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Insurance

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INSURANCE

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I. LIABILITY INSURANCE

A. *Liability of Insurer for Judgments Exceeding Policy Limits*

One of the most significant decisions during the past year in the field of liability insurance was that of the Court of Appeals in the case of *Southern Fire & Casualty Co. v. Norris.*[1] The case involved the duty of a liability insurer toward the insured in the settlement of claims. As early as 1928, the Supreme Court of Tennessee held that the insurer has an obligation toward the insured to use good faith in the conduct of litigation and in the settlement of claims when the insurer assumes control of a case under the provisions of its policy.[2]

In the *Norris* case, the insured was sued for severe personal injuries arising out of an automobile accident. The insurer failed to conduct a thorough investigation of the accident and failed to ascertain the gravity of the injuries to the claimant until shortly before the trial. The insurer did engage counsel to conduct the defense of the claim on behalf of the insured, and a vigorous defense was made. The accident happened in March, 1947, however, and the trial was not held until over a year later. In the interim, the insurer had failed to discover one of the material witnesses to the accident, had not obtained a medical report on the claimant and had made no effort to settle the claim. Finally, about two weeks before the trial of the case, the claimant offered to settle the case within the policy limits. The insurer refused to settle for the amount offered, and the offer was promptly withdrawn. A subsequent offer was made which was $2,000.00 above the policy limits. The insured was not advised of the previous offer to settle within the limits, nor was he advised of the serious nature of the injuries to the claimant. Two or three days before the trial, however, his personal attorney discovered that the case could still be settled for $2,000.00 above the policy limits. At that time, the insurer stated to them that it would pay the limits if the insured would contribute the additional $2,000.00. This the insured was unable to do. The insurer never offered its policy limits to the attorneys for the claimant. Upon the trial of the case, judgment was rendered against the insured for

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1. 35 Tenn. App. 657, 250 S.W.2d 785 (E.S. 1952), 22 TENN. L. REV. 965 (1953).

2. Aycock Hosiery Mills v. Maryland Cas. Co., 157 Tenn. 559, 11 S.W.2d 889 (1928).

$25,000.00, which was $15,000.00 above his policy limits. The judgment was affirmed upon appeal. The insured then brought this action against the insurer seeking to hold the insurer for the excess judgment.

In affirming a jury verdict in favor of the insured, the Court of Appeals held that the insurer is liable for an excess judgment where it fails in bad faith to settle a claim within the policy limits.[3] The Court pointed out that the insurer is not obligated to settle every claim. It has a right to look to its own interests, and if a claim is doubtful, or if there is a reasonable prospect of a recovery of less than the policy limits, the insurer may litigate the claim. But the insured surrenders control of the claim to the insurer under his policy, and therefore the insurer has no right to abandon the interests of the insured. A fidiciary relationship is created, calling for cooperation by the insured and for good faith and diligence by the insurer.

The Court of Appeals pointed out that liability of the insurer is not based on negligence, but on bad faith. The insurer is not held liable for an excess judgment when it simply makes an honest mistake of judgment. Nevertheless, the Court held that, in determining whether or not bad faith exists, a jury is entitled to consider the negligence of the insurer in handling the investigation of the accident. The manner in which the claim was investigated and prepared for trial is one of the circumstances which may be used to establish bad faith, since negligence in investigation and failure to keep the insured advised of developments is suggestive of indifference to his interests.

The Court further held that it is not necessary that the insured actually have paid the excess judgment in order to hold the insurer liable for it. In the principal case, the insured was insolvent and unable to pay. Nevertheless, the Court, while recognizing a division of authority on the point,[4] held that the insured may bring an action for an excess judgment when his liability for the excess has become fixed, even though he has not paid the judgment.

The United States District Court for the Middle District of Tennessee also imposed liability for an excess judgment upon an insurer in the case of *Vanderbilt University v. Hartford Accident & Indemnity Co.*[5] This was the second such case to be considered by that court within a very short time, and in the earlier case, the court had also imposed liability upon an automobile insurer for bad faith in failing to settle a claim.[6]

3. See generally 29 AM. JUR., *Insurance* § 1079 (1940); Notes, 131 A.L.R. 1499 (1941), 71 A.L.R. 1467, 1477 (1931), 43 A.L.R. 326, 329 (1926), 37 A.L.R. 1484 (1925), 34 A.L.R. 730, 738 (1925).

