather is a contract and this is a separate undertaking by the insurance company.

Another likely result of this case is that the insurance companies will begin to draft their policies so that the various coverages will not be held to be separate and distinct contracts. To this writer, it seems somewhat unfair that an injured person be allowed to recover the same medical expenses twice. However, *Moorman* suggested an easy way to correct the results from an insurance standpoint. The insurance companies may specificially provide that no payments be allowed under the medical payments clause of its policy if the actual medical expenses of the injured party have been recovered from the insured. Possibly such a clause should disallow payment if the injured party recovers his expenses in any manner whatever. Clauses to this effect should appear in any new policy issued in Virginia. For those cases arising under old policies, perhaps a carefully worded release would suffice to eliminate the possibility of a double payment by the insurance companies.

WILLIAM O. TUNE, JR.

INSURANCE: *Insurer's liability for a judgment in excess of the policy limits upon its refusal to settle the case*

Whether an insurer is liable for an amount in excess of the policy limits where it had an opportunity to settle within the limits but refused to do so has been the subject of increasing litigation in the last twenty years. However, the problem was not considered in Virginia until 1966.

The earlier cases on this question tend to disregard any obligation of the insurer to the insured and hold that where the right to settle is reserved by the insurer, which is normally the case, the company has no duty to settle the case.[1] At the other extreme there would be an absolute duty on the insurer to settle within the policy limits, if possible, but the courts have not gone this far. The Supreme Court of Appeals of Virginia confronted the issue in *Aetna Cas. and Sur. Co.* v. *Price*,[2] and placed this jurisdiction in accord with a majority of the courts.

In *Aetna* the plaintiff in the lower court had a medical malpractice liability policy, which had the usual provisions retaining control of investigation and defense by the named insurer. Control over settlements was also retained by the insurer (the normal situation) unless the insured wished to possibly subject himself to financial responsibility. In a prior action for malpractice there was a judgment rendered against the doctor substantially in excess of the policy limits, and it is significant that in this prior action the insurer had an opportunity to settle within the limits and refused to do so, giving rise to the case under consideration. In the lower court the doctor recovered a judgment for the excess, and on appeal the Virginia Court considered for the first time whether an insurer may be held liable for a judgment in excess of the

1. *C. Schmidt & Sons Brewing Co.* v. *Travelers' Ins. Co.*, 244 Pa. 286, 90 Atl. 653, 654 (1914).
2. 206 Va. 749, 146 S.E. 2d 220 (1966).

policy limits where the insurer had the opportunity to settle within the policy limits but refused to do so. The Court recognized the possible conflict of interest present. For example, if the proposed settlement is close to the policy limits, the insurer has little to lose in litigating the case since it would only be liable to the policy limits anyway, while the insured may lose much in litigation because he would have to pay that part of the judgment in excess of the limits out of personal funds. The Court said that since the defense is in the insurer's control, "a relationship of confidence and trust is created in the insurer and the insured." This being true, the Court followed the vast majority of jurisdictions in establishing a duty owed to the insured by the insurer.

The Court had to further consider what duty the insurer must fulfill before it will be protected from liability for the excess. The Court could have adopted one of a number of standards including an absolute duty to protect the insured, a duty to use good faith, a duty to exercise due care, or a duty to use good faith with the burden of proof on the insurer.[3] The vast majority of jurisdictions require the insurer to exercise either good faith or due care. Virginia adopted the more popular standard of good faith.

The Virginia Court pronounced that the insurer must exercise good faith, but it should be recognized that there is no substantial agreement on what constitutes good faith as is evident from the following examples. In *St. Joseph Transfer & Storage Co.* v. *Employer's Indem. Corp.*,[4] the Court, in recognizing the good faith standard, said that the insurer was to do nothing to prejudice the insured where the insurer would receive no benefit from such action, but if the insurer stood to benefit there was

3. Annot. 40 A.L.R. 2d 168, 173 (1955).

4. 224 Mo. App. 221, 23 S.W. 2d 215, 220 (1930).

no duty other than contractual obligations. On the other hand in *American Fid. & Cas. Co.* v. *G. A. Nichols Co.*, the Court said that the insurer must give "at least equal consideration to the interests of the insured."[5] In *Aetna*, Virginia gave an intermediate definition, quoting *Radio Taxi Ser., Inc.* v. *Lincoln Mut. Ins. Co.*,[6]

> . . . the obligation assumed by the insurer with respect to settlement is to exercise good faith in dealing with offers of compromise, having both its own and the insured's interests in mind. . . . A decision not to settle . . . must be an honest and intelligent one in the light of the company's expertise in the field. Where reasonable and probable cause appears for rejecting a settlement offer and for defending the damage action, the good faith of the insurer will be vindicated.[7]

