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tion does not preclude severance or deletion when, in the discretion of the trial judge, actual prejudice will ensue.[39]

Since the general rule may be damaging because it directs attention to the nonconfessing defendant, it may be that the defendant should be given the opportunity to decide if the limiting instruction should be given and how emphatic the admonition should be.

If credibility can be ascribed to the contention that the jury follows the court's limiting instruction, then the only safeguard against prejudice[40] is an unmistakably clear admonition to the jury.[41]

The decision as to which method to invoke must rest on the nature and facts of each case.[42] No single solution is applicable to every situation, and therefore, it seems as if there is no adequate substitute for the sound discretion of the trial judge in protecting such important interests.

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THE MYSTERIOUS DISAPPEARANCE CLAUSE IN THEFT INSURANCE

Fraudulent claims constitute a substantial moral hazard for companies writing theft insurance,[1] and insurers ordinarily require the in-

[39]E.g., Wellman v. United States, 227 F.2d 757 (6th Cir. 1955); People v. Skelly, 409 Ill. 613, 100 N.E.2d 915, 920 (1951).

[40]"Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations on the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made impregnable as possible." Blumenthal v. United States, 332 U.S. 539, 559-60 (1947).

Failure to give limiting instructions has been held to be error. Everitt v. United States, 281 F.2d 429 (5th Cir. 1960); Johnson v. State, 46 Ga. App. 494, 167 S.E. 900 (Ct. App. 1933); State v. Allison, 175 Minn. 218, 220 N.W. 563 (1928).

[41]United States v. Sykes, 305 F.2d 172, 176 (6th Cir. 1962).

[42]"Whether cautionary instructions to the jury to disregard prejudical evidence erroneously admitted will cure the error depends, of course, upon the nature of it and the circumstances in each instance. When it cannot with reasonable certainty be shown that the harm has been undone a reversal is required." United States v. Sansone, 206 F.2d 86, 88 (2d Cir. 1953).

[1]2 Richards, Insurance § 298 (5th ed. 1952). Vance, Insurance § 199 (3d ed. 1951). "Moral hazard" in theft insurance means the danger of fraudulent claim of loss, as measured by the character and interest of the insured, his habits, reputation for integrity, and the amount of gain he would make or the loss he would suffer by the disappearance of the property. Compare Black, Law Dictionary (4th ed. 1951).

Because of the difficulty and expense of investigating many small claims, the insurance companies realize that they must depend upon the integrity of the people insured. If the majority of people were not honest, theft coverage could not be

sured to supply "proof" that his loss did occur by theft.[2] There are, however, many instances in which the insured can show only that an item has disappeared, and that it was stolen is merely a conjectural explanation, perhaps supported by circumstantial evidence. It has been said that indemnification claims under the theft clause for unexplained disappearances were often determined by the mere whim of the insurer.[3] As a result of dissatisfaction with the clause limiting coverage to "theft," the "mysterious disappearance" clause was added in order to define the coverage more specifically.

The recent case of *Hammontree v. Central Mut. Ins. Co.*[4] examines the permutations of the mysterious disappearance clause, and provides a good illustration of the extent to which that clause has developed in insurance law. In 1961, defendant issued to the plaintiff a three-year homeowner's policy which included protection against various perils, including the peril of theft, "meaning any act of stealing or attempt thereat," of personal property on the premises, or while "owned, worn or used" off the premises. In 1962, for an additional premium, coverage was extended by an endorsement to "mysterious disappearance (except mysterious disappearance of a precious or semi-precious stone from its setting in any watch or piece of jewelry)."[5]

While dining out with friends, plaintiff discovered that her valuable necklace was missing. The clasp had never given any difficulty, and when she had put it on earlier in the evening, a slight tug had

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issued at all. Opgenorth, Mysterious Disappearance and Presumption of Theft Clause, 1952 Ins. L.J. 97, 129. Quinn, New Residence and Theft Policy—Mysterious Disappearance... and Other Points, The Weekly Underwriter, May 6, 1944, p. 1064, 1067.

[2]See any Standard Homeowners Policy "jacket."

