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## INSURANCE CONCEPTS OF TOTAL AND PERMANENT DISABILITY

By JOHN ALAN APPLEMAN\* AND JOHN D. CARSON\*\*

Ordinarily, disability provisions in insurance policies insure against, not loss of income, but loss of capacity to work.<sup>1</sup> It has been broadly stated that a reasonable construction should be given to total disability clauses.<sup>2</sup> Other courts have more bluntly, and perhaps more honestly, stated that a liberal construction will be given them,<sup>3</sup> even to declaring that such a

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<sup>1</sup> N. H.—*Bachman v. Travelers' Ins. Co.*, 1916, 97 A. 223, 78 N. H. 100.

Tex.—*Great Southern Life Ins. Co. v. Johnson*, Com. App. 1930, 25 S.W. 2d 1093, reversing Civ. App., 13 S.W. 2d 424.

<sup>2</sup> Iowa—*Hoover v. Mutual Trust Life Ins. Co.*, 1930, 282 N. W. 781, 225 Iowa 1034.

Tex.—*Great Southern Life Ins. Co. v. Johnson*, Com. App. 1930, 25 S.W. 2d 1093, reversing, Civ. App., 13 S.W. 2d 424; *Brotherhood of Locomotive Firemen & Enginemen v. Hassell*, Civ. App. 1933, 56 S.W. 2d 223, reversed on other grounds *Hassell v. Brotherhood of Locomotive Firemen and Enginemen*, 87 S.W. 2d 468, 126 Tex. 256, conformed to Civ. App., 93 S.W. 2d 789.

Va.—*International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood*, 1934, 175 S. E. 45, 162 Va. 517.

<sup>3</sup> Ind.—*American Liability Co. v. Bowman*, 1917, 114 N.E. 992, 65 Ind. App. 109.

R. I.—*Pannone v. John Hancock Mut. Life Ins. Co.*, 1932, 157 A. 876.

Tex.—*Brotherhood of Railroad Trainmen v. Britton*, Civ. App. 1927, 292 S.W. 286.

On the other hand, it has been held that, such provisions not being ambiguous, the rule of liberal construction had no application.

N. Y.—*Perlman v. New York Life Ins. Co.*, 1932, 254 N. Y. S. 646, 234 App. Div. 359.

Ohio—*Mosher v. Equitable Life Assur. Soc. of U. S.*, 1938, 14 N. E. 2d 413, 57 Ohio App. 435.

construction as will indemnify the insured from loss must be adopted.<sup>4</sup> New York has held that the language must be construed in the light of the insured's understanding, or that the words be interpreted as a layman would understand them.<sup>5</sup>

What constitutes total disability is not an absolute, but is a relative matter, to be determined in the light of the insured's occupation, education, training, and injury<sup>6</sup> by the trier of

<sup>4</sup> Pa.—Thompson v. Citizens' Casualty Co., 1929, 94 Pa. Super. 303.

<sup>5</sup> "The verdict of the jury that the plaintiff was entitled to recovery under a group insurance policy which provided that an employee who while insured thereunder 'becomes totally disabled and will presumably thereafter during life be unable to engage in any occupation or employment for wage or profit' is contrary to and against the weight of the evidence where it appears that the plaintiff, though suffering from silicosis during the period, did not know that he was suffering therefrom, did his full work every day, except one, during the entire period while the insurance was in force from April 30, 1933, to June 25, 1934, was not discharged because of any failure to do his work satisfactorily and did not consult a physician until March, 1933, shortly after which he first learned of his condition. We must interpret the words 'total disability' as they would be interpreted by the ordinary business man and give them the meaning which they have in common thought and in common speech." Sosknowski v. Aetna Life Ins. Co., 1939, 13 N. Y. S. 2d 791, 257 App. Div. 1035.

N. Y.—Gates v. Prudential Ins. Co. of America, 1934, 270 N. Y. S. 282, 240 App. Div. 444, appeal dismissed 193 N. E. 296, 265 N. Y. 510; Herschman v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 1936, 284 N. Y. S. 561, 158 Misc. 263, affirmed 290 N. Y. S. 425, 248 App. Div. 774; Sosknowski v. Aetna Life Ins. Co., 1939, 13 N. Y. S. 2d 791, 257 App. Div. 1035.

<sup>6</sup> "The term 'total disability' is a relative term, depending in a measure upon the character of the occupation and the capabilities of the insured, and to a large extent upon the circumstances of the particular case. Ordinarily it is a question of fact, and not of law." Travelers' Ins. Co. v. Plaster, 1924, 98 So. 909, 911, 210 Ala. 607.

Ala.—New York Life Ins. Co. v. Torrance, 1932, 141 So. 547, 224 Ala. 614.

Ark.—Aetna Life Ins. Co. v. Person, 1934, 67 S. W. 2d 1007, 188 Ark. 864; Travelers Ins. Co. v. Thompson, 1937, 99 S.W. 2d 254, 193 Ark. 332.

Mass.—Adamaitis v. Metropolitan Life Ins. Co., 1936, 3 N. E. 2d 833, 295 Mass. 215.

Mo.—Heald v. Aetna Life Ins. Co. of Hartford, Conn., App. 1936, 90 S.W. 2d 797, affirmed 104 S. W. 2d 379, 340 Mo. 1143.

Mont.—Cacic v. Slovenska Narodna Podporna Jednota of Chicago, Ill., 1936, 59 P. 2d 910, 102 Mont. 438.

Okla.—Travelers Ins. Co. v. Blake, 1936, 55 P. 2d 975, 176 Okla. 364.

S. C.—Thompson v. Aetna Life Ins. Co. of Hartford, Conn., 1935, 180 S. E. 880, 177 S. C. 120.

facts, whether court or jury.<sup>7</sup> Thus, total disability to carry on the insured's present occupation may constitute total disability for all purposes.<sup>8</sup> The disability provision must, therefore, be construed together with the other provisions of the contract.<sup>9</sup>

By "total" disability, however, is clearly meant disability which is entire in nature as distinguished from "partial," and the court will not construe one to cover the other.<sup>10</sup> It refers to a total loss of time,<sup>11</sup> and where the specific expression "total loss of time" is used, it will be held to mean the same as

Tenn.—Prudential Ins. Co. of America v. Davis, 1935, 78 S.W. 2d 358, 18 Tenn. App. 413.

Or, as will be pointed out later, it may refer to ability or inability to engage in some profitable enterprise.

N. Y.—Shabotzky v. Equitable Life Assur. Soc., 1939, 12 N. Y. S. 2d 848, 257 App. Div. 257, reargument denied 14 N. Y. S. 2d 279, 257 App. Div. 957.

Compare:

Tex.—Winters Mut. Aid Ass'n. Circle No. 2 v. Reddin, Com. App. 1932, 49 S. W. 2d 1095, reversing, Civ. App. 31 S. W. 2d 1103.

Ind.—American Liability Co. v. Bowman, 1917, 114 N. E. 992, 65 Ind. App. 109.

Okla.—Travelers Ins. Co. v. Blake, 1936, 55 P 2d 975, 176 Okla. 364.

Ky.—Travelers Ins. Co. v. Mahon, 1938, 117 S.W. 2d 909, 273 Ky. 691.

Similarly, a very liberal construction is given to the provision requiring that the insured be disabled from performing any kind or type of work, or from engaging in any gainful occupation.

Ky.—National Life & Accident Ins. Co. v. Bradley, 1932, 53 S.W. 2d 701, 245 Ky. 311; Jefferson Standard Life Ins. Co. v. Hurt, 1934, 72 S.W. 2d 20, 254 Ky. 603.

Neb.—Woods v. Central States Life Ins. Co. of St. Louis, Mo., 1937, 271 N. W. 850, 132 Neb. 261.

Mo.—John v. Aetna Life Ins. Co. of Hartford, Conn., App. 1937, 100 S.W. 2d 936.

Ala.—Metropolitan Life Ins. Co. v. Blue, 1931, 133 So. 707, 222 Ala. 665, 79 A. L. R. 852.

Ky.—Davis v. New England Mt. Life Ins. Co. of Boston, Mass., 1936, 92 S.W. 2d 822, 263 Ky. 568.

Tenn.—U. S. Stove Corporation, for Use and Benefit of Henderson v. Aetna Life Ins. Co., 1935, 84 S.W. 2d 582, 169 Tenn. 264.

But Missouri held that where the terms were not defined in the contract, it was at liberty to apply them to the facts and is not bound by an arbitrary classification thereof.

Mo.—Parks v. Maryland Casualty Co., 1936, 91 S. W. 2d 1186, 230 Mo. App. 383.

And, if there is an apparent conflict between the policy definitions of total and partial disability, the construction most favoring the insured will be used.

Mo.—Heald v. Aetna Life Ins. Co. of Hartford, Conn., App. 1936, 90 S.W. 2d 797, affirming 104 S.W. 2d 379, 340 Mo. 1143.

Ind.—Workingmen's Mut. Protective Ass'n. v. Roos, 1916, 113 N. E. 760, 63 Ind. App. 18.

Miss.—Mutual Ben. Health & Accident Ass'n. v. Mathis, 1932, 142 So. 494, 169 Miss. 187.

“total disability.”<sup>12</sup> And, a similar construction will be given to the word “wholly.”<sup>13</sup> Total disability, when followed by partial disability only, whether permanent or temporary, hardly fulfills the policy requirement.<sup>14</sup>

In order to establish a recovery, the insured would have to show that he is unable to engage in any remunerative occupation<sup>15</sup> and this he would have to show by a preponderance of the evidence.<sup>16</sup> But if his disability is such that prudence requires him to desist from work or that he could not work without physical injury to himself, the policy requirement is satisfied.<sup>17</sup> And the mere fact that he continues to work when the effect of such is to cause additional injury does not prevent recovery,<sup>18</sup> nor would the fact that he is still able to perform some

<sup>12</sup> Miss.—Mutual Ben. Health & Accident Ass'n. v. Mathis, 1932, 142 So. 494, 169 Miss. 187.

<sup>13</sup> Tex.—State Life Ins. Co. v. Wilson, Civ. App. 1932, 54 S. W. 2d 233, error dismissed.

<sup>14</sup> Ala.—Metropolitan Life Ins. Co. v. Blue, 1931, 133 S6. 707, 22 Ala. 665, 79 A. L. R. 852.

<sup>15</sup> “It has been repeatedly held in this jurisdiction that to recover under policies such as those before the court plaintiff must show his disability was such as to prevent him from engaging in any occupation or performing work for compensation of financial value. Finkelstein v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 286 N. Y. S. 779, 247 App. Div. 74; Steingart v. Metropolitan Life Ins. Co., 291 N. Y. S. 550, 249 App. Div. 114, affirmed 276 N. Y. 674, 13 N. E. 2d 56; Fuchs v. Metropolitan Life Ins. Co. 253 App. Div. 665, 3 N. Y. S. 2d 707. This does not mean an insured must be utterly helpless; the phrase is not absolute but relative. At least it means the insured is unable to engage in a remunerative occupation, as that phrase is ordinarily understood, or to do work in some profitable employment or enterprise. While the evidence in this case disclosed that plaintiff was suffering from a disease of the heart, it failed to establish that such disease totally disabled him within the definitions contained in the policies. Elenberg v. Metropolitan Life Ins. Co., 251 App. Div. 443, 297 N. Y. S. 343, First Dept., June, 1937.” Shabotsky v. Equitable Life Assur. Soc. 1939, 12 N. Y. S. 2d 848, at page 852, 257 App. Div. 257, reargument denied 14 N. Y. S. 2d 279, 257 App. Div. 957.

<sup>16</sup> N. Y.—Schwenk v. Equitable Life Assur. Soc. of U. S., 1939, 13 N. Y. S. 2d 611, 257 App. Div. 1012.

<sup>17</sup> Miss.—Metropolitan Life Ins. Co. v. Lambert, 1930, 128 So. 750, 157 Miss. 759.

N. Y.—Shabotsky v. Equitable Life Assur. Soc., 1939, 12 N. Y. S. 2d 848, 257 App. Div. 257, reargument denied 14 N. Y. S. 2d 279, 257 App. Div. 957.

Tex.—Kemper v. Police & Firemen's Ins. Ass'n. Com. App. 1932, 44 S. W. 2d 978, reversing Police & Firemen's Ins. Ass'n. v. Kemper, Civ. App., 28 S.W. 2d 1111, modified Kemper v. Police & Firemen's Ins. Ass'n., Com. App., 48 S. W. 2d 254.

<sup>18</sup> U. S.—Metropolitan Life Ins. Co. v. Bovello, 1926, 12 F. 2d 810, 56 App. D. C. 275.

inconsequential duties incident to his occupation.<sup>19</sup> On the other hand, his wilful refusal to perform work which he is physically able to perform will not render the insurer liable,<sup>20</sup> nor will his voluntary quitting where disability arose subsequent to giving up his job.<sup>21</sup>

Courts have been reluctant to abide solely by dictionary or

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<sup>19</sup> GENERAL DUTIES

Insured unable to perform substantial duties of his business, even though he may be able to perform some of the inconsequential duties pertaining thereto, is "disabled" within policy providing benefits in case of disability resulting in continuous, necessary, and total loss of all business time. *Moore v. Pacific Mut. Life Ins. Co. of California*, 1935, 259 N. W. 916, 128 Neb. 605.

OPERATION OF STORE

Insured becoming afflicted with tuberculosis was "totally disabled" within policy authorizing recovery therefor, though able to assist in operation of country store. *Equitable Life Assur. Soc. v. Serio*, 1929, 124 So. 485, 155 Miss. 515.

RETIREMENT

Some question may arise where the insured is retired. Thus, an accident policy insured against death or total disability resulting from bodily injuries effected through external, violent, and accidental means. The "total disability" was defined as follows: "If said member shall sustain bodily injuries by means, as aforesaid, which, shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he receives membership." Plaintiff stated his occupation in the contract to be that of a "retired," the term "gentleman" or equivalent being evidently omitted by clerical error, and in an action on the policy testified that he had no occupation except to amuse himself; that his income was derived from investments; that he had a shop at his house, where he sometimes amused himself; and was a director in a wagon company, and at times used some of its machinery in connection with his amusement. While operating a buzz saw at the wagon shops, he received a severe and painful wound on the back of the hand, which deprived him of the use of it for some time. Held, that the injury was not covered by the policy, as plaintiff was not totally disabled, and prevented from any and every kind of business pertaining to his situation. *Knapp v. Preferred Mut. Acc. Ass'n.*, 1889, 6 N. Y. S. 57, 53 Hun 84, 24 N. Y. St. Rep. 882, rehearing denied 8 N. Y. S. 946, 54 Hun 636, 26 N. Y. St. Rep. 986.