In applying this standard the Court considered the thoroughness of the company's investigation, the preparation and handling of the case, the diligence used in keeping the insured informed of negotiations, and the competency of counsel. The Court also held that the insurer's failure to accept counsel's suggestion as to settlement is not bad faith *per se*.[8]

There is authority to support a standard of due care although the distinction between due care and good faith is nebulous due to the varying application of each standard.[9] Even though the distinction is vague, it has been pointed out that in applying the standard of due care the jury is called upon to determine the reasonableness of a settlement, a decision that would challenge an experienced

5. 173 F. 2d 830, 832 (10th Cir. 1949).
6. 31 N.J. 299, 157 A. 2d 319, 322, 323 (1960).
7. *Supra* note 2, at 761.
8. *Id.* at 764.
9. Annot. 40 A.L.R. 2d 168, 171 (1955).

lawyer and a decision that a jury is not competent to make.[10] Considering this distinction and the nature of juries to render substantial verdicts against insurance companies, it would seem that the Virginia Court was wise in adopting the majority view.

WILLIAM L. DUDLEY, JR.

CONTRACTS: *A breaking away from the traditional law of seals in Virginia*

In the recent case of *Humble Oil Co.* v. *Cox*,[1] the Supreme Court of Appeals of Virginia held that a lease agreement under seal and signed by the lessor was not an irrevocable offer. Cox, the owner of a service station, signed an ordinary 10 year lease form in the presence of a notary public, with the letters (L.S.) following his signature. The lease was sent to lessee, Humble, for approval and execution. On the following day, before acceptance by Humble, Cox revoked execution of the lease. After Cox's revocation, Humble accepted and executed the lease. The case was first heard on a Motion for Declaratory Judgment by Cox. On appeal, the Court conceded that Cox, by signing the agreement, thereby made a valid offer, but not an irrevocable one.

Corbin is authority for the view that such an offer is irrevocable: ". . . by the common law, sealing and delivery make that promise binding and the power of acceptance as safe from any revocation as would the payment of a consideration . . . The offeree is not bound by anything: he has a binding option, an irrevocable offer.'"[2]

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10. Epps & Chappell, *Insurers Liability in Excess of Policy Limits: Some Aspects of the Problem,* 44 VA. L. REV. 267, 271 (1958). (emphasis added).
1. 207 Va. 197, 148 S.E. 2d 756 (1966).
2. 1 CORBIN, CONTRACTS §48 (1963); ANSON, CONTRACTS §50 (2d Am. ed.).

Williston, in referring to an option under seal, asserts: "A court of law as well as a court of equity assumes the irrevocability of such offers."[3]

The leading case of *Watkins* v. *Robertson*[4] was cited and distinguished by the Court. In *Watkins,* A made an offer under seal and for one dollar consideration, which B accepted. A alleged revocation of the offer before acceptance by B and denied consideration for the option. The Court held that the offer under seal was not revocable and when accepted became a binding contract which a court in equity could specifically enforce. The Court in *Watkins* said:

> Whether the contract here is to be treated as a contract made for valuable consideration depends, first, upon what force and effect is to be given a contract under seal over a like contract not under seal. . . . In Virginia, we have no statute abolishing or modifying the common law rule as to the seal upon executory contracts.[5]

In *Watkins,* the language of the instrument evidenced a clear intent to grant an option contract. The Court in *Humble* noted that Cox proposed to enter into only one contract, a bilateral one, imposing mutual rights and duties: "It is one thing to enforce a one-sided promise made with the solemnity evidenced by a seal. It is quite another thing to enforce an implied promise that was never intended by giving to a seal an effect that was never intended."[6] The purpose of the seal in *Humble,* according to the Court, was to comply with Virginia law

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3. 5 WILLISTON, CONTRACTS §1441 (rev. ed. 1937).
4. 105 Va. 269, 54 S.E. 33 (1906).
5. *Id.* at 278-279. See also 4 M.J., CONTRACTS §23 (1949).
6. *Id.* at 202.

that required a demise of property for a term of more than five years to be in the form of a deed.[7]

Indicating that *Humble* was a case of first impression in Virginia, the Court cited *Los Angeles Rams Football Club* v. *Cannon*[8] as the case most nearly on point. The Virginia Court said that the California Court had rejected the argument that Cannon, by signing a potential bilateral contract and accepting the tender of part of the specified consideration, had made an irrevocable offer or option contract. This writer submits that a close reading of the case will reveal no such holding. The California Court held that on the special facts of the case Cannon took possession of the check on condition that the contract would be later consummated. The unendorsed check was returned to the Rams before the contract became effective. The agreement contained no seal as a substitute for consideration, as in *Humble,* and the bonus check was held not to constitute a valid consideration for holding the offer open for a reasonable time under these special circumstances.