[3]Quinn, supra note 1, at 1064. The insurance companies did not have a policy of rejecting all claims that could not be absolutely proved, but complaints were made that decisions as to whether claims should be paid or rejected too often depended upon the personal prejudices, idiosyncrasies, or moods of individual adjusting agents or claims managers. During the twenty-odd years which the theft policies were silent as to what would or would not be deemed sufficient evidence of loss by theft, a large number of suits were brought for indemnification for mysteriously disappearing personalty.

[4]385 S.W.2d 661 (Mo. Ct. App. 1965).

[5]This wording is one of the forms taken by the 1956 revision of the mysterious disappearance provision. Infra note 25. The reason that the endorsement required an additional fee is partially explained by its second paragraph, which extends coverage to unattended automobiles. See, Extended Theft Endorsement HO-103 (Ed. 9-58). It is reasonable to believe, however, that some part of the extra charge was intended to compensate for extra coverage for mysterious disappearance. The answer of the insurance company is that the addition of the endorsement eases the burden of proof on the insured by allowing him to prove merely unexplained loss, rather than theft. See, e.g., The Fire, Casualty and Surety Bulletins, Questions and Answers, October 1963, p. 68.

shown that it was properly latched. A search of the places where she had been that night—clubs, parking lots, car, garage, and home—did not turn up the necklace. The plaintiff had not come into physical contact with anyone through shoving, jostling, or dancing. In the claim she filed with the insurance company, the plaintiff said that she believed the necklace "just fell off and someone picked it up," and at the trial she offered the same opinion. "[I]t was either lost or stolen."[6]

The defendant denied the claim on the ground that loss did not qualify as "mysterious disappearance."[7] Plaintiff thereupon brought suit and recovered judgment for $300, the agreed value of the necklace. The judgment was affirmed by a Missouri Court of Appeals.[8] The court followed the majority rule that mysterious disappearance as stated in the clause under consideration was a separately covered risk,[9] and held that although the earlier policy forms would have re-

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[6]"Lost" property may be the subject of a theft if the finder makes no effort to return it even though he has a reasonable opportunity to ascertain the identity of the owner. See, Perkins, Criminal Law 208 (1957); 2 Wharton, Criminal Law and Procedure § 459 (12th ed. 1957).

[7]The defendant's definition of a mysterious disappearance was "the separation of an item of personal property from its owner's possession by the owner's intentional placing of it in an identified [fixed] location, followed by its disappearance under unexplained circumstances.... On the other hand, there is nothing mysterious about losing or mislaying property; it is a common, everyday occurrence." Hammontree v. Central Mut. Ins. Co., supra note 4, at 665-66.

In an aside, the court doubted that the frequency of disappearances should be given any consideration, "for *if* the fact that 'it is a common, everyday occurrence' to lose or mislay personalty bars such disappearance from being regarded as 'mysterious,' disappearances by reason of theft, unfortunately also 'a common, everyday occurrence,' no more logically or reasonably could be regarded as mysterious.'" Id. at 666 n.5.

It must also be remembered that a frequent occurrence to the insurer is not necessarily such to an individual insured.

[8]Plaintiff also appealed from the trial court's refusal to award damages and attorney's fee for defendant's alleged vexatious refusal to indemnify her loss. Since, however, this was a case of first impression, and an insurer has a right to entertain an honest erroneous opinion as to its liability where there is an open question of law or an issue of fact determinative of liability, this part of the judgment, too, was affirmed. Id. at 667-69.

[9]The rule was first enunciated in Englehart v. Assurance Co. of America, 139 So. 2d 108 (La. Ct. App. 1962) (discussed infra in text at note 26). Accord: Seward v. Assurance Co. of America, 218 Cal. App. 2d 895, 32 Cal. Rptr. 821 (Super Ct. 1963) (insured missed her watch during the course of a shopping trip; watch had a double lock which was in good mechanical condition and had never needed repair). Michigan Millers Ins. Co. v. Geller, 168 So. 2d 204 (Fla. Dist. Ct. App. 1964) (insured's ring disappeared from her finger while she visited two stores in a shopping center; held, "the language of the policy makes loss from mysterious disappearance equivalent to theft"). Midlo v. Indiana Lumbermen's Mut. Ins. Co., 160 So. 2d 314 (La. Ct. App. 1964) (discussed infra in text at note 38). Conlin v. Dakota Fire Ins. Co., 126 N.W.2d 421 (N.D. 1964) (discussed infra in text at note 31). Contra: Austin v. American Cas. Co., 193 A.2d 741 (D.C. Ct. App. 1963) (discussed infra note 29).

