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### Private Law: Insurance

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Tiger Act as meaning "a surreptitious concealment or that which is not visible to the naked eye" and pointed out that there had been no concealment of intoxicating liquor by the druggist in the instant case.<sup>33</sup> Such a holding as to the scope and application of the Blind Tiger Act will not preclude the possibility of convictions for violation of the provisions of the Local Option Statute. The propriety of convicting a druggist under the 1948 Local Option Law for sales upon a licensed physician's prescription and for purely medicinal purposes is a matter which was not raised or decided in the *Kolb* case.

## INSURANCE

*Alvin B. Rubin\**

### PUBLIC LIABILITY POLICIES

*Notice of loss—direct action.* The nature of the direct action against the insurance company originally authorized by Louisiana Act 253 of 1918 has been the subject of extended litigation.<sup>1</sup> As amended by Louisiana Act 55 of 1930, the statute provides for a direct action by any injured person against the defendant's insurer and states that "any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured. . . ."

In a series of decisions, the supreme court has held that the insurer could not avail itself of defenses "personal to the insured."<sup>2</sup> The statutory phrase quoted above was not involved, but these decisions did show a clear intention to expand the scope of the remedy available to the injured third person.

Another group of cases raised a problem which directly concerned these words. Every public liability policy contains a clause requiring the insured, as a condition of the insurer's liability, to notify the insurer of any accident. The phrasing of these clauses varies, but their general purpose is to enable the insurer as soon as possible after an accident to commence an investigation and take such other action as it may deem necessary either toward settling the claim or preparing for litigation.

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33. 45 So. 2d 891, 895 (La. 1950).

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1. For a general discussion of this act, see Miller, *Aspects of a Public Liability and Property Damage Policy in Louisiana*, 15 *Tulane L. Rev.* 79 (1940).

2. See, for example, *Edwards v. Royal Indemnity Ins. Co.*, 182 La. 171, 161 So. 191 (1935) (action by wife against husband's insurer); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1934) (action by minor children for negligence of their father resulting in death of their mother).

In *Jackson v. State Farm Mutual*,<sup>3</sup> decided in 1946, the notice to the insurance company was given eighty-two days after the accident. The supreme court concluded that notice was not so untimely as to deprive the injured third person of his rights against the insurer because each case must be decided upon its own facts and the facts there shown did not make the delay unreasonable.

In *West v. Monroe Bakery*<sup>4</sup> the question of timely notice was once again presented. The policy required notice "as soon as practicable." The insured never gave notice of the accident, which happened on January 2, 1945. The injured third person filed suit on January 7, 1946, and mailed a copy of its petition to the insurance company, which arrived on January 14, 1946, over a year after the accident. The insurance company was joined as a defendant to the suit by a supplemental petition on May 2, 1946.

Under these circumstances, the court of appeal held that the notice was not timely and that the insurance company was released from liability under the policy. The supreme court granted writs, and reversed the decision of the court of appeal.

The supreme court reasoned that the direct action statute creates substantive rights in the injured third person. The statute expresses "the public policy of this State that an insurance policy against liability is not issued primarily for the protection of the insured but for the protection of the public.<sup>5</sup> . . . [W]here the third person is not at fault . . . he cannot be made liable for the breaching of an agreement by the insured with his own insurer." Justice Hamiter concurred in the decree. Justices Hawthorne, McCaleb and LeBlanc dissented.

As for the statutory clause making the direct action subject to the policy defenses, the majority opinion quoted with approval Judge Kennon's dissenting opinion in the court of appeal, stating that this applied "only to the amount which might be recovered and to those other warranties and conditions with which it was within the power of plaintiff to comply."<sup>6</sup>

The earlier decisions referred to above clearly indicated a path along which the supreme court trod one further step in reaching this decision. Despite long and heated argument in

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3. 211 La. 19, 29 So. 2d 177 (1946), court of appeal decision noted in 6 LOUISIANA LAW REVIEW 729 (1946), 20 Tulane L. Rev. 452 (1946).

4. 217 La. 189, 46 So. 2d 122 (1950). See decision of court of appeal in 39 So. 2d 620 (La. App. 1949).

5. Quoting at 46 So. 2d 122, 130 (La. 1950), from *Dauids v. Consolidated Underwriters*, 199 La. 459, 6 So. 2d 351 (1942).

6. 46 So. 2d 122, 130 (La. 1950).

legal and insurance circles, the legislature has never acted to repudiate the earlier decisions. The majority opinion in the *West* case continues to look to wider horizons. So far as can be ascertained, no other jurisdiction has given so broad an interpretation to the direct action statute.<sup>7</sup> The difficulties which this interpretation place on the insurer are obvious. But the insurers select their own customers and contract with them. It may be that a cause of action in favor of the company for failure to provide notice might lie against the insured. In any event where the matter of fault or negligence in the original accident is clear, little ultimate damage is done by failure of notice, save the possibility of effecting a quick settlement; certainly, if there is fraud or collusion between the insured and the claimant, the court would protect the insurer.

