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NOTES
"Preventive Justice"—Bonds to Keep the Peace and for Good Behavior

It would probably be a considerable surprise to many lawyers in this country, nurtured as they are in the atmosphere of American constitutional safeguards, to learn that an old common law power of justices of the peace, crystallized in two ancient English statutes, furnishes the basis for a group of American decisions and statutes which, although until recently the subject of very little comment, appear to be in violation of the spirit, if not


For recent newspaper notice of a bond to keep the peace see N. Y. Times, Dec. 7, 1939, p. 14, col. 3 (George Jessel required to give $1,000 bond at instance of his former wife, Norma Talmadge).
the letter, of various constitutional guarantees. This is the power to require a bond, not for a crime committed, but for what the justice feels is a threat of future crime—it is buttressed by power to commit one failing to give the required bond.

Early in the history of English jurisprudence the need for some method of crime-prevention was felt. This need was particularly great in the reign of Edward III, when the machinery of the criminal law seemed to be unable to preserve the peace of the realm. Consequently, justices of the peace were empowered to require of those "not of good fame" bonds for their good behavior. Such bonds were forfeit to the king if the one bound should "misbehave" during the term of the bond. For failure to give a bond, the one "not of good fame" was committed to jail by the justice. An analogous power, indicated by statute in the reign of Edward III, was the power to require a bond to keep the peace. This bond was particularly designed to prevent a specific threatened crime, and was granted at the instance of the one whose person was threatened by such crime, or was granted by a justice of the peace against one making an affray in his presence.

That the power to require bonds to keep the peace and for good behavior was well established in the English law at the time of the adoption of the constitutions of the United States and the thirteen original states bears directly on the constitutionality of the subsequent exercise of that power in the United States. In this country, the power has been the source of much confusion. There is considerable statutory law as to what was known at common law as security to keep the peace, although the distinction between security to keep the peace and that for good behavior has not been preserved—both terms being used to describe the procedure whereby an individual, on complaint to a justice of the peace, may compel one who threatens the individual to give a bond. A few statutes have gone so far as to give justices of the peace and magistrates the power to require, in addition to the punishment inflicted on defendants convicted of crime, bonds for the good behavior. No statutory authorization appears to exist for the exercise of the power to require security for the good behavior after acquittal in a criminal trial; yet this power still flourishes in Pennsylvania as part of the common law of that state.

3. As to conditions in England at the time see 2 GABBETT, CRIMINAL LAW (1843) 121.
4. 34 Edw. III, c. 1 (1360). But see Lansbury v. Riley, (1914) 3 K. B. 229, 231 (1913), where counsel argued to the effect that the statute has been mistranslated, and that it originally required bonds from "those of good fame". The court rejected the argument.
5. HIGHMORE, BAIL (1791) 250-251; 2 GABBETT, CRIMINAL LAW (1843) 123.
6. Id. at 112.
7. 1 Edw. III, Stat. 2, c. 16 (1327). See comment note 1 supra.
9. Id. at 254. For an American counterpart of this old common law power, see Sands v. Benedict, 5 Thomp. & C. 19 (Sup. Ct. N. Y. 1874). The power has been enacted into some statutes. See KAN. STAT. ANN. (Corrick, 1935) c. 62, § 207.
10. Justices of the peace, magistrates, and judges are usually accorded all the common law powers of conservators or justices of the peace. For example, see PA. CONST. art. V, § 9. See also State v. Cooper, 90 Ind. 575, 576, 577 (1883), for an indication that, although circuit judges may require peace bonds, they can do so only when acting in their capacity as "conservators", and not when sitting as a full court of original jurisdictions over such actions.
11. KAN. STAT. ANN. (Corrick, 1935) c. 62, § 1504; CARROLL, KY. STAT. ANN. (Bald. 1936) § 2554c-29; MISS. CODE ANN. (1930) § 1349.
I. CLASSIFICATION—CIVIL OR CRIMINAL?

The first problem which has confronted the courts in the anomalous administration of what Blackstone dubbed "preventive justice" has been the supposed need for the determination of whether the proceeding is a civil or a criminal one. The holdings on this point illustrate the great confusion in this field of the law. The courts have usually purported to determine whether the action is civil or criminal as the first step in arriving at a conclusion on the point at issue in each case; yet their decisions on the first step appear to rest more on the issue to be decided. Statutes have not been sufficiently specific to solve the problem of the first step, since they generally serve only as an authorization of the power to require the bond, not as a classification of the action into either the criminal or civil category. The problem has been considered in many cases, and it appears that only by classification on the basis of the ultimate issue to be decided in these cases may order be brought out of the chaos of answers to the question.

a. Burden of Proof

Burden of proof has been at issue in actions for a bond to keep the peace, sought at the instance of one who claims to fear some crime to his person or property. Whether or not the bond shall be required depends on whether complainant reasonably fears the commission of the crime allegedly threatened. With one voice the courts have held that, where such is the issue involved, the procedure to be followed is the civil procedure. Complainant is only required to show by the preponderance of the evidence that he has reason to fear the threatened crime—he need not prove this beyond a reasonable doubt. For this purpose the courts have consistently stated that the action is civil in nature. One court has even gone so far as to state that all doubts should be resolved in favor of the complainant. Dominant in the courts' arguments when this problem is presented is the theme that the action is one for prevention of crime, not its punishment; hence the law should aid the one seeking to prevent crime. It is urged that no substantial harm is done to either party by requiring a bond which will be forfeit only by a future crime in violation of the bond. Unfortunately, this argument disregards the possible harm to the impecunious defendant who is subject to commitment in default of a bond—a possibility which has apparently received no judicial recognition in this situation.

b. Jurisdiction

The question of whether the action for a peace bond may be entertained by a certain court is often made to depend on whether the action is classed as civil or criminal, under the statutes conferring jurisdiction on the court. This issue has arisen both as to original and appellate jurisdiction. Where objection to the jurisdiction of the justice was made on the ground that his jurisdiction in criminal cases was limited to those where the fine was to be less than a stated sum, or the imprisonment to be for less than a stated time, the court said that the action was not to be characterized

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13. 4 BL. COMM. *251.
14. Arnold v. State, 92 Ind. 187 (1883); State ex rel. Shockley v. Chambers, 221 Mo. App. 66, 278 S. W. 817 (1926); see Murray v. State, 26 Ind. 141, 142 (1866).
15. See cases cited cited note 14 supra.
16. Ibid. Cf. Shirley v. Terrel, 134 Ga. 61, 67 S. E. 436 (1910) (In action to forfeit bond for breach, defendant not entitled to instruction that jury shall fix amount to be forfeited—for this purpose the action was treated as criminal, and the entire amount forfeited).
as criminal for this purpose, that the requiring of a bond is not punishment by way of fine, that commitment in default of a bond is not punishment by way of imprisonment, and hence the justice had jurisdiction even though the bond required might exceed the limitation on amount of fines, and although imprisonment in default of the bond might exceed the limitation on duration of sentences. In an action for forfeiture of a $300 bond to run for six months, which had been required by a justice whose civil jurisdiction was limited to $200, and whose criminal jurisdiction was limited to fines of $50 and imprisonments of three months, it was held that neither limitation prevented jurisdiction of the action for a peace bond, or for its forfeiture. Thus it was tacitly admitted that the action could not be classified in either of the accepted categories. The gist of the courts' reasoning in these cases seems to be that the legislatures, in limiting the jurisdiction of the lower tribunals, had in mind only the power to punish, and that, although the result may be almost identical in proceedings for preventive justice, the legislature did not intend the limitation to apply to these proceedings.

The great confusion as to whether statutes giving jurisdiction over all criminal cases vest jurisdiction over proceedings of preventive justice is probably to be explained only on the basis of statutory construction. It has been held that jurisdiction conferred on justices of the peace to require bonds to keep the peace prevented a circuit court from exercising jurisdiction under a statute vesting in it jurisdiction over all criminal cases not vested in other courts—the court assuming that the problem was governed solely by statutes as to criminal jurisdiction. And under a statute vesting in a probate court jurisdiction over crimes, misdemeanors and offenses not otherwise provided for, that court was held to have jurisdiction over proceedings for a peace bond. A statute vesting in a criminal circuit court all criminal jurisdiction which formerly belonged to the common pleas court was held to have passed jurisdiction over proceedings for surety of the peace. Yet, under a statute giving a circuit court original jurisdiction in all criminal cases where exclusive or concurrent jurisdiction was not conferred on another court, the proceeding was thought not to be criminal so as to confer original jurisdiction. Under a statute giving appellate jurisdiction over appeals in criminal cases, defendant's appeal from a judgment requiring a peace bond was disallowed for lack of jurisdiction. And where the statute allowed appeals to the common pleas court by defendants in criminal cases, appellate jurisdiction was denied on defendant's appeal from the justice in a peace bond proceeding.