quired an inference of theft, the instant policy permitted a reasonable finding of "mysterious disappearance" without such an inference.[10]

Early policies covering theft required the claimant to show "by direct and affirmative evidence" exactly how his loss had been sustained, and mere proof of disappearance, even under circumstances inexplicable by means other than larceny or theft, was not a sufficient basis for recovery.[11] Since most theft is secretive, many claims which in good conscience should have been paid were denied payment because it was impossible for the insured to produce the requisite proof.[12]

The inequity of requiring an insured to prove his loss by direct evidence was not judicially recognized for many years, but in 1915 it was decided that circumstantial evidence should be sufficient to prove theft, even under a "direct and affirmative evidence" policy, if there was more than the bare circumstance of unexplained disappearance.[13] Even though the burden of proof remained on the insured, and

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[10]Hammontree v. Central Mut. Ins. Co., supra note 4, at 666-67.

[11]Schindler v. United States Fid. & Guar. Co., 58 Misc. 532, 109 N.Y. Supp. 723 (App. T. 1908) (the first case involving a loss under a personal theft policy; insured placed a handbag containing jewelry in a closet and went out; when she returned it had disappeared. A servant had been alone in the house). Duschenes v. National Sur. Co., 79 Misc. 232, 139 N.Y. Supp. 881 (App. T. 1913) (items disappeared from hotel room to which only plaintiff had legal access). Gordon v. Aetna Indem. Co., 116 N.Y. Supp. 558 (App. T. 1909) (locket placed under pillow; insured had not left the house all day; search of servants' belongings turned up nothing).

The earliest theft policies, issued during the 1890's, contained a provision that "the mere disappearance of an article is not to be deemed sufficient evidence of its loss by burglary, theft, or larceny." The apparent reason for this clause was timidity on the part of insurers, who were venturing a new coverage and did not know what to expect. The clause was replaced after a short period by the "direct and affirmative evidence" clause. Several cases in which circumstantial evidence was held enough to overcome a "mere disappearance" provision are: Reed v. American Bonding Co., 102 Neb. 113, 166 N.W. 196 (1918); Great E. Cas. Co. v. Boli, 187 S.W. 686 (Tex. Civ. App. 1916).

[12]Opgenorth, supra note 1, at 97.

[13]Fienglas v. New Amsterdam Cas. Co., 151 N.Y. Supp. 371 (Munic. Ct. N.Y.C. 1915) (first case to allow circumstantial evidence; assured left prospective tenant in hall momentarily; jewelry which had been left on dresser near door opening onto hall disappeared).

"[A thief] never invites anyone, unless it be a confederate, to witness the operation. To limit the assured's right to recovery to cases where the corpus delicti can be proved by direct testimony ... would make the policy next to valueless. We will not impute to the defendant company any such purpose in the use of these words; nor can we assume that the assured understood them in this narrow and restricted sense...." Miller v. Massachusetts Bonding & Ins. Co., 247 Pa. 182, 93 Atl. 320, 321 (1915).

