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# INSURANCE — 1955 TENNESSEE SURVEY

ROBERT W. STURDIVANT\*

If a period of three years be sufficient time to detect any trend in the field of insurance litigation, there is reflected a decrease in the number of cases reaching our appellate courts having to do with automobile liability insurance and an increase in the number of cases having to do with health and accident policies—the latter probably being the result of the extension of group insurance. In the past year there were only two reported decisions in the state courts and one in the federal court sitting in Tennessee involving automobile liability policies. During the present Survey period, there have not been the significant decisions of the past two years concerning the liability of insurer to insured for loss resulting from the insurer's failure to settle within the policy limits.<sup>1</sup>

## I. LIABILITY INSURANCE

In *English v. Virginia Surety Co.*,<sup>2</sup> decided by the Supreme Court, the policy covered a truck tractor belonging to one Stevens, who was the named insured. The policy contained the usual omnibus clause defining the insured as including the named insured and, "except where specifically stated to the contrary," any person while using the automobile, "provided the actual use of the automobile is with the permission of the named insured." An endorsement had been appended to the policy which provided that coverage extended in accordance with the terms and conditions of the policy, provided that "no load or merchandise other than that belonging to, or in charge of, the named assured is being carried, and only while such automobiles are being operated in the business occupation of the named assured as stated in item 1 of the policy declarations and occasionally for the personal, pleasure, family and other business purposes of the named assured." Stevens had loaned the vehicle to his brother in order for him to take his family to a reunion. While being so operated by the brother, the truck tractor was involved in a collision resulting in personal injury and property damage to complainant English. English had recovered a circuit court judgment against the brother, to collect which he had filed the instant suit in the chancery court against the

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1. The only development in this field was the affirmance by the federal court of appeals in a per curiam opinion of an earlier case wherein liability so predicated was imposed. *Hartford Acc. & Indemnity Co. v. Vanderbilt University*, 218 F.2d 818 (6th Cir. 1954), *affirming* 109 F. Supp. 565 (M.D. Tenn. 1952).

2. 196 Tenn. 426, 268 S.W.2d 338 (1954).

insurance company. A demurrer was interposed wherein it was urged that the endorsement limits the omnibus clause and that since the vehicle was not being used either for the commercial purposes of the named assured or for an occasional personal, pleasure or family purpose of the named insured, there was no coverage. The chancellor sustained the demurrer but the Supreme Court reversed. There was no question but that in the absence of the endorsement, the omnibus clause extended coverage to the user of the truck.<sup>3</sup> The court, noting an omnibus clause that coverage extended to persons using the vehicle with the permission of the named insured *except where specifically stated to the contrary*, found no such contrary statement in the endorsement. Further the policy declared that the vehicle was to be used for "commercial" purposes; in the policy the term "commercial" was defined as a use principally in the business occupation of the named insured, including occasional use for personal, pleasure, family and other business purposes. It was felt that at least one reasonable interpretation of the endorsement was that it merely restated the definition of commercial purposes appearing in the policy and was not a limitation on the omnibus clause. The court noted the rule of construction resolving ambiguities against the insurer and overruled the demurrer.

The other case of coverage decided by the Supreme Court was *Blue Ridge Ins. Co. v. Haun*,<sup>4</sup> a declaratory judgment suit filed by the insurance company in the chancery court. The insured at the time of the accident was towing behind his automobile a "hot rod" racing car which was owned by the insured and another. The towed vehicle was not covered by any separate insurance policy. The hot rod had become detached from the insured vehicle and had collided with an oncoming car. The towing vehicle had not been involved. The insurance policy excluded coverage "while the automobile is used for the towing of any trailer owned or leased by the insured and not covered by like insurance in the company . . ." In the same paragraph of exclusions, the policy provided (under the sub-head "Utility Trailers") for coverage while towing a trailer "if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer . . ."

The chancellor and the Court of Appeals held that this hot rod automobile was not a trailer within the meaning of the policy and that accordingly coverage extended to the insured, but the majority of the Supreme Court reversed. In the principal opinion no mention was made of the clause having to do with utility trailers, and the court predicated its decision upon the case of *Waddey v. Maryland Casualty Co.*,<sup>5</sup> wherein coverage was denied to one towing a boy's homemade

3. Sturdivant, *Insurance*, 6 VAND. L. REV. 1068, 1071 (1953).

4. 276 S.W.2d 711 (Tenn. 1954).