18. See State ex rel. Beslow v. Sargent, 74 Minn. 242, 245, 76 N. W. 1129, 1130 (1898). It should be noted, however, that the court said "... it is immaterial by what technical name the proceeding is designated". Ibid.
19. Ibid.
20. Ibid.
21. State v. Oates, 88 N. C. 668 (1883). The court made subclassifications within the criminal group, of actions to punish for public offenses, and those prosecuted by the state, at the instance of an individual, to prevent apprehended crimes against his person or property. The latter were held not to be included in the limitation of the magistrate's jurisdiction in either civil or criminal cases.
25. State v. Cooper, 90 Ind. 575 (1883). Under the statute involved, if the proceedings had been held to be criminal, the circuit court would have had concurrent jurisdiction with the justice of the peace. Id. at 576.
27. State ex rel. Long v. Long, 18 Ind. 438 (1862).
In two cases where the jurisdiction over the person was involved, it was held that the venue need not be laid in the county of the defendant's residence, the action following the rules of criminal procedure in this case.\textsuperscript{28}

From this group of cases involving the problem of jurisdiction, no guiding principle which controls the decision of whether the action is criminal or civil can be found. Perhaps this may be attributed to differences of the statutory law in each case, and to the fact that, although the problem in each case is jurisdictional, the immediate issues vary. However, a more likely explanation seems to be an enthusiasm for the actions of preventive justice, since it is usually the contention of the defendant which is defeated on the jurisdictional point.

c. Evidence

Careful search has revealed only two cases where the determination of whether the action was civil or criminal has been considered necessary in order to decide a problem of evidence. In one of these, the action was held to be criminal so as to make the defendant incompetent to testify in his own behalf, under a statute which had removed the common law incompetency only as to civil actions.\textsuperscript{29} In the other case, it was held that the rule of civil cases applied in so far as defendant was not entitled to an instruction that the jury should draw no inferences from defendant's failure to testify.\textsuperscript{30} Strangely enough, in this case the court went so far as to hold the case to be criminal in regard to the validity of an affidavit given in the proceeding.\textsuperscript{31}

d. Other Issues

As to the question of costs, proceedings for a bond to keep the peace have been treated both as criminal\textsuperscript{32} and civil\textsuperscript{33} but, absent explicit statutory authority to the contrary,\textsuperscript{34} with the uniform result of finding defendant not subject to imprisonment for costs,\textsuperscript{35} and with the added result of preventing any assessing of costs against the prosecuting witness.\textsuperscript{36}

In the two cases decided on the point of extra-territoriality, it has been held that a breach of the peace or carrying out of the threats in apparent violation of a bond to keep the peace did not render the bond forfeit, because the bond was viewed, for this purpose, as criminal in nature, and hence as being in force only in the jurisdiction where required.\textsuperscript{37}

Under a Kentucky statute requiring process in criminal cases to conclude "against the peace and dignity of the commonwealth", it has been held that the action for preventive justice is criminal, so that process not so concluding is invalid.\textsuperscript{38} Likewise, under a Kentucky statute requiring all

\textsuperscript{28} Ford v. State, 96 Miss. 85, 50 So. 497 (1909); State v. Goree, 108 Miss. 527, 66 So. 986 (1914) \textit{semble}.

\textsuperscript{29} Deloohery v. State, 27 Ind. 52 (1867).

\textsuperscript{30} Davis v. State, 138 Ind. 11, 137 N. E. 397 (1894). The decision of the lower court requiring the bond was reversed on other grounds.

\textsuperscript{31} \textit{Ibid}.

\textsuperscript{32} State v. Abrams, 4 Blackf. 440 (Ind. 1837); State \textit{ex rel}. Rabin v. Foster, 109 La. 587, 33 So. 611 (1903).

\textsuperscript{33} \textit{In re} Petition of Mitchell, 39 Kan. 762, 19 Pac. 1 (1888); \textit{Ex parte} Chambers, 221 Mo. App. 64, 290 S. W. 103 (1927).

\textsuperscript{34} State \textit{ex rel}. Beslow v. Sargent, 74 Minn. 242, 76 N. W. 1129 (1898).

\textsuperscript{35} \textit{In re} Petition of Mitchell, 39 Kan. 766, 19 Pac. 1 (1888); State \textit{ex rel}. Rabin v. Foster, 109 La. 587, 33 So. 611 (1903); \textit{Ex parte} Chambers, 221 Mo. App. 64, 290 S. W. 103 (1927).

\textsuperscript{36} State v. Abrams, 4 Blackf. 440 (Ind. 1837).

\textsuperscript{37} Kansas v. Stanley, 104 Kan. 475, 179 Pac. 24 (1919); Key v. Commonwealth, 3 Bibb. 495 (Ky. 1814).

\textsuperscript{38} Applegate v. Commonwealth, 7 B. Mon. 12 (Ky. 1846).
bonds in criminal cases to be taken in the name of the Commonwealth, the proceedings were considered to be criminal, so as to prevent forfeiture of a bond taken in the name of the governor. 88

From the foregoing examination of the decided cases, it becomes apparent that attempts at classifying proceedings for preventive justice as either civil or criminal are singularly fruitless and inconsistent. The issue involved should not be made to hinge on such classification. It is submitted that in the instances discussed so far, the reason for the decisions has not been the classification arrived at. That this is so would seem even more evident from the obvious weakness of the reasoning employed in arriving at a classification. Thus, it has been stated that all actions are either civil or criminal, that the action is not civil, and hence must be criminal. 40

A few courts have been frank to admit that if classification is necessary at all, the proceedings in question are neither civil nor criminal, but belong to a "tertium quid". 41 This being so, it is all the more unfortunate that courts have so frequently rested their decisions as to the constitutionality of the proceedings, and as to the safeguards of personal liberties from the possible abuses of discretion by magistrates, justices, and judges, on a classification of this nature. From the cases examined so far—cases dealing with matters relatively unimportant in comparison to the problems yet to be considered—it seems clear that no such basis is acceptable.

II. PROTECTION OF PERSONAL LIBERTY

The possibilities for the abuse of discretion on the part of members of the inferior branches of the judiciary, in proceedings for preventive justice, have been pointed out by several courts. 42 It is uniformly recognized that if a bond is required and is not given, the justice of the peace or magistrate requiring it may commit for default—provided the bond was properly

40. "The most general classification of cases is into criminal and civil; and whatever case does not come within the one description, seems properly to belong to the other. . . . It appears clear, therefore, that the expression criminal cases is used in contradistinction to civil cases, and that as the case in question does not come within the meaning of the latter, it is embraced by the former." Id. at 97. See Applegate v. Commonwealth, 7 B. Mon. 12, 13 (Ky. 1846).

Yet it could as easily be shown that the action is not criminal, and hence, if the premise is accepted, it would have to be classed as civil. See State v. Oates, 88 N. C. 698, 690 (1887), where the court, in order to avoid the consequences of being inconsistent with previous cases stating the action to be criminal, included in its definition of criminal actions two classes, the first being actions to punish for a public offense, the second being actions "prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property". It went on to state that all other actions were civil. Having arrived at the "conclusion" that the action was criminal, the court proceeded to show that the constitutional limitation of jurisdiction in criminal cases applied only to the first class of criminal cases. Thus, in effect, the decision seems to admit that the only flaw in the reasoning set out in the text lies in the major premise. In effect, the court admitted that there is, at least so far as jurisdiction is concerned, beside criminal and civil, a third category in which fall the actions of preventive justice.

41. See State v. Goree, 108 Miss. 527, 529, 60 So. 986 (1914).

In Territory v. Chun Yun, 33 Hawaii 109 (1934), it was admitted that the courts of other jurisdictions were in conflict as to whether the proceedings should be classified as civil or criminal. The court went on to state that, although, properly, the action should be classified as neither, the legislature had grouped the proceedings in the criminal class, and hence the criminal procedure should be followed.

42. See Respublica v. Cobbett, 3 Yeates 93, 100 (Pa. 1809); Commonwealth v. Keeper of the Prison, 1 Ashm. 140, 148 (Pa. C. P. 1831). These Pennsylvania cases are particularly interesting in the light of the later development and use of the power in this state. See infra pp. 339 and 340.
This power of commitment, although essential to whatever efficacy preventive justice may have, is also the power which renders such proceedings fraught with dangers to personal liberties. Without the sanction of committal for failure to give a bond, it is clear that no bonds would be forthcoming. If the bond is given there is little difficulty in seeing that the one required to give it should not be heard to complain, since the bond will not be forfeit provided he keeps the peace. But where the defendant is unable, or unwilling, to give the bond, an entirely different problem is presented. He may be a pauper with the best of intentions, who, despite good intentions, will be unable to give a bond or to afford an appeal from the decision. In such a case the purpose of preventive justice will be served by keeping the defendant in jail, but at the expense of his freedom. Thus, although he has committed no crime, he receives exactly what one convicted of a crime would receive. The result is the same whether the bond required is a peace bond or one for good behavior, and whether it is required at the instance of the one threatened, or on the justice's own motion. The possibilities for abuse are more strikingly illustrated, of course, in the latter case—particularly after acquittal of defendant from a crime charged, yet the net result is the same. Although the grounds for requiring a bond for good behavior are much more discretionary than those for a peace bond, peace bonds may just as readily result in a miscarriage of justice. It remains to be determined what safeguards there are against these possibilities.

a. The Right to Trial by Jury

In only two cases has the right to trial by jury been claimed against exercise of the justice's power to commit for failure to give the demanded recognizance. In both cases it was held that there was no right to a jury trial in the determination of whether the bond should be required. In both it was stated that the proceedings were not criminal, so that defendant was not entitled to a jury trial under a state constitutional guarantee of right to trial by jury in criminal cases. A sounder argument, however, is that made in one of these cases, where it was pointed out that no such right existed at common law at the time of the adoption of the state constitution. This view of the right to trial by jury is generally accepted, and it seems a fair construction of the intentions of the framers of the various constitutions. It should be noted, however, that some alarm has been expressed as to the dangers of the summary nature of the proceeding. Quite naturally, it is felt by some that trial by jury would serve as an effective check on the exercise of a power which is so susceptible to arbitrary abuse. Thus one state has provided for jury trial by statute. Strangely enough, although

44. See Ann Doyle’s Case, 19 Abb. Pr. 269, 270 (N. Y. Sup. Ct. 1865).
45. Such was the argument of counsel in State v. Webb, 7 Kan. App. 423, 427 (1898).
46. See PENNSYLVANIA REPORT OF LEGISLATIVE COMMISSION TO INVESTIGATE ADMINISTRATION OF CRIMINAL JUSTICE (1938) 57.
47. See infra p. 344.
49. Ibid.
50. See 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 865, and cases cited therein, n. 1.
52. IND. STAT. ANN. (Bald. 1934) §2053. See Long v. State, 10 Ind. 353, 354 (1858), for a discussion of the procedure under the forerunner of the present statute. See also State ex rel. Lowe v. Tow, 5 Ind. App. 261, 264, 31 N. E. 1120 (1892).
defendant is generally not entitled to a jury trial on the question of whether
a bond should be required, it has been stated that he is entitled to a jury
trial on the issue of whether a bond already given should be forfeited. Thus
the pocketbook appears to be held in higher esteem by the courts than
the personal liberty of defendant.