4. To the contrary *see* State Automobile Mut. Ins. Co. v. York, 104 F.2d 730, 734 (4th Cir.), *cert. denied,* 308 U.S. 591 (1939); Dumas v. Hartford Acc. & Indemnity Co., 92 N.H. 140, 26 A.2d 361, 362 (1942).

5. 109 F. Supp. 565 (M.D. Tenn. 1952).

6. Roberts v. American Fire & Cas. Co., 89 F. Supp. 827 (M.D. Tenn. 1950), *aff'd,* 186 F.2d 921 (6th Cir. 1951). In an earlier case, the Court of Appeals for

In the *Vanderbilt* case, a patient at Vanderbilt University Hospital sustained severe injuries, resulting in permanent blindness, as a result of a fall from her bed. The patient had been in labor and had been left unattended by the nurse for a considerable period of time. There was little question as to the liability of the hospital, and the adjuster for the insurer, in reporting the case to his company, stated absolutely that it was a case of liability. The accident happened on August 11, 1948. Suit was filed on May 14, 1949, seeking recovery from the university in the amount of $125,000.00. There was also an action by the husband of the patient for loss of services in the amount of $25,000.00. No action was taken by the insurer to negotiate a settlement of the case. On November 9, 1949, the attorneys for the claimants notified the University and its insurer that the cases could be settled for $50,000.00, the policy limits. No reply was made to this letter. The attorneys for the University, however, investigated the case and immediately concluded that a recovery by the plaintiffs would probably exceed the policy limits. They accordingly called upon the insurer to settle the case and put it on notice that the University would expect the insurer to cover any excess judgment. The insurer still made no effort to settle the case, although on November 21, 1949, its adjuster was authorized to pay up to $25,000.00 in settlement. Not until December 6, 1949, did the adjuster make this offer, which was refused. Thereafter, the insurer made no further offer of settlement, and the cases went to trial on December 12, 1949. At the conclusion of the plaintiffs' proof on December 15, 1949, a co-defendant, the doctor of the patient, received a directed verdict from the trial court. The insurer still made no offer of compromise, although after this development in the trial, the home office authorized the adjuster to pay the policy limits. The remainder of the proof in the case was presented, concluding on December 16, 1949. Just before the case finally went to the jury, the insurer offered its policy limits in settlement, but this was rejected. The jury returned a verdict of $85,000.00 in the case of the patient and $15,000.00 in favor of her husband. These verdicts were later reduced to $65,000.00 and $10,000.00, respectively.

The district judge held that the action of the insurer amounted to bad faith and an intentional and wanton disregard of and indifference to the interests of the insured. The court held that there was no substance in the contention of the insurer that the carrier for the doctor, who was made a co-defendant, should have contributed to the settlement. The allegations of the plaintiffs' declarations did not make out a case against the doctor, and in the depositions which the plaintiff had taken prior to trial, it was apparent that no serious effort was being made to recover against the doctor. The district court concluded that

the Sixth Circuit had held an insurer liable for bad faith, though not for negligence. Noshey v. American Automobile Ins. Co., 68 F.2d 808 (6th Cir. 1934).

the insurer was simply gambling with the money of the insured in an effort to save some of its own, hoping that the jury would return a verdict beneath the policy limits.

Under the foregoing cases, it is clear that insurers operating in Tennessee will be held to a strict compliance with their duty to protect the interests of their insured, as well as their own interests. The courts have not made it mandatory upon an insurer to settle every claim, but they have made it mandatory that in the handling of each claim the insurer must be keenly aware of its obligation to protect the insured. It is not necessary that the insured even make demand upon the insurer to settle the case within its policy limits if, under the facts, such settlement should be made in the exercise of good faith.[7] In view of the fact that the insured, at least under a policy containing a cooperative provision, is required strictly to cooperate with his insurer in the handling of the claim,[8] and in view of the fact that the insurer has control of the settlement, negotiations and defense of the claim, the requirement that it exercise good faith to protect the interests of the insured seems more equitable than the rule, followed in a few states, that an insurer is never liable for more than its policy limits.[9]