<sup>20</sup> Ala.—*United States Casualty Co. v. Perryman*, 1919, 82 So. 462, 203 Ala. 212.

Ind.—*American Liability Co. v. Bowman*, 1917, 114 N. E. 992, 65 Ind. App. 109.

<sup>21</sup> Railroad employee able to perform his work for railroad despite hernia held not entitled to recover total disability benefits on group policy, where employee quit on being informed that railroad intended to displace him with another man because of seniority rules and that he could have his choice of two other jobs, regardless of any total disability arising after he ceased to be employee of railroad. *Pan-American Life Ins. Co. v. Kirkpatrick*, 1936, 183 S. E. 88, 52 Ga. App. 344.

statutory definitions of the word "permanent" in applying it to disability actions.<sup>22</sup> Consequently they have held that it must be construed in relation to the subject matter solely.<sup>23</sup> As a result, they have held that the term does not mean permanent, unalterable, or unchanging, nor does it mean that the disability must absolutely continue for the duration of the insured's life.<sup>24</sup> This is particularly true where the contract provides that payments shall not be made after the termination of such disability<sup>25</sup> or that the condition will be presumed to be permanent

<sup>22</sup> Pa.—*Garabedian v. Metropolitan Life Ins. Co.*, 1939, 5 A. 2d 379, 135 Pa. Super. 320.

CONTRA:

The "plain, ordinary and popular" understanding of the adjective "permanent" is in accord with the definition given in Webster's New International Dictionary (1925 Edition), as follows: "Continuing in the same state, or without any change that destroys form or character; remaining unaltered or unremoved; abiding; durable; fixed; stable; lasting." *Conley v. Pacific Mut. Life Ins. Co.*, of California, 1928, 8 Tenn. App. 405.

<sup>23</sup> Word "permanent," as used in permanent disability clause of life insurance policy, does not always mean forever or lasting forever, but its meaning is to be construed according to its nature and its relation to subject-matter of contract. *Penn. Mut. Life Ins. Co. v. Milton*, 1925, 127 S. E. 140, 160 Ga. 168, 40 A. L. R. 1382, answers to certified questions conformed to 127 S. E. 798, 33 Ga. App. 634.

Also:

Ga.—*Adamson v. Metropolitan Life Ins. Co.*, 1931, 157 S. E. 104, 42 Ga. App. 587.

<sup>24</sup> Where an insurance policy providing for total and permanent disability benefits also provides that the insurer will, "during the continuance" of the disability, waive the payment of premiums and will pay the insured a specified income, and that the insurer may, at any time, have the insured examined to determine whether or not he is totally and permanently disabled, and that, if it shall appear that he is able to work, no further premium shall be waived or income paid, it is not essential, to entitle the insured to receive such benefits in case of his total and permanent disability, that he shall establish that he will be disabled for the remainder of his life, but, whenever it appears that the plaintiff is totally disabled and that this disability will, as far as can be ascertained at the time, be permanent, the insured should receive the income and have the premiums waived from the time the fact of disability is determined until he recovers or dies. *Johnson v. Mutual Trust Life Ins. Co.*, 1934, 269 Ill. App. 471.

Ind.—*New England Mut. Life Ins. Co. of Boston, Mass. v. Durre*, 1936, 199 N. E. 868, 101 Ind. App. 467.

Md.—*New England Mut. Life Ins. Co. of Boston, Mass. v. Hurst*, 1938, 199 A. 822, 174 Md. 596.

Ohio—*Gibbons v. Metropolitan Life Ins. Co.*, 1939, 21 N. E. 2d 588, 135 Ohio St. 481, affirming 23 N. E. 2d 662, 62 Ohio App. 280.

Utah—*Gibson v. Equitable Life Assur. Soc. of U. S.*, 1934, 36 P. 2d 105, 84 Utah 452.

<sup>25</sup> Mo.—*Steck v. American Nat. Assur. Co.*, App. 1935, 86 S. W. 2d 113.

covery may be had where the condition is only apparently permanent,<sup>29</sup> or where the conditions, while indicative of permanency, prove to be temporary only.<sup>30</sup> Thus a distinction might be found in results depending upon whether the term used is "permanent" or "presumably permanent."<sup>31</sup>

Other courts, however, rather than considering the expression "permanent" to refer to a state of indefinite continuance, have considered that it refers to something incapable of alteration, fixed, or immutable, and have, accordingly, set up a much higher test for recovery.<sup>32</sup> Thus, under this rule, it must appear that the disability will probably continue for the remainder of the insured's life.<sup>33</sup> If recovery seems certain

Mass.—*Yoffa v. Metropolitan Life Ins. Co.*, 1939, 23 N. E. 2d 108.

N. Y.—*Ginell v. Prudential Ins. Co. of America*, 1923, 200 N. Y. S. 261, 205 App. Div. 494, affirming, 1922, 196 N. Y. S. 337, 119 Misc. 467, and reversed 143 N. E. 740, 237 N. Y. 554.

Pa.—*Losnecki v. Mutual Life Ins. Co. of New York*, 1932, 161 A. 434, 106 Pa. Super. 259; *Garabedian v. Metropolitan Life Ins. Co.*, 1939, 5 A. 2d 379, 135 Pa. Super. 320.

<sup>29</sup>Pa.—*Janney v. Scranton Life Ins. Co.*, 1934, 173 A. 819, 315 Pa. 200.

#### HEART AND BLOOD AILMENTS

<sup>30</sup>Tenn.—*Metropolitan Life Ins. Co. v. Noe*, 1930, 31 S. W. 2d 689, 161 Tenn. 335.

<sup>31</sup>In disability benefit policies, there is a definite legal distinction between a coverage of permanent disability and a coverage of presumably permanent disability. *Finkelstein v. Equitable Life Assur. Soc. of U. S.*, 1939, 11 N. Y. S. 2d 135, 256 App. Div. 593, affirmed 23 N. E. 2d 19, 281 N. Y. 690.

Term "presumably permanent" in group insurance certificate, covering total disability presumably permanently preventing insured from pursuing any gainful occupation for life, held not to preclude recovery for such disability so long as any expectation of recovery was entertained by some physicians or others familiar with nature and extent of injury; "presumably" presupposing facts showing probability of permanency. *Gibson v. Equitable Life Assur. Soc. of U. S.*, 1934, 36 P. 2d 105, 84 Utah 452.

<sup>32</sup>Ky.—*Equitable Life Ins. Co. of Iowa v. Hauser*, 1937, 107 S. W. 2d 282, 269 Ky. 374.

N. J.—*Gusaeff v. John Hancock Mut. Life Ins. Co.*, 1937, 192 A. 528, 118 N. J. L. 364.

<sup>33</sup>"The phrases, totally and permanently, and wholly and permanently, of course, have the same meaning. A total and permanent disability means that the disability is of such character that the insured has been rendered incapable of performing with reasonable regularity any substantially gainful occupation. The word, permanently, as used in both the policies in connection with the character of the disability, means that such disability was based upon a condition that rendered it reasonably certain, at the time, that it would continue throughout the life of the insured." *Culver v. Prudential Ins. Co.*, Del. 1935, 179 A. 400, at page 403, 6 W. W. Harr. 582.



upon the expiration of a certain time,<sup>26</sup> either expression implying that such disability might terminate.

The common interpretation of the expression "permanent" is, therefore, a disability which will persist for a long or indefinite period of time,<sup>27</sup> as distinguished from a condition which is merely transient or temporary.<sup>28</sup> Accordingly, re-

<sup>26</sup> Under life policy providing for payment of benefits, on due proof of total and permanent disability continuing uninterruptedly

within a short period of time, the claim is properly one of temporary total disability and no recovery can be had.<sup>34</sup> And this result obtains regardless of the seriousness of the injuries at the time of their occurrence.<sup>35</sup>

It may be made essential that the two elements co-exist, and where the test is total and permanent disability, neither, standing alone, will permit a recovery.<sup>36</sup> In construing the

Ark.—*Plunkett v. Metropolitan Life Ins. Co.*, 1936, 95 S. W. 2d 1144, 192 Ark. 1065.

Del.—*Culver v. Prudential Ins. Co. of America*, 1935, 179 A. 400, 6 W. W. Harr. 582.

Ind.—*Prudential Ins. Co. of America v. Citizens Trust & Savings Bank of Evansville*, 1935, 198 N. E. 116, 101 Ind. App. 168.

Mo.—*Paul v. Missouri State Life Ins. Co.*, 1932, 52 S. W. 2d 437, 228 Mo. App. 124; *Buis v. Prudential Ins. Co. of America*, 1935, 77 S.W. 2d 127, 229 Mo. App. 190.

Utah.—*Ralston v. Metropolitan Life Ins. Co.*, 1937, 62 P. 2d 1119, 90 Utah 496.

New York has set up a double test, holding that insured could not be found "permanently disabled" within contemplation of policy unless there was evidence either that insured could never recover or that time of recovery was so far removed that end of disability could not be foreseen, and disability was found to be such that insured was unable to engage in a remunerative occupation, or to do work in some profitable employment or enterprise. *Feldmann v. Metropolitan Life Ins. Co.*, Sup. 1939, 14 N. Y. S. 2d 652.

<sup>34</sup> N. Y.—*Silverstein v. Prudential Ins. Co. of America*, 1936, 286 N. Y. S. 211, 246 App. Div. 359.

R. I.—*Grenon v. Metropolitan Life Ins. Co.*, 1932, 161 A. 229, 52 R. I. 453.

Similarly:

Under employees' group certificate providing for disability payments if insured should become wholly and permanently unable to perform any work during remainder of his lifetime, insured held not entitled to recover for disability insured admitted lasted only ten months and three days. *Prudential Ins. Co. of America v. Bond*, 1936, 88 S. W. 2d 988, 261 Ky. 808.

<sup>35</sup> Injuries consisting principally of five fractures of insured's arm were not "permanent" injuries within meaning of life policy having disability benefits, including benefit payments and waiver of premiums, for "permanent" and total disability, notwithstanding that insured was totally disabled for eight months, where it had not appeared at the time of injury that insured's condition would be reasonably certain to continue indefinitely. *Leibson v. Metropolitan Life Ins. Co.*, 1939, 18 N. E. 2d 99, 297 Ill. App. 649.

<sup>36</sup> Ill.—*Supreme Tent of Knights of Maccabees of the World v. King*, 1898, 79 Ill. App. 145.

Mich.—*Brod v. Detroit Life Ins. Co.*, 1931, 235 N. W. 248, 253 Mich. 545.

Miss.—*Shipp v. Metropolitan Life Ins. Co.*, 1927, 111 So. 453, 146 Miss. 18.

N. J.—*Gusaeff v. John Hancock Mut. Life Ins. Co.*, 1937, 192 A. 528, 118 N. J. L. 364.

terms specifically, the court will, of course, consider the contract or endorsement as a whole.<sup>37</sup>

The rule, as previously stated, is to construe the provisions favorably to the insured, and not to take a literal or strict view of the policy requirements.<sup>38</sup> On the other hand, the construction should not be so broad or so sweeping as to make a new contract for the parties.<sup>39</sup> It should, rather, reflect, if possible, the real intent of the parties based upon what the ordinary layman would consider the words to mean.<sup>40</sup>

Thus, the court will look at the circumstances of the particular case in making this determination,<sup>41</sup> based, at least partly, upon the insured's occupation and capabilities.<sup>42</sup> Even

<sup>37</sup> N. Y.—*Medlinsky v. Metropolitan Life Ins. Co.*, 1933, 263 N. Y. S. 179, 146 Misc. 855.

<sup>38</sup> Ky.—*Aetna Life Ins. Co. v. Shemwell*, 1938, 116 S.W. 2d 328, 273 Ky. 264.

Mo.—*Young v. Metropolitan Life Ins. Co.*, 1935, 84 S.W. 2d 1065, 229 Mo. App. 823, certiorari quashed *State ex rel. Metropolitan Life Ins. Co. v. Allen*, 1936, 100 S.W. 2d 487, 339 Mo. 1156.

R. I.—*Cole v. Metropolitan Life Ins. Co.*, 1934, 170 A. 74, 54 R. I. 88.

Tex.—*Jefferson Standard Life Ins. Co. v. Curfman*, Civ. App. 1939, 127 S.W. 2d 567, error dismissed.

<sup>39</sup> "We are of the opinion that the facts in this case do not warrant a finding that Brinkley has been totally and permanently disabled under the provisions of this policy. While this court has given a liberal interpretation to such provisions, these interpretations have been within the spirit and purpose of the contract. To go further than this makes a new and different contract between the parties, not permitted by any rule of construction." *Travelers' Ins. Co. v. Brinkley*, 1936, 184 S. E. 225, at page 227, 166 Va. 147.

Mass.—*Rezendes v. Prudential Ins. Co. of America*, 1934, 189 N. E. 826, 285 Mass. 505.

Va.—*Travelers Ins. Co. v. Brinkley*, 1936, 184 S. E. 225, 166 Va. 147.

<sup>40</sup> Ky.—*Aetna Life Ins. Co. of Hartford, Conn. v. Gullett*, 1936, 89 S.W. 2d 1, 262 Ky. 1.

N. Y.—*Medlinsky v. Metropolitan Life Ins. Co.*, 1933, 263 N. Y. S. 179, 146 Misc. 855.

And, respecting disability covered by accident policy, words "wholly and continuously" held synonymous with "totally and permanently." *American Nat. Ins. Co. v. Briggs*, Tex. Civ. App. 1936, 90 S.W. 2d 602, error dismissed.

<sup>41</sup> Whether specific injury or disease renders one permanently and wholly disabled within meaning of term as used in insurance policy is to be determined in light of nature and extent of disability in particular case, taking into consideration a practical application and construction of term in order to effectuate purpose of contract. *Travelers Ins. Co. v. Brinkley*, 1936, 184 S. E. 225, 166 Va. 147.

<sup>42</sup> R. I.—*Cole v. Metropolitan Life Ins. Co.*, 1934, 170 A. 74, 54 R. I. 88.

the physical appearance of the insured may be one of the elements entering into this consideration.<sup>43</sup>

Disability is considered to be total and permanent when it prevents the insured from following a remunerative occupation and such disability is lasting or continuous as distinguished from temporary.<sup>44</sup> Some few cases require the latter portion of this definition to run for the lifetime of the insured,<sup>45</sup> but it is at least necessary that it be apparent that in all probability it will continue for a long and indefinite period of time.<sup>46</sup>

The expression "total and permanent disability" is not construed so as to require the insured to be in a state of either physical or mental helplessness or hopelessness in order to establish a recovery.<sup>47</sup> It was not the intention of the parties

<sup>43</sup>Jury or judge may look to physical appearance of claimant and history of case, and consider lay and expert testimony in determining whether insured's disability is total and permanent. Metropolitan Life Ins. Co. v. Noe, 1930, 31 S.W. 2d 689, 161 Tenn. 335.