In one case it was suggested that there is an analogy between these
cases and contempt cases, in so far as the right to trial by jury and the
power to commit are concerned. Indeed there is analogy in the possibility
for the abuse of power—a possibility which would seem to suggest a
reason for requiring trial by jury, rather than denying it. Modern research
has dispelled some traditional notions about the right to trial by jury in
contempt cases. The revision of opinions as to the law of contempt has
been brought about by the discovery that a right to trial by jury did exist,
at common law, in certain types of contempt proceedings. No such dis-
cover can be looked for in regard to the proceedings of preventive justice,
since it is unquestionably true that no right to trial by jury existed in these
cases at common law, although it is submitted that reasons for denial of
jury trial originally existing at common law are no longer pertinent. How-
ever, in the absence of statutes requiring jury trials, it seems clear that this
safeguard will be lacking. If we admit the validity of the principle of
preventive justice, the need for quick action by the justice must be granted.
It is then at least arguable that the justices’ action should be unhampered
by juries. However, this argument seems answered by the fact that the
proceedings are still used under statutes requiring jury trial. At any rate,
the constitutional construction is well embedded, and we can look only to
legislative action to provide for the safeguard of a jury trial.

b. Double Jeopardy

The question of constitutional inhibitions against double jeopardy has
most often been raised in those cases where a bond which, at common law,
would be called for good behavior, has been required. The issue is pre-
sented when a bond is required in addition to or despite the “punishment”
inflicted by virtue of defendant’s guilt of a crime charged. The opinions
on this point are few, and not well-reasoned. The usual argument is that a
proceeding for preventive justice is not a jeopardizing in the constitutional
sense, but is, for this purpose, a quasi-civil action. At least, it is stated
that the bond is not punishment for a crime committed within the meaning
of the double jeopardy limitation, but is merely the prevention of anti-
The element of prevention is one of the moving factors in requiring punishment for crime, hence it cannot be feasibly argued that because a proceeding is preventive, it is not punishment. As to the proposition that the proceeding is not criminal, and hence does not fall within the limitation against double jeopardy, such reasoning has already been shown to be untenable.

In one case where the issue of double jeopardy was raised, the court denied the defendant's contention on the ground that the action for a bond for the good behavior had been upheld for more than thirty years in that jurisdiction, and therefore the demonstration of unconstitutionality would have to be exceedingly strong in order to convince the court to override its previous holdings.

It has also been held that forfeiture of a bond for a breach committed is not prevented by a prosecution for that breach. It can be argued that this case does not come within the double jeopardy limitation, because the bond was exacted as part of a conviction for a previous crime, and its forfeiture would seem to be a mere conclusion of the former proceedings, not a criminal jeopardizing for the new offense. Yet, again, this would seem to be a failure to uphold the purpose of the constitutional limitation on a technicality. In essence, defendant does suffer twice for his new offense.

It should be noted that in almost all the decided American cases where a bond has been required in addition to the ordinary criminal sentence, direct statutory authority has existed for such action.

However, in Pennsylvania, where the only statute deals with the power to require bonds to keep the peace on complaint of the individual threatened, the courts, particularly in Philadelphia, have been wont to require large bonds of defendants in criminal prosecutions, despite their acquittal by a jury from the crime charged. This power has long been exercised in Pennsylvania by common pleas judges acting in their capacity as conservators of the peace, and it stems directly from the old English

61. See State v. Vankirk, 27 Ind. 121, 122 (1866).
62. In Hyser v. Commonwealth, 116 Ky. 410, 76 S. W. 174 (1903), under a Kentucky statute authorizing the requirement of a bond for the good behavior from defendants convicted for the second time of an offense against the local liquor law, defendant objected that the statute violated the prohibition against double jeopardy, by imposing a bond after the second conviction. Defendant's contention was that the bond was really punishment for the previous conviction, since it was only authorized on second conviction. The court rejected this argument, stating that it was merely punishment imposed on hardened criminals in a different degree—merely punishment for the second offense. Although this took care of defendant's objection, it would seem that the admission that the bond was part of the punishment for the second crime (the only basis on which it could be justified) would make the statute invalid in another way. For, if the bond is punishment for the second offense, and it is imposed in addition to the customary sentence, then, in effect defendant is twice jeopardized. However, Hyser v. Commonwealth was approved in Sharp v. Commonwealth, 124 S. W. 316 (Ky. 1910).
63. See supra p. 333 et seq.
66. State v. Chandler, 31 Kan. 201 (1884); State v. Webb, 7 Kan. App. 423, 53 Pac. 276 (1898); Hyser v. Commonwealth, 116 Ky. 410, 76 S. W. 174 (1903); Sharp v. Commonwealth, 124 S. W. 316 (Ky. 1910); Jackson v. Belew, 110 Miss. 243, 70 So. 346 (1915); Jones v. State, 146 Miss. 819, 112 So. 170 (1927). But see discussion infra p. 344, and cases cited notes 101-105 infra. See also Bill Against Scott, Kirby 62 (Conn. 1785), where the power to require a bond for the good behavior after acquittal was impliedly admitted—the court merely objecting to the manner in which it was exercised.
68. Loc. cit. supra note 46.
statute.\textsuperscript{69} The constitutionality of such action has been questioned, but never adequately tested in the courts.\textsuperscript{70} Although, quite possibly, there is no technical violation of the double jeopardy limitation, the spirit of that limitation is not being upheld. The judge’s opinion is substituted for that of the jury. In the trial by jury, defendant has once been put in jeopardy for the offense alleged; it may be argued that, by requiring a bond, the judge is not again jeopardizing defendant\textsuperscript{71}—is not punishing for the offense charged, but is merely preventing future crimes. In effect, however, his requirement of a bond appears to be more for the sake of punishment for what he feels has been done (the jury notwithstanding) than a bona fide attempt to prevent \textit{anticipated} crimes—albeit the effect of requiring the bond is to render the commission of future crimes impossible if the defendant is committed in default of the bond. That the bond is really imposed out of a desire to imprison the defendant is indicated by the fact that the amount of the bonds required is often far beyond the reach of defendant’s modest purse.\textsuperscript{72} Perhaps the bonds are required by judges who have concluded, on excellent grounds, that the jury’s acquittal is wrong. If such is the case, the complaint lies with the jury system, and efforts of the courts should be bent to a correction of the system, rather than to a remedying of its effects by such a harsh and arbitrary method.

\textit{c. Excessive Bail}

On the basis of the decided cases, of which there are but two on point, it would seem that constitutional provisions against excessive bail have been overlooked as a possible safeguard against arbitrary actions in proceedings for preventive justice. Of course, even if “excessive”\textsuperscript{73} amounts are prevented, the proceedings still endanger personal liberty,\textsuperscript{74} but this is

\footnotesize{\textsuperscript{69} 34 Edw. III, c. 1 (1360). Report of Judges, 3 Binn. 599, 612 (Pa. 1808). The power was first approved in Respublica v. Donagan, 2 Yeates 437 (Pa. 1799), where defendants, after being acquitted as accessories in a murder, were committed on failure to give a 14 year bond of $10,000. On \textit{certiorari}, the Supreme Court upheld the action of the lower court. The reporter notes, however, that “The prisoners afterwards broke gaol and escaped”. In Respublica v. Cobbett, 3 Yeates 93 (Pa. 1800) the court felt itself bound by \textit{stare decisis} to uphold the power of the lower court to require bonds for good behavior, and hence the bond was forfeit for a breach. However, the court recognized the perils of the power, and was reluctant in upholding it. In Commonwealth v. Duane, 1 Binn. 98 (Pa. 1806) the court distinguished bonds to keep the peace from those for good behavior, and held that the Mayor of Philadelphia abused his discretion in requiring the latter in the case of threatened libels. In Bamber v. Commonwealth, 10 Pa. 339 (1849) the court upheld the decision of the Philadelphia Court of Quarter Sessions in requiring a $5,000 bond of defendant who had been acquitted of a charge of burglary. In Commonwealth v. Foster, 28 Pa. Super. 400 (1905), the court reviewed the law on the subject in Pennsylvania, and concluded that the discretion had been abused in requiring a bond from one guilty of violations of the blue laws. For a more recent Pennsylvania case, see \textit{infra} pp. 22 and 23, and note 84.

\textsuperscript{70} Loc. cit. supra note 46. The legislative commission states, without citing any authorities, that “... it is the conclusion of many eminent jurists, lawyers, and scholars, that such procedure is clearly unconstitutional and a flagrant and dangerous abuse of judicial power”. It is probable that many eminent jurists would hold this opinion if they were acquainted with the practice, but, at least so far as any written evidence of such opinion is concerned, there seems to be slight basis for the commission’s assertion.