*Omnibus clause.* The so-called omnibus clause in the typical automobile public liability insurance policy extends coverage to any person using the automobile "provided the actual use of the automobile is with the permission of the named insured." In 1938, in the case of *Parks v. Hall*,<sup>8</sup> the Louisiana Supreme Court adopted a liberal construction of this clause (which did not then contain the word "actual") and held that only initial permission of the named insured was necessary, and that a later deviation from the purpose for which permission had been granted did not deprive the driver of coverage under the clause.

It has been previously pointed out in a comprehensive study of the omnibus clause that this is only one of three views taken by the various courts which have considered the subject, the other views being (a) that such initial permission alone does not suffice, and that the nature of the particular deviation will be considered, with "material" deviations destroying that initial permission, the various courts in this group differing widely on what are "material" deviations; and (b) that the *particular* use of the automobile at the moment of the accident must have been with the express or implied "permission" of the named insured.<sup>9</sup>

Subsequent to the decision in *Parks v. Hall*, the "initial permission" test was applied in a number of decisions by the courts of appeal and by the supreme court.<sup>10</sup>

The most recent consideration of the clause by the supreme court prior to the present term was in *Waits v. Indemnity Insur-*

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7. 46 So. 2d 122, 128 (La. 1949).

8. 189 La. 849, 181 So. 191 (1938).

9. See Miller, *The Omnibus Clause*, 15 Tulane L. Rev. 422 (1941).

10. These decisions were cited at 46 So. 2d 744, 747 (La. 1950).

ance Company of North America,<sup>11</sup> in which the initial permission test was applied and coverage was found even though an employee who had been authorized to use a vehicle for business only had removed it contrary to instructions after working hours.<sup>12</sup>

A similar problem was again presented in *Dominguez v. American Casualty Company*.<sup>13</sup> One Williams had been employed as the driver of a truck for a period of about four or five months by Thomas, who operated a saw-mill and sold wood. Williams' duties were to drive employees to the mill in the morning, deliver loads of wood during the day, and take the employees back to town in the evening, after which he drove the truck to his home and parked it until the following morning. One night after parking the truck at his home, Williams removed it and went to the assistance of a fellow employee, whose car had run into a ditch, with the intention of pulling the car back onto the highway. On his way back to his home, Williams and the plaintiff had an accident. The plaintiff sued Williams, Thomas, and Thomas' insurer for damages.

The court found that the case fell within the general doctrine of *Parks v. Hall*. Chief Justice Fournet concurred in the opinion. Justice Hawthorne dissented. "So far as I can ascertain, no other state in the Union has extended the initial permission rule so far."

#### LIFE AND DISABILITY POLICIES

*Double indemnity provisions.* In *Franklin v. Mutual Life Insurance Company of New York*,<sup>14</sup> suit was brought for double indemnity benefits under a policy of life insurance. The policy provided for double indemnity "Upon receipt of proof that the Insured died as a direct result of bodily injury effected solely through external, violent, and accidental means, independently and exclusively of all other causes . . . directly or indirectly from disease or bodily or mental infirmity."

The court affirmed a decision of the trial court denying recovery. It was necessary for plaintiffs to prove "that the injuries received in the conceded accident were the predominant cause of death."<sup>15</sup> The court stated that plaintiffs must prove their

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11. 215 La. 349, 40 So. 2d 746 (1949).

12. See Note commenting on this case in 21 Tulane L. Rev. 251 (1940).

13. 217 La. 487, 46 So. 2d 744 (1950).

14. 216 La. 1062, 45 So. 2d 624 (1950).

15. See 29 Am. Jur. 748, Verbo Insurance, § 916.

case "by a preponderance of the evidence," reinforcing their conclusion by reference to the words of the policy provision quoted above: "upon receipt of *proof*."

*Disability benefits.* In the case of *Robbert v. Equitable Life Assurance Society of the United States*<sup>16</sup> the insured brought suit to recover monthly benefits for total and permanent disability and to recover premiums paid on his insurance policy during the period of disability. The policy was a life insurance policy, containing disability benefits. It provided that if "the insured became totally and permanently disabled by bodily injury or disease" the insurer would grant certain benefits. These benefits were as follows:

"(a) Waive Payment of All Premiums payable upon this policy *falling due after the receipt of such proof and during the continuance of such total and permanent disability*; and

"(b) Pay to the Insured a Monthly Disability Annuity as stated on the face hereof; *the first payment to be payable upon receipt of due proof of such Disability* and subsequent payments monthly thereafter during the continuance of such total and permanent Disability."<sup>17</sup> (Italics supplied.)