<sup>44</sup>Ky.—Prudential Ins. Co. of America v. Dismore, 1936, 88 S.W. 2d 924, 261 Ky. 741.

Tenn.—Blagg v. Missouri State Life Ins. Co., 1932, 15 Tenn. App. 242.

<sup>45</sup>U. S.—Starnes v. U. S., D. C. Tex. 1926, 13 F. 2d 212.

Mich.—Brod v. Detroit Life Ins. Co., 1931, 235 N. W. 248, 253 Mich. 545.

N. H.—Turcotte v. Prudential Ins. Co. of America, 1936, 182 A. 9, 87 N. H. 440.

Tenn.—Metropolitan Life Ins. Co. v. Noe, 1930, 31 S. W. 2d 689, 161 Tenn. 335.

<sup>46</sup>Ky.—Equitable Life Assur. Soc. of U. S. v. Green, 1935, 83 S.W. 2d 478, 259 Ky. 773.

Minn.—Maze v. Equitable Life Ins. Co. of Iowa, 1933, 246 N. W. 737, 188 Minn. 139.

<sup>47</sup>"Total disability" does not mean utter helplessness, and "permanent disability" does not mean utter hopelessness, and a man to be totally and permanently disabled does not have to be reduced to a state wherein he is entirely dependent on others and is absolutely without hope of improvement." Aetna Life Ins. Co. v. Gullett, 1936, 89 S.W. 2d 1, at page 3, 262 Ky. 1.

U. S.—Clarkson v. New York Life Ins. Co., D. C. Fla. 1933, 4 F. Supp. 791.

Ala.—John Hancock Mut. Life Ins. Co. v. Schroder, 1938, 180 So. 327, 235 Ala. 655.

Ark.—Mutual Ben. Health & Accident Ass'n. v. Bird, 1932, 47 S. W. 2d 812, 185 Ark. 445.

Ill.—Davis v. Midland Casualty Co., 1914, 190 Ill. App. 338; Kelly v. Supreme Court of Independent Order of Foresters, 1915, 195 Ill. App. 501.

Ind.—Metropolitan Life Ins. Co. v. Schneider, 1935, 193 N. E. 690, 99 Ind. App. 570.

Iowa—Kurth v. Continental Life Ins. Co., 1931, 234 N. W. 201, 211 Iowa 736.

to confine recovery to instances of invalidism, coma, or insanity.<sup>48</sup> Of course, if the person is actually an invalid<sup>49</sup> or has

Ky.—Aetna Life Ins. Co. v. Wyant, 1933, 61 S. W. 2d. 50, 249 Ky. 562; Bankers' Life Co. v. Green, 1935, 76 S. W. 2d 276, 256 Ky. 496; Aetna Life Ins. Co. of Hartford, Conn., v. Gullett, 1936, 89 S. W. 2d 1, 262 Ky. 1; Davis v. New England Mut. Life Ins. Co. of Boston, Mass., 1936, 92 S. W. 2d 822, 263 Ky. 568; Equitable Life Ins. Co. of Iowa v. Hauser, 1937, 107 S. W. 2d 282, 269 Ky. 374.

Mass.—Rezendes v. Prudential Ins. Co. of America, 1934, 189 N. E. 826, 285 Mass. 505.

Miss.—Equitable Life Assur. Soc. v. Serio, 1929, 124 So. 485, 155 Miss. 515.

Mo.—Thomas v. Metropolitan Life Ins. Co., 1936, 89 S. W. 2d 590, 230 Mo. App. 206; Wright v. Metropolitan Life Ins. Co., App. 1938, 115 S. W. 2d 102.

Neb.—McCleneghan v. London Guarantee & Accident Co., 1937, 271 N. W. 276, 132 Neb. 131; Serven v. Metropolitan Life Ins. Co., 1937, 272 N. W. 922, 132 Neb. 637; Russell v. Glens Falls Indemnity Co. of Glens Falls, N. Y., 1938, 279 N. W. 287, 134 Neb. 631; Schultz v. John Hancock Mut. Life Ins. Co., 1938, 280 N. W. 165, 134 Neb. 885.

N. H.—Duhaime v. Prudential Ins. Co. of America, 1933, 167 A. 269, 86 N. H. 307.

Pa.—Cantor v. Metropolitan Life Ins. Co., 1933, 164 A. 145, 108 Pa. Super. 1; Eisenhauer v. New York Life Ins. Co., 1937, 189 A. 561, 125 Pa. Super. 403; Rudy v. New York Life Ins. Co. of New York City, 1938, 46 Dauph. 1.

S. C.—McCutchen v. Pacific Mut. Life Ins. Co., 1930, 151 S. E. 67, 153 S. C. 401.

Utah—Gibson v. Equitable Life Assur. Soc. of U. S., 1934, 36 P. 2d 105, 84 Utah 452.

<sup>48</sup> U. S.—U. S. Fidelity & Guaranty Co. v. McCarthy, C. C. A. Iowa 1931, 50 F. 2d 2, certiorari denied 52 S. Ct. 32, 284 U. S. 652, 76 L. Ed. 553.

Mo.—Parks v. Maryland Casualty Co., 1936, 91 S.W. 2d 1186, 230 Mo. App. 383.

Although insanity is included, the bylaws of a fraternal benefit society provided that, "whenever any member \* \* \* shall become permanently and totally disabled from pursuing the ordinary vocations of life, \* \* \* he shall be entitled to receive one-half of his certificate." One form of permanent total disability was declared to be "insanity so adjudged by the courts." Held that, in order to recover on a certificate of membership on the ground of insanity, it must be such degree of insanity as would authorize an adjudication of the insured's mental status by the proper courts. Knipp v. United Benev. Ass'n., 1907, 101 S.W. 273, 45 Tex. Civ. App. 357.

<sup>49</sup> Under an accident policy providing that, if sickness shall totally disable and prevent insured from performing any and every duty pertaining to any and every kind of business and occupation, and shall necessarily confine him within the house, he was to receive a certain indemnity per month, insured was entitled to receive such indemnity, where he had been continuously confined to his bed from July 27, 1915, to October 27, 1916, and was a helpless invalid, paralyzed from his waist down, and unable to walk or move from his bed, incapable of doing each and every duty or thing appertaining to his occupation of stenographer and typist, and would remain a helpless invalid all his life. Thompson v.

practically lost all means of locomotion<sup>50</sup> a recovery may still more easily be obtained. This is particularly true where the combination of specific losses set forth by the contract going to make up permanent and total disability would not, in themselves, reduce the insured to such a condition.<sup>51</sup>

Nor is it fatal that the insured may conceivably be able, by some means, to earn some money.<sup>52</sup> Absolute financial helplessness or incapacity to earn money need not be shown; the usual test applied by the courts being the inability to perform the material acts of the insured's business in substantially the usual and customary manner.<sup>53</sup> Other decisions, not so sweep-

General Acc., Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 1924, 98 So. 746, 155 La. 31.

And see:

Miss.—Eminent Household of Columbian Woodmen v. Bunch, 1917, 76 So. 540, 115 Miss. 512, Ann. Cas. 1918C, 110.

<sup>50</sup> Charges that, if insured was able to walk with aid of canes about his home and to his automobile and from his automobile to his office or was able to walk with aid of canes for distance of about 100 feet, then he was not disabled within the meaning of the policy, were properly refused, since a state of complete helplessness was not necessary to authorize recovery. John Hancock Mut. Life Ins. Co. v. Schroder, 1938, 180 So. 327, 235 Ala. 655.

<sup>51</sup> A life insurance policy provision for total and permanent disability benefits, if insured were continuously and wholly prevented for life from engaging in any occupation or performing any work for compensation or profit was construable in light of policy provision declaring irrecoverable loss of sight of both eyes, severance of both hands at or above wrists, or of both feet at or above ankles, or loss of one entire hand and one entire foot a total and permanent disability, and, so construed, does not require absolute helplessness to entitle insured to total and permanent disability benefits. Wood v. Federal Life Ins. Co., 1938, 277 N. W. 241, 224 Iowa 179.

<sup>52</sup> Ga.—Cato v. Aetna Life Ins. Co., 1927, 138 S. E. 787, 164 Ga. 392.

S. C.—McCutchen v. Pacific Mut. Life Ins. Co., 1930, 151 S. E. 67, 153 S. C. 401.

Tenn.—Pacific Mut. Life Ins. Co. v. McCrary, 1931, 32 S.W. 2d 1052, 161 Tenn. 389.

<sup>53</sup> Ala.—John Hancock Mut. Life Ins. Co. v. Schroder, 1938, 180 So. 327, 235 Ala. 655.

Ark.—Equitable Life Assur. Soc. of U. S. v. Bagley, 1934, 69 S.W. 2d 394, 188 Ark. 1009; Mutual Life Ins. Co. of New York v. Dowdle, 1934, 71 S.W. 2d 691, 189 Ark. 296; Equitable Life Assur. Soc. of U. S. v. Barton, 1936, 96 S.W. 2d 480, 192 Ark. 984; Metropolitan Life Ins. Co. v. Jones, 1936, 96 S.W. 2d 957, 192 Ark. 1106; Travelers Ins. Co. v. Thompson, 1937, 99 S.W. 2d 254, 193 Ark. 332.

Cal.—Fitzgerald v. Globe Indemnity Co. of New York, 1927, 258 P. 458, 84 Cal. App. 689.

Fla.—Equitable Life Assur. Soc. of U. S. v. McKeithan, 1935, 160 So. 883, 119 Fla. 486.

ingly expressed, hold that total and permanent disability exists where insured is unable to perform any substantial part of his work,<sup>54</sup> or can only do work of a trifling<sup>55</sup> or unimportant

Ill.—Missouri State Life Ins. Co. v. Copas, 1933, 265 Ill. App. 478.

Iowa—Hoover v. Mutual Trust Life Ins. Co., 1939, 282 N. W. 781, 225 Iowa 1034; Eller v. Preferred Accident Ins. Co., 1939, 284 N. W. 406, 226 Iowa 474.

Ky.—Travelers' Ins. Co. v. Turner, 1931, 39 S.W. 2d 216, 239 Ky. 191; John Hancock Mut. Life Ins. Co. v. Cave, 1931, 40 S.W. 2d 1004, 240 Ky. 56, 79 A. L. R. 848.

La.—Pete v. Metropolitan Life Ins. Co., App. 1937, 171 So. 868; Madison v. Prudential Ins. Co. of America, 1938, 181 So. 871, 190 La. 103.

Mo.—Stoner v. New York Life Ins. Co., App. 1936, 90 S.W. 2d 784; Barton v. Metropolitan Life Ins. Co., App. 1937, 103 S.W. 2d 889; Heald v. Aetna Life Ins. Co. of Hartford, Conn., 1937, 104 S.W. 2d 379, 340 Mo. 1143, affirming, App., 90 S.W. 2d 797; Pogue v. Metropolitan Life Ins. Co., App. 1937, 107 S.W. 2d 144; Smith v. Metropolitan Life Ins. Co., App. 1937, 108 S.W. 2d 995; Rogers v. Metropolitan Life Ins. Co., App. 1939, 122 S.W. 2d 5.

Neb.—Bennett v. Metropolitan Life Ins. Co., 1939, 287 N. W. 609, 136 Neb. 785.

S. C.—Smoak v. Southeastern Life Ins. Co., 1935, 179 S. E. 56, 175 S. C. 324.

Tenn.—Pacific Mut. Life Ins. Co. v. McCrary, 1931, 32 S.W. 2d 1052, 161 Tenn. 389.

Tex.—Home Ben. Ass'n. v. Springer, Civ. App. 1937, 104 S.W. 2d 172.

W. Va.—Wade v. Mutual Ben. Health & Accident Ass'n., 1935, 177 S. E. 611, 115 W. Va. 694; Neill v. Fidelity Mut. Life Ins. Co., 1938, 195 S. E. 860, 119 W. Va. 694.

<sup>54</sup>“Total disability” is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case, and on the occupation and employment and capabilities of the person injured. It does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation, and may exist although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. Brotherhood of Locomotive Firemen & Enginemen v. Aday, 1911, 134 S.W. 928, 97 Ark. 425, 34 L. R. A. (N. S.) 126.

And see:

Okla.—Continental Casualty Co. v. Wynne, 1912, 129 P. 16, 36 Okla. 325; Travelers Ins. Co. v. Blake, 1936, 55 P. 2d 975, 176 Okla. 364.

Thus, “total disability” within disability provisions of life policy held not to mean absolute physical disability on part of insured to transact any kind of business pertaining to his occupation, but to exist although insured might be able to perform few occasional or trivial acts relating thereto, if he was able to do any substantial portion of work connected with his occupation. New York Life Ins. Co. v. Razzook, 1936, 61 P. 2d 686, 178 Okla. 57.

<sup>55</sup>Complete physical or mental incapacity of insured held not essential to “total disability” within supplementary contract attached to life policy providing for payment of benefits for “total and permanent disability” preventing insured from engaging in

character.<sup>56</sup> And the doing of light work at irregular intervals would not prevent recovery.<sup>57</sup>

The insured is considered to be permanently and totally disabled where it is impossible for him to work without endangering his health or risking his life.<sup>58</sup> It is unnecessary for him to do so,<sup>59</sup> and if common prudence requires him to desist from work, and he in fact does so, recovery is allowed.<sup>60</sup> The fact,

any occupation and performing any work for compensation or profit, it being sufficient that disability of insured was such that it prevented him from performing remunerative work of substantial and not merely trifling character (G. L. Mass. (Ter. Ed.) c. 175, § 24). *Adamaitis v. Metropolitan Life Ins. Co.*, 1936, 3 N. E. 2d 833, 295 Mass. 215.

<sup>56</sup> Ky.—*Bankers' Life Co. v. Green*, 1935, 76 S.W. 2d 276, 256 Ky. 496; *Prudential Ins. Co. of America v. Kelsay*, 1935, 78 S.W. 2d 923, 257 Ky. 633.

<sup>57</sup> Pa.—*Kramer v. Travelers' Ins. Co. of Hartford, Conn.*, 1934, 170 A. 700, 111 Pa. Super. 367.

<sup>58</sup> Ind.—*Prudential Ins. Co. of America v. Girton*, 1938, 12 N. E. 2d 379, 105 Ind. App. 52.

Mass.—*Rezendes v. Prudential Ins. Co. of America*, 1934, 189 N. E. 826, 285 Mass. 505.