\textsuperscript{71} As to what constitutes a legal jeopardy, see 1 COOLEY, \textit{CONSTITUTIONAL LIMITATIONS} (8th ed. 1927) 686-692, and cases cited therein n. 2, p. 686.


\textsuperscript{73} In \textit{Ex parte} Whatley, 136 Tex. Cr. App. 144, 124 S. W. (2d) 357 (1939), a $35,000 bond was considered to be not excessive, the court indicating that wide latitude must be given to the magistrate’s discretion.

\textsuperscript{74} In \textit{Ex parte} Wilkerson, 102 Tex. Cr. App. 336, 278 S. W. 426 (1925), the court, while affirming the limitation against excessive bail, felt that this protection
one safeguard which has been upheld. In the two cases, both of comparatively recent date, the courts, on writs of habeas corpus, after going through the step of deciding that the proceedings were criminal for this purpose, held that the limitation applied, and the amounts of the bonds were reduced. It remains to be seen whether other courts will accept these holdings, or will consider the bonds required to be different from the bail to which the limitation is applied.

**d. Habeas Corpus**

As will be seen below, the right to appeal from a decision of a justice or comparable member of the inferior judiciary who has committed for failure to furnish a bond to keep the peace or for good behavior, is greatly restricted in many states. Consequently, the efficacy of habeas corpus proceedings becomes important.

There are two views of the scope of habeas corpus in questioning commitments by magistrates or justices of the peace: one allows investigation only into the jurisdiction of the court committing the defendant; the other allows review of the entire proceeding, including the sufficiency of the evidence. If the restricted right to appeal coincides with the more limited type of habeas corpus (which is the majority view) in the same jurisdiction, it seems that the injustice of the situation appears more clearly. Yet the fact that there is no right to appeal has been urged as a reason for restricting the scope of habeas corpus. The reasoning is that, where an appeal cannot be taken directly, it should not be allowed by means of habeas corpus—the law will not do indirectly that which it forbids directly. Directly contrary is the reasoning of some courts which restrict the scope of habeas corpus on the ground that since an appeal is provided for, habeas corpus is not necessary.

**e. Due Process**

In a recent habeas corpus proceeding, seeking release from a commitment for failure to fulfill the requirement of a $25,000 bond made, after acquittal by jury, by a Pennsylvania common pleas judge, sitting in the court of quarter sessions, the federal district court refused to entertain alone was not sufficient, and on appeal from a habeas corpus proceeding wherein the bond had been reduced, held that appellant should be discharged. "Otherwise one who might be held in custody by a purely arbitrary act of such officer would be without remedy." Id. at 427.

75. People ex rel. Smith v. Blaylock, 357 Ill. 23, 19 N. E. 206 (1934); Jones v. State, 146 Miss. 819, 112 So. 170 (1927).

Habeas corpus is a proper method for obtaining a reduction of excessive bail. CHURCH, HABEAS CORPUS (2d ed. 1893) 633.

76. Cooley indicates that bonds to keep the peace are included in a limitation against excessive bail. COOLEY, CONSTITUTIONAL LAW (4th ed. 1931) 363.

77. See infra p. 346 et seq.

78. See CHURCH, HABEAS CORPUS (2d ed. 1893) 324.


80. In re Satterthwaite, 32 Cal. App. (2d) 630, 60 P. (2d) 325 (1939); Ex parte Harfoud, 16 Fla. 283 (1877); Ex parte Wilkerson, 102 Tex. Cr. App. 336, 278 S. W. 426 (1925); Ex parte Allen, 113 Tex. Cr. App. 73, 19 S. W. (2d) 58 (1929); Ex parte Montez, 134 Tex. Cr. App. 315, 115 S. W. (2d) 912 (1938).

It should be noted that the broader view of habeas corpus is usually due to a statute, and does not apply to a commitment resulting from a conviction in a magistrate's court. CHURCH, HABEAS CORPUS (2d ed. 1893) 332-334.


82. See Cox v. State, 157 Ala. 1, 3, 47 So. 1025, 1026 (1908).
the writ because relator had not exhausted his remedies in the state courts.\textsuperscript{88} Careful search has failed to reveal any other attempt to attack the proceedings of preventive justice as a violation of rights guaranteed by the federal constitution. The proceedings were attacked on the basis of the due process clause.\textsuperscript{84} It is unfortunate that there was no decision on the merits, because it is quite possible that in the catch-all of that clause, some measure of protection from arbitrary action in such proceedings may be found.

\textbf{f. The Right to Appeal}

By far the most common type of preventive justice is the issuance of a bond to keep the peace at the instance of the one threatened by defendant. This proceeding is mainly governed by statute. Most statutes provide that the bond shall require the defendant to appear at the first day of the next term of a designated superior court, and require him to keep the peace meanwhile. The case is heard by the designated court \textit{de novo}. That court then either renews the bond until the following term and so on, ad infinitum, or it discharges the defendant.\textsuperscript{85} This is in accord with the customary practice at common law.\textsuperscript{86} This limitation on the duration of the bond has, apparently, led legislatures to feel that a right to appeal is unnecessary,\textsuperscript{87} and the courts have consistently upheld statutes preventing or curtailing appeals,\textsuperscript{88} even where it has been admitted that the decision of the magistrate or justice was clearly erroneous.\textsuperscript{89} Such a point of view


\textsuperscript{84} United States \textit{ex rel.} Henson v. Mills, 21 F. Supp. 616, 617 (E. D. Pa. 1937).

The federal constitutional guarantees are not applicable to proceedings for preventive justice in state courts, except in so far as a violation of the principles announced by the limitations may be considered a violation of due process—either as to procedure or substance.


\textsuperscript{86} The statute of 3 Hen. VII, c. 3 (1485) seemed to require the bond to run merely until the next term of court. This construction was rejected in Willes v. Bridger, 2 B. & Ald. 278, 106 Eng. Rep. R. 368 (K. B. 1819). However, the court there recognized and approved the usual practice of binding only to the next term. \textit{Id. at 280-291, 106 Eng. Rep. R. at 372-373.}

Such was the practice at common law in the United States as well. Commonwealth \textit{v.} Ward, 4 Mass. 497 (1808); Commonwealth \textit{v.} Morey, 8 Mass. 78 (1811). In one of the early American cases involving a bond for the good behavior it was held that the bond should only run until the next term. \textit{Bill Against Scott, Kirby 62 (Conn. 1786).} This is indicative of the failure of the American courts to distinguish peace bonds from bonds for the good behavior. As to the latter, the time limitation was not the rule of the English common law.

\textsuperscript{87} See \textit{Bradley v. Malen, 37 N. D. 295, 299, 164 N. W. 24, 25} (1917). This reasoning has also been employed by the courts. \textit{See State v. Wilson, 46 N. C. 559, 552} (1854).

\textsuperscript{88} Ross \textit{v.} Superior Court, 39 Cal. App. 590, 179 Pac. 536 (1919); \textit{State v. Syster, 33 Idaho 76, 107 Pac. 1025} (1912); \textit{Love v. Commonwealth, 120 Ky. 565, 112 S. W. 647} (1908); \textit{Deskins v. Childers, 195 Ky. 209, 242 S. W. 9} (1922); \textit{Rodes v. Gilliam, 197 Ky. 123, 245 S. W. 897} (1922); \textit{State v. Lyon, 93 N. C. 575} (1885); \textit{State v. Walker, 94 N. C. 587} (1886); \textit{Bradley v. Malen, 37 N. D. 295, 164 N. W. 24} (1917); \textit{see State v. Locust, 63 N. C. 574, 575} (1869).

\textsuperscript{89} In \textit{Ross v. Superior Court, 39 Cal. App. 590, 179 Pac. 536} (1919), the appellate tribunal admitted that the magistrate had no power to require defendant to invest $300 in Liberty Bonds, and to pay these over to his "faithful little wife". Yet this error could not be remedied by appeal. However, the court stated that "the magistrate attempt to enforce it, petitioner would be entitled to some appropriate remedy for his protection against the unwarranted act". (Italics added.) \textit{Id. at 592, 179 Pac. at 537.} What the "appropriate remedy" would be is the subject of some doubt. As to the availability of the remedy of habeas corpus see \textit{supra} pp. 21 and 22.

In \textit{Deskins v. Childers, 195 Ky. 209, 242 S. W. 9} (1922), the court admitted that there was no authority for requiring the bond, but since the statute authorizing similar proceedings provided for no appeal, it was held that the upper court could not remand the error.
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disregards entirely the hardship to an impecunious defendant who is thus confined until the next term, in default of the bond. The right to appeal may be unimportant to one who is merely temporarily out of pocket, but not to one incarcerated, even though his stay is destined to be but short. It has been argued frequently that, since this proceeding is designed to prevent a threatened crime, it must be quick and conclusive, and it is urged that if a right to appeal is granted, the whole purpose of the statutes will be defeated by vacating the requirement for a bond. However, this reasoning disregards a simple alternative that has been employed in one state. Defendant may be committed in default of his bond, and, on the furnishing of a simple appeal bond, may be allowed his appeal without vacating the existing decision. Thus the preventive force of the justice's decision is not disturbed—defendant being required to furnish the required peace bond or else be committed—while the right to appeal is preserved.

In states where habeas corpus serves only to review jurisdictional facts, the injustice of thus abridging the right to appeal is patent. Even where habeas corpus will review the entire proceeding, it is difficult to see any valid reason why defendant should not be allowed his simple right to appeal under the method suggested above.