The instrument executed by Cox in *Humble* was in the nature of an indenture deed, containing promises from both parties. Whether the first signer is bound on such a deed is a question of intention, according to Professor Williston:

> Though one part only of an indenture is executed, the deed will nevertheless be binding if that part is delivered; but if there was no intent to deliver any part until all the parts were executed, there is no obligation until this condition is fulfilled. In any event, intent to deliver is the controlling element.[9]

7. VA. CODE ANN. 1950 §55-2 (Repl. Vol. 1959).
8. 185 F. Supp. 717 (S.D. Cal. 1960).
9. 1 WILLISTON, CONTRACTS 210 (3d ed. 1957).

The rules applicable to deeds are generally applicable to leases.[10] "An ordinary lease is a partly bilateral contract."[11]

Section 105 of the *Restatement of Contracts* (2nd), cited by the Virginia Tribunal as the applicable law in *Humble,* speaks not of a deed or lease but in more general terms of a "conveyance" or "document." When such a document contains mutual promises by the parties, rather than a single promise only of the promisor, ". . . acceptance by the grantee or promisee is essential to create any contractual obligation *other than an option contract binding on the grantor or promisor.*"[12] Both *Williston* and this section of the *Restatement,* it will be noted, focus primarily on the intent of the parties. The comment to Section 105 speaks of such intent: "Moreover, it is ordinarily not contemplated that one promise shall be made without the other. But if consideration is given or is not required *and an intention to create an option contract,* one promise may be made irrevocable, the promisee remaining free to accept or reject. See Sec. 24A."[13]

On the facts in *Humble,* Cox did not intend the surrender of the agreement to Humble's agent to be a legal delivery and he was not thereby bound. There was no *intent* on the part of Cox to *create* an option contract, an exception to the rule in Sec. 105. Thus there was no option contract created by the signing and sealing of the indenture by Cox.

Section 19 of the tentative draft of the *Restatement,* also mentioned by the Court, states: "Except as stated . . . [under special rules] . . . the formation of a contract requires a bargain in which there is a manifestation of

10. 3 AMERICAN LAW OF PROPERTY §1272 (1952).
11. 6 WILLISTON, CONTRACTS §890 (3d ed. 1962).
12. RESTATEMENT (SECOND), CONTRACTS §105 (Tent. Draft No. 2, 1965). (emphasis added).
13. *Id.* §105, comment a. (emphasis added).

mutual assent to the exchange and a consideration." (Section 24A speaks of an "option" as an "*option contract,*" having the same requirements for its formation as any other contract.) Comment a of Section 19 notes an exception: "*Where contracts under seal still have their common-law effect, neither manifestation of assent by the promisee nor consideration is essential.*" (emphasis added). Under Section 24A (Option Contracts), Comment c, the common law rule is again recognized by the *Restatement:* "The traditional common law devices for making an offer irrevocable are the giving of consideration *and the affixing of a seal.*" (emphasis added). See illustration 1.: "A promises B under seal . . . that A will sell 100 shares of stock in a specified corporation for $5,000 at any time within thirty days that B selects. There is an option contract under which B has an option." According to Section 35A: ". . . the power of acceptance under an option contract is not terminated by rejection . . . of the offeror. . . ."

In summary, it would appear that there was ample common law authority to hold that the lease signed and sealed by Cox was an irrevocable offer and, there being no time in the instrument stated for acceptance, that the offer would have remained open for a reasonable time. The acceptance by Humble within 24 hours would have been within a reasonable time and the parties would then have had a binding contract. The text writers and the authors of the *Restatement* seem to recognize this common law rule. *Watkins,* cited by the Court, says that there is no statute abolishing the common law rule in Virginia.