Accord: National Sur. Co. v. Fox, 174 Ark. 827, 296 S.W. 718 (1927); Firemen's Fund Indem. Co. v. Perry, 149 Fla. 410, 5 So. 2d 862 (1942); Sowden v. United States Fid. & Guar. Co., 122 Kan. 375, 252 Pac. 208 (1927); Fidelity & Cas. Co. v. Wathen, 205 Ky. 511, 266 S.W. 4 (1924); Wolf v. Aetna Acc. & Liability Co., 183 App. Div.

though a mere showing that theft was one of several possible explanations did not sustain this burden,[14] the courts occasionally showed great willingness to sustain awards granted on the basis of questionable circumstances.[15]

Notwithstanding the allowance of circumstantial evidence to show larceny, there remained a widespread dissatisfaction with the coverage given under the old policies. In 1943, the theft clause was amended to eliminate the necessity for strained interpretations.[16] Among other

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409, 170 N.Y. Supp. 787 (1918); Stitch v. Fidelity & Deposit Co., 159 N.Y. Supp. 712 (App. T. 1916); Hamill v. Fidelity & Cas. Co., 104 Pa. Super. 602, 159 Atl. 205 (1932); McDuff v. General Acc., Fire & Life Assur. Corp., 47 R.I. 172, 131 Atl. 548 (1925).

[14]National Sur. Co. v. Redmon, 173 Ky. 294, 190 S.W. 1081 (1917) (diamond stud left in tray on dresser near second floor window; marks on screen and footprints on shed roof below window, discovered three weeks after loss, held not sufficient evidence of burglary); Rosen v. Royal Indem. Co., 259 Mass. 194, 156 N.E. 52 (1927) (diamond ring in handbag left in kitchen cabinet was discovered missing in afternoon; a number of workmen, as well as the maid and chauffer, had been in and out during the morning); Polstein v. General Acc., Fire & Life Assur. Corp., 173 App. Div. 938, 158 N.Y. Supp. 868 (1916) (jewelery missing; no other facts reported); Bachmand v. New Amsterdam Cas. Co., 194 N.Y. Supp. 89 (App. T. 1922) (insured had reported missing jewelry to police as "lost"; there was no evidence pointing persuasively to the conclusion that theft was the explanation, and strong circumstantial evidence to the contrary); Marks v. New Jersey Fid. & Plate Glass Ins. Co., 168 N.Y. Supp. 627 (App. T. 1918) (insured had last seen certain articles prior to packing to move to a new residence, but could not later find them; evidence was held consistent with loss, but not with theft).

The Rosen case would probably have turned out differently under any of the policies containing the various mysterious disappearance clauses. The Polstein case was apparently decided on the ground that the circumstances shown did not eliminate the possibility of misplacement or forgotten disposal; since the insured does not ordinarily have the burden of eliminating such possibilities, the case is out-of-line with the general view.

[15]E.g., "Upon this appeal the only serious question is whether this testimony justifies the inference that the jewelry was stolen. It establishes that the jewelry was placed in a box which only two persons were authorized to open. Neither of these persons took out the jewelry. It follows with reasonable probability that some unauthorized person opened the box and extracted the only articles of value. No unauthorized person would have taken the jewelry, except with felonious intent.

"It follows that the judgment rests, not on mere suspicion, but on logical inference, and should be affirmed...." Stich v. Fidelity & Deposit Co., 159 N.Y. Supp. 712, 714 (App. T. 1916) (rings missing from hotel room).

"About the only proof that could be made as to burglary or larceny, ordinarily, would be that the doors or windows were open and that articles that were in the house before were missing and could not be found. This was sufficient proof that they had been stolen...." National Sur. Co. v. Fox, 174 Ark. 827, 296 S.W. 718, 721 (1927) (insured rented his house while he went on an extended trip; he returned to find doors and windows open, tenants gone, and articles of personalty missing).

[16]Mutual Cas. Ins. Rating Bureau, Circular No. BTRR-145, December 13, 1946. The intent was not to broaden the coverage to include property merely mislaid or lost, but was to make clearer the degree of proof needed to establish loss by theft. Many persons, however, including insurance company officers and agents,

revisions, the following sentence was added to the theft clause: "Mysterious disappearance of any insured property shall be presumed to be due to theft."[17]

This original mysterious disappearance clause was intended merely to clarify theft policies and make them conform to the law as it had developed.[18] The first case involving the clause recognized this and interpreted it as creating a rule of evidence binding on the parties that the presumption of theft was equal to theft.[19] Under this "presumptive theft" provision, proof of mysterious disappearance, without more, was proof of theft.[20] The presumption could be rebutted, however, upon an affirmative showing by the insurer that the surrounding facts and circumstances indicated loss or mislaying of the property to be more probable than theft.[21] Mere speculation or surmise, therefore, do not rebut the presumption as a matter of law;[22] but where the possibility of theft was remote, the presumption was easily re-

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thought that there had been a basic change in coverage to an "all-risk" policy, and the policy was often sold on that basis. Opgenorth, supra note 1, at 97. Kelly, "Mysterious Disappearance" Defined, 28 Ins. Counsel J. 72, 73 (1961). Field, "Mysterious Disappearance" Under the New Theft Policy, 1945 Ins. L.J. 3.