5. 171 Tenn. 112, 100 S.W.2d 984, 109 A.L.R. 654 (1937).

wagon behind his automobile. The policy language was not identical in the two cases, since in the *Waddey* case the policy excluded from liability the vehicle while "being used for towing or propelling any trailer or any vehicle used as a trailer." The court in the *Waddey* case had adopted the definition of "trailer" given in *Webster's New International Dictionary* as "a vehicle or one in a succession of vehicles hauled, usually, by some other vehicle." The Court of Appeals had undertaken to distinguish the *Waddey* case on the difference in policy language, specifically, the effect of the added phrase "or any vehicle used as a trailer." The majority of the Supreme Court felt that this distinction was not valid and, relying on the *Waddey* case, denied coverage. There was a short but vigorous dissent by Chief Justice Neil wherein he stated that it was conceded that the vehicle was not a trailer but was an automobile, that he interpreted the majority opinion as recognizing an ambiguity in the policy and that he was in agreement with the Court of Appeals wherein they had recognized such an ambiguity and resolved it against the insurance company. On petition to rehear, the court declared that the majority did not consider the policy ambiguous and that the *Waddey* case was controlling. To the argument that the enumerated exclusions of home, office, store, display, or passenger trailers operated to include all others, the court held that the listing was not an attempt to enumerate all excluded trailers but was simply an explanation and definition of utility trailers by saying what they were not.<sup>6</sup> Also in the petition to rehear, the argument was made that the Tennessee Motor Vehicle Financial Responsibility Act<sup>7</sup> operated to effect coverage. The court noted that our act, unlike those of certain other states, is not a compulsory insurance law, and does not provide for absolute liability on the part of the companies; and accordingly, the act does not affect the question of coverage in this case.<sup>8</sup>

There was one federal case from the eastern district involving the question of coverage.<sup>9</sup> The plaintiff transportation company, a common carrier, having certain miscellaneous freight to be hauled for which its own facilities were not available, arranged for one Carter to make the haul, compensation to be on a mileage basis. Carter hauled beer for a distributing company, which was named with Carter as the insured in the policy on Carter's truck. While on the trip, Carter's truck and driver were involved in a collision with third parties who were seriously injured. The third parties brought suit against Carter,

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6. It is difficult to discern any pattern in this type of case involving non-descript vehicles. See Note, 31 A.L.R.2d 298 (1953). Further policy definition can probably be expected.

7. TENN. CODE ANN. §§ 2715.49-15.68 (Williams Supp. 1952).

8. Compulsory insurance laws can affect coverage. *United States Cas. Co. v. Timmerman*, 118 N.J. Eq. 563, 180 Atl. 629 (Ch. 1935).

9. *Eastern T. & W.N.C. Transp. Co. v. Virginia Surety Co.*, 129 F. Supp. 305 (E.D. Tenn. 1953).

Carter's driver, the transportation company, and the distributing company. The transportation company called upon Carter to compromise and settle the suits and when he declined, negotiated settlements of the suits for \$17,000 and again called on Carter and his insurance carrier to make settlement. On their failure to do so, the transportation company through its insurance carrier, settled the cases and brought suit and obtained judgment in the chancery court against Carter for the amount of the settlement.<sup>10</sup> After a nulla bona return, the present action was brought seeking a recovery of the amount of the settlement from Carter's insurance carrier. Defense was made on several grounds, one of which was that the policy did not cover the accident because the truck was not at the time being used to haul beer. The policy had described the occupation of the insured "truck owner and driver" and had provided the purpose for which the automobile was to be used as "hauling Beer (Distributor)." The policy further provided that it applied only to accidents occurring "while the automobile is within the United States of America . . . or is being transported between parts thereof and is owned, maintained and *used for the purposes* stated as applicable thereto in the declarations." As the first affirmative defense, the insurance company argued that the vehicle was not being so used at the time of the accident in that it was not hauling beer but miscellaneous merchandise. The use declared in the policy was a commercial use, and such use was defined in the policy as "used principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes." The court held that all that is required by this policy is that the declared use of the vehicle be the principal use, not the only use. This holding was amply supported by decisions of the Tennessee courts and those of other jurisdictions.<sup>11</sup> Pertinent to the decision, though incidental thereto, was the fact that the insured was being charged a premium based upon the hauling of miscellaneous freight which was approximately fifty per cent in excess of the premium that would be applicable to hauling beer alone. Further, it was pointed out that by endorsement the policy had specifically excluded coverage while hauling gasoline and certain other inflammables which was deemed inconsistent with the insistence of use restricted to the hauling of beer.

By another affirmative defense, the defendant relied upon the policy exclusion, obtaining in the event that the named insured should rent,

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10. *Carter v. Eastern T. & W.N.C. Transp. Co.*, 35 Tenn. App. 196, 243 S.W.2d 505 (E.S. 1949). This case was strongly contested, it being urged that contribution was being sought from a joint tort-feasor. The court held, however, that the transportation company's liability was derivative and that the doctrine of *Cohen v. Noel*, 165 Tenn. 600, 56 S.W.2d 744 (1933), permitted indemnity.