B. *Omnibus Coverage*

The question of the scope of coverage provided by the omnibus clause of automobile liability insurance policies has been before the Tennessee appellate courts on a number of occasions within the past few years. The problem has been the subject of innumerable cases in other jurisdictions, and the courts have generally taken one of three different views on the point.[10] The so-called strict rule denies coverage if the person using the vehicle departs to any degree from the use authorized by the owner.[11] A second view, called the minor deviation rule, holds that the policy covers the driver although he deviates from the original permission given him by the owner, if the deviation is minor and can be termed "slight."[12] The third, or liberal rule, holds that the policy covers the driver although he deviates from the original permission given, so long as he did have permission to use the vehicle at the outset.[13]

Very early Tennessee was committed to the so-called liberal view, the Supreme Court holding that, so long as the driver had initial per-

7. No such notice was given in the *Norris* case, *supra* note 1.
8. Hartford Acc. & Indemnity Co. v. Partridge, 183 Tenn. 310, 192 S.W.2d 701 (1946).
9. Rumford Falls Paper Co. v. Fidelity & Cas. Co., 92 Me. 574, 43 Atl. 503 (1899); see 22 TENN. L. REV. 965 (1953).
10. See generally 5 AM. JUR., *Automobiles* §§ 532 *et seq.* (1936); Note, 5 A.L.R.2d 600 (1949).
11. Note, 5 A.L.R. 600, 626 (1949).
12. Note, 5 A.L.R.2d 600, 636 (1949).
13. Note, 5 A.L.R.2d 600, 629 (1949).

mission from the owner, he was covered, even though he deviated from the purposes for which he was authorized to use the vehicle.[14] In an unpublished opinion a few years later, however, the Supreme Court modified this position by drawing a distinction between broad permission to use the vehicle and limited authority.[15] The Court held that, if the driver is entrusted with the vehicle generally and has a broad general permission to use it, then he is covered even though he deviates from that permission; but where the driver is given limited permission for a particular purpose and for a specified time, he is not covered when he exceeds the permission given.

During 1951 and early 1952, the Tennessee Supreme Court rendered three more opinions dealing with the problem.[16] In these opinions, the Supreme Court has made it clear that it will adhere to the distinction drawn in its unpublished opinion between general custody and limited permission.

In a recent federal case, the Court of Appeals for the Sixth Circuit was called upon to interpret the Tennessee cases dealing with omnibus coverage.[17] In that case, the owner of an automobile authorized an employee of a garage to take the automobile from the owner's home to the garage for servicing. The employee did so, but thereafter took the automobile from the garage on a completely different and unauthorized personal mission. While so using the vehicle, he was involved in a serious accident. In holding that he was not covered under the omnibus clause of the owner's policy, the court of appeals reviewed the recent Tennessee cases in detail and followed the latest and most definitive of them, in which the distinction between general custody and limited permission was clearly drawn.[18] The court of appeals held that, since the driver in the principal case had only a limited permission, he was not covered when he put the automobile to a completely different and unauthorized use.

The Tennessee Supreme Court had an additional case dealing with the omnibus clause during the past year.[19] Although originally committed to the so-called liberal or initial permission rule, the Court very early held that, where the person authorized by the owner to use the

14. Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S.W.2d 473, 72 A.L.R. 1368 (1928).

15. Romines v. The Preferred Acc. Ins. Co. (Tenn., Nov. 26, 1932, unreported). In this case, an automobile was delivered by the owner to a driver to take it to a garage two blocks distant for repairs. Instead, the driver took it on a personal mission and several hours later was involved in an accident on a highway. The Supreme Court held that the policy did not cover this use of the vehicle.

16. Hubbard v. U.S. Fidelity & Guaranty Co., 192 Tenn. 210, 240 S.W.2d 245 (1951); Foley v. Tennessee Odin Ins. Co., 193 Tenn. 206, 245 S.W.2d 202 (1951); Moore v. Liberty Mut. Ins. Co., 193 Tenn. 519, 246 S.W.2d 960 (1952).