[17]Residence and Outside Theft Policy, AS 1719 NMA NS (3-46). The clause was revised in 1948 to read: "Mysterious disappearance of any insured property, except a precious or semiprecious stone from its setting in any watch or piece of jewelry, shall be presumed to be due to theft." Residence and Outside Theft Policy, GPO 1719 Ed. 2 N NS (10-48). The reason for this exclusion was apparently the belief that the companies were paying too many losses due to carelessness on the part of the policy-holders.

[18]Kelly, supra note 16, at 73. Quinn, supra note 1, at 1066.

[19]Davis v. St. Paul Mercury & Indem. Co., 227 N.C. 80, 40 S.E.2d 609 (1946).

[20]Caldwell v. St. Paul Mercury & Indem. Co., 210 Miss. 320, 49 So. 2d 570 (1950) (insured's wife lost setting from her ring; maid who helped search left without giving notice or collecting wages due). Levine Accident & Cas. Ins. Co., 203 Misc. 135, 112 N.Y.S.2d 397 (Munic. Ct. N.Y.C. 1952) (insured removed his ring while washing in a public rest-room, turned to dry his hands, walked out and forgot the ring). Gordon v. Eureka Cas. Co., 187 Pa. Super. 636, 146 A.2d 379 (1958) (maid who helped search for lost ring never returned after her day off).

[21]Casey v. London & Lancashire Indem. Co. of America, 3 Misc. 2d 918, 160 N.Y.S.2d 114 (Albany County Ct. 1956) (ring disappeared from pocket during business day). Davis v. St. Paul Mercury & Indem. Co., supra note 19 (insured went fishing with $97 in his pocket, discovered it missing when he crawled from lake after his boat capsized). Sigel v. American Guar. & Liab. Ins. Co., 173 Pa. Super. 434, 98 A.2d 376 (1953) (insured placed ring wrapped in tissue into an envelope with a similarly wrapped watch; envelope was not sealed; ring disappeared, but watch did not; verdict to insurer, but new trial granted for error in instructions). Erskine v. Glen Falls Indem. Co., 76 Pa. D. & C. 172 (Dist. Ct. 1951) (insured was feeding a horse when the animal snatched the diamond from her ring and dropped it; the gem could not afterwards be found).

[22]Davis v. St. Paul Mercury & Indem. Co., supra note 19, at 611.

butted;[23] and where no fact evidenced even the remotest possibility of theft, the presumption could not arise.[24]

The "presumptive theft" provision was rewritten in 1956 to eliminate the presumption and make mysterious disappearance simply a separate form of theft.[25] The drafter's apparent intention was to eliminate the evidentiary problems that had been encountered, but to retain for the insured the benefit of more easily proving a loss. With this in mind, insurance company counsel have tended to defend claims under the revised clause on the ground that mysterious disappearance is not shown unless a possibility of theft is also shown.

The courts have not gone along with this insurance company view. When the 1956 revision was initially considered, in *Englehart v. Assurance Co. of America*,[26] wherein the insured appealed from a judgment in favor of the insurer on a claim for a missing ring, the appellate court originally upheld the judgment on the ground that the facts did not present a reasonable possibility of theft. On rehearing, however, the court reversed and held mysterious disappearance to be a separately covered risk. Two factors influenced the decision. Primarily,

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[23]Ruby v. Farmers Mut. Auto Ins. Co., 274 Wis. 158, 79 N.W.2d 644 (1956) (while working with creosote, insured got it on his hands and ring; he pulled the ring off in a barn to wash his hands; when he returned, the center diamond was missing).