11. See, e.g. *Smith v. Service Fire Ins. Co.*, 184 Tenn. 139, 197 S.W.2d 233 (1946); *Commercial Standard Ins. Co. v. Blankenship*, 134 F.2d 784 (6th Cir. 1943); *Constitution Indemnity Co. v. Lane*, 67 F.2d 433 (6th Cir. 1933).

hire or lease the vehicle to any other person, firm or corporation. When the transportation company and Carter had made the agreement, they had signed a document which was labeled "lease agreement" and which purported to rent or lease the vehicle involved. The court found that the agreement had obviously been misnamed, that the language had not correctly described the agreement between the parties, that the undisputed proof showed that by the arrangement Carter was to be paid so much per mile for the distance traveled, and that their agreement was not in any sense one of leasing.

The third affirmative defense was predicated upon the policy's exclusion, obtaining in the event that the named insured should rent, agreement. The so-called lease agreement also contained a provision purporting to make Carter liable for all personal injury or property damage occasioned by the vehicle. The court noted that plaintiff was a legalized common carrier and could not relieve itself of liability occasioned by its hauling; accordingly, the agreement with Carter in this respect was void. The court adjudicated recovery in favor of the plaintiff for the amount of the judgment and interest.

Another case involving the duty of a liability insurance company under its policy was *Munal Clinic v. Applegate*,<sup>12</sup> decided by the Court of Appeals for the Eastern Section. The policy provision involved was the usual requirement that "when bodily injury occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable." The Munal Clinic had Applegate as a patient. On June 30, 1952, three days after his admission, he escaped. He was thereafter arrested and confined to jail on a charge of public drunkenness, where he died from a heart attack on the same day. The Munal Clinic made no report to the insurance company until February 27, 1953, two days after the clinic had received notice from attorneys for Applegate's administrator that they were claiming liability of the clinic for Applegate's death. Suit was subsequently filed on April 27, 1953, wherein it was alleged that the clinic negligently failed to attend and confine Applegate while he was delirious and irrational. The Munal Clinic filed this suit in the chancery court against its insurer, and others, seeking a declaratory judgment as to whether or not the insurance company was obligated to furnish a defense to the law suit. The defense of the company was that the complainant had violated the aforesaid notice provision of the policy. The company in its pleadings alleged generally that it had been prejudiced by such failure. The chancellor declared that the insurance company must extend coverage to the clinic and the Court of Appeals affirmed. The court concurred in the chancellor's view that there was no reasonable ground for complainant to believe that a claim against it for

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12. 273 S.W.2d 712 (Tenn. App. E.S. 1954).

damages would arise and that, until there is such reasonable ground, the duty to give notice does not arise.<sup>13</sup> Further the court stated that there was no evidence that the delay had prejudiced the rights of the defendant. Earlier Tennessee cases, however, had indicated that an insurer need not show prejudice where notice was a condition precedent to coverage.<sup>14</sup>

In *Kuhn's, Inc. v. Bituminous Casualty Co.*,<sup>15</sup> there was presented a question of coverage under a limited coverage liability policy on two store buildings. The policy was the usual property liability policy, and its limitations were \$10,000 for one accident and \$25,000 as an aggregate liability. Two of the exclusion clauses were significant in the decision of the case. Clause (g) excluded "injury to or destruction of buildings or contents thereof caused by the discharge, leakage or overflow of water or steam . . ." Clause (h) provided for exclusion of coverage with respect "(2) to the collapse of or structural injury to any building or structure due (a) to excavation, tunneling . . . while such operations are being performed by the named insured." Kuhn's was converting the two buildings into a single store building and had done excavating under the buildings. The excavating work had been completed prior to May 27, 1952. On this date the complainant's building, together with the building adjoining on the east, collapsed, and the buildings and all the contents were a total loss. On May 29, 1952, the building adjoining on the west collapsed, and it and its contents were a total loss. Claims were presented against Kuhn's, one in the amount of \$14,800 for the personal property destroyed on May 27, 1952, in the building to the east and another in the amount of \$28,900 for personal property destroyed by the collapse on May 29, 1952, of the building to the west. The insurance company denied liability for these items, and suit was brought for collection, it being agreed that Kuhn's was obligated therefor to the respective owners. The chancellor and the Supreme Court noted that exclusion clause (g) makes reference specifically to the contents of other buildings but that no such specific reference to contents is made in exclusion clause (h), that the wording of clause (h) makes it doubtful whether building contents were in the minds of the parties in connection with the exclusion, and that, at the minimum, the clause is ambiguous. Accordingly, the insurance company was held liable. Secondarily, there was involved the question as to whether there was only one accident so that the \$10,000 limitation measured the extent of the company's liability. The court concluded

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13. It is settled that circumstances may excuse delay, *Massachusetts Mut. Life Ins. Co. v. England*, 171 Tenn. 104, 100 S.W.2d 982 (1937); and that a reasonable belief that no claim will be made from a trivial occurrence is such a circumstance. Note, 18 A.L.R.2d 443, 474 (1951).