The issue of whether an appeal may be had as of right has been raised where constitution or statute guarantees to the defendant a right to appeal in all criminal cases, or from all criminal convictions. As might be anticipated, the courts, in this situation, have held the proceeding not to be a "criminal" one, or the requirement of a bond not to be a "criminal conviction", and have consequently held the guarantees inapplicable. This would seem to controvert the intention of the legislators to provide a remedy from all arbitrary or unfair sentences or fines. The purpose of the legislature was to allow recourse from the effect of such action, and hence, where the effect of the requirement of a bond is identical with that of a "conviction" in a "criminal case", it would seem that the purpose of the legislation or constitution would be better served by allowing an appeal.

Perhaps the danger of curtailing appeals is even better illustrated in a Kentucky case where the statute authorizes appeals in cases where the fine is over $50, or the imprisonment over thirty days. There the right to appeal was denied where a bond was required of defendant in addition to the rest of a sentence imposed in a prosecution for a crime. And this, even though the decision of the lower tribunal in requiring the bond was erroneous, although a simultaneous appeal from so much of the decision of the court as imposed a sentence of sixty days was allowed, and although the part of the sentence requiring the bond ordered defendant's commitment for 90 days in default of the bond.

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91. People ex rel. Smith v. Blaylock, 357 Ill. 23, 191 N. E. 206 (1934). In this case the bond required was for $7,500. When defendant sought an appeal, the appeal bond was fixed at $7,700 (this figure representing the $200 customary for appeals, plus the amount of the peace bond). On habeas corpus it was held that defendant should have been allowed to appeal on giving a $200 bond. The appeal would not vacate the order of the magistrate requiring the peace bond, and defendant would stand committed until he gave that bond, or until the order was revised by the appellate court.
92. See supra p. 341, and cases cited note 79.
93. See supra p. 341, and cases cited note 80.
94. State v. Syster, 33 Idaho 761, 187 Pac. 1025 (1921) ; State v. Lyon, 93 N. C. 575 (1885).
95. See cases cited supra note 94.
g. Grounds for Requiring Bond

Besides the limitations already discussed there are certain well defined limits inherent in the substantive law of these proceedings which serve to restrict their scope. However, these limits are important as a check on abuses only in so far as they may be effectuated by a right to appeal or by a full review in habeas corpus proceedings.97

Most important of these limitations is the substantive law as to what grounds are proper for the requirement of bonds. At common law a bond for good behavior, as well as other punishment, could be required of one convicted of a gross misdemeanor.99 Although the power to require a bond was not restricted to this instance alone, under the words of the English statute,100 or under the English cases,101 still, such has been the dogma accepted in this country, in the absence of the statute.102 Thus it has been held that, absent statutory authority, there can be no bond required upon conviction of a statutory misdemeanor,103 or one not defined as "gross" at common law.104 It has been aptly pointed out that the evidence necessary for conviction of a gross misdemeanor is not, necessarily, relevant to the issue of whether preventive justice is needed or not.105 However, the English statute, in permitting the bond to be required of those "not of good fame"106 seems to be broad enough to allow the bond in every case. Fortunately it has been limited by the American decisions.

Strangely enough, the grounds for requiring a bond for good behavior after acquittal in a criminal prosecution have never been clearly defined.107 This is somewhat anomalous in the light of the law where a conviction has been obtained, but appears to stem from a more literal interpretation of the words "not of good fame".

As to the nature of the offense threatened against the person or property of the one seeking to bind another to keep the peace, the rule, roughly, would seem to be that the threat of any offense against the person is a sufficient ground, provided there are facts to substantiate the fear of such threats;108 as to property, only the threat of arson has been felt a sufficient

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97. See supra p. 342 et seq.
98. See supra p. 341.
99. 4 BL. COMM. *251.
100. 34 Edw. III, c. 1 (1360) authorizes conservators of the peace to "take of all them that be not of good fame, where they shall be found, sufficient surety and main-prize of their good behavior towards the King and his people". (Italics added.)
101. See Highmore, Bail (1791) 248, for examples of various common law grounds for requiring bonds for good behavior.
102. Estes v. State, 2 Humph. 496 (Tenn. 1842). In State v. Gould, 26 W. Va. 258, 271 (1885), the court indicated, by way of dictum, that it disapproved of the rule and indicated that it did not consider it part of the common law of West Virginia. However, in State v. Gilliland, 51 W. Va. 278, 41 S. E. 131 (1902), the court rejected the dictum. The rule was admitted, but limited strictly to cases of gross misdemeanor. Apparently it was felt that Estes v. State had not sufficiently limited the rule. Id. at 282, 41 S. E. at 133.
103. Estes v. State, 2 Humph. 496 (Tenn. 1842).
108. 4 BL. COMM. *255.
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ground for a bond, and this seems to be allowed only because of the possible peril to life and limb in the event that the arson is carried out.\(^{109}\)

### h. Duration of the Bond and Commitment

As before pointed out, it is frequently the practice, in the case of peace bonds, for the bond required by the justice to be in effect only until the next term of a named superior tribunal.\(^{110}\) Thus defendant’s good behavior, as well as his appearance, are secured during the interim. On the appearance at the next term, the whole proceeding is heard *de novo*.\(^{111}\) Where such is the type of bond required, it is established that commitment in default of bond may run only until the next term of the named court.\(^{112}\)

Where, under statute, or by common law, the bond may be required to run only for a specified length of time,\(^{113}\) it seems incontestable that commitment in default of bond may last only for that period.

It should be noted, however, that restrictions as to the duration of the bond, and consequently the commitment, are not at all universal. Particularly where the old common law power to require bonds for the good behavior exists, there seems to be no time limitation.\(^{114}\)

### i. Malicious Prosecution

Tort actions resulting from proceedings for preventive justice are also important in a consideration of factors checking abuses in preventive justice. One would except that frequent actions by those who think themselves threatened would clutter up the courts with proceedings for peace bonds. However, the fact that the proceeding is not generally known to the public, coupled with the possibility of an action for malicious prosecution, tends to prevent this result. Of course, the action for malicious prosecution does not serve as a safeguard to civil liberty, once it is imperilled, but tends to discourage the initiation of proceedings for peace bonds, thereby lessening the number of cases in which such dangers arise. Most of the decided cases involving the problem have held that the magistrate’s decision is a final judgment so as to prevent a suit against the prosecutor if the magistrate required the bond—the decision of the magistrate being treated, to this extent, as conclusively showing the existence of probable cause.\(^{115}\) This view, while in accord with tort law generally,\(^{116}\) operates

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\(^{109}\) *Ex parte Harfoud*, 16 Fla. 283 (1877); *State ex rel. Gestner v. Murphy*, 40 La. 855 (1888).

\(^{110}\) See *supra* p. 342, and cases cited notes 85 and 86.

\(^{111}\) *Ibid.*

\(^{112}\) The reasoning is identical with that used in a case where the bond was only allowed to run for a year. *In re Penske*, 148 Kan. 161, 79 P. (2d) 829 (1938). The court pointed out that if defendant has been confined for the period during which the bond would have been in force, the complainant has received greater protection than he would have received had the bond been given, since defendant was not at liberty so as to be able to breach the bond by carrying out his threats. Smith, J., dissented on the unique ground that since defendant could have afforded the bond, but did not give it, he showed a criminal nature, and hence should not be released. *Id.* at 165, 79 P. (2d) at 831.


\(^{115}\) *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703 (1893); *Merritt v. Merritt*, 193 Iowa 890, 188 N. W. 32 (1922). *Contra*: *Hyde v. Gruich*, 62 Md. 577 (1884); *Johnston v. Meaghr*, 14 Utah 426, 47 Pac. 861 (1897). In *Hyde v. Gruich*, *supra*, the court pointed out that, under the Maryland procedure at that time, a peace bond issued as a matter of right, on complaint by affidavit to the magistrate. There was no hearing. Thus there would be no justification for holding the magistrate’s requirement of the bond as conclusive evidence of probable cause, since the magistrate had no alternative but to require the bond.

\(^{116}\) *Restatement, Torts* (1938) §§ 663 and 667.
to prevent any redress where the magistrate's action has been arbitrary, and to this extent there is, again, no check or redress if the justice or magistrate has abused his power.

j. False Imprisonment

Careful search has failed to reveal more than two cases where an action has been brought against the committing justice for false imprisonment. On the basis of these cases it would appear that this action is not particularly effective as a safeguard against abuses of power. In one case the defendant justice of the peace demurred to plaintiff's statement which alleged the most gross sort of bias and unfairness. The court, stating the general rule that the justice was suable if he acted without jurisdiction or illegally—not for mere errors in judgment—managed to find for defendant on technicalities. Apparently the cloak of “mere errors of judgment” is large enough to cover a multitude of abuses, and hence an action against the justice is not adequate protection for personal liberties. In the other case the recital of jurisdictional facts in the magistrate's warrant raised a presumption that he was acting within his jurisdiction, and hence plaintiff could not prevail because unable to overcome the presumption.