Miss.—*New York Life Ins. Co. v. Bain*, 1934, 152 So. 845, 169 Miss. 271.

<sup>59</sup> Under total disability clause of life policy, insurer was not relieved from liability if insured could have continued to work without unduly endangering his life or health, but although insured may have been able to continue at work, it was unnecessary for him to do so if common care and prudence under the circumstances required that he not do so. *Metropolitan Life Ins. Co. v. Evans*, 1938, 184 So. 426, 183 Miss. 859.

<sup>60</sup> "Total disability" does not mean absolute physical inability to work at one's occupation, or to pursue some occupation for wages or gain; but it exists if the injury or disease of the insured is such that common care and prudence require him to desist, and he does in fact desist, from transacting his business. In such circumstances, total disability exists." *Blackman v. Travelers Ins. Co.*, 1934, 174 S. E. 384, 49 Ga. App. 137.

And as regards question whether insured was totally and permanently disabled under policy, law does not require one to perform duties at peril of life or health, or if performance entails pain and suffering which persons of ordinary fortitude would be unwilling to endure. *Mutual Life Ins. Co. of New York v. Dowdle*, 1934, 71 S.W. 2d 691, 189 Ark. 296.

In accord:

Ala.—*New York Life Ins. Co. v. McLean*, 1928, 118 So. 753, 218 Ala. 401.

Ark.—*Missouri State Life Ins. Co. v. Johnson*, 1933, 54 S.W. 2d 407, 186 Ark. 519, certiorari denied 53 S. Ct. 404, 288 U. S. 609, 77 L. Ed. 984, certiorari granted 53 S. Ct. 689, 289 U. S. 719, 77 L. Ed. 1471, Reversed on procedural grounds *Missouri State Life Ins. Co. v. Jones*, 54 S. Ct. 133, 290 U. S. 199, 78 L. Ed. 267; *Metropolitan Life Ins. Co. v. Weathersby*, 1935, 82 S.W. 2d 527, 190 Ark. 1050; *Sovereign Camp, W. O. W., v. Sams*, 1937, 108 S.W. 2d 1089, 194 Ark. 557.



also, that he may have continued work for a few days without realizing the seriousness thereof<sup>61</sup> or that he continued to work under circumstances endangering his health would not relieve the insurer.<sup>62</sup>

Cal.—Fitzgerald v. Globe Indemnity Co. of New York, 1927, 258 P. 458, 84 Cal. App. 689; Sherman v. Continental Casualty Co., 1930, 284 P. 946, 103 Cal. App. 518.

Ga.—Cato v. Aetna Life Ins. Co., 1927, 138 S. E. 787, 164 Ga. 392; Blackman v. Travelers' Ins. Co., 1934, 174 S. E. 384, 49 Ga. App. 137; A. B. & C. Railroad Ben. Ass'n. v. South, 1934, 175 S. E. 924, 49 Ga. App. 659; Prudential Ins. Co. of America v. Baker, 1934, 176 S. E. 134, 49 Ga. App. 505; New York Life Ins. Co. v. Williamson, 1936, 184 S. E. 755, 53 Ga. App. 28; Metropolitan Life Ins. Co. v. Manufacturers Nat. Bank, 1937, 189 S. E. 83, 54 Ga. App. 771.

Ky.—Pacific Mut. Life Ins. Co. v. Arnold, 1936, 90 S.W. 2d 44, 262 Ky. 267.

Minn.—Lobdill v. Laboring Men's Mut. Aid Ass'n. 1897, 71 N. W. 696, 69 Minn. 14, 38 L. R. A. 537, 65 Am. St. Rep. 542.

Miss.—Metropolitan Life Ins. Co. v. Lambert, 1930, 128 So. 750, 157 Miss. 759.

Mo.—Albert v. Metropolitan Life Ins. Co., App. 1936, 95 S.W. 2d 343.

N. Y.—Collis v. Massachusetts Bonding & Insurance Co., 1932, 260 N. Y. S. 241, 236 App. Div. 525, affirmed 191 N. E. 507, 264 N. Y. 447.

Okla.—Travelers Ins. Co. v. Blake, 1936, 55 P. 2d 975, 176 Okla. 364.

Tex.—North American Accident Ins. Co. v. Miller, Civ. App. 1917, 193 S. W. 750, error refused.

Thus, insured suffering from bursitis, painfully affecting use of right arm, and mild form of diabetes, and whose condition was such that he was advised to refrain from performance of duties of employment as manager and officer of corporations owning real estate, and of construction company engaged in renovation work of which he was active manager, held so disabled by disease as to be prevented from performance of duties pertaining to his occupation, within coverage of health and accident policy. *Klosk v. Equitable Life Assur. Soc. of U. S.*, 1937, 296 N. Y. S. 5, 162 Misc. 686.

<sup>61</sup> *Tex.—Metropolitan Casualty Ins. Co. v. Edwards*, Civ. App. 1919, 210 S.W. 856, dismissed for want of jurisdiction.

<sup>62</sup> That insured does that which he is unable to do without great physical pain or without endangering health or life, or that which common prudence would require one in his condition to desist from doing does not as a matter of law show that insured is not "totally disabled" within disability provision of life policies. *Stoner v. New York Life Ins. Co.*, 1938, 114 S.W. 2d 167, 232 Mo. App. 1048.

#### HEART AND BLOOD AILMENTS

That insured had discharged duties incident to his business did not preclude recovery under fraternal beneficiary certificate for "total disability" from high blood pressure, heart trouble, and arteriosclerosis, where evidence showed that such activities endangered insured's physical well-being. *Sovereign Camp, W.O.W., v. Sams*, 1937, 108 S. W. 2d 1089, 194 Ark. 557.

#### CONTRA:

Evidence that insured, suffering from nephritis and rheumatism, continued work for same salary, though it was attended by

It has been stated broadly that the court must look at the insured's occupation as a whole in order to determine whether or not recovery should be allowed on the ground the insured can no longer perform his occupational duties.<sup>63</sup> And the policy provision itself is to be construed together with the remaining sections of the contract in order to make such determination.<sup>64</sup> In accordance with the usual rules, a liberal construction is given for the purpose of protecting the policyholder.<sup>65</sup>

The occupation to which such contracts refer in promising indemnity when the insured is unable to carry on an occupation is the occupation which the insured was carrying on at the time he was injured.<sup>66</sup> And the rule laid down by almost unanimous authority is this: If the insured is unable to perform his material duties pertaining to his usual and customary occupation in substantially the same manner as before, he may recover. If he is able to do substantially all the acts material to his business, and there are only a few immaterial things which he cannot do, the rule is otherwise, but if there is any material, important, or substantial act which he cannot fulfill, recovery must be allowed.<sup>67</sup> And this means that the insured must be able to do such tasks with substantial continuity.<sup>68</sup>

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physical inconvenience, pain, and considerable danger of aggravating condition, showed as matter of law that sickness did not "wholly disable" him within meaning of insurance policy sued on, as word "disability" is synonymous with "incapacity." *Lyle v. Reliance Life Ins. Co. of Pittsburg, Pa.*, 1939, 124 S.W. 2d 958, 197 Ark. 737.

<sup>63</sup> Mo.—*Stoner v. New York Life Ins. Co.*, 1938, 114 S.W. 2d 167, 232 Mo. App. 1043.

<sup>64</sup> Mo.—*Stoner v. New York Life Ins. Co.*, App. 1936, 90 S.W. 2d 784.

<sup>65</sup> Mo.—*Stoner v. New York Life Ins. Co.*, App. 1936, 90 S.W. 2d 784.

Tex.—*Winters Mut. Aid Ass'n., Circle No. 2 v. Reddin*, Civ. App. 1930, 31 S.W. 2d 1103, reversed, Com. App., 49 S.W. 2d 1095.

<sup>66</sup> Ky.—*Benefit Ass'n. of Ry. Employees v. Secrest*, 1931, 39 S.W. 2d 682, 239 Ky. 400.

Mo.—*Stoner v. New York Life Ins. Co.*, App. 1936, 90 S.W. 2d 784; *Heald v. Aetna Life Ins. Co. of Hartford, Conn.*, App. 1936, 90 S.W. 2d 797, affirmed 104 S.W. 2d 379, 340 Mo. 1143.

<sup>67</sup> "We conclude that a policy of insurance providing for the payment of benefits when the insured has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation, does not mean, as its literal construction would require, a state of complete helplessness; but the total disability contemplated means inability to do all the substantial and material acts necessary to the prosecution of the insured's

business or occupation in his customary and usual manner. Under this construction of the policy, plaintiff is totally and permanently disabled and entitled to recover the benefits provided for in the policy." *Woods v. Central States Life Ins. Co.*, 1937, 271 N. W. 850 at page 852, 132 Neb. 261.

"If the insured was unable either physically or mentally to discharge the important and material duties necessary to the prosecution of his businesses in substantially his usual and customary manner, he was totally disabled." *Equitable Life Assurance Soc. v. Bomar*, C. C. A. Ky. 1939, 106 F. 2d 640, at page 643.

U. S.—*Metropolitan Life Ins. Co. v. Bovelto*, 1926, 12 F. 2d 810, 56 App. D. C. 275; *Equitable Life Assur. Soc. of U. S. v. Bomar*, C. C. A. Ky. 1939, 106 F. 2d 640; *Standard Accident Ins. Co. of Detroit, Mich. v. Bittle*, C. C. A. Tex. 1930, 36 F. 2d 152.

Ala.—*Jefferson Standard Life Ins. Co. v. Simpson*, 1934, 153 So. 198, 228 Ala. 146.

Ark.—*Aetna Life Ins. Co. v. Spencer*, 1930, 32 S.W. 2d 310, 182 Ark. 496; *Travelers' Protective Ass'n. of America v. Stephens*, 1932, 49 S.W. 2d 364, 185 Ark. 660; *Guardian Life Ins. Co. v. Johnson*, 1933, 57 S.W. 2d 555, 186 Ark. 1019; *American Nat. Ins. Co. of Galveston, Tex. v. Chastain*, 1934, 65 S.W. 2d 899, 188 Ark. 466; *Mutual Life Ins. Co. of New York v. Dowdle*, 1934, 71 S.W. 2d 691, 189 Ark. 296; *Jefferson Standard Life Ins. Co. v. Slaughter*, 1935, 79 S.W. 2d 58, 190 Ark. 402; *Aetna Life Ins. Co. v. Martin*, 1936, 96 S.W. 2d 327, 192 Ark. 860; *Travelers Ins. Co. v. Thompson*, 1937, 99 S.W. 2d 254, 193 Ark. 332; *Monarch Life Ins. Co. v. Riddle*, 1937, 101 S.W. 2d 781, 193 Ark. 572; *Sovereign Camp, W. O. W. v. Sams*, 1937, 108 S.W. 2d 1089, 194 Ark. 557; *Pacific Mut. Life Ins. Co. v. Hawkins*, 1938, 115 S.W. 2d 845, 195 Ark. 1099.

Fla.—*Equitable Life Assur. Soc. of U. S. v. McKeithan*, 1935, 160 So. 883, 119 Fla. 486; *New England Mut. Life Ins. Co. v. Huckins*, 1937, 173 So. 696, 127 Fla. 540.

Ga.—*Cato v. Aetna Life Ins. Co.*, 1927, 138 S. E. 787, 164 Ga. 392; *New York Life Ins. Co. v. Tarbutton*, 1932, 163 S. E. 229, 45 Ga. App. 97; *New York Life Ins. Co. v. Oliver*, 1932, 165 S. E. 840, 45 Ga. App. 756; *Metropolitan Life Ins. Co. v. McKee*, 1934, 176 S. E. 118, 49 Ga. App. 533; *Metropolitan Life Ins. Co. v. Pack*, 1934, 176 S. E. 119, 49 Ga. App. 535; *Prudential Ins. Co. of America v. Baker*, 1934, 176 S. E. 134, 49 Ga. App. 505; *Aetna Life Ins. Co. v. Stewart*, 1934, 176 S. E. 777, 49 Ga. App. 786; *Jefferson Standard Life Ins. Co. v. Oliff*, 1935, 178 S. E. 318, 50 Ga. App. 407; *Hurst v. Federal Life Ins. Co.*, 1935, 178 S. E. 762, 50 Ga. App. 900.

Iowa—*Elmore v. Southern Surety Co.*, 1929, 224 N. W. 32, 207 Iowa 872.

Ky.—*Fidelity & Casualty Co. of New York v. Logan*, 1921, 229 S. W. 104, 191 Ky. 92; *Fidelity & Casualty Co. of New York v. Bynum*, 1927, 298 S.W. 1080, 221 Ky. 450; *Henderson v. Continental Casualty Co.*, 1931, 39 S.W. 2d 209, 239 Ky. 93; *Benefit Ass'n. of Ry. Employees v. Secrest*, 1931, 39 S.W. 2d 682, 239 Ky. 400; *Columbia Casualty Co. v. McHargue*, 1933, 54 S.W. 2d 617, 246 Ky. 93; *Aetna Life Ins. Co. v. Wyant*, 1933, 61 S.W. 2d 50, 249 Ky. 562; *Equitable Life Assur. Soc. of U. S. v. Branham*, 1933, 63 S.W. 2d 498, 250 Ky. 472; *Prudential Ins. Co. of America v. Harris*, 1934, 70 S.W. 2d 949, 254 Ky. 23; *Aetna Life Ins. Co. of Hartford, Conn. v. Staggs*, 1934, 75 S.W. 2d 214, 255 Ky. 638; *Equitable Life Ins. Co. of Iowa v. Hauser*, 1937, 107 S.W. 2d 282, 269 Ky. 374.

La.—*Crowe v. Equitable Life Assur. Soc. of U. S.*, 1934, 154 So. 52, 179 La. 444; *Hall v. International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America*, App. 1936, 170 So. 516.

Minn.—Lobdill v. Laboring Men's Mut. Aid Ass'n., 1897, 71 N. W. 696, 69 Minn. 14, 38 L. R. A. 537, 65 Am. St. Rep. 542; Monahan v. Supreme Lodge of the Order of Columbian Knights, 1903, 92 N. W. 972, 88 Minn. 224; Maze v. Equitable Life Ins. Co. of Iowa, 1933, 246 N. W. 737, 188 Minn. 139.

Miss.—Mutual Ben. Health & Accident Ass'n. v. Mathis, 1932, 142 So. 494, 169 Miss. 187; American Bankers' Ins. Co. v. White, 1935, 158 So. 346, 171 Miss. 677; Reliance Life Ins. Co. v. Cassity, 1935, 163 So. 508, 173 Miss. 840.