14. *Phoenix Cotton Oil Co. v. Royal Indemnity Co.*, 140 Tenn. 438, 205 S.W. 128 (1918); *Foreman v. Union Indemnity Co.*, 12 Tenn. App. 89 (E.S. 1928).

15. 270 S.W.2d 358 (Tenn. 1954).

that the fact that one loss happened two days after the other one made it clear that there were two accidents, and the company was held liable within its aggregate policy limits.

Another case involving a matter of coverage was *Butler v. United States Fidelity & Guaranty Co.*<sup>16</sup> In this case the defendant was successful. Butler was in the construction business and carried a "Manufacturers or Contractors Schedule Liability Policy," covering several hazards. Among the hazards covered was liability for personal injury on account of "carpentry in the construction of detached private residences." Butler made certain repairs and improvements to a residence in Memphis, and in addition to the contract of repair, he agreed to keep and maintain said repairs in proper condition for a period of one year. Butler finished the work and sometime thereafter an occupant of the premises fell when a bannister that had been repaired by Butler gave way. Butler was forced to employ counsel and successfully defend the suit for personal injury. The present suit was filed against the insurance carrier seeking to recover the expenditure that was made on account of attorney's fees. A demurrer was filed to the complainant's bill and was sustained by the chancellor. The Supreme Court affirmed. The court distinguished the situation where the accident occurs during an interim in the work and held that the work here having been completed, the insurer was no longer liable under this carpentry hazard even though the repairs were negligently made and notwithstanding that insured had contracted to keep same in repair for a period of one year.<sup>17</sup>

## II. FIRE INSURANCE

A case of first impression in Tennessee was decided during the survey period by the Eastern Section of the Court of Appeals.<sup>18</sup> Although no petition for certiorari was filed in the case, the opinion has been published. The First Christian Church of Greeneville had insured its building with a standard fire insurance policy covering "all direct loss by fire" to the church building. On the occasion of the loss the heat generated by the furnace was too great for the water in the boiler with the result that the water evaporated and the boiler melted. The heat melted or burned off about five inches of two control wires, the wooden wall at the rear of the furnace was blackened, and the paint was burned off the top part of the steel jacket covering the boiler. The fire did not escape from the fire box. The claim made was for damage to the furnace, it not even being claimed that the blackened wood had

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16. 277 S.W.2d 348 (Tenn. 1955).

17. The holding is not surprising in view of dictum in *Foster Trailer Co. v. United States F. & G. Co.*, 190 Tenn. 181, 187, 228 S.W.2d 107, 110 (1950).

18. *First Christian Church v. Hartford Mut. Ins. Co.*, 276 S.W.2d 502 (Tenn. App. E.S. 1954).



been charred. The fire insurance companies denied liability, and suit was brought in the circuit court where the plaintiff had judgment. The Court of Appeals, in an exhaustive opinion by Judge Hale, reversed and dismissed the action. The text authorities and courts in other jurisdictions have long made a distinction between "friendly" as distinguished from "hostile" fires,<sup>19</sup> but the question had not heretofore been decided in a reported case in Tennessee. Recognizing the authority to the contrary,<sup>20</sup> the court adopted the clear majority rule, which makes a distinction between the two types of fires and interprets the quoted section of a standard fire policy as covering only the "hostile" type. The distinction is that if the fire burns in a place where it is intended to burn, although with unintended results, the fire is a friendly fire; on the other hand, if the fire is not confined to the place intended or is unintentionally started, it is deemed hostile. Of course, where a friendly fire escapes, it becomes hostile. The facts in this case put this fire into the friendly category.

### III. THEFT INSURANCE

The case of *Commercial Credit Corp. v. Monroe*<sup>21</sup> decided by the Middle Section of the Court of Appeals, involved a question of coverage under an automobile theft policy and the measure of damages for loss under such a policy. The policy stated that the purposes for which the automobile would be used were "business and pleasure." The policy provided that there was no coverage while the automobile is used "as a public or livery conveyance" unless such use had been specifically declared and a premium paid therefor which was not the situation in this case. Monroe was in the entertainment business and used the automobile to transport himself and his employees about the country to give performances. The court affirmed the chancellor in his finding that this use did not amount to a "public or livery conveyance" use of the automobile and, accordingly, was not within the exclusion of the policy. The court recognized the distinction between such a use and the use of an automobile as a taxicab which has been held to make this exclusion clause applicable.<sup>22</sup> As to the question of the measure of damages, the policy contained the usual provisions as follows: "the limit of the company's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss nor what it would then cost to repair or replace the automobile or such part thereof

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19. See 5 APPLEMAN, INSURANCE LAW AND PRACTICE § 3082 (1941); 29 AM. JUR., Insurance § 1016 (1940).