The insured contended that he became totally and permanently disabled within the meaning and terms of the policy on January 7, 1939, and remained disabled to August 31, 1939. However, he presented this claim on July 9, 1940. The insurance company contended that receipt of due proof of disability was a condition precedent to the liability of the company to make the disability payments of one hundred dollars a month and to waive any premiums.

In its first hearing, the majority opinion stated that the appellate courts of five states had interpreted the provisions of insurance policies identical with those of the policy under consideration. "In every instance the Court concluded that the policy was clear and free of ambiguity, and that submission of proof of disability was a condition precedent to the liability of the Insurer under the disability provisions of the policy. . . . These cases are so called 'goose cases', all of the geese being of the same color and in perfect step."<sup>17</sup>

Justice Hamiter concurred in that portion of the decision relating to the waiver of premiums, but dissented from that por-

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16. 217 La. 325, 46 So. 2d 286 (1949) (on rehearing 1950).

17. See 46 So. 2d 286, 288-289 (La. 1950).

tion of the decision dealing with the monthly payment provision. He felt that the latter portion of the policy was ambiguous and could be interpreted as obligating the company for disability benefits from the inception of the disability, with the obligation dischargeable or payable on or after receipt of due proof. "Being susceptible of two different interpretations, and hence ambiguous, the disability-annuity provision should be given that construction which is most favorable to the insured."

Justice Moise dissented, stating that:

"The insured purchased a policy, *the prime motive and essential was to protect himself during permanent disability*, and like all other insurance contracts, his protection began from the moment the contract was completed, that is, the delivery of the policy, coupled with the payment of the premium. An incidental [sic] to the contract was the method to be effected in order to insure payment in case of disability—the submission of proof to the Company. I do not believe that the contract should be interpreted so that a mere incidental payment should be made to supersede the policy provisions and the prime motive of the assured for its purchase."

On rehearing the court reversed its original opinion, and the majority opinion was prepared by Justice Moise. The court decided that the provisions of the policy relating to monthly disability payments were ambiguous, and should be interpreted favorably to the insured. In addition the court noted that it had been shown, as a matter of fact, that the company had knowledge that the insured was in the hospital and had knowledge that the insured had a policy for permanent disability because it had the policy in its possession for a time during assured's disability for the purpose of changing the beneficiary.

The court awarded the disability benefits at the rate of one hundred dollars a month, but did not, however, award refund of the premiums during the period of disability.

Justices Hawthorne and McCaleb dissented with written reasons, and Justice LeBlanc also dissented.

A second rehearing was applied for and denied. In a per curiam opinion, the court pointed out that it adhered to the view that a disability which lasted for more than three months would be construed as total and permanent disability under the provisions of the policy because the policy provided that "such total disability shall be presumed to be permanent when it is present

and has existed continuously for not less than three months." Even though the insured might later recover from his disability, the presumption stated in the policy would be deemed conclusive. The court pointed out that in its opinion there is authority supporting this view and likewise authority to the contrary in other states.

### LEASE

*J. Denson Smith\**

The cases under this heading decided during the 1949-1950 term were not of any significance jurisprudentially. In *Anglin v. Nasif*<sup>1</sup> the court rejected an attempt by three plaintiffs, lessees, to recover amounts claimed to have been paid by them in excess of allowable rentals under applicable OPA regulations. Defendant had converted an apartment renting at \$45 per month into two bedrooms, which he rented at \$30 per month each plus \$5 from each of the plaintiffs for kitchen privileges. This was done with the authority of the Shreveport Rent Director, and the conclusion of the court was that defendant's action was not an illegal evasion of the regulations, but a lawful avoidance.

Eviction proceedings brought in *Canal Realty and Improvement Company, Incorporated v. Paillet*<sup>2</sup> were dismissed as premature. After having accepted rent for the month of June, plaintiff instituted the eviction suit on June 27 without giving the tenant ten days' notice that the contract was terminated because of violations of its provisions. A notice to vacate previously given was waived by the later acceptance of additional rent.

In the case of *Salter v. Zoder*<sup>3</sup> the court, on certiorari, annulled judgments of the district court and the court of appeal, and found in favor of the plaintiff, who was suing for damages resulting from injuries to his minor daughter. The daughter was injured when she fell against a sheet of galvanized iron being used to cover a stack of lumber placed in a driveway by the defendant lessor. Plaintiff was a sub-lessee. The court found the defendant negligent in obstructing the driveway in violation of the rights of plaintiff and his family and in creating a condition highly dangerous to children, knowing that the child in question and others were accustomed to play in the driveway. The decision rested on Articles 2315 and 2316 of the Louisiana Civil Code.

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1. 217 La. 392, 46 So. 2d 309 (1950).

2. 217 La. 376, 46 So. 2d 303 (1950).

3. 216 La. 769, 44 So. 2d 862 (1950).