17. Branch v. United States Fidelity & Guaranty Co., 198 F.2d 1007 (6th Cir. 1952).

18. Moore v. Liberty Mut. Ins. Co., 193 Tenn. 519, 246 S.W.2d 960 (1952).

19. Home Indemnity Co. v. Bowers, 253 S.W.2d 750 (Tenn. 1952).

vehicle delegates the use to still a third person, then the omnibus clause does not provide coverage to such third person.[20] In the latest decision, the Supreme Court pointed out another modification to omnibus coverage. In that case, the owner of the automobile, to whom the insurance policy was issued, had sold the automobile under a conditional sale contract. The conditional vendee was involved in an accident, and judgment was rendered against him. The judgment creditor then sought to hold the insurer of the owner under the omnibus clause. The Supreme Court held, in accord with most of the other authorities upon the point,[21] that there was no coverage under such facts.

The Court held that the conditional vendee is the true owner of the vehicle for all practical purposes. Upon him falls the risk of loss and the hope of gain. The conditional vendor simply retains a lien on the vehicle for security purposes.[22] The vendee has equitable title to the property and a right to use it. The Court pointed out that the use by the vendee of the vehicle was not by virtue of any consent or permission of the former owner, but by virtue of the vendee's own right of ownership. The omnibus clause simply provides coverage when the owner authorizes and permits some other person to use the vehicle. In this case, the person insured was no longer the owner of the automobile and therefore in no position to authorize its use by anyone. Consequently, the vendee could not come within the scope of coverage provided by the vendor's liability policy.

C. *Automobile Dealer as Insurance Agent*

Another case of interest decided during the past year is that of *T. H. Hayes & Sons v. Stuyvesant Ins. Co.*[23] The case held that the Tennessee statute making the solicitor of an application for insurance the agent of the insurer[24] applies to automobile insurance solicited by an automobile dealer. In view of the previous decisions of the Supreme Court and Court of Appeals, the decision is not unexpected,[25] but it is the first opinion by the Supreme Court construing this Code section in its application to automobile insurance. The plaintiff had gone to the Union

20. American Automobile Ins. Co. v. Jones, 163 Tenn. 605, 45 S.W.2d 52 (1932). The Court of Appeals for the Sixth Circuit had also denied coverage when the vehicle was put to a prohibited use. Caldwell v. Standard Acc. Ins. Co., 98 F.2d 364 (6th Cir.), *cert. denied*, 305 U.S. 640 (1938).

21. Whitney v. Employers' Indemnity Corp., 200 Iowa 25, 202 N.W. 236 (1925); Merchants Mut. Cas. Co: v. Pinard, 87 N.H. 473, 183 Atl. 36 (1936); *see* Virginia Auto Mut. Ins. Co. v. Brillhart, 187 Va. 336, 46 S.E.2d 377, 380 (1948).

22. McDonald Automobile Co. v. Bicknell, 129 Tenn. 493, 167 S.W. 108 (1914); Marion Mfg. Co. v. Buchanan, 118 Tenn. 238, 99 S.W. 984, 8 L.R.A. (N.S.) 590 (1907).

23. 250 S.W.2d 7 (Tenn. 1952).

24. TENN. CODE ANN. § 6087 (Williams 1934).

25. See Maryland Cas. Co. v. McTyier, 150 Tenn. 691, 266 S.W. 767, 48 A.L.R. 1168 (1924); Maryland Cas. Co. v. F. B. Hunter & Co., 8 Tenn. App. 516 (W.S. 1928); Cheek v. American Eagle Fire Ins. Co., 6 Tenn. App. 632 (M.S. 1928).