CONCLUSION

From the decided cases it is clear that safeguards against abuses of power by justices of the peace and members of the inferior judiciary, in proceedings of preventive justice, are inadequate. Is this justified by any sound policy? Only the most forceful demands of society warrant such an invasion of personal liberties. The policy of preventive justice is the old one of “an ounce of prevention”. If crime can be prevented at the outset, how much simpler and easier our way of life—this, indeed, is a worthy objective. Does preventive justice really effectuate this policy? Its usefulness depends on how great a deterrent from crime is the prospect of forfeiture of the posted bond. But there is already a much greater deterrent in the ordinary forms of punishment. The prospect of fine, jail sentence, and possible civil liability is a much stronger factor in the prevention of crime than the possible loss of a bond—which loss is frequently borne by sureties rather than the offender. Yet crime has not been stamped out by the possibility of such punishment. We cannot expect that preventive justice will do that which our system of criminal law has failed to do. Furthermore, preventive justice presupposes a threat of crime. The proceedings, even if effective, reach only the small sphere of crimes prefixed by threats; since their scope is so narrow, their effects upon the community seem to be too insignificant to warrant sacrifice of personal liberty. Finally, it is seen that whatever effectiveness a bond may have is in inverse proportion to the wealth of the prospective offender. The proceedings are most effective against the impoverished offender—the very one who is unable to protect himself from their harshness. If he is able to raise the amount of the bond, the possible financial loss may tend to dissuade him from


118. King v. Cawood, 223 Ky. 291, 3 S. W. (2d) 616 (1928). Plaintiff alleged that great enmity existed between himself and the defendant justice, that defendant procured a false complaint against plaintiff, that the justice refused to allow removal on account of bias, and that no evidence was introduced against plaintiff. The court held that plaintiff's complaint was defective in not alleging that there was no information against him, and in failing to state that he did not behave badly in court (both of which seem to be matters for defense). The court also denied that the justice lacked jurisdiction.

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crime. But the truly effective prevention will come only from the imprison-
ment of the prospective offender. If imprisonment is the means of
effectiveness, we find that in order for prevention to work we must im-
prison one who has committed no offense. Yet these proceedings are,
supposedly, not based on the desirability of confining those who may com-
mit crime, but rather on the preventive force of a bond which has been
given. Imprisonment is merely the sanction used to enforce the order
requiring the bond. If the bond itself is ineffective, then all reason for
giving such a drastic power to secure compliance with the order requiring
the bond disappears. Yet this is the power which causes the violations of
the spirit of our constitutional safeguards. The only conclusion seems to
be that there is no strong policy requiring preventive justice. The spirit
of our constitutional safeguards should prevail, and the entire proceedings
should be scrapped. However, our legislatures will probably be slow to
eradicate from our laws a power which is so time-honored, although the
original justification for the power is no longer pertinent. If legislatures
persist in preserving the power—in upholding an ounce of prevention
where a pound has failed—they should at least circumscribe the proceedings
with adequate safeguards. Most present legislation is inadequate. The
proceedings should be specifically confined to the statutory method, which
should be made subject to quick and adequate review.

H. F. DeL.

Insurance of Mortgaged Property

Primarily, recovery under a fire insurance policy is predicated upon
the principle of indemnity. There has always been strong public policy
against the formation of wagering contracts, the theory being that the
insured should not be allowed to make a profit out of the destruction of
property which he has no interest in preserving; furthermore, courts have
long held the belief that the moral hazard is increased if the insured stands
to gain by the loss.

In order to curtail wagering contracts and to eliminate profits to the
insured, courts require that the latter must have an insurable interest in
the property to be covered. The insurable interest is more or less a rule
of thumb, defining the sine qua non of recovery, but not always guar-
anteeing recovery on an otherwise valid policy. The purpose of this note

1. Patterson, Essentials of Insurance Law (1935) 87-89. See Note (1934)
3. The older decisions go upon the assumption that the moral hazard is increased if
the property is heavily mortgaged. In Dover Glass-Works Co. v. American Fire Ins.
Co., 15 Del. 32, 46, 29 Atl. 1039, 1042 (Ct. Errors and App. 1894) the court stated: "So
long as the insured property remains in a condition in which its preservation is of more
interest to the owner than its destruction there is no inducement to court or invite the
peril against which it is protected by the insurance. . . . But when it becomes incum-
bered to such an extent that the incumbrances are equal to or in excess of its value, the
motive to caution and vigilance ceases." Accord, Penn. Mut. F. Ins. Co. v. Schmidt,
110 Pa. 449, 13 Atl. 317 (1888). See Cohen, Encumbering Realty as Affecting the
Moral Hazard in Fire Insurance (1924) 24 Col. L. Rev. 605. The author contends that
cases holding that the moral hazard is increased when the property is heavily mort-
gaged "proceed upon the inarticulate premise that incendiarism or purposeful neglect
by the assured plays some considerable part in fire losses. Investigation some years
ago brought out that this factor is comparatively negligible." Id. at 612.
4. For instance, the mortgagor might insure his interest with a loss-payable policy
making the mortgagee an appointee of the insurance fund as his interest may appear,
is to follow the theory of strict indemnity into the realm of mortgagor-mortgagee insurance, dealing briefly with insurable interests, the application of insurance proceeds, and the effect of the restoration of the property by the mortgagor without the consent of the mortgagee. Throughout must be kept in mind the fundamental rule that courts are interested chiefly in taking care that the various parties involved are indemnified to the full extent of their respective losses, and at the same time, guarding that the sum total of these losses shall not exceed the total value of the property destroyed.

I. INSURABLE INTEREST

The separate interests of the mortgagor and mortgagee are everywhere considered insurable even though there is a provision in the policy that the insurance will be void if there is "other insurance" on the property. The mortgagor may insure in an amount equal to the full value of the property, even though the mortgage debt equals or exceeds that value. In this situation the amount of recovery is generally coextensive with the insurable interest of the mortgagor.

If the mortgagor is personally liable and recovers on his separate insurance, the mortgagee has only the status of an unsecured creditor with regard to the insurance funds, provided, of course, that the mortgagor has not contracted to insure for the benefit of the mortgagee. Where the mortgagee has also insured his own separate interest, the insurance com-

The mortgagee could also insure his own separate interest for the purpose of protecting himself in case the loss-payable policy became bad because of a breach of condition by the mortgagor. But if the mortgagor was guilty of no breach this does not mean that the mortgagor would be able to recover on both policies. To allow such indemnity for the same loss would be against public policy and no case can be found where such recovery has been permitted.

5. Farmers' Mut. Ins. Co. v. Young, 104 Ind. App. 139, 10 N. E. (2d) 421 (1937); Baughman v. Niagara Fire Ins. Co., 163 Minn. 300, 204 N. W. 321 (1925); Brant v. Dixie Fire Ins. Co., 179 S. C. 55, 183 S. E. 587 (1935). There is no completely satisfactory definition of an insurable interest. In Sandlin's Adm'x v. Allen, 262 Ky. 355, 97 S. W. (2d) 357, 359, 351 (1936), the following rule of thumb was used: "A person has an insurable interest in the subject matter insured where he has such relation or connection with, or concern in it, that he will derive pecuniary benefit or advantage from its preservation or will suffer pecuniary loss from its destruction, termination, or injury by the happening of the event insured against." Plum Trees Lime Co. v. Keefer, 92 Conn. 1, 101 Atl. 509 (1917); Farmers' Mfrs. Ins. Co. v. Pollock, 52 Ga. App. 603, 184 S. E. 383 (1936); Kozlowski v. Pavonia Fire Ins. Co., 116 N. J. L. 194, 183 Atl. 154 (1936).

6. "Other insurance" is construed to mean other insurance on the same interest, and therefore does not apply to the situation where the mortgagor and mortgagee have insured their separate interests. Collins v. Iowa Mfrs. Ins. Co., 184 Iowa 747, 169 N. W. 199 (1918); Gould v. Maine Farmers' Mfrs. Fire Ins. Co., 114 Me. 416, 96 Atl. 732 (1916).

Neither is the mortgagee obliged under a contribution clause in the policy to pro-rate fire policies covering his own interest with those taken out by the mortgagor without the knowledge of the mortgagee. Duncan Building & Loan Ass'n v. Glen Falls Ins. Co., 11 N. J. Misc. 791, 168 Atl. 767 (Sup. Ct. 1933); Taylor v. Home Ins. Co., 202 N. C. 659, 163 S. E. 749 (1932). But this does not mean that either the mortgagor or mortgagee may make a profit on the transaction. If the mortgagee is allowed to recover from his insurer the full amount of the loss without pro rating with the coin-surer, his insurer may sue the insurer of the mortgagor for contribution. Pennsylvania Fire Ins. Co. v. Brook, 125 Okla. 201, 257 Pac. 774 (1927).

7. Florea v. Iowa State Ins. Co., 225 Mo. App. 49, 32 S. W. (2d) 111 (1930). This is true even though the deed is absolute in form, provided that the parties intended it as a mortgage and equity will recognize it as such.

8. In such a case the mortgagee may impress an equitable lien upon the insurance funds. Dougherty v. Van Horn, 29 N. J. Eq. 90 (1878); Ames v. Richardson, 29 Minn. 330, 13 N. W. 137 (1882); House v. Brackins, 130 S. W. (2d) 927 (Tex. Civ. App. 1939).
pany is subrogated to his rights against the mortgagor,9 and in this way indemnity is preserved. However, in actual practice the insolvent mortgagor who has recovered on his separate insurance may make a profit. He may dissipate the money before the mortgage debt becomes due, and apparently the mortgagor can do nothing about it if the mortgagor is not under contract to insure for his benefit.

The insurable interest of the mortgagor continues after default and even after foreclosure sale. It is not divested until the statutory period of redemption has expired,10 provided of course, that there is no clause in the policy invalidating it by foreclosure. Even where the combined interests of the mortgagor and mortgagee have been protected by a loss-payable policy making the mortgagee an appointee of the insurance funds, and the loss occurred after foreclosure, it has been held that the mortgagor can recover to the full extent of his insurable interest provided he redeems within the redemption period.11 Allowing the mortgagor to insure and recover in an amount equal to the full value of the property seems a justifiable rule because he may reacquire the property within the period of redemption by paying the price it brought at the foreclosure sale.

