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INSURANCE—1958 TENNESSEE SURVEY

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LIABILITY INSURANCE

The case of *Clinchfield R.R. v. United States Fidelity & Guaranty Co.*[1] involved the question of whether the insured, in a suit against his insurer, is bound by findings adverse to him in prior litigation between the insured and a third person.

The liability insurance policy involved covered certain vehicles of the railroad company but expressly excluded from coverage injuries to employees in the course of their employment. One Harrison, a regular railroad employee, was injured while riding in an insured vehicle with a fellow employee. He sued the railroad company under the Federal Employers Liability Act.[2] Before he could recover under this statute, of course, he had to establish that he was injured in the course of his employment.

The railroad company notified the insurer of the suit, but the insurer declined to defend it on the ground that the employee's injury was not covered by the policy. The railroad company thereupon defended the action, insisting that the employee was not in the course of his employment when injured, but that he was on the way home after completing the day's work. The jury found this controverted issue against the employer and awarded damages to the plaintiff Harrison.

To recover the amount of this judgment with interest and costs, the railroad company brought the present suit against the insurer.

The district court held that the insured was bound by the adverse decision in the previous case, and that it could not re-litigate the issue. The court pointed out that an indemnitor is bound by the decision of issues in suits to which the indemnitor is a party or of which he has notice and declines to defend; and that the same rules apply to an indemnitee.[3] Clearly if the jury had found that the plaintiff in the former action was not in the course of his employment when injured, the insurer would have been precluded from ever again litigating that issue; accordingly the insured was also held bound by the decision under principles of judicial estoppel. The holding seems proper and is in accord with other decisions in Tennessee dealing with similar problems of estoppel by judgment.[4]

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1. 160 F. Supp. 337 (E.D. Tenn. 1958).
2. 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1952).
3. RESTATEMENT, JUDGMENTS § 107(e) (1942).
4. Caldwell v. Kelly, 302 S.W.2d 815 (Tenn. 1957) (judgment in favor of

The insured also insisted in this case that the policy provisions excluding coverage of injuries to employees were ambiguous, but the court found no ambiguity in the contract.[5] Accordingly the insurer was held not obligated to indemnify the railroad company for the prior judgment, since the plaintiff in that case came within the exclusions of the policy.

One case was reported during the survey period dealing with excess liability of an insurer for failure to settle a claim.[6] Such liability, of course, is established by proof that the insurer was guilty of bad faith, not that it was merely negligent or imprudent; usually it is necessary to prove that the insurer recklessly sacrificed the interests of the insured to further its own interests.[7] The resolution of such cases frequently is left to a jury.

In the present case, the court of appeals, by a two-to-one decision, affirmed a jury verdict against the insurer. The presiding justice dissented upon the ground that the evidence did not demonstrate bad faith. The case involved an unusual automobile accident in which the insured had driven upon some steps to a school building and had injured two women who were entering the building. From the beginning the insured insisted that he had experienced a sudden and unexpected mechanical brake failure, and he denied liability to the injured persons. The attorneys for the insured accepted his version of the accident. At the trial of the damage suit, however, the jury had found the issues against the insured and had rendered a verdict above the policy limits. The appellate courts had affirmed.[8]

In the present suit for the excess judgment, there was conflicting testimony as to whether the cases could have been settled within the policy limits and as to whether the insured had been kept properly advised of the handling of the claims. The dissenting judge felt that there was no evidence of mishandling of the damage suits, and his

master binding on plaintiff in action against servant); Cantrell v. Burnett & Henderson Co., 187 Tenn. 552, 216 S.W.2d 307 (1948) (judgment in favor of distributor for alleged defective product held binding on plaintiff in action against manufacturer); *cf.* Wiles v. Young, 167 Tenn. 224, 68 S.W.2d 114 (1934) (joint judgment against tortfeasors not determinative as to their relative fault in later action for indemnity between them, since this issue not litigated in prior suit).

5. The court declined to follow the suggestion in B. & H. Passmore Metal & Roofing Co. v. New Amsterdam Casualty Co., 147 F.2d 536 (10th Cir. 1945) that a court should construe the phrase "engaged in the business" of an employer liberally in favor of an employee claiming workmen's compensation, but strictly against an insurer defending under an exclusion clause. Policy provisions excluding employees were deemed free from ambiguity in Patty v. State Farm Mut. Automobile Ins. Co., 228 F.2d 363 (6th Cir. 1955) and Campbell v. American Farmers Mut. Ins. Co., 238 F.2d 284 (8th Cir. 1956).

6. Tennessee Farmers Mutual Ins. Co. v. Hammond, 306 S.W.2d 13 (Tenn. App. W.S. 1957).

7. See Sturdivant, *Insurance—1953 Tennessee Survey*, 6 VAND. L. REV. 1068-71 (1953).

8. Hammonds v. Mansfield, 296 S.W.2d 652 (Tenn. App. W.S. 1955).

opinion is convincingly written. The majority, however, held that from all of the circumstances connected with the investigation, settlement negotiations and trial of the negligence actions, a jury issue was presented as to the good faith of the insurer.