20. *Salmon v. Concordia Fire Ins. Co.*, 161 So. 340 (La. App. 1935).

21. 277 S.W.2d 423 (Tenn. App. M.S. 1954).

22. *Smith v. Service Fire Ins. Co.*, 184 Tenn. 139, 197 S.W.2d 233 (1946); *Jackson v. Old Colony Ins. Co.*, 31 Tenn. App. 424, 216 S.W.2d 354 (M.S. 1948).

with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations."<sup>23</sup>

The proof showed that the value of the automobile when stolen was \$2,195, and the value of the salvage when recovered was less than \$600. The wrecked car's value after some repairs was \$625. There was proof that it would cost about \$1,000 to repair the car and that even after it was repaired, it would not be in as good condition as before the theft. The chancellor so found and the Court of Appeals concurred in the finding. Upon such facts, the court deemed the legal question already decided by the Supreme Court<sup>24</sup> in its holding that the reasonable meaning of such policy provisions is that the duty of the insurer is to put the insured in the same situation with regard to his automobile as he was before the loss and that if this cannot be done by the replacement and repair provisions of the policy, it must be done by paying the cost of the automobile less the fair value of the salvage. Obviously, this presents a question of fact in most cases. The court affirmed the recovery awarded by the chancellor, the value of the automobile when stolen less the value of the salvage.

A federal case involving a unique situation was *Clark & Jones, Inc. v. American Mutual Liability Ins. Co.*<sup>25</sup> The plaintiff owned and operated a music store and was covered by theft insurance, which required that the "insured shall keep verifiable records of all property covered by the policy." During the years in question, 1946-1951, the plaintiff kept records, including inventory records, on the musical instruments, radios, and other large items of merchandise. As to sheet music and music books, no records were kept other than an "annual inventory" amounting to a foot and inch measurement of the height of the piles. Neither the records on the larger items of merchandise, nor this inventory taking as to sheet music disclosed any losses by the plaintiff. However, in November of 1951 one Godwin, who had been an employee of plaintiff during the years in question, made a confession that during the five years in question he had taken from plaintiff's funds and appropriated to his own use approximately \$6.50 per day. Shortly thereafter Godwin died. It was admitted that plaintiff had no evidence of loss other than the aforesaid confession, the competency of which had been objected to by the defendant. The court noted that in Tennessee the "iron safe clause" of fire insurance policies is enforced,<sup>26</sup> although substantial rather than absolute accuracy in com-

23. The policy also provided: "The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the company."

24. *Weems v. Service Fire Ins. Co.*, 181 Tenn. 1, 178 S.W.2d 377 (1944).

25. 129 F. Supp. 282 (E.D. Tenn. 1955).

26. *Kustoff v. Stuyvesant Ins. Co.*, 160 Tenn. 208, 22 S.W.2d 356 (1929).

pliance is required.<sup>27</sup> A like rule as to record keeping is recognized.<sup>28</sup> The court did not actually sustain the objection to the competency of the confession but noted the rule in criminal cases that a confession loses its weight unless the corpus delecti is otherwise established.<sup>29</sup> The proof in this case not only failed to confirm the corpus delecti but rather contradicted it. The court concluded that the aforesaid requirement of the policy had not been met by the insured as to a substantial segment of its business, that the clear implication is that had it been followed, this shortage, if it actually existed, would have been discovered, and that as a result the insurer had been prejudiced by the lack of compliance. The plaintiff's case was accordingly dismissed.

Turning more on a question of contract law than of insurance was *Continental Ins. Co. v. Weinstein*,<sup>30</sup> decided by the Middle Section of the Court of Appeals. Certain diamonds were shipped from New York on consignment to the defendant in Nashville. The complainant insurance company insured the diamonds against loss on a policy issued to the consignor. The defendant received the shipment and after a period of time retained some of the diamonds but returned the others. The diamonds returned were delivered by the defendant to the express agency and a nominal value declared thereon pursuant to previous instructions of the consignor. They were stolen or lost en route. The consignor made a demand upon the defendant for the full value of the original shipment but made no mention of insurance. At the same time the complainant insurance company paid the loss to the consignor but no notice of this fact was given to the defendant. Subsequently and pursuant to the claim of the consignor, the defendant remitted its check for the price of the diamonds that it had retained; the check bore the notation "in full settlement of all claims" and was cleared by the consignor. In this suit the insurer, as subrogee of the consignor, sought recovery from Weinstein, the consignee, apparently on a theory of negligence in having declared a nominal value on the return shipment. The chancellor dismissed the bill and the Court of Appeals affirmed. The court found that the acceptance by the consignor of the defendant's check, reciting that it was in full settlement of all claims, amounted to a compromise settlement of the claim of consignor. The court applied the rules of law, settled in Tennessee and elsewhere, that the insurer is subrogated only to such rights as the insured possessed,<sup>31</sup> and that the right of the insurer against the wrongdoer may be

