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The Work of the Louisiana Appelate Courts for the 1962-1963 Term: A Symposium
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Private Law: Insurance

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It is true that the Title Controversy Committee of the Louisiana State Mineral Board affords some measure of relief. But negotiations with that body may be unsuccessful, or at least unsatisfactory, and for the ordinary individual claiming title adversely to the state the problems of securing authorization to bring suit may prove insurmountable in such circumstances.

The *Walmsley* decision appears to be a compassionate response to the plight of citizens with title claims against the state. The court could limit the damage done to the concepts underlying our system of real actions by restricting it to similar situations involving controversy with the state as in other cases litigants have remedies available through the real actions. However, remedial legislation seems preferable.

INSURANCE

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The great volume of insurance litigation considered by the Louisiana appellate courts in past years continued during the 1962-1963 term. Over one hundred decisions of our appellate courts were rendered during that time. Those of most general interest and significance are reviewed in these comments. The Supreme Court rendered only two of the decisions, a rather unusual fact in view of the large number of decisions.

I. LIFE COVERAGES

In the field of life insurance, the Fourth Circuit Court of Appeal applied the usual rule in holding that the wife forfeits her rights as the beneficiary of the policy of life insurance on the life of her husband when she feloniously kills him and the insurance proceeds then become the property of the insured's estate. As such the proceeds are property of the decedent's separate estate and are not community property. In the opinion of the court, it would be illogical and against public policy to hold that the wife, denied recovery personally for feloniously killing her husband, yet could recover half of the proceeds as her community interest. The only interest a wife could have, the court says, would be the recovery from her husband's estate of half

the community funds used in payment of the insurance premiums.[1]

Where a rescission rather than the enforcement of a contract was sought, the Third Circuit Court of Appeal concluded that an insured had the right to rescind a life insurance contract and to secure the refund of the premiums paid where the evidence established that he would not have purchased the policy except for error induced by fraudulent representations made by the insurer's agent that large dividends would be paid on the policy. Such representations were shown to be material, and the reliance which had been placed thereon was shown not to be unreasonable to the extent that it would constitute fault or negligence on the part of the plaintiff sufficient to estop him. The court, in applying the rule that the insured must act promptly and seek relief within a reasonable time, found that a delay of two years between the time the policy was issued and the suit was commenced was excused because the insured, a forty-nine year old farmer with little formal education, was unable to understand the insurance contract and had relied on a written schedule of premiums and dividends which had been given to him by the agent.[2]

Both the Second and Third Circuits had for consideration the termination of coverage under the contract issued by the Metropolitan Life Insurance Company in accordance with the Federal Employee Group Life Insurance Act of 1954. In the first case the Second Circuit upheld the provision of the policy which provided that the insurance would cease on the civilian federal employee who had been issued coverage thereunder on the date of separation. The thirty-one day grace period for conversion of the policy expired before the decedent's death and the right to convert had not been exercised. The court enforced the termination provision of the policy measuring the thirty-one day grace period from the date of the employee's separation from service even though an advanced premium, previously deducted from his salary, would have paid for the coverage beyond the termination date.[3] The Third Circuit, in construing the same provision, reached a similar conclusion and found that a payment to the insured by his employer of a sum representing his

1. Butler v. Life Ins. Co. of Georgia, 147 So. 2d 684 (La. App. 4th Cir. 1962).
2. Broussard v. Fidelity Standard Life Ins. Co., 146 So. 2d 292 (La. App. 3d Cir. 1962).
3. Kerlin v. Metropolitan Life Ins. Co., 141 So. 2d 895 (La. App. 2d Cir. 1962).

accrued annual leave had no significance in determining the date he was separated from federal service so as to be within the extended coverage of the group policy. Additionally, they held the right of conversion under the contract to be a right that could not be inherited by the widow of the insured upon his death.[4]

II. HOSPITALIZATION AND HEALTH COVERAGES

One of the cases considered by the Supreme Court involved the interpretation of a hospitalization contract. The case was first considered by the Third Circuit Court of Appeal.[5] In its decision that court held hospital expenses incurred more than eight months after the date of an accident were within the coverage granted by the policy despite the insurer's claim that its coverage was limited to hospital expenses incurred within thirty days of the accident by the policy language. Penalties and attorney's fees were granted for the insurer's failure to pay. The Supreme Court granted a writ to review that portion of the judgment of the court of appeal which awarded penalties and attorney's fees. That portion of the contract which leads to the controversy provides "If the Insured shall, within 30 days from the date of such injury, require any necessary hospital care or service, the Company will pay such expense incurred, provided, however, that the Company's maximum liability for Medical, Surgical and/or Hospital care shall not exceed a maximum of $3,000.00 and provided that such expense shall be incurred within fifty-two weeks from the date of such injury." The Supreme Court found that the insurer's refusal to pay the claim was unreasonable and was based upon a "far-fetched, impossible interpretation placed on this provision of the policy it wrote." Having found the interpretation unjustified, the court found the company's refusal to pay a proper ground for the imposition of the statutory penalty.[6]