[24]Deckler v. Travelers Indem. Co., 94 So. 2d 55 (La. Ct. App. 1957) (insured's wife discovered her ring missing after trying to fix garbage disposal). Loop v. United States Fid. & Guar. Co., 63 So. 2d 247 (La. Ct. App. 1953) (insured's wife put on ring and went shopping; ring was gone when she returned home).

[25]Kelly, supra note 16, at 72-3. Each insurance company is free to vary the clause suggested by the Central Forms Committee; as it has come before the courts, the 1956 revision has taken the following variations:

"This company agrees to pay for loss by theft or attempt thereat or mysterious disappearance away from the premises of personal property which is owned or used by an insured...." Seward v. Assurance Co. of America, 218 Cal. App. 2d 895, 32 Cal. Rptr. 821, 822 (Super. Ct. 1963); Englehart v. Assurance Co. of America, 139 So. 2d 108, 110 (La. Ct. App. 1962).

"Theft, meaning any act of stealing or attempt thereat, or mysterious disappearance (except mysterious disappearance of a precious or semi-precious stone from its setting in any watch or piece of jewelry)." Austin v. American Cas. Co., 193 A.2d 741 (D.C. Ct. App. 1963); Michigan Millers Ins. Co. v. Geller, 168 So. 2d 204, 205 (Fla. Dist. Ct. App. 1964); Hammontree v. Central Mut. Ins. Co., 385 S.W.2d 661, 663 (Mo. Ct. App. 1965); Conlin v. Dakota Fire Ins. Co., 126 N.W.2d 421, 424 (N.D. 1964).

"Theft, including attempted theft, mysterious disappearance, larceny, burglary, robbery...." Midlo v. Indiana Lumberman's Mut. Ins. Co., 160 So. 2d 314, 315 (La. Ct. App. 1964).

[26]139 So. 2d 108 (La. Ct. App. 1962) (the insured last noticed his ring when he removed it before retiring; he did not notice the ring missing until later; in the interim he had flown from Baton Rouge to Shreveport, rode in an airport limousine, and sent the suit he had been wearing to the cleaners).

the court noted that the provision covered any loss incurred as a result of *attempted* theft, which clearly is a separate risk. Also, the court noted that the exclusions listed for that coverage group included a statement that the policy did not apply to mysterious loss of precious or semiprecious stone from its setting, and "if the mysterious disappearance is intended to be merely another form of theft, then no such exclusion relating to a *loss* would be necessary."[27]

All courts,[28] except one,[29] which have considered the different forms of the 1956 revision have declared that mysterious disappearance is a separate risk and, as stated by the California Superior Court, that "there is no necessity to show possibility or probability that the loss resulted from theft."[30]

Another typical case in which the 1956 revision was considered is *Conlin v. Dakota Fire Ins. Co.*,[31] in which it was held that disappearance of luggage, checked with an airline by an insured traveler, was within the coverage of a mysterious disappearance clause. Although relying on Englehart, the court placed great emphasis on the fact that the clause was susceptible to various interpretations and should be construed in the light most favorable to the insured.[32]

In addition to agreeing with the reasoning of the *Englehart* and *Conlin* cases, the court in *Hammontree* analyzed the 1956 revision grammatically[33] and decided that it must make mysterious disappearance a separate risk. The court then adopted the definition of mysterious disappearance favored by a majority of the courts which have reviewed the question.[34]

> "[A]ny disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity, or specula-

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[27]Id. at 112-113.

[28]See cases cited supra notes 4 and 9.

[29]The only case to hold that the language of the 1956 revision did not convert mysterious disappearance into a separate risk is Austin v. American Cas. Co., 193 A.2d 741 (D.C. Ct. App. 1963). The authority of the case seems weak for two reasons: (1) the court ignored the clause excluding recovery for gems lost from their mounting, and (2) it apparently considered an "all-risk" interpretation to be the only alternative to interpreting mysterious disappearance as evidence of theft. A case in another jurisdiction was decided almost simultaneously on quite similar facts and reached the opposite result. Seward v. Assurance Co. of America, 218 Cal. App. 2d 895, 32 Cal. Rptr. 821 (Super. Ct. 1963).