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27. *Accident and Cas. Ins. Co. v. Lasater*, 32 Tenn. App. 161, 222 S.W.2d 202 (E.S. 1949).

28. *Ibid.*

29. *Ashby v. State*, 124 Tenn. 684, 139 S.W. 872 (1911); *Williams v. State*, 80 Tenn. 211 (1883).

30. 37 Tenn. App. 596, 267 S.W.2d 521 (M.S. 1953).

31. *Globe & Rutgers Fire Ins. Co. v. Cleveland*, 162 Tenn. 83, 34 S.W.2d 1059 (1931).

defeated by the action of the insured prior to the loss, or even after the loss, unless the wrongdoer has knowledge of the insurer's right of subrogation.<sup>32</sup> There was no such knowledge in this case at the time of the settlement; moreover, the nominal valuation was declared by defendant pursuant to direction of the consignor.

#### IV. HEALTH, ACCIDENT AND DISABILITY INSURANCE

In the field of health and accident insurance there were three cases involving the meaning of language in the policies. In *Ferguson v. Postal Life & Casualty Ins. Co.*,<sup>33</sup> decided by the Eastern Section of the Court of Appeals, the intestate had a limited accident insurance policy with the defendant. The policy provided for a \$500 death benefit if accidental death was caused "by the burning of a church, school building, store, theatre, municipal administration building, office building, or library, while the insured is therein . . ." The insured met his death from fire or suffocation in the residence of his son-in-law. He was in a sunroom which was used as a combination living room, library and music room. In the room were book shelves and a bookcase, containing an encyclopedia and other books including some related to his son-in-law's work. The room was also equipped with a radio and victrola. The suit was brought on the theory that the deceased was in a "library" within the meaning of the policy. The chancellor dismissed the suit and the Court of Appeals affirmed. The court rejected the complainant's insistence that the policy provision was ambiguous and, while finding no Tennessee cases on the point, applied the test of "dominant use" as distinguished from "incidental use," recognized by other jurisdictions.<sup>34</sup> It appeared merely that the insured had lost his life in a private dwelling and that the use of this room as a library was merely incidental to the occupants of the building.

In *Interstate Life & Acc. Ins. Co. v. Gann*,<sup>35</sup> decided by the Supreme Court, the company had issued an accident policy which provided for payment of \$500 for the loss of both arms or limbs or the sight of both eyes. It also provided for the payment of one-half of said sum "for the loss of one arm or limb or the sight of one eye." The plaintiff had lost one leg and the sight of one eye and claimed the full sum. The Supreme Court, affirming the trial court, held for the plaintiff. It was noted that in our cases,<sup>36</sup> as well as in English usage, "or" is

32. 29 AM. JUR., *Insurance* § 1344 (1940). Of course, the insured's release before payment by the insurer may abrogate coverage, and his release after payment may render him liable to the insurer. Notes, 36 A.L.R. 1267 (1925), 55 A.L.R. 926 (1928), 38 A.L.R.2d 1095 (1954).

33. 37 Tenn. App. 615, 267 S.W.2d 760 (E.S. 1954).

34. *Spiller v. Washington Nat. Ins. Co.*, 240 Mo. App. 226, 206 S.W.2d 581 (1947); *Dunn v. National Cas. Co.*, 255 App. Div. 52, 5 N.Y.S.2d 699 (2d Dep't 1938).

35. 196 Tenn. 422, 268 S.W.2d 336 (1954).

36. *Smith v. Haire*, 133 Tenn. 343, 181 S.W. 161 (1915) (bank deposit);

often recognized to mean "and." The policy clearly agreed to pay \$250 for the loss of the leg and to pay \$250 for the loss of an eye, and there was no expressive language confining liability to only one payment. The contract, being ambiguous, was construed against the company.