Chevrolet Company to purchase a vehicle suitable for conversion into a small ambulance. The automobile salesman was familiar with the intended use, and subsequently a sedan delivery truck was sold to plaintiff for the purpose. The salesman advised that collision insurance would be required and that the automobile dealer would be willing to obtain such insurance; and the premium therefor was included in the monthly deferred payments. By reason of subsequent trips by plaintiff to the Chevrolet company, the company was aware of the use to which the vehicle was being put. After the ambulance was involved in a collision, the defendant insurance company denied liability on the collision policy. In this suit thereon, it pleaded that plaintiff had misrepresented and concealed the use to which the vehicle would be put and that the insurance was written on a truck and accordingly did not cover an ambulance. It argued against the application of Code section 6087, urging that it was limited to those in the insurance business who, as insurance agents, habitually sold insurance. The Supreme Court, as had the Court of Appeals, rejected this argument, both on the language of the statute itself and on the authority of previous decisions of the Court, particularly in the case of *Maryland Cas. Co. v. McTyier*.[26]

Accordingly, it is clear that, where an automobile dealer solicits insurance on the vehicle which it sells, such dealer becomes the agent of the insuring company, not only in matters relating to the application, but also as to matters relating to the policy, and that knowledge on the part of such dealer that the insured vehicle is to be used for a different purpose than that stated in the policy is knowledge to the insurer. The acquiescence therein by the dealer constitutes a waiver of the policy provisions.

D. *Notice of Claims*

Another case decided during the past year by the Middle Section of the Court of Appeals is of interest in that it points up a situation that suggests the occasional need for precautionary action by a plaintiff. The case is *Jamison v. New Amsterdam Cas. Co.*[27] The complainant had been struck and injured by a taxicab and recovered a judgment in the circuit court against the cab company for his injuries. Execution on the judgment was returned *nulla bona*. To collect his judgment, he brought suit against the defendant insurance company on a policy by which it had insured the cab company, which policy had been issued and filed with the City Clerk of Nashville pursuant to a city ordinance requiring operators of taxicabs to carry insurance. The ordinance required the policy to provide that any person who had recovered such a

26. 150 Tenn. 691, 266 S.W. 767, 48 A.L.R. 1168 (1924).
27. 254 S.W.2d 353 (Tenn. App. M.S. 1952).

judgment should have a right of action on the policy in the event that the operator did not pay the judgment within thirty days. Both the chancellor and the Court of Appeals found that there had been no notice to the insurer of the accident or of the circuit court suit. The policy contained the usual provisions requiring the insured to give notice of claims or suits against it. Upon this record, the chancellor and the Court of Appeals held that the complainant could not recover on the policy. While the situation which brought about the lack of notice in this case was unusual and not likely to occur frequently, it does suggest that a plaintiff who suspects that an insurer has not been notified of an accident might do well to give such notice where possible. With cab companies, and others, having to file evidence of coverage with public authorities, this can easily be accomplished.

E. *Products Liability Coverage*

In the case of *American Indemnity Co. v. Sears, Roebuck & Co.*,[28] the Court of Appeals for the Sixth Circuit held that a products liability insurance policy should be strictly construed against the insurer. The insurer issued a policy insuring a manufacturer against liability in connection with certain gas floor furnaces and other products. An endorsement on the policy extended the coverage to a retailer, Sears, providing, however, that there should be no coverage as to any negligence of Sears or as to any warranties made by Sears which were not authorized by the manufacturer. Sears sold one of the furnaces in its original crate as received from the manufacturer. After installation in the home of the customer, two members of the customer's family were asphyxiated by escaping gas. The customer brought suits against Sears, alleging that it was guilty of negligence, and also that it was guilty of breach of warranty. The insurer refused to defend the cases. After settling them, Sears filed this action claiming reimbursement from the insurer. In allowing recovery, the court held that the exclusion clauses of the policy should be construed strictly against the insurer. One ground of the customer's claim against Sears was for breach of warranty. Although not covering negligence, the insurer did cover warranties of Sears except those not authorized by the manufacturer. The claim of the customer did not on its face fall within this exclusion. Further, the evidence showed that the representations made by Sears actually had received the approval of the manufacturer. Consequently, the insurer should have defended the claim and was obligated to reimburse the retailer.

28. 195 F.2d 353 (6th Cir. 1952).