Mo.—Bellows v. Travelers' Ins. Co. of Hartford, Conn., Sup. 1918, 203 S.W. 978; Katz v. Union Cent. Life Ins. Co., 1932, 44 S.W. 2d. 250, 226 Mo. App. 618; Buis v. Prudential Ins. Co. of America, 1935, 77 S.W. 2d 127, 229 Mo. App. 190; Moss v. Metropolitan Life Ins. Co., 1935, 84 S.W. 2d 395, 230 Mo. App. 70, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Hostatter, 92 S.W. 2d 122, 338 Mo. 589, followed in 92 S.W. 2d 126; Stoner v. New York Life Ins. Co., App. 1936, 90 S.W. 2d 784; Parks v. Maryland Casualty Co., 1936, 91 S.W. 2d 1186, 230 Mo. App. 383; Heald v. Aetna Life Ins. Co. of Hartford, Conn., 1937, 104 S.W. 2d 379, 340 Mo. 1143, affirming, App., 90 S.W. 2d 797; Wright v. Metropolitan Life Ins. Co., App. 1938, 115 S.W. 2d 102.

Neb.—Hamblin v. Equitable Life Assur. Soc. of U. S., 1933, 248 N. W. 397, 124 Neb. 841; McCleneghan v. London Guarantee & Accident Co., 1937, 271 N. W. 276, 132 Neb. 131; Woods v. Central States Life Ins. Co. of St. Louis, Mo., 1937, 271 N. W. 850, 132 Neb. 261; Reinsch v. Travelers Ins. Co. of Hartford, Conn., 1937, 274 N. W. 572, 133 Neb. 249; Russell v. Glens Falls Indemnity Co. of Glens Falls, N. Y., 1938, 279 N. W. 287, 134 Neb. 631.

N. H.—Canney v. Massachusetts Bonding & Insurance Co., 1937, 189 A. 168, 88 N. H. 325.

N. J.—Booth v. U. S. Fidelity & Guaranty Co., 1925, 130 A. 131, 3 N. J. Misc. 735.

N. M.—Bubany v. New York Life Ins. Co., 1936, 51 P. 2d 864, 39 N. M. 560.

Okla.—Ozard Mut. Life Ass'n. of Mena, Ark. v. Winchester, 1926, 243 P. 735, 116 Okla. 116; Metropolitan Life Ins. Co. v. Richter, 1935, 49 P. 2d 94, 173 Okla. 489; Mid-Continent Life Ins. Co. v. Bean, 1937, 65 P. 2d 1018, 179 Okla. 394.

Pa.—Janney v. Scranton Life Ins. Co., 1934, 173 A. 819, 315 Pa. 200.

R. I.—Cole v. Metropolitan Life Ins. Co., 1934, 170 A. 74, 54 R. I. 88.

S. C.—Brown v. Missouri State Life Ins. Co., 1926, 134 S. E. 224, 136 S. C. 90; McCutcheon v. Pacific Mut. Life Ins. Co., 1930, 151 S. E. 67, 153 S. C. 401; Ford v. New York Life Ins. Co., 1935, 180 S. E. 37, 176 S. C. 186; Owens v. Sovereign Camp, W. O. W., 1935, 178 S. E. 125, 174 S. C. 514; Hardin v. Southeastern Life Ins. Co., 1935, 180 S. E. 210, 176 S. C. 337; Thompson v. Aetna Life Ins. Co. of Hartford, Conn., 1935, 180 S. E. 880, 177 S. C. 120.

S. D.—Frazier v. Travelers Ins. Co. of Hartford, Conn., 1939, 287 N. W. 589, 66 S. D. 638.

Tex.—Hefner v. Fidelity & Casualty Co. of New York, Civ. App. 1913, 160 S.W. 330; Fidelity & Casualty Co. v. Joiner, Civ. App. 1915, 178 S.W. 806; North American Accident Ins. Co. v. Miller, Civ. App. 1917, 193 S. W. 750, error refused; Commonwealth Bonding & Casualty Ins. Co. v. Bryant, 1922, 240 S. W. 893, 113 Tex. 21, reversing, Civ. App. 1916, 185 S. W. 979; Massachusetts Bonding & Insurance Co. v. Worthy, Civ. App. 1928, 9 S. W. 2d 388, error dismissed; U. S. Fidelity & Guaranty Co. v. Hardeman, Civ. App. 1930,

22 S. W. 2d 1112, error refused; Great Southern Life Ins. Co. v. Johnson, Com. App. 1930, 25 S. W. 2d 1093, reversing, Civ. App. 13 S. W. 2d 424; Winters Mut. Aid Ass'n, Circle No. 2 v. Reddin, Civ. App. 1930, 31 S. W. 2d 1103, reversed, Com. App., 49 S. W. 2d 1095; Amarillo Mut. Benev. Ass'n v. Franklin, Com. App. 1932, 50 S. W. 2d 264, affirming, Civ. App., 33 S. W. 2d 859; Herold v. Aetna Life Ins. Co., Civ. App. 1935, 77 S. W. 2d 1060; Travelers Ins. Co. v. Cox, Civ. App. 1935, 86 S. W. 2d 844.

Vt.—Clarke v. Travelers' Ins. Co., 1920, 111 A. 449, 94 Vt. 383; Jacobs v. Loyal Protective Ins. Co., 1924, 124 A. 848, 97 Vt. 516; Corsones v. Monarch Accident Ins. Co., 1931, 154 A. 693, 103 Vt. 379.

W. Va.—Hertzel v. Pacific Mut. Life Ins. Co. of California, 1929, 150 S. E. 385, 108 W. Va. 22.

#### DIRECT OR PERFORM

Where a mutual benefit certificate provided for the payment of a certain indemnity if beneficiary became totally disabled so as to be unable to "direct or perform" the kind of business or labor which he had always followed, it was held that a beneficiary who customarily performed physical labor was entitled to the indemnity on being disabled from performing such labor though he was still able to direct it, the provision as to "directing" having reference only to those whose customary business consisted in giving direction. Beach v. Supreme Tent Knights of Maccabees of the World, 1902, 77 N. Y. S. 770, 74 App. Div. 527, affirmed, 1904, 69 N. E. 281, 177 N. Y. 100.

#### DISABLED FROM PERFORMING ANY DUTY

Other cases would seem to allow recovery unless the insured could do any and every duty pertaining to his occupation as before:

Ky.—National Life & Accident Ins. Co. v. O'Brien's Ex'x., 1913, 159 S. W. 1134, 155 Ky. 498.

Mo.—Heald v. Aetna Life Ins. Co. of Hartford, Conn., 1937, 104 S. W. 2d 379, 340 Mo. 1143, affirming, App. 90 S. W. 2d 797.

N. J.—Teitelbaum v. Massachusetts Accident Co., 1936, 184 A. 808, 116 N. J. L. 417, affirming 181 A. 395, 13 N. J. Misc. 811.

S. C.—McCutcheon v. Pacific Mut. Life Ins. Co., 1930, 151 S. E. 67, 153 S. C. 401.

#### NOT DISABLED IF PERFORMING SUBSTANTIALLY

Inability to transact some kinds or branches of business pertaining to his occupation as merchant would not constitute total disability within the meaning of the policy, provided he was able to transact other kinds or branches of business pertaining substantially and to a material extent to such occupation. Lobdill v. Laboring Men's Mut. Aid Ass'n., 1897, 71 N. W. 696, 69 Minn. 14, 38 L. R. A. 537, 65 Am. St. Rep. 542.

#### NOT DISABLED IF PERFORMING ANY PORTION OF WORK

A few scattered decisions have held, also, that the insured must be so disabled as to prevent him doing any portion of his customary work:

Me.—Young v. Travelers' Ins. Co., 1888, 13 A. 896, 80 Me. 244.

Pa.—Spicer v. Commercial Mut. Acc. Co., 1895, 16 Pa. Co. Ct. R. 163, 4 Pa. Dist. R. 271.

Compare also:

Ky.—Equitable Life Assur. Soc. of U. S. v. Powers, 1934, 72 S. W. 2d 469, 254 Ky. 770.

N. J.—Doherty v. American Employers' Ins. Co. of Boston, Mass., 1934, 169 A. 652, 112 N. J. L. 52.

Even if this policy provision is so worded as to deny benefits unless the insured is totally disabled from following *any* occupation, the better rule has apparently been to hold that this refers to any occupation from which the insured has been accustomed to gain his livelihood, and to permit recovery precisely the same as if the clause referred to the insured's ordinary vocation.<sup>69</sup> There are, however, a few gleanings from the field of jurisprudence which enforce his clause as written and deny recovery if the insured is able to carry on *any* business or

<sup>69</sup> Minn.—Wilson v. Metropolitan Life Ins. Co., 1933, 245 N. W. 826, 187 Minn. 462.

Thus, under a benefit certificate payable in case insured should become "totally incapacitated to perform manual labor," total incapacity means inability to perform sustained manual labor, so as to enable one to earn or assist in earning a livelihood. Grand Lodge Locomotive Firemen v. Orrell, 1903, 69 N. E. 68, 206 Ill. 208, affirming Grand Lodge Brotherhood of Locomotive Firemen v. Orrell, 97 Ill. App. 246.

Ark.—Missouri State Life Ins. Co. v. Case, 1934, 71 S. W. 2d 199, 189 Ark. 223.

Ga.—Liner v. Travelers Ins. Co., 1935, 180 S. E. 383, 50 Ga. App. 643.

Ky.—Henderson v. Continental Casualty Co., 1931, 39 S. W. 2d 209, 239 Ky. 93; Prudential Ins. Co. of America v. Bond, 1935, 77 S. W. 2d 373, 257 Ky. 45.

Minn.—Lorentz v. Aetna Life Ins. Co. of Hartford, Conn., 1936, 266 N. W. 699, 197 Minn. 205.

Mo.—Foglesong v. Modern Brotherhood of America, 1906, 97 S. W. 240, 121 Mo. App. 548; Stoner v. New York Life Ins. Co., App. 1936, 90 S. W. 2d 784.

Neb.—Oswald v. Equitable Life Assur. Soc. of U. S., 1935, 258 N. W. 41, 128 Neb. 173; Bennett v. Metropolitan Life Ins. Co., 1939, 287 N. W. 609, 136 Neb. 785.

S. C.—Austell v. Volunteer State Life Ins. Co., 1933, 170 S. E. 776, 170 S. C. 439.

Tex.—Jefferson Standard Life Ins. Co. v. Curfman, Civ. App. 1939, 127 S. W. 2d 567, error dismissed.

Thus, under policy providing for disability benefits when insured becomes totally and permanently disabled, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, insured who as result of infantile paralysis was unable to continue his occupation as a barber because of atrophy of leg and who was given temporary employment in office as result of employer's friendship was "totally and permanently disabled" and entitled to disability benefits. Bennett v. Metropolitan Life Ins. Co., 1939, 287 N. W. 609, 136 Neb. 785.

#### CONFINEMENT UNNECESSARY

Ala.—United States Casualty Co. v. Perryman, 1919, 82 So. 462, 203 Ala. 212.

#### HELPLESSNESS NOT REQUIRED

Ark.—Equitable Life Assur. Soc. of U. S. v. Bagley, 1934, 69 S. W. 2d 394, 188 Ark. 1009.

vocation, whether his own or another.<sup>70</sup> Missouri, when faced with such an argument, stated bluntly that the provisions so construed would be invalid, and in order to give it validity, the term *any* would be taken to refer to any occupation which the insured is then carrying on, or with which he is familiar.<sup>71</sup> Pennsylvania has lent some authority to this rule, but limits the

#### <sup>70</sup> RULE OF STRICT CONSTRUCTION

In action on disability clause of life policies providing for monthly payments if insured should become permanently, continuously, and wholly prevented from performing work for compensation and from following any gainful occupation, instruction permitting recovery if insured was disabled from carrying on occupation in which he had been trained or employment in work of same general character constituted error. *Waldman v. Mutual Life Ins. Co. of New York*, 1937, 399 N. Y. S. 490, 252 App. Div. 448.

Under accident policy providing for insurance for injury disabling insured from performing duties pertaining to any business or occupation, insured could not recover on showing only that injury would incapacitate him from performing duties of his occupation. *American Nat. Ins. Co. v. Briggs*, Tex. Civ. App. 1934, 70 S. W. 2d 491, error dismissed.

"Total and permanent disability" provisions of insurance policies are not limited in their application to occupation or vocation in which insured might be engaged at time of disability. *Travelers Ins. Co. v. Brinkley*, 1936, 184 S. E. 225, 166 Va. 147.

Insured's disability to follow occupation that he had been actually engaged in did not justify recovery under total disability clause of life policy covering disability to pursue any occupation for wages or profit. *Jones v. Connecticut General Life Ins. Co.*, 1934, 173 S. E. 259, 114 W. Va. 651.

Insured is not entitled to disability benefits because he is not able to engage in his accustomed vocation if disability does not prevent him from performing in practical manner some other and useful work, but fact that he might do some light work occasionally does not defeat right to disability payments. *National Life & Accident Ins. Co. v. Thompson*, 1936, 183 S. E. 863, 117 W. Va. 61.

#### REGARDLESS OF FAMILIARITY WITH WORK

A policy of "accident insurance" providing for weekly payments to the insured while totally disabled and prevented from the transaction of all kinds of business, should be enforced as it reads; and he cannot recover because totally disabled for his own trade or business, if he retains health, strength, etc., sufficient for other vocations, whether he is conversant with such or not. *Lyon v. Railway Passenger Assur. Co.*, 1877, 46 Iowa 631.

#### OCCUPATION FOR PROFIT

In action to recover disability benefits under life policy, facts held not to warrant finding insured was "totally disabled and thereby prevented from engaging in occupation for profit" during disability. *Pannone v. John Hancock Mut. Life Ins. Co.*, 1932, 157 A. 876, 52 R. I. 95.

<sup>71</sup> Mo.—*Heald v. Aetna Life Ins. Co. of Hartford, Conn.*, 1937, 104 S. W. 2d 379, 340 Mo. 1143, affirming, App., 90 S. W. 2d 797.

scope of the term *any* occupation to such occupations as the insured is ordinarily capable of performing.<sup>72</sup> And the decision of a medical examiner as to such disability will be liberally construed so as to afford some protection to the insured.<sup>73</sup>

It is at least necessary, among states adopting less liberal rules than those previously discussed, that in order for the insurer to be excused from making disability payments, the insured must be able to engage in some occupation reasonably comparable to his present one in type of work and in remuneration.<sup>74</sup> In the case of the average untrained employee, disability to follow his own occupation is equivalent to absolute inability to follow any whatsoever.<sup>75</sup> And the mere fact that he might be able to perform a few of the operations of some vocation at which he had once worked will not relieve the insurer of liability.<sup>76</sup>

The average salaried worker is not a highly trained man. He is trained and experienced, usually, in one type of work only. When he is unable to do that on which he is trained to depend for a living, he is helpless and the courts will award him a recovery.<sup>77</sup> If he is unable to perform, then, any type of work

<sup>72</sup> Pa.—Cooper v. Metropolitan Life Ins. Co., 1935, 177 A. 43, 317 Pa. 405; Garver v. Prudential Ins. Co., 1937, 51 York 133 (Pa. Com. Pl.); Silvano v. Metropolitan Life Ins. Co., 1939, 5 A. 2d 423, 135 Pa. Super. 260; Harrington v. Travelers Ins. Co., 1939, 19 Wash. 180; Kennedy v. Metropolitan Life Ins. Co., 1939, 6 Schuyl. Leg. Reg. 348.