In a case involving a question of jurisdiction and venue the Third Circuit Court of Appeal held that the term "insurance policy" as used in the statutes relating to venue of actions on insurance policies includes any contract of insurance regardless of the manner in which the contract is evidenced. Where the

4. Funderburk v. Metropolitan Life Ins. Co., 146 So. 2d 710 (La. App. 3d Cir. 1962).
5. Fontenot v. Wabash Life Ins. Co., 143 So. 2d 592 (La. App. 3d Cir. 1962).
6. Fontenot v. Wabash Life Ins. Co., 150 So. 2d 10 (La. 1963).

plaintiff relied upon the charter, the general rules, and the by-laws of a corporation showing that members in good standing are entitled to specified medical and hospital expenses the court found that this was sufficient evidence of a health and accident insurance contract within the meaning of the term "health and accident insurance policy" as used in Louisiana Code of Civil Procedure article 76.[7]

III. AGENTS AND AGENTS' LIABILITY

Two cases of interest considered the agent's liability for failure to obtain coverage.[8] In the Fourth Circuit the court found that the evidence sustained a cause of action for damages against the insurance agency because of a failure to place burglar insurance on the plaintiff's property in accordance with an alleged agreement. In this case the plaintiff had requested insurance and had been advised that the same was in effect. The defendant agent had inspected the premises and, while he denied that any commitment had ever been made, upon being notified of the claim he attempted to have the company make an ex gratia payment to the insured. The Third Circuit, relying upon the foregoing and other similar decisions, reiterated the established rule to the effect that recovery may be allowed a prospective insured where the actions of the insurance agent are shown to be such as to warrant an assumption by the insured that he was adequately covered by suitable insurance. The court here found that the limits of liability which the defendant agent asserted he had agreed to obtain, would be the limit of recovery and that the plaintiff had not been misled to expect more than this.

The Second Circuit Court of Appeal, in determining whether or not sufficient notice had been given of the acquisition of another automobile to secure coverage under an existing policy, found that an agency relationship may exist in fact outside the scope of the statutes regulating insurance brokers and solicitors. The effect of this was to hold the insurance company bound by a notice given to an individual said to be authorized as a representative of a licensed and authorized agency of the company although the individual did not hold an agent's or solicitor's license or contract to represent the agency or the insurance com-

7. Francis v. Texas & Pacific Railway Employees Hospital Association, 148 So. 2d 118 (La. App. 3d Cir. 1962).

8. Clyde Bourgeois, Jr. v. Beeson-Warner Agency, 144 So. 2d 563 (La. App. 4th Cir. 1962); Arceneaux v. Bellard, 149 So. 2d 444 (La. App. 3d Cir. 1963).

pany. These regulatory "statutes do not exclude other insurance relationships. That is, these regulatory insurance statutes do not prevent the courts from finding that an agency relationship exists in fact, outside the scope of the statutes." It is interesting to note that at the time the notice was given to the individual, Frazier, he was licensed only as a life insurance agent. The court apparently did not consider the distinction between a licensed life insurance agent and a licensed agent for lines other than life in deciding the case. It would appear to be of no significance since the question of whether or not the individual actually held a license from the state was not a point upon which the decision turned.[9]

IV. AUTOMOBILE COVERAGES

As one would expect, the greatest number of insurance cases litigated involved automobile coverages. The direct action statute was up for consideration a number of times. In a case where the plaintiff commenced suit against the insurer alone under the option provided for in the direct action statute, the Second Circuit Court of Appeal found that this did not constitute an irrevocable "election of remedies," and by such action, the plaintiff did not forfeit the right to proceed against the insured tortfeasor. The court found that the injured person or his survivors had a right of direct action against the insurer and such action might be brought against the insurer alone or against the insured and the insurer jointly and in solido in the parish where the accident occurred. Further, the insured and the insurer were held as debtors in solido to the plaintiff although the insured was bound in tort and the insurer in contract, subject to the limits of liability contained in the policy by which the insurer was bound.[10]