II. LIFE INSURANCE

A. *Disability Claims*

In *Henderson v. New York Life Ins. Co.*,[29] the Supreme Court held that a jury question was presented as to whether the insured had sustained total and permanent disability before he was sixty years of age, entitling him to benefits under a life policy. The Court of Appeals had held the insurer entitled to a directed verdict. The insured was injured in an accident on May 3, 1945, approximately one month before the anniversary date of the policy nearest his sixtieth birthday. Lay witnesses testified that he was not thereafter able to work. He was not hospitalized until 1946, however, since which time he had been disabled by thrombo-phlebitis. Notice was not given to the insurer of his claim for disability benefits until February 2, 1947. The Supreme Court held that a jury should have been allowed to decide whether he had been totally disabled by accident or disease prior to his sixtieth birthday and that lay testimony as to his inability to work was highly competent in determining the date of and the degree of his disability. The Court also held that the insurer was not prejudiced by the delay in giving notice of the claim and that the delay was not so clearly unreasonable as to entitle the company to a directed verdict. The insured testified that he had forgotten the disability benefits in his policy and for that reason had delayed giving notice. While recognizing that delay may be unreasonable as a matter of law,[30] the Court held that in the instant case the question should have been submitted to the jury.

B. *Authority of Soliciting Agent for Life Insurance*

In *Bailey v. Life & Casualty Ins. Co. of Tennessee*,[31] the authority of a soliciting agent to vary or waive the terms of a written application for insurance was discussed. The application stated that no one other than officers of the company could waive or modify the terms of any contract. Both the application and the receipt which was given to the applicant for a partial premium payment stated that no insurance would take effect until the issuance and delivery of a policy, unless the first full premium accompanied the application. The applicant elected to pay premiums annually, but paid only a small portion of the first premium at the time of signing the application. He was killed by accident before a policy was ever delivered to him, although the application had been approved and a policy issued and placed in the hands of the agent for delivery at the time of his death. The beneficiary under

29. 250 S.W.2d 11 (Tenn. 1952).
30. Brumit v. Mutual Life Ins. Co. of N.Y., 178 Tenn. 48, 156 S.W.2d 377 (1941) (delay of five years); Prudential Ins. Co. of America v. Falls, 169 Tenn. 324, 87 S.W.2d 567 (1935) (same); Metropolitan Life Ins. Co. v. Walton, 19 Tenn. App. 59, 83 S.W.2d 274 (E.S. 1934) (four years).
31. 35 Tenn. App. 574, 250 S.W.2d 99 (M.S. 1951).

the policy, who was the applicant's widow, insisted that the soliciting agent had told her and her husband that the insurance would take effect immediately if any money was paid on the first premium and sent in with the application. She testified that neither she nor the applicant read the application or the receipt. The jury awarded her a verdict.

In reversing and dismissing the suit, the Court of Appeals held that the terms of an application or policy may be waived,[32] but that there was no proof of waiver in the present case. The soliciting agent's authority was plainly limited in the written application and receipt, which were notice to the applicant. There was no proof of apparent or ostensible authority on the agent's part to waive company requirements. Nor was there any proof of knowledge on the part of company officials of the attempted waiver by the soliciting agent. Consequently, there was no basis for holding that the company had waived the provisions of the application or estopped itself to rely upon them.

The result is in accordance with previous holdings of the Tennessee courts that an applicant for insurance is bound by the terms of the written application whether he reads it or not[33] and that he is charged with knowledge of the limitations upon the authority of the soliciting agent when those limitations are contained in the application.[34] It is also in keeping with previous holdings that there can be a waiver of policy provisions only when the person charged with making the waiver has full knowledge of the facts.[35]

C. *Insurance Payable to Insured's Estate*

In the case of *Pope v. Alexander*,[36] an insurance question was incidentally involved. The insured had died childless without making any disposition by will or otherwise of a life insurance policy payable to his estate. His widow died twelve days after his death. The Tennessee statutes provide that life insurance effected by a husband on his own life shall "inure to the benefit of his widow and children. . . ."[37] While it is possible for a husband to dispose of insurance payable to his estate in clear language and thereby deprive his widow and children of the benefit of the statutory provisions,[38] it is well settled that insur-

32. American Central Ins. Co. v. McCrea, 76 Tenn. 513, 41 Am. Rep. 647 (1881); Murphy v. Southern Life Ins. Co., 62 Tenn. 440, 27 Am. Rep. 761 (1874).