The case adds little to the previously existing law on excess liability in Tennessee. Primarily the issues were questions of fact. However, liability is not nearly so clear as in some of the earlier cases.[9] The dissenting judge viewed the decision as permitting a jury to second-guess a reputable and capable attorney in his handling of the intricate and difficult questions which always arise in defending a damage suit.

In the case of *McMahon v. Baroness Erlanger Hospital*,[10] plaintiff suffered personal injuries while she was a paying patient in a municipal hospital. The injuries were caused by alleged negligence of a hospital employee. It appeared that the hospital was jointly operated by funds from the city and county, and that it also received revenue from paying patients, a tea room or restaurant, and vending machines on the premises.

Both the trial court and court of appeals held that the hospital was immune from tort liability, following a line of previous decisions in the state which had held that such municipal institutions are immune.[11] The fact that the institution had sources of revenue which were incidental to its operation was held not to exempt the hospital from immunity.

Both courts recognized that if the institution carried liability insurance to cover malpractice or negligence actions, then there would be a waiver of immunity to the extent of such insurance.[12] In the present case, the hospital board carried a "comprehensive" liability policy on the hospital vehicles, and this policy also covered public liability for accidents on the hospital elevators and grounds. It did not expressly exclude coverage for malpractice, but the proof showed that such coverage was not charged for in the premiums and had apparently not been purchased. Although a "liberal" interpretation of the policy could have resulted in a holding that there was coverage, especially since by later amendment to the policy malpractice suits were expressly excluded, nevertheless the court refused to construe the contract to bind the insurer to a risk not contemplated either by it or by the insured.

9. See, *e.g.*, Vanderbilt University v. Hartford Accident & Indemnity Co., 109 F. Supp. 565 (M.D. Tenn. 1952), *aff'd mem.* 218 F.2d 818 (6th Cir. 1954).
10. 306 S.W.2d 41 (Tenn. App. E.S. 1957).
11. Lane v. Knoxville, 170 Tenn. 482, 96 S.W.2d 769 (1936) (city hospital); Wallwork v. Nashville, 147 Tenn. 681, 251 S.W. 755 (1922) (same).
12. McCloud v. LaFollette, 38 Tenn. App. 553, 276 S.W.2d 763 (E.S. 1954) (city vehicle); Kingsport v. Lane, 35 Tenn. App. 183, 243 S.W.2d 285 (E.S. 1951) (insurance on city park).

FIRE, THEFT AND COLLISION INSURANCE

A case of first impression in this state was *Cherokee Insurance Co. v. Hardin*.[13] The insurance company had issued a collision insurance policy which contained the usual provision for cancellation and provided that the "mailing of notice" should be sufficient proof of notice of cancellation.[14] Following a loss, suit was brought on the policy. The company plead cancellation. The plaintiffs testified that they never received the notice. The company produced from its files a carbon of the purported notice to which was attached an official receipt of the post office at Nashville acknowledging receipt of mail for transmission to plaintiff. The trial judge, recognizing that the requirement of the policy for cancellation was the mailing of notice, rather than receipt by the assured, submitted an interrogatory to the jury as to whether or not the notice was mailed. This, they answered in the negative, and judgment was entered for the plaintiffs against the company. The trial judge had declined to direct a verdict and his action was affirmed by the court of appeals. However, the supreme court reversed. The post office receipt was deemed critical. In the ordinary situation while evidence of office routine and carbon with confirmatory circumstances as to location of the carbon, etc., is sufficient to support a finding of mailing, it is also true that denial of receipt or other proof raises a presumption that the letter was never mailed. In such a situation a jury issue is presented. But, as in this case, where there is unimpeached, uncontradicted, written official acknowledgment of the post office that it received the letter for transmission to the addressee, testimony of non-receipt alone is not sufficient to permit an inference that the notice was not mailed.[15]

In *Palatine Insurance Co. v. E. K. Hardison Seed Co.*[16] suit was brought against the insurer upon a theft policy for loss of a truck. The court of appeals held that the policy involved was a "valued policy" rather than an open policy and that accordingly the insurance company had no reasonable ground to insist upon an appraisal to ascertain the actual value of the vehicle which had been stolen.[17] The facts also disclosed that the company had rejected the proof of loss

13. 302 S.W.2d 817 (Tenn. 1957).

14. The policy provided: "The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period." 302 S.W.2d at 818.

15. *Accord,* Wright v. Grain Dealers Nat. Mut. Fire Ins. Co., 186 F.2d 956 (4th Cir. 1950). *Contra,* Farmers Insurance Exchange v. Taylor, 193 F.2d 756 (10th Cir. 1952) (applying Oklahoma law).

16. 303 S.W.2d 742 (Tenn. App. M.S. 1957).