The grantee of the mortgagor’s interest acquires an insurable interest measured by the full value of the property, irrespective of whether he has assumed, and apparently he can recover to that extent.12 If the grantee has not assumed personal liability, in this situation the principles of strict indemnity would seem to be violated; yet, to restrict his insurable interest to the price paid for his grantor’s interest would deprive him of any advantage gained by his purchase. After the mortgagor has conveyed, it has been held that he retains an insurable interest apparently measured by the full value of the property, provided he is personally liable on the debt.13 Actually this situation rarely arises because most policies have clauses rendering them void if the property is transferred.

Although the mortgagor has an insurable interest measured by the full value of the property, the mortgagee can insure only to the extent of the mortgage debt.14 As indicated above, in this situation there is little possibility of double indemnity because after the mortgagee has recovered on his separate insurance, the insurer is subrogated to his rights against the mortgagor.15 The mortgagee’s insurable interest, as measured by the amount of the debt, continues until the period of redemption has expired; that is, unless he himself has bought in at the sale.16 If a third party has bought

11. Malvaney v. Yagel, 101 Mont. 331, 54 P. (2d) 135 (1936). This appears to be true even though the mortgagor is the purchaser at the foreclosure sale. The mortgagor must redeem, however, within the statutory period as a condition precedent to recovery, and if he fails to do so, the mortgagee who has bought in is entitled to the proceeds, even though the amount recoverable when taken with the value of the remaining property exceeds the amount of the mortgage debt.
12. Generally, the personally-bound mortgagor and his grantee take out loss-payable policies, making the mortgagee an appointee of the insurance funds, although, a clause against “other insurance” will probably void these policies. Baughman v. Niagara Fire Ins. Co., 163 Minn. 300, 204 N. W. 321 (1925); Lumbermans’ Nat. Bank v. Corrigan, 167 Wis. 82, 166 N. W. 650 (1918).
15. See note 9 supra.
in it would seem that the mortgagee's insurable interest is limited to the amount of the deficiency. No cases can be found where under these circumstances the mortgagee has sought to recover the full amount of the original debt from the insurer.

The second mortgagee, like the first mortgagee, has an insurable interest to the extent of the debt owed him, and regardless of whether there would be anything remaining for him if the property were sold on foreclosure, some courts allow him recovery if the actual value of the property destroyed exceeds the amount of the first mortgage. Although not in principle a violation of strict indemnity, this rule would nevertheless seem to encourage fraudulent fires. In times of fallen real estate values, when junior liens can be purchased for almost nothing, to allow such junior mortgagees to recover in excess of what they paid for their interests would seem undesirable.

II. Allocation of Insurance Funds

It has already been stated that the mortgagor and mortgagee have separate insurable interests, and consequently that they may take out separate insurance on those interests. In actual practice, however, it is seldom that the parties go to the expense of taking out separate policies. In recent years use of the New York standard mortgagee policy has become widespread. Under this type of policy the collective interests of the mortgagor and mortgagee are covered, and the feature distinguishing it from the older but now much less prevalent loss-payable policy is the presence of a clause preventing any act of the mortgagor from defeating the right of the mortgagee to recover.

Where a loss-payable policy is involved, the mortgagee is an appointee of the insurance proceeds, and his right to recover depends upon the adherence by the mortgagor to the terms of the policy. Recovery by the mortgagee will reduce pro tanto the amount of the debt only where the mortgagor has not violated a clause in the policy. If the mortgagor breaches one of the conditions, the insurance company is subrogated into the rights of the mortgagee.

Money paid to the mortgagee under either type of policy cannot be applied by him to the mortgage debt if the debt is not yet due, without the making loss payable to the mortgagee was taken out while the mortgage was being foreclosed. The loss occurred after the period of redemption had expired. The court, in allowing the mortgagee to recover, said: "It would be contrary to reason and justice to permit an insurer to escape liability merely because at the time of the loss the insured had acquired a greater interest in the policy than he had when the policy was issued. In respect to this change of insurable interest, there is nothing in the policy to preclude the plaintiff from recovering its loss not exceeding the amount insured."
According to the principles of strict indemnity, the fund received by the mortgagee must be regarded as substituted security for the lost property, rather than payment of the debt not yet due. By statute in New York the mortgagee may either hold the fund and apply it to the extinguishment of the debt as it matures, or he may pay the money over to the mortgagor for the purpose of rebuilding the property. It has been indicated that the mortgagee has this choice at common law. However, a mere promise on the part of the mortgagor to rebuild does not impose any duty upon the mortgagee to turn over the funds, although one court has regarded an offer to pay the insurance funds to the mortgagor upon the restoration of the property as fair enough.

If the mortgagor is required by the mortgage to insure the mortgagor's interest, but instead takes out insurance on his own separate interest, the mortgagor may impress an equitable lien upon the insurance fund and apply it to the pro tanto reduction of the mortgage debt. On the other hand, if the mortgagor, by the terms of the mortgage, has paid or is made liable for insurance premiums, he can require money recovered on a policy taken out by the mortgagee to be applied pro tanto in reduction of the mortgage debt.

If the mortgagor and mortgagee agree to apply the insurance money to the restoration of the premises, the second mortgagee has no right to have the amount so received applied in reduction of the indebtedness. By this procedure recovery by a junior lienor who has purchased his interest for almost nothing can be defeated, but in the usual case the mortgagee considers it expedient to hold the insurance funds rather than to apply the money to rebuilding the premises.

III. RESTORATION OF PREMISES BY MORTGAGOR

As indemnity is universally regarded as the cardinal principle of insurance recovery, it would seem that neither party should be able to complain if they are placed in the same position as before the happening of the contingency. Closely related to the problem of preserving strict indemnity is the right of the mortgagee to recover on the loss even though the security remaining unimpaired is greater in value than the amount of the debt.

22. In the words of the court in Gordon v. Ware Savings Bank, 115 Mass. 588, 591 (1874), "The insurance was for indemnity to the mortgagor as well as to the mortgagee. To the mortgagee it was for the protection of the security, not for payment of the debt. It was collateral to the debt. Money received from the insurance took the place of the property destroyed, and was still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt. . . ."
23. N. Y. REAL PROP. LAW § 254 (4).
24. Fergus v. Wilmart, 117 Ill. 547, 7 N. E. 508 (1886).
25. Ibid.
28. Gordon v. Ware Savings Bank, 115 Mass. 588 (1874). Cf. Connecticut Mut. Life Ins. Co. v. Scammon, 4 Fed. 263, 275 (C. C. N. D. Ill. 1880). Here the court intimated that if the first mortgage debt had been due, the second mortgagee would have been able to require that the insurance funds be applied to the debt.
29. Thompson v. National Fire Ins. Co., 48 S. D. 224, 203 N. W. 464 (1925). In Meader v. Farmers' Mut. Fire Relief Ass'n, 137 Ore. 111, I P. (2d) 138 (1931), where the mortgagee built another house on the premises, thus greatly increasing the security originally contracted for, and after the loss the security remaining was more than sufficient to pay the debt, the court held that the mortgagee could recover on the insurance policy up to the full amount of the debt. Excelsior Fire Ins. Co. v. Royal Ins.
This rule, although perhaps justifiable practically, is theoretically in derogation of the principles of strict indemnity. Under these circumstances the mortgagee should not be allowed to recover the full extent of the loss up to the amount of his interest in the property. True, his security has been diminished, but it has not been totally nor perhaps appreciably depleted. Suppose a property worth $6,000 encumbered by a mortgage of $4,000 with the mortgagee's interest fully insured. A fire occurs and the loss is assessed at $1,000. The mortgagee may recover $1,000 or one-fourth of the mortgage debt, whereas the value of his security has been diminished only one-sixth. In accordance with the principles of strict indemnity a pro tanto recovery by the mortgagee should be required in this situation.

Generally, by the terms of the policy the insurer is given an option to repair the damaged premises, and if it exercises that option it is conceded that both the mortgagor and mortgagee have been fully indemnified. An interesting but infrequently litigated question is whether the mortgagee can recover when the mortgagor himself, not acting as the agent of the insurer, and without being under contract to do so, has rebuilt the premises.

The leading case on the subject is Savarese v. Ohio Farmers' Ins. Co., decided in 1932 by the New York Court of Appeals. Here the policy was of the standard mortgagee type. The insurance company did not exercise its option to rebuild, but the mortgagor himself, not acting as agent of the insurer, restored the property at his own expense, and then obtained a judgment against the insurance company. The mortgagee appealed, claiming the full amount of the loss unimpaired by the fact that the mortgagor had restored the property to its previous condition.

The court, reversing the Appellate Division, allowed the mortgagee to recover, on the ground that the happening of the contingency insured against obligated the insurer to pay the mortgagee, and this right could not be divested by any act of the mortgagor. Furthermore, by New York statute, the mortgagee has an election either to keep the insurance money in reduction of the debt or to pay it over to the mortgagor for the repair of the buildings. According to the court, this choice excluded a like choice on the part of the mortgagor.


The mortgagee is allowed full recovery even where the policy is of the loss-payable type. Uhlfelder v. Palatine Ins. Co., 44 Misc. 153, 89 N. Y. Supp. 792 (Sup. Ct. 1904); Meader v. Farmers' Mut. Fire Relief Ass'n, 137 Ore. 111, 1 P. (2d) 138 (1931).

It will be seen later that when the mortgagor rebuilds the premises, courts draw a distinction in determining the rights of the mortgagee between a loss-payable and a standard mortgagee policy, and in the former case the mortgagee is not permitted to recover. According to the reasoning of the courts in this situation, it can be argued that if the security is impaired and a loss-payable clause is involved, the mortgagee's recovery should be proportionate to the diminution of the security.

Ramsdell v. Ins. Co. of N. America, 197 Wis. 136, 221 N. W. 654 (1928).