33. Beasley v. Metropolitan Life Ins. Co., 190 Tenn. 227, 229 S.W.2d 146 (1950).

34. Arnold v. Locomotive Engineers Mut. Life & Acc. Ins. Ass'n, 30 Tenn. App. 166, 204 S.W.2d 191 (M.S. 1946).

35. Baird v. Fidelity-Phenix Fire Ins. Co., 178 Tenn. 653, 162 S.W.2d 384, 140 A.L.R. 1226 (1942); cf. Somerville v. Gullett Gin Co., 137 Tenn. 509, 194 S.W. 576 (1917).

36. 250 S.W.2d 51 (Tenn. 1952).

37. TENN. CODE ANN. § 8456 (Williams 1934).

38. Union Trust Co. v. Cox, 108 Tenn. 316, 67 S.W. 814 (1902).

ance payable to the estate ordinarily is subject to the statutes.[39] There was nothing in the present case to prevent the operation of the statutes, and the insurance was ordered paid to the administrator of the widow's estate.

D. *Death by Accidental Means*

In *Maddux v. National Life & Accident Ins. Co.*,[40] the sole issue presented was whether the insured died by accident or by suicide. The evidence was entirely circumstantial, and there was no direct proof as to the actual manner in which he met death. He was shown to have been ill on the night prior to his death and to have been highly nervous. He arose early in the morning and went to work, but returned home, as was his custom, at about seven-thirty in the morning. His wife drove their son to school and returned about thirty minutes later to find the insured dead in the garage from a shotgun wound in the head. The trial court directed a verdict for the insurer. In reversing, the Court of Appeals held that a jury issue was presented as to the means causing death, pointing out the general presumption against suicide[41] and a number of circumstances in the case which were consistent with the theory of accident. Among these were the absence of any previous suicidal tendencies, the happiness of the insured in his home and business life, the possibility that the insured was killed accidentally while shooting birds or while extracting a shell from the gun, and several others. In the absence of direct proof of suicide, the Court felt that a verdict should not have been directed for the defendant.

E. *Incontestable Clause*

The 1953 General Assembly amended the statutory provisions relating to the period of incontestability in ordinary life insurance policies[42] so as to make them conform to the requirements of incontestable clauses in industrial policies.[43] Formerly, the statutes provided that ordinary life policies should be incontestable "after two years" from their date. By Chapter 181 of the 1953 Public Acts, this provision was changed so that such a policy shall be incontestable after it "shall have been in force during the lifetime of the insured for a specified period, not more than two years from its date."

Under the former statutory requirements, the death of the insured within two years from the date of issue did not automatically stop the

39. American Trust & Banking Co. v. Twinam, 187 Tenn. 570, 216 S.W.2d 314 (1948); Chrisman v. Chrisman, 141 Tenn. 424, 210 S.W. 783 (1919).
40. 254 S.W.2d 433 (Tenn. App. M.S. 1953).
41. Provident Life & Acc. Ins. Co. v. Prieto, 169 Tenn. 124, 83 S.W.2d 251 (1935); Mutual Benefit Health & Acc. Ass'n v. Denton, 22 Tenn. App. 495, 124 S.W.2d 278 (M.S. 1938).
42. Tenn. Pub. Acts 1953, c. 181, amending TENN. CODE ANN. § 6179 (Williams 1934).
43. TENN. CODE ANN. § 6447.2 (Williams Supp. 1953).

running of the incontestable period.[44] Consequently, if suit was not brought on the policy until after the second anniversary date of the policy, the insurer could no longer raise the defense of fraud or misrepresentation, even though the insured died within the incontestable period. The amendment to the statutes corrects this situation by making the death of the insured within the incontestable period stop the running of the period against the insurer. Only if the insured lives out the incontestable period, which shall not exceed two years, will the insurer be barred from raising its defenses growing out of fraud or misrepresentation in the application.

44. Humpston v. State Mut. Life Assur. Co., 148 Tenn. 439, 256 S.W. 438 (1923).