The Supreme Court in *Indiana Lumbermen's Mut. Ins. Co. v. Russell*, reviewed by writ of certiorari a decision of the Second Court of Appeal in the same case[11] to determine the extent of coverage granted under the terms of an automobile policy. The facts show that Billy Russell had a policy on a Pontiac which he owned and while this policy was in effect he married Sandra,

9. Mathews v. Marquette Casualty Company, 152 So. 2d 577 (La. App. 2d Cir. 1963).

10. Finn v. Employers' Liability Assur. Corp., 141 So. 2d 852 (La. App. 2d Cir. 1962).

11. 135 So. 2d 491 (La. App. 2d Cir. 1961), *rehearing denied*, 243 La. 189, 142 So. 2d 391 (1962).

who owned a Ford automobile and carried public liability insurance thereon with another company. Subsequently, Billy Russell was issued a renewal policy by the insurer. Upon the expiration of this renewal policy there was a lapse of time in which no policy was in force before a subsequent policy was issued on February 4, 1962, without consultation between Russell and the agent. The premium was not paid and the policy was finally cancelled. However, between the date of its issue and the date of its cancellation Russell was involved in an accident while driving his wife's Ford automobile. The policy which was in effect at this time described only the Pontiac automobile and no policy was in effect on the Ford owned by the wife. Under these circumstances, the insurance company sued for a declaratory judgment seeking to escape the possibility of liability under the policy which was limited to the Pontiac described therein. Russell asserted that he was covered for the liability created by the accident while driving the Ford, since under the terms of the policy on the Pontiac he and his wife are both named insureds and that the Ford was, therefore, an *owned* automobile as it was owned by a named insured. In an exhaustive review the Supreme Court found that the Family Combination Policy by its clear and express language "provides insurance protection to the insured and members of the insured's household while using an automobile owned either by the insured named in the declaration or his spouse." Emphasis was placed by the court upon the fact that the policy was issued without any restriction as to the coverage of *owned* automobiles although the company and its agent had knowledge of the ownership of the Ford. The opinion also charged the insurance company with notice of the applicable rules of the Louisiana Insurance Rating Commission which provided in part with respect to Family Coverage that "if all owned automobiles, as defined in this Supplement, are not to be insured in this policy the appropriate endorsement must be attached." There is a strong dissent by Judge Hawthorne stating that the interpretation placed on the policy by the majority goes beyond the language of the contract and beyond the intention of the parties.

That portion of the automobile contract which excludes from coverage injury to property "owned or transported by the insured" was up for consideration by the appellate courts. The Fourth Circuit Court of Appeal considered the case in which the Maryland Casualty Company had issued an automobile liability

policy to Trahan and the General Accident Fire and Life Assurance Corporation had issued a collision policy to him, both policies being written on the one automobile owned by Trahan. Trahan gave permission to Miss Wyble to drive his automobile and she negligently damaged it. The General Accident paid for the repair of the damaged car and as subrogee of Trahan brought suit against Miss Wyble to recover the amount so paid. Miss Wyble then filed a third party action against the Maryland Casualty Company asserting that she was insured under the liability policy, and, therefore, any judgment rendered against her should be paid by the Maryland Casualty Company. The Maryland contended that it had no liability because when the accident occurred the automobile was being driven by Miss Wyble who had become an insured under the terms of the policy upon receiving permission to use it and who was, therefore, "in charge of the property." The court found that the exclusion in the policy was plain and unambiguous and that Maryland was not liable as an insurer for damage to the automobile while it was in the care and charge of Miss Wyble, an insured under the policy at the time of the accident.[12] The First Circuit Court of Appeal considered an almost identical question, and, citing the *Wyble* case, arrived at the same conclusion.[13] Until the decision in the *Wyble* case, the question was res nova in Louisiana.