Did the Virginia Court in *Humble* break away from this common law principle? Limiting the holding to the facts of this case, there still seems to be some departure from the rigid tradition of the seal. This is in line with a

recent legislative trend within the United States to rid the seal of its common law effect.[14]

In future litigation in Virginia, it would seem to this writer, that unless the offeree clearly manifests his intent to be bound by an option contract, the offer under seal will be a revocable one. This would certainly be true if the seal could serve some other purpose, such as the necessity of making the conveyance "a deed" for a term of more than five years, as was true in *Humble.* If the term was for less than five years, the Court could hold that the seal was mere surplusage, noting that there was no clear intent manifested to form an option contract as is necessary in Sections 19, 24A, and 105 of the *Restatement,* as was expressed in *Humble.* If the case involved a "bare" offer under seal with no reciprocal promise by the offeree, there is Virginia authority to the effect that this alone would make the offer irrevocable for a reasonable time.[15] Whether the Court would follow this authority or follow the "spirit" of *Humble* and the *Restatement* is an open question. Finally, if the offer involved a sale of goods that would fall within the *Uniform Commercial Code,* the law regarding seals would not apply.[16]

Absent clear intent by the parties, *because* of the weight afforded the *Restatement* by the Court in *Humble,* this could be the case precedent needed for the repudiation of the common law seal in Virginia.

GRAYSON M. SANDY, JR.

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14. RESTATEMENT (SECOND), CONTRACTS § 189 (Tent. Draft No. 2, 1965).
15. 4 M. J., CONTRACTS §23 (1949).
16. VA. CODE ANN. 1950 § 8.2-203 (Added Vol. 1965).

CRIMINAL PROCEDURE: *Appeal or Russian roulette*

American case law, Federal and State, substantially supports the proposition that the accused may be sentenced to a harsher punishment when he has successfully appealed and is being retried for the same offense.[1] However, the stage is set for the courts to overrule this precedent. The revisionary process was initiated in *Green* v. *United States,*[2] and was subsequently employed in *People* v. *Henderson,*[3] and in *State* v. *Wolf*[4] to prevent harsher punishment on retrial. The Court in *Green* ruled that the accused, after being found guilty of arson and second degree murder on an indictment for arson and murder, could not be convicted of first degree murder on a retrial after a successful appeal. This decision at face value is no departure from widely accepted principles.[5] This case predicts revised judicial thinking not in its actual conclusion but in the reasoning employed. The court reaches its decision on two lines of argument.

1. Green was in jeopardy of being found guilty of first degree murder on the indictment and instructions given at his first trial. The jury by finding Green guilty of second degree murder, implicitly found him innocent of the greater offense of first degree murder. Since Green was tried once for first degree murder and found innocent, it would be double jeopardy to try him again for first degree murder.

2. An accused in a criminal trial is guaranteed due process of law by the Constitution. To enforce this right,

1. *Stroud* v. *United States,* 251 U.S. 15 (1919); *State* v. *Williams,* 261 N.C. 172, 134 S.E. 2d 163 (1964); 21 AM. JUR. 2d *Crim. Law* § 167 (1965).
2. 355 U.S. 184 (1957).
3. 60 Cal. 2d 482, 386 P. 2d 677 (1964).
4. 46 N.J. 301, 216 A. 2d 586 (1966).
5. *Leigh* v. *Commonwealth,* 192 Va. 583, 66 S.E. 2d 586 (1951); *Cates* v. *Commonwealth,* 111 Va. 837, 69 S.E. 520, 61 A.L.R. 2d 1155 §6 (1910).

he must be able to appeal a trial denying him due process. If Green's conviction for first degree murder on the second trial is allowed, then he is being punished for a greater crime because he pursued a successful appeal. This conclusion is based on the fact that if he had not appealed, he could not be convicted for the greater crime. Allowing the greater sentence to stand after a successful appeal would be placing an unconstitutional condition on the claiming of a constitutional right.

The idea of double jeopardy is that the state with its power and resources should not be allowed a second chance to subject a man to the possibility of being convicted for the same offense.[6] A man should not be terrified and harrassed by being tried again and again for the same offense. The protection is against being tried a second time, regardless of whether the jury found a verdict of guilt or innocence, or even reached a verdict.[7] The pure theory of double jeopardy would protect a defendant, who successfully appealed, from being retried even for the same offense. This was the practice in England until 1964.[8] American jurisdictions have avoided this conclusion by saying that the accused waives his right against being tried for the same offense when he appeals.[9] *Green* decided that this waiver should not extend to a greater degree of the same crime of which the accused was convicted in the first trial. The jury, by finding the accused guilty of a lesser included offense, has in effect said, "We find the accused guilty of second degree murder and innocent of murder in the first degree." Is it logical to say

6. *Cross* v. *Commonwealth,* 195 Va. 62, 77 S.E. 2d 447 (1953); *United States* v. *Ball,* 163 U.S. 662 (1896); *Green* v. *United States,* 335 U.S. 184 (1957); U.S. CONST. amend. V; VA. CONST. Bill of Rights, §8.
7. *Coleman* v. *Tennessee,* 97 U.S. 509, 100 A.L.R. 2d 371 (1878); 21 AM. JUR. 2d *Crim. Law* § 167 (1965).
8. ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE 861, 912 (35th ed. 1962).
9. *Supra* note 6.