[30]Seward v. Assurance Co. of America, supra note 29, at 823.

[31]126 N.W.2d 421 (N.D. 1964).

[32]Id. at 425. The familiar principle that a contract will be most strictly construed against its drafter has always applied in insurance law. See, e.g., 1 Richards, Insurance § 35, at 116 (5th ed. 1952); 13 Appleman, Insurance § 7401 (1943).

[33]Hammontree v. Central Mut. Ins. Co., 385 S.W.2d 661, 665 (Mo. Ct. App. 1965).

[34]Id. at 666.

> tion, or circumstances which are difficult to understand or explain. A mysterious disappearance is a disappearance under circstances which excite, and at the same time baffle, wonder or curiosity."[35]

This definition is substantially different from that contended for by the insurance company,[36] but the court emphatically pointed out that it was not under any obligation to accept "the construction accorded to the policy terms by astute insurance specialists or perspicacious counsel"; rather, it was "concerned with the meaning which the ordinary insured of average intelligence and common understanding reasonably would give to the words or language under consideration."[37]

The notion in *Hammontree*, that there need not be any circumstances suggesting theft as a logical explanation, was also applied in *Midlo v. Indiana Lumberman's Mut. Ins. Co.*,[38] wherein the Louisiana Court of Appeals held: "We take the mysterious disappearance clause contained in the present policy to eliminate the necessity of speculating upon and weighing the probabilities of various conceivable explanations of such a disappearance."[39]

The recent cases seem to indicate that the insurance companies have created, perhaps unintentionally, a new insurance coverage which is substantially different from that for theft, but which does not ex-

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[35]The definition was first enunciated in Davis v. St. Paul Indem. Co., 227 N.C. 80, 40 S.E. 2d 609, 611 (1946). It was subsequently adopted in: Seward v. Assurance Co. of America, 218 Cal. App. 2d 895, 32 Cal. Rptr. 821 (Super. Ct. 1963); Midlo v. Indiana Lumbermen's Mut. Ins. Co., 160 So. 2d 314, 315 (La. Ct. App. 1964); Englehart v. Assurance Co. of America, 139 So. 2d 108, 113 (La. Ct. App. 1962); Deckler v. Travelers Indem. Co., 94 So. 2d 55, 58 (La. Ct. App. 1957); Loop v. United States Fid. & Guar. Co., 63 So. 2d 247, 248 (La. Ct. App. 1953); Caldwell v. St. Paul Mercury & Indem. Co., 210 Miss. 320, 49 So. 2d 570, 572 (1950); Conlin v. Dakota Fire Ins. Co., 126 N.W.2d 421, 425 (N.D. 1964); Gordon v. Eureka Cas. Co., 187 Pa. Super. 636, 146 A.2d 379, 380 (1958); Sigel v. American Guarantee & Liab. Ins. Co., 173 Pa. Super. 434, 98 A.2d 376, 381 (1953).

[36]Supra note 7. The insurance company definition is essentially that of Kelly, supra note 16, at 77, who said: *"First:* The disappearance must be from a clearly identified location.... *Second:* The circumstances should suggest theft as the logical explanation." Although this definition was drawn from an analysis of the "circumstantial evidence" and "presumption of theft" cases would be helpful in deciding cases involving the older mysterious disappearance provisions, it seems inappropriately restrictive in view of the 1956 revision.

[37]Hammontree v. Central Mut. Ins. Co., supra note 4, at 666-67. The notion is not new that the reasonable understanding and intent of the insured should govern in interpreting the construction of clauses in his policy. See, e.g., 1 Couch, Insurance § 15:14 (2d ed. 1959); 13 Appleman, Insurance § 7402, at 96-97 (1943).

[38]160 So. 2d 314 (La. Ct. App. 1964) (insured had strung ring on handkerchief in his pocket; both disappeared). The breadth of the court's statement invites an "all-risk" interpretation which is not necessarily warranted by the factual situation.

[39]Id. at 316.