<sup>73</sup> A contract between a railroad company and an employee provided for the payment for each day of disability by reason of accident, and the regulations in connection with the relief department of such railroad provided that the word "disability" should be held to mean physical inability to work. Held, that the decision of a medical examiner of such department that plaintiff, who had suffered amputation of a leg by reason of injury, was "able to work," will not be construed to mean that plaintiff had recovered from his disability, when the evidence shows that the examiner at the same time declared plaintiff "able to do light work at present, \* \* \* but he is still disabled." Chicago, B. & Q. R. Co. v. Olson, 1903, 97 N. W. 831, 70 Neb. 559, rehearing denied, 1904, 99 N. W. 347, 70 Neb. 570.

<sup>74</sup> N. Y.—Arico v. Prudential Ins. Co. of America, 1934, 271 N. Y. S. 241, 241 App. Div. 826; Robinson v. Equitable Life Assur. Soc. of U. S., 1935, 280 N. Y. S. 77, 155 Misc. 583.

<sup>75</sup> Ga.—Cato v. Aetna Life Ins. Co., 1927, 138 S. E. 787, 164 Ga. 392.

<sup>76</sup> La.—White v. Metropolitan Life Ins. Co., App. 1936, 166 So. 655, rehearing denied and amended 167 So. 212.

<sup>77</sup> S. C.—Hickman v. Aetna Life Ins. Co. of Hartford, Conn., 1932, 164 S. E. 878, 166 S. C. 316; Durant v. Aetna Life Ins. Co., 1932, 164 S. E. 881, 166 S. C. 367.



for which he may be said to be reasonably fitted, he is disabled.<sup>78</sup> And Texas has held in this connection that he is under no duty to incur great expense to secure further education and training to fit himself to perform other types of work.<sup>79</sup>

Persons in all walks of life may thus find themselves incapable of performing other tasks, and incapacity in their line of work may render the insurer liable.

On the other hand, the insured may not be regarded as disabled if he may still perform his ordinary work in the customary and usual manner.<sup>80</sup> Or, if he may perform it "substantially," the same result is obtained. Thus, where a dancing teacher can do every task except dancing with the pupils, re-

<sup>78</sup> Total permanent disability to perform the work of the occupation followed through life, and, so far as appears, the only profitable occupation for which she is suited by training and experience is the disability covered by such policies. *New York Life Ins. Co. v. Torrance*, 153 So. 463, 228 Ala. 286; *New York Life Ins. Co. v. Torrance*, 141 So. 547, 224 Ala. 614; *Equitable Life Assur. Sec. v. Doriety*, 157 So. 59, 229 Ala. 352; *Metropolitan Life Ins. Co. v. Blue*, 133 So. 707, 222 Ala. 665, 79 A. L. R. 852; *United States Casualty Co. v. Perryman*, 82 So. 462, 203 Ala. 212; *Travelers' Ins. Co. v. Plaster*, 98 So. 909, 210 Ala. 607; *New York Life Ins. Co. v. McLean*, 118 So. 753, 218 Ala. 401. *John Hancock Mutual Life Ins. Co. v. Beaty*, 1935, 162 So. 281, at page 283, 230 Ala. 638.

Neb.—*From v. General American Life Ins. Co.*, 1937, 273 N. W. 36, 132 Neb. 731.

N. Y.—*Ursaner v. Metropolitan Life Ins. Co.*, 1933, 262 N. Y. S. 462, 146 Misc. 121.

S. C.—*Brunson v. Prudential Ins. Co. of America*, 1936, 188 S. E. 255, 182 S. C. 24.

<sup>79</sup> "We do not believe it was within the contemplation of the parties that the insured should educate himself, or go through apprenticeship for another occupation and, perchance, be able to do some occupation, thereby be able to relieve the Insurance Company from the obligations of its contract. It is not believed that it is the duty of the insured to equip himself, by the expense of education, training and experience, to follow some occupation for which he was totally unqualified at the time of the issuance of the contract of insurance, or at the time of the sustaining of the injury. The rule of a liberal construction of such clause of life insurance policies, as involved here—that the disabilities, 'from pursuing any occupation whatsoever for remuneration or profit'—means that if the disabilities are such that the insured cannot, in the exercise of ordinary prudence, perform substantially all of the material duties of his occupation, any occupation for which he is qualified by training, education and experience, comes within the terms of such provision." *Jefferson Standard Life Ins. Co. v. Curfman*, 1939, Tex. Civ. App., 127 S. W. 2d 567, at page 572, error dismissed.

<sup>80</sup> Colo.—*Denton v. Prudential Ins. Co. of America*, 1937, 67 P 2d 77, 100 Colo. 293.

Ky.—*Coburn v. Maryland Casualty Co.*, 1928, 6. S. W. 2d 471, 224 Ky. 377.

covery has been denied.<sup>81</sup> Or the fact that a building appraiser occasionally must forego climbing upon a structure and hire someone else to do so is not sufficient.<sup>82</sup> And the fact that insured has an arrested case of tuberculosis will not permit recovery if he continues to do his work.<sup>83</sup>

Where there is no ambiguity in the terms of the contract or the tests laid down by it, neither party will be favored in its construction.<sup>84</sup> Thus, the courts will not construe two entirely dissimilar expressions to have the same meaning. If a contract refers to "engaging in any occupation or employment for wage or profit,"<sup>85</sup> it necessarily does not mean the same as "performing any and every kind of duty pertaining to the insured's employment." One is general, the other limited—the latter pertaining only to the occupation which the insured is following at the time of the injury. Thus, it would be error for the court to permit the jury to consider only the question as to whether the insured, after injury, could follow his present vocation under the general type of clause.<sup>86</sup>

In general, total disability is not considered to exist if the insured can follow any remunerative occupation, whether his present vocation or another,<sup>87</sup> especially where a general type

<sup>81</sup> Ga.—Federal Life Ins. Co. v. Hurst, 1931, 160 S. E. 533, 43 Ga. App. 840.

<sup>82</sup> Appraiser of buildings and construction whose work was made more difficult by incurable varicose ulcer of right leg which impaired his ability to climb in inspection of buildings requiring that third person be hired to do necessary climbing on some occasions held not "wholly prevented for life from engaging in any occupation or employment for wage or profit" within coverage of policy. Jersey v. Travelers Ins. Co., 1937, 294 N. Y. S. 938, 163 Misc. 25, affirmed 294 N. Y. S. 940, 250 App. Div. 768.

<sup>83</sup> Ark.—Aetna Life Ins. Co. v. Person, 1934, 67 S. W. 2d 1007, 188 Ark. 864. Tuberculosis is usually considered to constitute total and permanent disability: Miss.—Equitable Life Assur. Soc. v. Serio, 1929, 124 So. 485, 155 Miss. 515.

<sup>84</sup> Ill.—Sibley v. Travelers' Ins. Co. of Hartford, Conn., 1935, 275 Ill. App. 323.

<sup>85</sup> Tex.—Travelers Ins. Co. v. Cox, Civ. App. 1935, 86 S. W. 2d 844.

<sup>86</sup> Ohio—Mosher v. Equitable Life Assur. Soc. of U. S., 1938, 14 N. E. 2d 413, 57 Ohio App. 435.

Tenn.—Wray v. Metropolitan Life Ins. Co., 1936, 91 S. W. 2d 577, 19 Tenn. App. 533.

W. Va.—Frazier v. New York Life Ins. Co., 1938, 196 S. E. 556, 120 W. Va. 81.

<sup>87</sup> N. Y.—Jersey v. Travelers Ins. Co., 1938, 294 N. Y. S. 938, 163 Misc. 25, affirmed 294 N. Y. S. 940, 250 App. Div. 768.

of clause is used as that just indicated "so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit."<sup>88</sup> This rule is not applied, however, without qualification. In construing what constitutes total disability, the courts have held that the insured can only be expected to follow occupations for which his age, health, training, and experience have fitted him and for which he is reasonably qualified.<sup>89</sup> And this result is the same under the general type of clause previously discussed.<sup>90</sup>

N. C.—Thigpen v. Jefferson Standard Life Ins. Co., 1933, 168 S. E. 845, 204 N. C. 551; Misskelley v. Home Life Ins. Co., 1934, 171 S. E. 862, 205 N. C. 496.

Ore.—Fagerlie v. New York Life Ins. Co., 1929, 278 P. 104, 129 Ore. 485.

R. I.—Pannone v. John Hancock Mut. Life Ins. Co., 1932, 157 A. 876, 52 R. I. 95.

W. Va.—Hayes v. Prudential Ins. Co. of America, 1934, 171 S. E. 824, 114 W. Va. 323.

<sup>88</sup> Del.—Culver v. Prudential Ins. Co. of America, 1935, 179 A. 400, 6 W. W. Harr, 582.

Ill.—Buffo v. Metropolitan Life Ins. Co., 1935, 277 Ill. App. 366.  
Utah—Colovos v. Home Life Ins. Co. of New York, 1934, 28 P. 2d 607, 83 Utah 401.

<sup>89</sup> "We think the narrow rule contended for by defendant, and seemingly supported by some foreign authorities, is not in harmony with the rule in Missouri, and in the majority of the states of this country. We shall not write at length setting out what various opinions have held under the different facts, but we have reached the conclusion, after reading many cases, that the general holdings under facts similar to these and under contracts worded similar to the one under consideration here, are that the insured is totally and permanently disabled, so as to bring him within the provisions of the policy, when he is no longer able to perform the usual, customary, and substantial duties of his own occupation, and when, in view of the insured's age, training, experience, education, and physical condition, there is no work or occupation in which he can engage for profit." Kane v. Metropolitan Life Ins. Co., 1934, 73 S. W. 2d 826, at page 829, 228 Mo. App. 649, quashal of opinion denied 85 S. W. 2d 469, 337 Mo. 525.

Ala.—Protective Life Ins. Co. v. Wallace, 1935, 161 So. 256, 230 Ala. 338; Equitable Life Assur. Soc. of U. S. v. Davis, 1935, 164 So. 86, 231 Ala. 261.

Ga.—Metropolitan Life Ins. Co. v. Manufacturers Nat. Bank, 1937, 189 S. E. 83, 54 Ga. App. 771; Metropolitan Life Ins. Co. v. McDevitt, 1937, 190 S. E. 404, 55 Ga. App. 342.

Kan.—Maresh v. Peoria Life Ins. Co., 1931, 299 P. 934, 133 Kan. 191, rehearing denied 3 P. 2d 634, 133 Kan. 654.

Mo.—Katz v. Union Cent. Life Ins. Co., 1932, 44 S. W. 2d 250, 226 Mo. App. 618; Kane v. Metropolitan Life Ins. Co., 1934, 73 S. W. 2d 826, 228 Mo. App. 649, quashal of opinion denied State ex rel. Metropolitan Life Ins. Co. v. Allen, 85 S. W. 2d 469, 337 Mo. 525; Buis v. Prudential Ins. Co. of America, 1935, 77 S. W. 2d 127, 229 Mo. App. 190.

- Pa.—Amrovck v. Metropolitan Life Ins. Co., 1935, 180 A. 727, 119 Pa. Super. 176.  
 S. C.—Harman v. New York Life Ins. Co., 1937, 192 S. E. 878, 184 S. C. 461.  
 Tenn.—Principi v. Columbian Mut. Life Ins. Co., 1935, 84 S. W. 2d 587, 169 Tenn. 276.  
 Wash.—Storwick v. Reliance Life Ins. Co., 1929, 275 P. 550, 151 Wash. 153.

## GROUP LIFE INSURANCE

- Ala.—Protective Life Ins. Co. v. Hale, 1935, 161 So. 248, 230 Ala. 323.  
 Fla.—Equitable Life Assur. Soc. of U. S. v. Wiggins, 1934, 155 So. 327, 115 Fla. 136.  
 Ky.—Aetna Life Ins. Co. of Hartford, Conn. v. Gullett, 1936, 89 S. W. 2d 1, 262 Ky. 1.  
 N. Y.—Williams v. John Hancock Mut. Life Ins. Co., 1935, 283 N. Y. S. 87, 245 App. Div. 585, reversing 277 N. Y. S. 429, 154 Misc. 504, and reargument denied 285 N. Y. S. 840, 246 App. Div. 891.  
<sup>99</sup>“That the parties to the policy here involved intended that the disability covered involved a consideration of the insured's capabilities and experience is deducible from the word ‘pursuing.’ For certainly to ‘pursue’ an occupation presupposes present ability and experience to carry on such occupation. We cannot assume that it was contemplated that plaintiff, an uneducated man, should be disqualified from receiving the benefits of his policy because he might, with his present disabilities, but with training and study at some future date, pursue the profession of law or medicine or become a banker.” Gibson v. Equitable Life Assur. Soc., 1934, 36 P. 2d 105, at page 110, 84 Utah 452.  
 Ga.—Guardian Life Ins. Co. of America v. Snow, 1935, 180 S. E. 241, 51 Ga. App. 280; Metropolitan Life Ins. Co. v. Smith, 1933, 196 S. E. 81, 57 Ga. App. 725.  
 Ind.—Indiana Life Endowment Co. v. Reed, 1913, 103 N. E. 77, 54 Ind. App. 450.  
 Ky.—Prudential Ins. Co. of America v. Harris, 1934, 70 S. W. 2d 949, 254 Ky. 23.  
 Mo.—McMahon v. Supreme Council Order of Chosen Friends, 1893, 54 Mo. App. 468.  
 N. J.—Kordulak v. Prudential Ins. Co. of America, 1937, 190 A. 325, 15 N. J. Misc. 242.  
 N. Y.—Waldman v. Mutual Life Ins. Co. of New York, 1937, 299 N. Y. S. 490, 252 App. Div. 448.