that the accused by appealing an injustice leading to his conviction for second degree murder has waived his immunity to another indictment for first degree murder? He has been found innocent of murder. To allow a retrial for murder would be contrary to the very essence of the protection against double jeopardy. A waiver must be a voluntary and intentional relinquishment.[10] Waiver of the innocent verdict would not be voluntary and, at the time of the appeal, not even contemplated. This reasoning applies with equal force to allowing greater punishments.[11] The jury recommends the punishment in most states just as they give the verdict, and both decisions are based on the finding of fact. The jury has decided that the accused is not guilty of a crime deserving a more serious classification or a more serious punishment. If it is implicit in the verdict that the jury has found the accused innocent of any higher degree of crime as argued in *Green,* it is also implicit that they have found him innocent of a crime deserving a higher punishment. In fact, many jurors arrive at the punishment they wish to award and *then* decide the degree of crime to suit the penalty they believe is deserved. Mr. Justice Frankfurter's dissent in *Green* predicted the consequence of the decision:

> It is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment.[12]

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10. 56 AM. JUR. *Waiver* §2 (1947).

11. English Courts so rule: Samuels, *Criminal Appeal Act, 1964,* 27 MODERN L. REV. 568, 572 (1964). "Upon reconviction the accused may not be given a sentence of greater severity than that imposed at the original trial."

12. *Supra* note 2, at 213.

The Court in *People* v. *Henderson*[13] applies this reasoning to overrule a death sentence on a retrial when the accused had been sentenced to life imprisonment on a prior trial for the same offense.

The opinion in *Green* reaffirmed the doctrine that a person cannot be forced to waive a constitutional right as a prerequisite to claiming other rights protected by the Constitution.[14] If the accused does not appeal, the double jeopardy clause of the Virginia and Federal Constitutions will protect him from retrial for the same offense and from an increase in his sentence.[15] The opinion in *Green* argues that it is an unconstitutional condition for appeal to force the accused to waive this protection. If there is an error in a criminal trial which violates the constitutional rights of the accused, he must have the right to appeal the decision so as to remedy the denial of his constitutional right. The courts must give a person an available and reasonable remedy to protect these constitutional rights. If the accused's remedy (the right to appeal) is preconditioned on the waiver of his constitutionally guaranteed freedom from double jeopardy, the remedy is not reasonable. To force the accused to take the risk of an increased punishment upon a successful appeal is to force the accused to take a "desperate chance."[16] This argument is valid only if the error justifying the appeal and reversal was of a constitutional nature.[17] If the error in the trial court did not violate the accused's constitutional rights, then conditioning of an appeal on an unjust condition or even denial of an appeal would not be unconstitutional. A recent New Jersey case avoids this

13. *Supra* note 3.

14. *Unconstitutional Conditions,* 73 HARV. L. REV. 1595 (1960).

15. Ex parte *Lange,* 85 U.S. (18 Wall.) 163 (1874).

16. *Supra* note 3.

17. Van Alstyne, *In Gideon's Wake: Harsher Penalties and the Successful Criminal Appellant,* 74 YALE L. J. 606 (1965).

rebuttal by placing its decision on a procedural basis. In *State* v. *Wolf,* the court said:

> . . . since the State has granted the universal right of appeal, standards of procedural fairness forbid limiting the right by requiring the defendant to barter with his life for the opportunity of exercising it.[18]

The Court used its power to regulate its procedure to prevent higher punishment on retrial. To force the accused to waive his protection from a greater punishment is an unreasonable condition for appeal.[19]

Allowing harsher punishments on retrial attaches a great danger to applying for a criminal appeal. It places a "grisly choice" on the accused and forecloses many justified appeals. In *Fay* v. *Noia,*[20] the accused, Noia, was sentenced to life imprisonment on the basis of a coerced confession while his two companions were sentenced to death for the same offense. It was unfair to force Noia to make a choice between lanquishing in prison after being denied due process in the trial court or petitioning for an appeal which, if successful, might well lead to a death sentence on retrial. This is forcing the accused to play Russian roulette. *Green* has pointed the way for courts to eliminate this "grisly choice" and prevent harsher punishments on a retrial, and the decisions in California and New Jersey indicate the probable trend of the courts.

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18. *Supra* note 4, at 590.
19. *Supra* note 3, at 686.
20. 372 U.S. 391 (1963).