The oft-considered question of the right of an owner-passenger of an automobile to recover damages, caused by the negligent driving of the owner's permittee and agent, from the owner-passenger's own insurer under the omnibus clause of an automobile liability policy was reviewed exhaustively in *Grimes v. American Motorists Ins. Co.*[14] In a well-reasoned opinion, the court reviewed the former jurisprudence and stated the rule to be that the owner-passenger may recover such damages but this right will be barred by any independent or contributory negligence. In determining whether there is such negligence, the owner-passenger is under a greater obligation than is a guest passenger since the owner-passenger has a right to control the operation of a motor vehicle by his agent and the duty to do so. A failure in this duty which is shown to be the proximate cause

12. General Accident Fire & Life Assur. Corp. v. Wyble, 144 So. 2d 114 (La. App. 4th Cir. 1962).

13. Middlesex Mutual Fire Ins. Co. v. Ballard, 148 So. 2d 865 (La. App. 1st Cir. 1963).

14. Grimes v. American Motorists Ins. Co., 145 So. 2d 62 (La. App. 1st Cir. 1962).

of the accident is a bar to his recovery as it convicts him of contributory or independent negligence.

Two cases of interest in which the appellate courts considered the provisions of an automobile policy which require cooperation of the insured in any claim, and notice to the company when any suit is brought against the insured, sustained the validity of the policy requirements. In the first instance, the Second Circuit Court of Appeal denied liability against the Marquette Casualty Company when the insured had failed to notify the company of citations and pleadings which had been served upon an omnibus insured. In so holding, it found that the insurer need not show that its rights had been prejudiced by the insured's failure to comply with the policy requirement as to the forwarding of the suit papers in order to be relieved of the liability under the policy.[15] In the second case, the Third Circuit found that a breach of cooperation clause by the insured must be both material and prejudicial to relieve the insurer of liability.[16]

In other interesting cases the courts found that a release by one motorist of claims arising from an accident with another motorist did not create any liability in favor of third parties for injuries received in the same accident, even though the release contained language stating that the party signing it did covenant to indemnify and save harmless the party to whom it was granted.[17] Payments made by non-tortfeasors are not deductible by liability carriers when such payments are made from collateral sources wholly independent of the wrongdoer.[18] And automobile coverage does not extend to damages caused by the explosion of a tire which has been removed from a trailer and is being worked on while so removed, the court finding that the language granting coverage for bodily injury "caused by accident, while occupying or through being struck by an automobile" not to include such an injury.[19] The sufficiency of notice of cancellation with respect to automobile coverage was considered and language stating that "this leaves us with no alternative, and we are obligated to notify you that this policy is cancelled, effective on 10-13-57 12:01 A.M. Standard Time," was held to be suffi-

15. Hallman v. Marquette Cas. Co., 149 So. 2d 131 (La. App. 2d Cir. 1963).
16. Freyou v. Marquette Cas. Co., 149 So. 2d 697 (La. App. 3d Cir. 1963).
17. Moore v. Liberty Mutual Ins. Co., 149 So. 2d 192 (La. App. 3d Cir. 1963).
18. Roux v. Brickett, 149 So. 2d 456 (La. App. 3d Cir. 1963).
19. Bowab v. St. Paul Fire and Marine Ins. Co., 152 So. 2d 67 (La. App. 3d Cir. 1963).

cient under the statutory requirement as being clear, unequivocable, unambiguous, and valid and effective.[20]

V. FIRE COVERAGE

Cases of note in the fire insurance field included a review by the appellate courts of the proper penalty which can be assessed on the *non-payment of claims* on a fire contract (12%, not 25%);[21] and a determination that an agreed adjustment after a fire loss becomes a new contract and its enforcement therefore not subject to any policy restriction.[22]

WORKMEN'S COMPENSATION

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Although the Louisiana appellate courts handed down more than a hundred decisions on workmen's compensation during the past term, most of these either were resolutions of factual disputes or involved only reiterations of familiar rules and principles. This reviewer was unable to locate more than a dozen decisions whose novelty or contribution to the compensation law of Louisiana justifies any extended comment.

THE EMPLOYMENT RELATIONSHIP

It is a fundamental observation in workmen's compensation law that an employee is not entitled to compensation unless his work was *in the course of his employer's hazardous trade, business, or occupation.*[1] Somewhat similarly, an employee of a *contractor* cannot successfully claim compensation from his employer's *principal* under R.S. 23:1061 unless the employer-contractor was executing work which was *a part of* the principal's *trade, business, or occupation.*[2] Thus the relationship between

20. Alexander v. State Farm Mutual Automobile Ins. Co., 148 So. 2d 898 (La. App. 1st Cir. 1962).

21. Welch v. New York Underwriters Ins. Co., 145 So. 2d 376 (La. App. 3d Cir. 1962).

22. McCarter v. National Union Fire Ins. Co. of Pittsburgh, 147 So. 2d 104 (La. App. 2d Cir. 1962).

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1. See MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 102 (1951).

2. *Id.* § 125.