## GROUP CERTIFICATES

- Tenn.—Prudential Ins. Co. of America v. Davis, 1935, 78 S. W. 2d 358, 18 Tenn. App. 413.  
 Tex.—Travelers Ins. Co. v. Cox, Civ. App. 1935, 86 S. W. 2d 844.  
 Utah—Gibson v. Equitable Life Assur. Soc. of U. S., 1934, 36 P. 2d 105, 84 Utah 452.

## CONTRA:

“Total and permanent disability” under group life policy providing for “total and permanent disability” benefits did not necessarily mean that insured must be bedridden, but meant inability to do any substantial work for compensation or profit without injury to health, irrespective of whether work was within insured's training or experience. Metropolitan Life Ins. Co. v. Foster, C. C. A. Ga. 1933, 67 F. 2d 264.

The insured, if idle, however, must show that he has made an effort to adapt himself to other work and that his health will not permit, where the contract prohibits recovery if he can follow other occupations for gain or profit.<sup>91</sup> And the insurer will not be held liable if the evidence shows clearly that the insured has made no effort to secure other employment.<sup>92</sup>

Such terms as "compensation," "gain," or "profit" refer to remuneration received in return for labor performed or gain received in the conduct of a business.<sup>93</sup> If the insured's capacity to work and ability to earn has been reduced far below normal, the court will not take such a strict construction of these expressions as to deny him recovery.<sup>94</sup> Ordinarily, if gainful work cannot be performed, total disability is established,<sup>95</sup> and such work must be profitable and advantageous to the insured, rather than some trivial work which would yield only an inconsequential emolument.<sup>96</sup> California and North Carolina have

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This result would no longer be reached by a federal court sitting in Georgia since it is bound to follow the decisions of the state court.

Under accident policy requiring payments so long as insured was unable to do any kind of work, the liability ceased when insured became able to do any work to which he was fitted, though light, and not such as he had been doing. *Life & Casualty Ins. Co. of Tennessee v. Jones*, 1917, 73 So. 566, 112 Miss. 506.

<sup>91</sup> Md.—*Prudential Ins. Co. of America v. Brookman*, 1935, 175 A. 838, 167 Md. 616.

<sup>92</sup> Insurer held not liable under permanent total disability provision of life policy, providing for benefits if insured should be "prevented from performing any work or conducting any business for compensation or profit" where insured was discharged as teacher because of impaired hearing, but evidence failed to disclose that insured had been unable, because of impaired hearing, to obtain other employment. *White v. Aetna Life Ins. Co.*, 1936, 185 S. E. 236, 117 W. Va. 214.

<sup>93</sup> Kan.—*Maresh v. Peoria Life Ins. Co.*, 1931, 299 P. 934, 133 Kan. 191, rehearing denied 3 P. 2d 634, 133 Kan. 654.

<sup>94</sup> N. Y.—*Williams v. John Hancock Mut. Life Ins. Co.*, 1935, 283 N. Y. S. 87, 245 App. Div. 585, reversing 277 N. Y. S. 429, 154 Misc. 504, and reargument denied 285 N. Y. S. 840, 246 App. Div. 891.

Thus, a small farmer and peddler unable to do substantially all necessary farm labor and to handle bags of produce could not conduct farming or peddling for "compensation or profit" within terms of policy. *Colovos v. Home Life Ins. Co. of New York*, 1934, 28 P. 2d 607, 83 Utah 401.

<sup>95</sup> And "permanent total disability" need not wholly prevent insured from performing any gainful work. *McCutchen v. Pacific Mut. Life Ins. Co.*, 1930, 151 S. E. 67, 153 S. C. 401.

#### <sup>96</sup> LACK OF CONTINUITY

To recover "total and permanent disability" benefits under policy defining total disability as impairment of mind or body continuously rendering it impossible for insured to follow gainful occu-

held to the contrary, however, in stating that the insured is not entitled to benefits for any time during which he attends to any business, whether profitable or not.<sup>97</sup> Such would seem to be a far less liberal and a somewhat unsound rule.

The term relative to engaging in any occupation for profit or gain, if enforced unrestrictedly, is generally considered to place undue limitations upon the construction of the contract.<sup>98</sup> It may be construed, rather, to mean the inability to perform the acts customary to the pursuit of the insured's own business in a substantial manner<sup>99</sup> or his engaging in related vocations or work for which he is reasonably well fitted.<sup>100</sup>

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pation, insured must establish only disability continuously rendering it impossible for him to follow gainful occupation, and total disability to perform any sort of labor or service was not necessary; "gainful" meaning profitable, advantageous, or lucrative. *Smith v. Mutual Life Ins. Co. of New York*, La. App. 1936, 165 So. 498.

#### ODD JOBS

"Engaging in gainful occupation" within meaning of disability policy is ability of insured to work with reasonable continuity in his usual occupation or in such occupation as he is qualified physically and mentally, under all circumstances, to perform substantially the reasonable and essential duties incident thereto, rather than ability to do odd jobs of comparatively trifling nature. *Leonard v. Pacific Mut. Life Ins. Co. of California*, 1937, 193 S. E. 166, 212 N. C. 151.

#### GROUP POLICY

A person may be able to do some work along lines in which he is qualified, and receive remuneration therefor, without forfeiting benefits under a group policy which prescribes a condition of "total" or "whole" disability. *Woodrow v. Travelers Ins. Co.*, 1938, 1 A. 2d 447, 121 N. J. L. 170.

<sup>97</sup>Cal.—*Martin v. Postal Union Life Ins. Co.*, 1939, 87 P. 2d 897, 31 Cal. App. 2d 329.

N. C.—*Lee v. New York Life Ins. Co.*, 1924, 125 S. E. 186, 188 N. C. 538.

<sup>98</sup>Tex.—*Jefferson Standard Life Ins. Co. v. Curfman*, Civ. App. 1939, 127 S. W. 2d 567, error dismissed.

<sup>99</sup>S. D.—*Hale v. Metropolitan Life Ins. Co.*, 1937, 273 N. W. 657, 65 S. D. 314.

#### <sup>100</sup>LIBERAL CONSTRUCTION

Where one provision of accident policy obligated insurer to make weekly payments for period not exceeding 52 weeks where insured was disabled from performing any duties pertaining to occupation in which he was engaged at time of accident, following provision requiring insurer to make payments after expiration of 52-week period in event insured was disabled from "engaging in any and every occupation" was to be reasonably and practically applied to determination of whether insured was capable of engaging in ordinary forms of employment apart from that in which he was engaged when accident occurred. *Muzio v. Metropolitan Life Ins. Co.*, 1937, 291 N. Y. S. 955, 249 App. Div. 177.

The insurer may not avoid liability upon the ground there is a mere possibility that by education or otherwise the insured might be able in the future to earn a living by some means presently unavailable.<sup>101</sup> And where a woman has followed one vocation all her life and is manifestly unfitted for any other, recovery almost certainly would be allowed.<sup>102</sup>

Nor is it sufficient that the insured is able to do some merely temporary work. The policy condition means, rather, that the insured must be able to do gainful work with reasonable regularity and continuity.<sup>103</sup> Some courts have allowed re-

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In action on policy providing for benefits if insured were "disabled from engaging in any gainful occupation, or from performing any work, or from conducting any business for compensation or profit," instruction that such provision meant inability to do substantial portion of usual tasks of workman in such manner as to procure and retain employment held not error, since literal construction would not be adopted where it would provide only negligible, if any, insurance. *Home Ben. Ass'n v. Springer*, Tex. Civ. App. 1937, 104 S. W. 2d 172.

#### FARMER

"Total and permanent disability" within life policy provision for monthly payments in event insured by reason of injury or disease should become wholly and continuously disabled from pursuing any occupation for remuneration or profit was to be construed as providing for payment if disability rendered insured substantially unable, in exercise of ordinary care, to perform substantial part of work pertaining to his farming occupation, or any occupation which, by education, training, or experience, he, since injury, in exercise of prudence, could have done, and could do in the future. *Jefferson Standard Life Ins. Co. v. Curfman*, Tex.-Civ. App. 1939, 127 S. W. 2d 567, error dismissed.

<sup>101</sup> Mo.—*Buis v. Prudential Ins. Co. of America*, 1935, 77 S. W. 2d 127, 229 Mo. App. 190.

<sup>102</sup> The deafness of insured, who was a 50-year old woman with an eighth grade education who had never engaged in any business other than that of a beauty shop operator, entitled her to total and permanent disability benefits under life policy defining total disability as impairment of mind or body rendering it impossible for insured to follow a gainful occupation. *Harms v. Mutual Life Ins. Co. of New York*, Mo. App. 1939, 127 S. W. 2d 57.

<sup>103</sup> "The court, over objection, permitted a witness to testify that it was more difficult now, on account of the depression, to get plaintiff a job of any kind than it was four or five years ago. This evidence came out on cross-examination of defendant's witness. It was not thereafter referred to. No motion was made to strike it out. The evidence was objected to as immaterial. It should have been excluded, but the court clearly charged the jury that, in order to recover, plaintiff must show such impairment of capacity 'as to render it impossible \* \* \* to follow continuously any substantial gainful occupation; or in other words, the existence of total and permanent disability so as to prevent the plaintiff from engaging in any occupation and performing any work for compensation or profit must mean any occupation similar to that in which he was ordinarily en-

covery where it was shown that the insured could do other work.<sup>104</sup> More particularly, recovery has been allowed where the nature of the tasks which insured could perform are of a noncompensatory nature.<sup>105</sup>

As previously discussed, a policyholder is not obligated to work when such labor would subject him to intense pain and discomfort and seriously endanger his health. Conversely, it has been held that his efforts to work under these circumstances, even though it is shown that he did receive certain payments therefor, will not arbitrarily deprive him of right to disability payments.<sup>106</sup> And the simple fact of his return to work, where

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gaged before the accident, or for which he may be capable of fitting himself within a reasonable time. If the disability prevents the insured, the plaintiff, from performing the essential parts of such an occupation with substantial continuity, it should entitle him to the amount provided for in the policy.' This was the issue submitted to the jury, and the evidence objected to cannot be held to have been prejudicial." *Wilson v. Metropolitan Life Ins. Co.*, 1932, 245 N. W. 826, at page 829, 1887 Minn. 462.

Del.—*Culver v. Prudential Ins. Co. of America*, 1935, 179 A. 400, 6 W. W. Harr. 582.

Mass.—*Rezendes v. Prudential Ins. Co. of America*, 1934, 189 N. E. 826, 285 Mass. 505.

Minn.—*Wilson v. Metropolitan Life Ins. Co.*, 1933, 245 N. W. 826, 187 Minn. 462.

<sup>104</sup> Ky.—*Equitable Life Assur. Soc. of U. S. v. Fannin*, 1932, 53 S. W. 2d 703, 245 Ky. 474.

S. D.—*Cass v. Pacific Mut. Life Ins. Co. of California*, 1934, 253 N. W. 622, 62 S. D. 502, followed in 256 N. W. 120, 63 S. D. 23.

#### CONTRA:

Ga.—*Parten v. Jefferson Standard Life Ins. Co.*, 1923, 117 S. E. 772, 30 Ga. App. 245.

<sup>105</sup> Disability of the insured to follow a gainful occupation, within the meaning of the permanent disability clause of a life policy, is not negated merely by the facts that the insured can drive a car for a short distance and can sit in a chair and whittle. *Wood v. Prudential Ins. Co. of America*, 1933, 271 Ill. App. 103.

<sup>106</sup> "Evidence tended to show the insured to be a negro laborer, 57 years of age, employed as a coal miner, taken out of the mines in the spring of 1931 because of disability, and put to light outdoor work, clean-up work, cutting weeds, removing litter, etc., and finally laid off June 24, 1931; that later he was assigned to CWA work relief, where his duties were 'toting water.' Further testimony tended to show such work was performed intermittently with pain and exhaustion, with continuing rales, symptoms of asthma. Competent medical authority reported total disability as per the complaint in the fall of 1932. There was conflict in professional opinion as to his condition, some on examinations at different periods, and some conflict as to condition about the time of the trial.



"The mere fact that, when not suffering an acute attack of asthma, he could and did, up to the time of trial, perform some such work, would not justify an affirmative instruction for defendant. If work is accompanied by suffering, aggravation of a chronic disease, in such sort that sound medical advice says not to work, the fact that there is still strength to do it at times, and, under stress of circumstances he does so perform, will not defeat his right to the total permanent disability benefit under stipulations here presented." *Equitable Life Assur. Soc. v. Watts*, 1935, 160 So. 713, at page 714, 230 Ala. 297.

U. S.—*Clarson v. New York Life Ins. Co.*, D. C. Fla. 1933, 4 F. Supp. 791.

Ala.—*United States Casualty Co. v. Perryman*, 1919, 82 So. 462, 203 Ala. 212; *Equitable Life Assur. Soc. of U. S. v. Watts*, 1935, 160 So. 713, 230 Ala. 297.

Cal.—*Fitzgerald v. Globe Indemnity Co. of New York*, 1927, 258 P. 458, 84 Cal. App. 689.

Ind.—*Prudential Ins. Co. of America v. Martin*, 1935, 196 N. E. 125, 101 Ind. App. 320.

Mo.—*McMahon v. Supreme Council Order of Chosen Friends*, 1893, 54 Mo. App. 468; *Smith v. Metropolitan Life Ins. Co.*, App. 1937, 108 S. W. 2d 995; *Wright v. Metropolitan Life Ins. Co.*, App. 1938, 115 S. W. 2d 102.

#### RAILROAD CONDUCTOR

Railroad conductor suffering loss of leg and spinal injuries, who had insufficient education to do clerical work, and could not undertake work requiring physical exertion, held "totally and permanently disabled" so as to be entitled to recover disability benefits under group life policy, notwithstanding his employment as crossing flagman, which was attended with pain and was imprudent, and was given to insured because of consideration for his condition rather than because of his ability to work. *Protective Life Ins. Co. v. Wallace*, 1935, 161 So. 256, 230 Ala. 338.

#### FARMER AND STORE MANAGER

Insured who, though handicapped by loss of leg, operated plantation store and superintended farming activities, and who was afflicted with hardening of arteries, high blood pressure and enlargement of heart, mainly super-induced by chronic Bright's disease which would probably hasten death, especially if insured continued his regular work, properly recovered on life policy, notwithstanding policy purported to require "total and permanent disability," preventing insured from pursuing any occupation whatever for profit, as against contention that recovery should not exceed amount accrued to date of judgment. *Cates v. Jefferson Standard Life Ins. Co.*, La. App. 1935, 159 So. 168.

#### SALESWORK AFTER INJURY

That insured who had suffered a paralytic stroke had for about one month attempted to sell an article on a house-to-house canvass basis held not to establish, contrary to testimony of medical experts and others, that insured had not been "totally disabled" continuously within disability clause of life policy, especially where attempt resulted in his being thereafter confined to bed. *Frey v. Great Southern Life Ins. Co.*, La. App. 1936, 167 So. 480.