This theory is discussed at length in Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343 (1873). Here E could recover at once upon the happening of the contingency because the insurance was on his separate interest. In Binder v. Northern Assur. Co., 140 Misc. 807, 251 N. Y. Supp. 535 (1931) a standard mortgage policy was involved. Here the mortgagor's receiver began to rebuild the premises, but the work was only partially completed when the mortgagee brought suit on the policy. The court allowed the mortgagee to recover, stating that the fact that the premises had been wholly or partially restored would not alter the situation.

35. Had the court adhered to the strict wording of the statute the opposite result could just as easily have been reached. It could readily have construed the statute to apply only to the situation wherein the mortgagee had recovered from the insurer.
According to the tenets of strict indemnity, this holding is open to criticism. If indemnity is to be the basis of recovery, it is difficult to understand why the restoration of the premises did not put the mortgagee in exactly the same economic position he was in before the fire. Whether or not the decision was correct, the result is in accord with most of the scant authority available.39

Cases refusing to allow the mortgagee to recover, in situations where the mortgagor has rebuilt the property on his own initiative, have been distinguished from the instant case in that they were of the loss-payable rather than the standard mortgagee type. In Friemansdorf v. Watertown Ins. Co., an old federal case, this distinction was brought out emphatically. The court there stated that in the loss-payable situation the mortgagee has no right of direct indemnity. The policy is solely an insurance that the property shall remain unimpaired as security. On the other hand, where the mortgagee’s interest is insured (as in the standard mortgagee case), a cause of action having arisen, the mortgagee has the right of indemnity for which he has stipulated.

Similarly, in Huey v. Ewell, the administrator of the mortgagor restored the property without the consent of the mortgagee, and the court held that the mortgagee could not recover; but here again the policy was of the loss-payable type.

Although this distinction could have been used to bring about the desired result in the Savarese case, the court did not mention it, preferring rather to reexamine the whole problem anew.

Advocating strict indemnity, Lehman, J., dissented from the majority of the court in the Savarese case. He conceded that if the mortgagee had the right to sue immediately upon the happening of the contingency, he, rather than the mortgagor should be entitled to recover the insurance proceeds. However, the policy gave the insurer a 30-day option to repair, and in the meantime the mortgagor had rebuilt. Therefore, when the mortgagee’s right to be indemnified vested, he had already been made whole.

It is submitted that this argument does not go far enough. Although it should not be made incumbent upon the mortgagee to wait until the mortgagor decides whether or not he will rebuild, it would seem to be in harmony with the principles of indemnity to allow the mortgagor to rebuild even though the mortgagee’s right against the insurance money has accrued, provided that the security has been made whole before the mortgagee has actually exercised his right.

Pink v. Smith, a recent Michigan decision similar on its facts to the Savarese case, also reached a similar result. Here the grantee of the mortgagor had rebuilt and the assignee of the mortgagee was attempting to recover on two policies, one insuring his separate interest and the other

36. Foster v. Equitable Mut. Fire Ins. Co., 68 Mass. 216 (1854), the earliest case on the subject, held that the restoration of the premises by the mortgagor does not deprive the mortgagee of his right to recover from the insurer. In this case the policy had been assigned by the mortgagor to the mortgagee, thus in effect giving the mortgagee an insurance on his separate interest. Aetna Ins. Co. v. Baker, 71 Ind. 102 (1880).

37. 1 Fed. 68 (C. C. N. D. Ill. 1879).


39. Furthermore he contended that the ruling of the majority would not indemnify the mortgagor because without the insurance money he could probably not afford to rebuild, and therefore might be induced to take out additional insurance on his own separate interest. To allow recovery on this separate insurance would be against public policy.

a standard mortgagee policy. The court invoked the old distinction of the *Friemansdorf* case, stating that when the mortgagee's interest is insured, as in a standard mortgagee policy or in a policy covering the mortgagee's separate interest, upon the happening of the contingency the mortgagee's contractual right to sue becomes vested and cannot be defeated by the mortgagor's act of rebuilding the premises. The court intimated that the result would be otherwise if the clause were of the loss-payable type. Furthermore, while the holding in the *Savarese* case was partially based upon the construction of a statute which, according to the court, negated the idea that the mortgagor might rebuild, no similar statute was involved in *Pink v. Smith*.

In *Cottman Co. v. Continental Trust Co.*, a recent Maryland decision, the trustee-mortgagee had already received the insurance proceeds from the insurer, and the mortgagor, having rebuilt the property, brought suit against the trustee to have the insurance money applied to the cost of the repairs. The court allowed the mortgagor to recover on the theory that as the debt had not yet matured the insurance money in the hands of the trustee serves as a substituted security for the property, and therefore that it is not inequitable to require the payee of the insurance fund to transfer the same to the debtor for the purpose of defraying the expense of rebuilding. Although the court did not mention the distinction, and the decision would probably have been the same even under a standard mortgage policy, it must be noted that the policy here involved was of the loss-payable type. On the basis of strict indemnity, this case goes much further than the earlier decisions refusing to allow the mortgagee to recover on a loss-payable policy if the mortgagor has rebuilt. In the *Cottman* case the insurance money had actually been paid to the mortgagee. On the authority of this decision, the mortgagor apparently can rebuild and have the proceeds applied to that purpose right up to the date of maturity of the mortgage debt. Such a rule would of course be impossible in New York because of the statute giving the option to the mortgagee either to hold the insurance money or to pay it over to the mortgagor for the purpose of rebuilding.

Whatever may be the merits of the *Savarese* and *Pink* rulings, where the same problem has come up in the analogous lessor-lessee situation, courts have adhered more carefully to the strict indemnity rule. In *Ramsdell v. Insurance Co. of N. A.*, the lessor and lessee took out separate policies insuring their individual interests in the property. Upon the occurrence of the loss, and after the insurer had failed to exercise its option to repair, the lessee, as he had a right to do under the lease, restored the premises and recovered on his policy. The lessor then brought action on his own policy. The rationale of the court in allowing the lessee alone to recover, thus achieving strict indemnity, was that if the insurance company had exercised its option the lessor would have had no claim and suffered no loss; therefore the loss was no greater merely because the mortgagor rather than the insurer had made the repairs. Apparently this theory was not regarded very highly by the New York court.

Although offhand the *Ramsdell* case seems to be in opposition to the *Savarese* case at least with regard to the principles enunciated by the two courts, actually, the cases are distinguishable. In the *Ramsdell* case if the

41. 169 Md. 595, 182 Atl. 551 (1936).
42. 197 Wis. 136, 221 N. W. 654 (1928). See (1929) 29 Col. L. Rev. 362, wherein the author contends that the *Ramsdell* case stands for an undesirable extension of the doctrine of strict indemnity, arguing that the rebuilding of the premises by the lessee should be regarded as a gift to the lessor.
lessor had been allowed recovery, considering the fact that neither party was under a contractual obligation to repair, the lessor would get a windfall upon the termination of the five year term, whereas in the Savarese case the money recovered by the mortgagor would ultimately be applied to the mortgage debt. However, the decision of the court was apparently in no way based upon this factor.

In Larner v. Commercial Union Assur. Co., a New York Supreme Court case, the court adhered strictly to the indemnity dogma. In this decision the lessee had insured his separate interest, but immediately after the loss the lessor repaired the premises according to a stipulation in the contract that he do so. It was decided that the lessee could not recover on the policy, and furthermore the court stated that if the insurance company had paid the lessee for the loss and the lessor subsequently rebuilt, the insurer would have an action against the lessee to reclaim the insurance money. Although only dictum, this latter statement is some indication of how far the court was willing to go in its efforts to preserve strict indemnity. However the decision is distinguishable from the Savarese case in that if the lessee were allowed to recover he would have double indemnity.

CONCLUSION

Although the doctrine of strict indemnity has been broken down in certain of the "limited interest" cases to the extent of permitting recovery substantially in excess of exact indemnity, courts have been more conservative in the field of mortgagor-mortgagee insurance.

It is true that in some instances courts have allowed junior lienors to recover when their actual interest in the property, owing to fallen real estate values, is absolutely nothing, but recovery under such circumstances is no more a violation of public policy than is recovery under the valued-policy laws.

As shown above, the mortgagor suing on a standard policy after the mortgagor has rebuilt the property gratuitously is usually allowed to recover even though he has suffered no actual loss, but the proceeds of such recovery are regarded merely as a substitute for the property. As such, until default, the insurance money is no more available to the mortgagee than the property itself would be. Of course the mortgagee would benefit to the extent that he would not be required to go to the trouble of foreclosure upon default, but this does not seem to be a grave deviation from the doctrine of strict indemnity. On the mortgagor's side, if he can afford to rebuild he has the advantage of a property free from the encumbrance. In most cases, however, he probably cannot afford to rebuild, and for this reason,


45. Under the valued-policy laws which are in force in different variations in almost half of the states, the property is generally evaluated at the time the policy is issued, and upon the occurrence of the loss the insured must prove that the property has been fully destroyed. He then may recover the face value of the insurance. Reilly v. Franklin Fire Ins. Co., 43 Wis. 449 (1877); Mississippi Fire Ins. Co. v. Planters' Bank of Tunica, 138 Miss. 275, 103 So. 84 (1925). See Patterson, Essentials of Insurance Law (1935) 117.
allowing him to recover the insurance proceeds would seem to be more in harmony with strict indemnity.

However, the public policy behind the doctrine of strict indemnity is not so much based upon indemnity as such; rather, indemnity is regarded as a rule of thumb limiting wagering contracts, and concomitantly, fraudulent fires. On this basis, deviation from the principles of strict indemnity in these mortgage cases would seem to be less significant than they are sometimes regarded.

J. K. G.