17. By endorsement several vehicles were covered by the policy. On the truck involved the endorsement showed the cost and also the "amount of insurance $1100." On the other covered vehicles neither of these items appeared and there was considerable premium differential. The court thought this made it apparent that, as regards this vehicle, it was a valued policy.

because the insured had failed to include certain information that was already known to the company.[18] From these facts the court found that there was ample evidence to support the jury's award of the statutory penalty to the plaintiff.[19] It appeared that the trial judge had directed a verdict in favor of the defendant as to the penalty at the time of ruling on defendant's motion for a new trial. This action of the judge was reversed, it being held that there was substantial evidence of bad faith. There having been a jury verdict for the penalty, the trial judge could have granted a new trial if he were not satisfied therewith, but his discretion did not extend to directing a verdict on this issue. The court of appeals, utilizing the statute permitting reinstatement of a verdict where there has been a remittitur,[20] reinstated the penalty portion of the jury verdict. While, as the court of appeals observed, the remittitur statute does not specifically reach the situation presented, it would appear that reinstatement by the court of appeals was certainly the logical and sensible procedure in the premises.

WORKMEN'S COMPENSATION INSURANCE

In the case of *T. H. Mastin & Co. v. Loveday*,[21] an injured employee filed a workmen's compensation suit against the insurance carrier for his employer without joining the employer as a defendant. The accident for which he sought compensation occurred in Blount county, where the employer had an office, but the petitioner lived in Sevier county and filed his suit there. The insurer had no resident agent in the state and was sued through process on the Commissioner of Insurance and Banking.[22] The insurer filed a plea in abatement, insisting that proper venue was in Blount county.

Both the trial court and the supreme court held that the suit was properly brought in the county where petitioner resided. It is not necessary that the employer be made a defendant in compensation cases.[23] When the insurer has no resident agent, and process is served

18. Among the reasons assigned for rejecting the proof of loss was that it did not contain the policy number or the name and address of the agent that issued the policy.

19. TENN. CODE ANN. § 56-1105 (1956).

20. TENN. CODE ANN. § 27-118 (1956) which provides in part: "if, in the opinion of said Court of Appeals, the verdict of the jury should not have been reduced, but that the judgment of the trial court is correct in other respects, the case shall be reversed to that extent, and judgment shall be rendered in the Court of Appeals for the full amount originally awarded by the jury in the trial court."

21. 308 S.W.2d 385 (Tenn. 1957).

22. The Commissioner is expressly made a proper agent for service of process for all foreign insurance companies doing business in the state. TENN. CODE ANN. § 56-308 (1956).

23. TENN. CODE ANN. § 50-1209 (1956).

on the Commissioner, the Commissioner is agent for the entire state. Process can be served upon him from any county in the state.[24]

The result reached seems correct. It enables the petitioner to maintain his action in the county of his residence when otherwise he could not do so. The venue statute for compensation cases clearly seems to permit suit in such county in all cases,[25] but by judicial construction it is well settled that if the employer is sued, he cannot be sued in the county of petitioner's residence unless he maintains an office or agency there.[26]

LIFE INSURANCE

Curfman v. Prudential Insurance Co. of America[27] is an interesting decision of first impression. While the contest was between the administrator of the deceased insured and a former wife of the insured claiming under the "Facility of Payment Clause" of industrial policies, with the company having interplead the claimants, the implications of the holding should be of concern to insurance companies. The insured's former wife testified that she had taken out the policies and paid all of the premiums, and that when her husband was sentenced to prison, and again when she obtained a divorce, the agent of the company assured her that if she continued to pay the premiums that the proceeds would be paid to her; and that relying thereon, she continued to pay until his death. There was no other testimony. No beneficiary was named in the policies, and the proceeds were claimed by the administrator. The chancellor held in his favor. The court of appeals reversed, holding that the representations of the agent amounted to an election under the facility of payment clause, thereby obligating the company to pay the proceeds to the former wife. While it is generally recognized that the facility of payment clause is included for the benefit of the company and ordinarily affords no predicate for suit,[28] it is also true that the company, having a right of election, may make the election and be bound thereby.[29] Such election is more frequently found in conduct after loss. In this case the election is based upon representations of the agent before loss. In considering

24. Cartmell v. Mechanics Ins. Co., 167 Tenn. 498, 71 S.W.2d 688 (1934).
25. TENN. CODE ANN. § 50-1018 (1956).
26. Flowers v. Aetna Cas. & Surety Co., 186 Tenn. 603, 212 S.W.2d 595 (1948); Brown v. Stone & Webster Engineering Co., 181 Tenn. 293, 181 S.W.2d 148 (1944).
27. 308 S.W.2d 429 (Tenn. App. M.S. 1957).
28. Metropolitan Life Ins. Co. v. Chappell, 151 Tenn. 299, 269 S.W. 21 (1924); Annot., 166 A.L.R. 10, 42 (1947).
29. Cawthon v. Metropolitan Life Ins. Co., 170 Tenn. 159, 93 S.W.2d 631 (1936). In this case, after death the company paid the widow the face amount of the policy under the facility of payment clause. When she sued for double indemnity the claim was made that she had no right to sue. The court held that the company had elected to treat her as the beneficiary. See generally 2 APPLEMAN, INSURANCE LAW AND PRACTICE § 1168 (1941).

the effect of the holding it must be remembered that in this case the proceeds had not been paid out and the court was deciding between the two claimants therefor. The equities were overwhelmingly with the former wife. It cannot be concluded that the company would have been held liable to her if it had already paid the proceeds to the administrator, yet the case does suggest caution in this area.