Another case involving the meaning of language in an accident policy was *Pacific Mutual Life Ins. Co. v. Walt*,<sup>37</sup> decided by the Supreme Court. The policy provided for double indemnity if the insured died "in consequence of the burning of a building, provided the insured is therein or thereon at the commencement of the fire . . ." The proof showed that the insured died from burns received when the mattress on his bed became ignited. While the mattress emitted smoke, it did not flame up until the firemen threw it out the window. The only damage to the room itself was a scorched or burned place on the floor, and there was no proof that this had anything to do with the extensive burns about the body of the insured. The administrator of the insured brought suit for the double indemnity payment provided in the policy and had a recovery in the trial court which was affirmed by the Court of Appeals. The Supreme Court granted certiorari and reversed, holding that there was no ambiguity in the policy provision and that the facts demonstrated that there was no burning of the building other than the small charred areas and no evidence from which even an inference could be deemed that this could have accounted for the injury to the deceased.<sup>38</sup>

Though not finally settling the rights between the parties, of interest is the case of *Alsup v. Travelers Ins. Co.*,<sup>39</sup> decided by the Supreme Court. The suit was one filed in the chancery court to recover disability benefits under a group policy. To the bill the defendant filed a special plea in bar raising the six year statute of limitations. The parties entered into a stipulation of fact to the effect that the complainant had been employed by the Carnation Company, that his employment terminated on November 4, 1944, and that as to complainant the insurance involved was cancelled on November 30, 1944. Suit had not been brought until September 25, 1951; and the initial action being dismissed on a plea in abatement, the present suit was instituted on April 11, 1952. The policy provided for payment by the insurer in the event of total disability. By the policy the employer

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*Bird v. State*, 131 Tenn. 518, 175 S.W. 554 (1915) (statute); *Ransom v. Rutherford County*, 123 Tenn. 1, 130 S.W. 1057 (1910) (statute).

37. 277 S.W.2d 434 (Tenn. 1955).

38. In accord that the burning of the contents of a building is generally deemed insufficient to meet the requirements of such a policy, see 29 AM. JUR., *Insurance* § 1013 (1940); Notes, 125 A.L.R. 1440 (1940), 33 A.L.R. 64 (1924). And the authorities are agreed that if a building is only partially burned, such burning must be the proximate cause of the injuries before coverage applies. *Ibid.*

39. 196 Tenn. 346, 268 S.W.2d 90 (1954).

was given the right to elect the mode of settlement. While it does not appear from the opinion, counsel in the case advise that the employer may elect payment in a lump sum, monthly payments extending over one year, or monthly or annual payments extending over two, three, four, five, ten, fifteen or twenty years. The bill alleged that complainant was totally disabled. The chancellor sustained the special statute of limitations plea and dismissed the suit. The Supreme Court, in its initial opinion affirmed the chancellor upon the ground that no proof of loss was shown to have been given within a reasonable time. A petition to rehear was filed pointing out that the original bill contained an allegation that proof of disability had been furnished under the terms of the policy and that such allegation, not having been denied by the defendant's special plea, was deemed admitted. The court recognized the validity of this insistence<sup>40</sup> and granted the petition to rehear. Thereupon, the matter of the statute of limitations was considered, and the court noted that insofar as disability benefits are payable in installments, Tennessee has held that each installment constitutes a distinct cause of action, successively suable.<sup>41</sup> Accordingly, the employer not having elected any particular mode of settlement and there being no time limit specified in the policy as to when employers must do so, it cannot be said that the six-year statute of limitations is a bar to complainant's suit. The court recognized that some installments might be barred and others not barred. The chancellor was reversed and the cause remanded for "answer or such other action as is deemed advisable, in conformity with this opinion."<sup>42</sup>

#### V. LIFE INSURANCE

In the life insurance field there was decided the case of *Kentucky Home Mutual Life Ins. Co. v. Rogers*.<sup>43</sup> The case is one of two arising out of a rather unique situation in the field of group insurance. Some years ago the Inter-Southern Life Insurance Company had issued a group policy to the Nashville Postal Employees Benefit Society. While

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40. GIBSON, *SUITS IN CHANCERY* §§ 321, 342 (4th ed., Higgins & Crownover 1937).

41. *Atkinson v. Railroad Employes' Mut. Relief Soc'y*, 160 Tenn. 158, 22 S.W.2d 631 (1929).

42. *Alsup v. Travelers Ins. Co.*, 196 Tenn. 346, 356, 268 S.W.2d 90, 94 (1954). We are advised by counsel that the case is still pending. The question immediately presents itself as to what, if any, limitations there are upon the employer's right of election as to mode of settlement. Since the case remains pending it would not be proper herein to speculate as to the answer, but one wonders whether the employer is bound to elect payment over a twenty-year period which might be the most favorable to the complainant, or might he elect the lump sum option, or payment under a one-year period whereby presumably all payments would be barred by the statute, or is it possible that the statutes will be deemed to commence running with the date of his election although certainly this last possibility is not indicated by the opinion hereinabove discussed.