#### LIGHT WORK

Where life policy provided for disability benefits if insured became wholly, continuously, and permanently unable to engage in

conditions show that his ailments grow progressively worse, will not bar a recovery.<sup>107</sup>

Accordingly, the mere fact that the insured attempted for a time to continue to do his work will not avail the insurer, whether the insured, at the time of so working, knew of his disability or not.<sup>108</sup> This has been held even where the insured worked until the day he was laid off.<sup>109</sup>

Similarly, the mere fact that the insured did do work of some character for financial gain is not conclusive as to his inability to recover.<sup>110</sup>

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any occupation for profit, that insured would at times be able to beg, pick rags, or sell peanuts, or for brief periods do work necessarily resulting in great pain or loss of life, would not prevent recovery of disability benefits. *Janney v. Scranton Life Ins. Co.*, 1934, 173 A. 819, 315 Pa. 200.

#### ODD JOBS

A man recovering from an illness of about three weeks' duration may justly be deemed to be "incapable of working," within the meaning of a by-law of a mutual benefit association giving to persons so disabled a certain benefit, although, by unreasonable, excessive, and harmful effort and exertion, he succeeds in doing light work for two consecutive days, and then by reason thereof suffers a relapse, and the fact that he receives wages for those two days is immaterial. *Genest v. L'Union St. Joseph*, 1886, 6 N. E. 380, 141 Mass. 417.

<sup>107</sup> In action for indemnity under policy requiring that injury incapacitate insured from date of accident from performing any and every kind of duty of his occupation, right hemiplegia, accompanied by aphasia, caused by a lesion of the brain due to concussion as result of a fall, held to warrant total recovery, notwithstanding insured returned to work after accident, but complained of headaches and inability to see, and condition resulting in entire inability to work developed gradually. *Booth v. U. S. Fidelity & Guaranty Co.*, 1925, 130 A. 131, 3 N. J. Misc. 735.

<sup>108</sup> Ga.—*Marchant v. New York Life Ins. Co.*, 1930, 155 S. E. 221, 42 Ga. App. 11; *Metropolitan Life Ins. Co. v. McKee*, 1934, 176 S. E. 118, 49 Ga. App. 533.

Ky.—*Prudential Ins. Co. of America v. Kelsay*, 1935, 78 S. W. 2d. 923, 257 Ky. 633.

N. H.—*Duhaime v. Prudential Ins. Co. of America*, 1933, 167 A. 269, 86 N. H. 307.

<sup>109</sup> That insured actually worked for remuneration until day he was laid off did not bar recovery under disability clause of group policy, notwithstanding policy defined a totally and permanently disabled employee as one who had become, while insured, permanently, continuously, and wholly prevented, as result of bodily injuries suffered, or disease contracted, from performing any work for compensation or profit. *Young v. Metropolitan Life Ins. Co.*, 1935, 84 S. W. 2d 1065, 229 Mo. App. 823, certiorari quashed State ex rel. *Metropolitan Life Ins. Co. v. Allen*, 100 S. W. 2d 487.

#### <sup>110</sup> IN GENERAL

Disability payments under life policy became due when insured became unable to work or obtain wages, irrespective of whether in-

This is true whether the insured works along the lines of his regular vocation or some other type of work with which he is familiar.<sup>111</sup>

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sured actually engaged in occupation. *Pacific Mut. Life Ins. Co. of California v. Ringold*, C. C. A. Miss. 1931, 47 F. 2d 738.

In action on accident policy, that the insured undertook to return to work and was able to perform a part of his duties and draw full salary therefor held not to preclude recovery of benefits, since insured was merely attempting to minimize liability of insurer. *Mann v. Travelers' Ins. Co.*, 1935, 179 S. E. 796, 196 S. C. 198.

Insured's endeavor to work when disabled held not to preclude right to recover total and permanent disability benefits under life policy. *Millis v. Continental Life Ins. Co.*, 1931, 298 P. 739, 162 Wash. 555.

#### FARMER

The fact that insured was physically able to perform some labor, though handicapped with pain and disability from loss of use of foot, would not negative "total and permanent disability" within provision in life policy for monthly payments in event insured by reason of injury or disease should become wholly and continuously disabled from pursuing any occupation for remuneration or profit. *Jefferson Standard Life Ins. Co. v. Curfman*, Tex. Civ. App. 1939, 127 S. W. 2d 567, error dismissed.

#### MECHANIC

Where insured, prior to injuries to hip, back, and leg in automobile accident, was mechanic whose duties required manual or muscular labor, and injuries incapacitated him from pursuing his regular occupation upon which he was dependent for livelihood, insured was "totally disabled" within group accident and health policy, notwithstanding insured attempted unsuccessfully to pursue usual occupation and to engage in other work. *Metropolitan Life Ins. Co. v. McKee*, 1934, 176 S. E. 118, 49 Ga. App. 533.

#### RAILROAD SHOP WORK

That insured could engage in light work in railroad shop before expiration of disability policy held not conclusive against total and permanent disability. *Pacific Mut. Life Ins. Co. v. Dupins*, 1934, 66 S. W. 2d 284, 138 Ark. 450.

<sup>111</sup> U. S.—*Pacific Mut. Life Ins. Co. of California v. Ringold*, C. C. A. Miss., 1931, 47 F. 2d 738.

Fla.—*New York Life Ins. Co. v. Lecks*, 1936, 165 So. 50, 122 Fla. 127.

N. J.—*Woodrow v. Travelers Ins. Co.*, 1938, 1 A. 2d 447, 121 N. J. L. 170.

Tenn.—*Pacific Mut. Life Ins. Co. v. McCrary*, 1931, 32 S. W. 2d 1052, 161 Tenn. 389.

Tex.—*Great Southern Life Ins. Co. v. Johnson*, Com. App. 1930, 25 S. W. 2d 1093, reversing, Civ. App., 13 S. W. 2d 424.

#### ATTEMPTS UNSUCCESSFUL

This is more soundly sustained where his attempt to work proved indiscreet and he was not able to continue. *United States Casualty Co. v. Perryman*, 1919, 82 So. 462, 203 Ala. 212.

Mo.—*Thomas v. Metropolitan Life Ins. Co.*, 1936, 89 S. W. 2d 590, 230 Mo. App. 206.

On the other hand, recovery has been denied where the insured did not stop working because of his claimed disability,<sup>112</sup> or where he had returned to his old employment and was drawing the same wages.<sup>113</sup> Even though he worked only part time during the period of disability claimed, if he received the same earnings, recovery has been denied.<sup>114</sup> Nor does mere inconvenience in working affect the case where the life or health of the insured is not endangered thereby.<sup>115</sup>

Recovery has also not been permitted where the insured is working a substantial part of each day, though not to the same extent nor at the same total wages as before.<sup>116</sup> Similarly, if

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<sup>112</sup> Ga.—Blackman v. Travelers' Ins. Co., 1934, 174 S. E. 384, 49 Ga. App. 137.

Thus, a store fixture salesman who became totally deaf but who according to some testimony still actively engaged in work around store which he had previously owned was not "totally and permanently disabled" within meaning of disability provisions of life policy which obligated insurer to pay disability benefits only in event that insured was prevented from engaging in any occupation and performing any work for compensation or profit. Fuchs v. Metropolitan Life Ins. Co., 1938, 3 N. Y. S. 2d 707, 253 App. Div. 665.

<sup>113</sup> The insured in a life policy containing a total and permanent disability clause, providing indemnity "upon receipt of due proof of such disability, and that it has existed continuously for 90 days," was not entitled to recover under such clause, notwithstanding an actual 90-day disability, where, at the time he presented his proof of claim he had already returned to and was again engaged in his usual employment, as there thus was no proof of his then being totally and permanently disabled. Steffan v. Bankers' Life Co. of Iowa, 1933, 267 Ill. App. 248.

Insured accidentally shot in leg when substantially performing usual duties and earning same wages held not entitled to monthly indemnity under accident policy. Provident Life & Accident Ins. Co. of Chattanooga, Tenn. v. Harris, 1930, 28 S. W. 2d 40, 234 Ky. 358.

<sup>114</sup> Ga.—Metropolitan Life Ins. Co. v. Stalworth, 1937, 191 S. E. 149, 55 Ga. App. 629.

<sup>115</sup> Insured who regularly and continuously was engaged in customary employment in usual manner save for some pain and slowness of movement occasioned by arthritis during period in which disability was claimed, and received compensation therefor, held not "totally and permanently disabled" within disability clause of life policy. Stewart v. Pioneer Pyramid Life Ins. Co., 1935, 180 S. E. 889, 177 S. C. 132.

<sup>116</sup> Insured, afflicted with tuberculosis, but continuing to work, earning over 42 per cent of usual wages, could not recover for total disability, under employer's group policy, though illness made continued work inadvisable, and decreased earning capacity. Cato v. Aetna Life Ins. Co., 1927, 138 S. E. 787, 164 Ga. 392.

Where plaintiff had his thumb injured in his work, but continued working 9 hours a day, instead of 10, as he had previously done, at the same rate per hour that he had before received, he cannot recover for such injuries on an accident policy conditioned that the ac-

he works for a long period of time after injury, the evidence may be so overpowering to the effect that the disability does not exist as to preclude recovery.<sup>117</sup> Particularly is this true where he works until the date of discharge or the expiration date of the policy.<sup>118</sup>

And where a person engages actively in another and remunerative occupation, it has been stated, and wisely so, that recovery for permanent and total disability is no longer justi-

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cident must wholly and continuously disable him from performing any and every kind of duty pertaining to his occupation. *Bylow v. Union Casualty & Surety Co.*, 1900, 47 A. 1066, 72 Vt. 325.

<sup>117</sup> Insured who, though unable to work regularly because of bronchial asthma, worked in mill for nine months after contracting illness, was not "totally and permanently disabled" within disability provision of group policy. *Lee v. Equitable Life Assur. Soc. of U. S.*, 1937, 189 S. E. 626, 211 N. C. 182.

An insured who had returned to work and had been gainfully employed at his trade as a mechanic for more than 18 months prior to claiming disability benefits was not totally disabled at time of claim, and hence was not entitled to such benefits under life policies providing for total and permanent disability benefits if proof was furnished during continuance thereof. *Wolf v. Prudential Ins. Co. of America*, R. I. 1939, 4 A. 2d 897.

Insured, who worked as laborer for city almost continuously for 107 days after leaving employment in foundry in which disability allegedly arose, held not "totally and permanently disabled," within group policy covering insured while engaged as foundry employee, notwithstanding insured was on "relief list" when employed by city and became ill on several occasions while working for city. *Metropolitan Life Ins. Co. v. Krupel*, 1936, 183 S. E. 241, 165 Va. 602.

<sup>118</sup> Beneficiary of group policy held not entitled to recover for disability or death of insured under clause which provided benefits if insured should become "totally and permanently disabled" or incapacitated to extent that he was wholly, continuously, and permanently unable to work, where insured worked without claim of disability until expiration date of policy, despite fact that during life of policy insured had most of the symptoms which, as physicians later declared, demonstrated his disability. *Sanders v. Prudential Ins. Co. of America*, 1937, 273 N. W. 286, 279 Mich. 608.

#### DISCHARGE FOR OTHER REASONS

That insured, after injury, worked two years and was let off solely for conditions other than ability to work, established his ability to work for profit. *Metropolitan Life Ins. Co. v. Barela*, Tex. Civ. App. 1932, 44 S. W. 2d 494.

#### REDUCTION IN FORCE

Where the evidence disclosed that the plaintiff, an employee of a silk mill, received injuries to his wrist and later was discharged because the company was reducing the number of its employees and the evidence further disclosed that the plaintiff had not obtained any other work, but other than for a stiff wrist was able to work, held that the claimant was not totally and permanently disabled within the meaning of the provision of the policy. *Blagg v. Missouri State Life Ins. Co.*, 1932, 15 Tenn. App. 242.

fied.<sup>119</sup> And if the circumstances seem to show definitely that the insured is not disabled, recovery must be denied.<sup>120</sup>

It will be seen from this discussion that the results in various states are not wholly uniform. It may be concluded, however, that the majority of the courts look to the insured's training and experience. If the insured cannot perform his usual occupation substantially, or perform other duties for which he is trained and qualified, so that he sustains actual monetary loss, indemnity will be allowed. The purpose of disability insurance is protection from financial loss by reason of inability to work, and courts will not lightly permit insurance companies to evade their policy obligations.

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<sup>119</sup> FILLING STATION

Insured who operated oil station and tire business held not wholly disabled so as to be permanently and continuously prevented from engaging in any occupation for remuneration or profit within disability clause of life insurance policy. *Ellis v. New York Life Ins. Co.*, 1926, 106 So. 689, 214 Ala. 166.

FARMER

Insured, who has ceased to do manual labor as result of disease, but continues in active charge of his farm, managing labor, marketing crops, etc., with profit and remuneration to himself, and attending meetings as director of bank, would not be totally disabled for carrying on avocation for profit or remuneration within policy insuring against such incapacitation. *Lee v. New York Life Ins. Co.*, 1924, 125 S. E. 186, 188 N. C. 538.

Insured farmer who, though unable because of stroke of paralysis to continue working on farm, received \$40 monthly for services as court crier until few days before his death, held not "wholly disabled" within disability clause of life policy. *Thigpen v. Jefferson Standard Life Ins. Co.*, 1933, 168 S. E. 845, 204 N. C. 551.

TEACHER

Insured who, though afflicted with tuberculosis and unable to follow her former occupations of school teacher and proprietor of rooming and boarding house, became charity patient in tuberculosis hospital and received from hospital compensation equaling or exceeding her former income from teaching class of patients and subsequently acting as attendant and clerk in X-ray department held not entitled to disability benefits under life policy requiring that total permanent disability prevent insured from performing any work for compensation. *Patey v. Metropolitan Life Ins. Co.*, 1936, 93 S. W. 2d 1271, 19 Tenn. App. 634.

<sup>120</sup> An insured, who manifested few objective symptoms of the mental illness for which disability benefits under life policy were sought, who was physically active, engaged in business on behalf of his wife during period of alleged disability, applied for additional insurance denying that he had been suffering from physical or mental ill health, and applied for automobile licenses for a succession of years during which he stated he was suffering no physical or mental ill health, was not entitled to recover total permanent disability benefits under life policy. *Robinson v. Equitable Life Assur. Soc. of U. S.*, 1938, 198 A. 192, 16 N. J. Misc. 211, affirmed 8 A. 2d 600, 126 N. J. Eq. 242.