43. 196 Tenn. 641, 270 S.W.2d 188 (1954).

the policy set out the amount of insurance available to members according to age and a schedule of premium rates according to age, the policy was endorsed to provide that until otherwise provided by the society, each member should pay the same rate of insurance regardless of age. The policy also provided: "At the end of each year from date hereof the company shall have the right to change the premium rates at which subsequent renewals shall be computed, such changes being based on the Company's classified group mortality experience and schedules then in force." For several years each member paid the same premium for each \$1,000 of insurance. In 1932 the Inter-Southern went into receivership, and the Kentucky Mutual Life Insurance Company reinsured this business. Considering the unfairness of a premium charge calculated without regard to age, the company with the consent of the society in 1946 commenced calculating premiums according to a step-rate schedule, that is, setting up several age groups. This schedule did not eliminate the inequities of the other plan although it moderated them. Subsequently, the company, without the consent of the society, abandoned the step-rate plan and put into effect the regular attained age plan where each person's premium depended upon his age. With Rogers, who was advanced in years, the premium was very substantially increased. Rogers declined to pay the advanced premium, and after the expiration of the grace period provided in the policy, the company lapsed his policy. At about the same time one Duling, another postal employee, had filed suit against the company in the circuit court but the suit had been removed to the federal court. Duling's situation differed from Rogers' in that Duling had continued to pay his premium in the increased amount, and he sued for a return of all premiums paid. The district court had permitted Duling's suit to lie as a class action and had granted to him and the class a recovery of the excess premium paid. The district court had found that the change to the step-rate basis was authorized, and the excess of the attained age rate over the step-rate was the basis of the recovery. The federal court of appeals reversed the district court as to its holding Duling's suit to be a class action but affirmed the recovery as to excess premiums with interest.<sup>44</sup> Following the above decision, the company wrote to Rogers offering to reinstate his policy on the step-rate basis. This offer was declined, and this suit was brought to recover all of the premiums paid by him together with interest. Rogers was successful in the circuit court and in the Court of Appeals. The Supreme Court granted certiorari but affirmed the lower court. The court noted that where an insurer wrongfully cancels, repudiates, or terminates a contract of insurance, the insured may pursue either of three courses: (1) he may elect to consider the policy

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44. *Kentucky Home Mut. Life Ins. Co. v. Duling*, 190 F.2d 797 (6th Cir. 1951).

at an end and recover its just value, or such measure of damages as a court in the particular jurisdiction approves; (2) he may institute proceedings to have the policy adjudged to be in force; or (3) he may tender the premiums, and, if acceptance is refused, wait until the policy by its terms becomes payable, and test the forfeiture in a proper action on the policy.<sup>45</sup>

Rogers, of course, had elected to pursue his rights under "(1)" above. The court reached the same result as had the federal courts to the effect that the change to the step-rate basis was valid and effective but that the further attempted change without the consent of the society was wrongful; that while the policy reserved to the company the right annually to change premium rates, there was no reservation of right to change the plan. Having so found, the question presented was one of proper measure of damage. The court discussed the question as to whether or not the action of the company amounted to a constructive fraud but concluded that an answer to this question was not essential to the decision. There had been an entire breach of contract by the company,<sup>46</sup> and Tennessee had already adopted the rule that on such a breach an insured is not limited to a recovery of the value of his policy but may recover all of the premiums paid together with interest.<sup>47</sup>

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45. 6 COUCH, CYCLOPEDIA OF INSURANCE LAW § 1429 (1930); see Notes, 48 A.L.R. 107 (1927), 107 A.L.R. 1233 (1937).

46. This situation is to be distinguished from that of an insurer's failure to pay installments of a disability policy which only gives rise to successive severable causes of action and does not ordinarily amount to an anticipatory breach of the entire contract. See *King v. Mutual Life Ins. Co.*, 114 F. Supp. 700 (E.D. Tenn. 1953); Sturdivant, *Insurance—1954 Tennessee Survey*, 7 VAND. L. REV. 851, 857 (1954); *Atkinson v. Railroad Employes' Mut. Relief Soc'y*, 160 Tenn. 158, 22 S.W.2d 631 (1929).

47. *National Life & Acc. Ins. Co. v. Hamilton*, 170 Tenn. 612, 98 S.W.2d 107 (1936); *Life & Cas. Ins. Co. v. Baber*, 168 Tenn. 347, 79 S.W.2d 36, 107 A.L.R. 1228 (1935). This measure is not universally accepted. Some courts hold that if the insured is still insurable his measure of damages is the difference between the cost of carrying the insurance which he has for the stipulated term, and the cost of new insurance for a like term; if he is no longer insurable, the measure that has been applied is the present value of his policy as of date of death less the estimated cost of carrying same from the date of cancellation at his then age. Note, 107 A.L.R. 1233 (1937).