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Insurance

John Kenneth Bowlin

Calvin W. Holder

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eliminated, the state could take advantage of statements made at a time when there is a strong motive for truthfulness and little inducement for falsification; the accused may in any event still show a confession was made under compulsion of fear or hope of gain and thus prevent its admission. The subjective test laid down is extremely difficult to apply and, although this of itself is no reason for the rule's being changed, it inures, so far as can be seen, solely to the benefit of the guilty. If, under the protection of the Texas rule, the position of the innocent accused were improved, the rule would not only be desirable, but necessary. It is interesting to note that on rehearing it was indicated that defendant was not under the apprehension that he was in custody. On the whole, it is doubtful that there are fewer innocent persons convicted in Texas than in other jurisdictions where there is no necessity for such a warning. Legislative action in this matter is indicated now as it was some twenty-five years ago.²³

Frederick L. Woodlock, Jr.

INSURANCE

VARIANCE OF POLICY TERMS AS COUNTER OFFER (TEXAS)

In *Southland Life Insurance Co. v. Vela*¹ the deceased made application for a \$5,000 ordinary life policy. The application stated the effective date of policy should be the date of delivery. The insurer refused the requested policy but issued one for \$2,500, specifying September 18 as the effective date of policy and providing for quarterly premiums. Authority to alter or waive any terms of the policy was limited to named officers. Kubena, the local agent, offered the policy to Vela, who refused to take it until October 19, at which time Mrs. Vela took it to look over.

²³ *Ibid.*

¹ 147 Tex. 478, 217 S. W. 2d. 660 (1949), *rev'd* 212 S. W. 2d. 210 (Tex. Civ. App. 1948).

On October 26 she stated that she would accept it and made a monthly premium payment figured by Kubena, for which she received a receipt. Kubena took the policy and on November 23 mailed it to the home office for the purpose of changing the quarterly premium to a monthly premium.

Upon receipt by the company of the policy the premium payment was placed in a suspense fund, and Chandler, not a named officer having authority to alter the policy, wrote Kubena that since effective date of policy was September 18, it had lapsed for failure to pay premiums and could be reinstated only by completion of a health certificate. On November 27 Vela wrote the company requesting information. On December 4 Chandler answered, stating that he had written Kubena concerning "your policy" and that Vela would probably be contacted in the near future by Kubena. Vela, however, was never contacted because he left for San Antonio on December 1 and died there on December 12. The company was notified of the death on December 17 by Mrs. Vela and immediately denied liability on the ground that the policy had never been in force. Nothing further was done until in 1944 when suit was commenced, at which time the company denied liability on three grounds: the policy was never in force; if it ever was in force, it had lapsed for nonpayment of premiums; the insured took his own life.

The trial court gave judgment for the company notwithstanding a jury verdict for insured. This was reversed by the court of civil appeals on the grounds that the company had, by denying liability for the reason that the policy had never been delivered, waived all other defenses and that when Kubena delivered the policy on October 19 and received a monthly premium payment, this amounted to a delivery and acceptance. The court reasoned that, since equity considers that done which should be done, the mode of payment was altered at that time to monthly payments and in the absence of a premium date in the policy, the date of delivery became the controlling and effective date of the policy. The court felt that

the rights of the beneficiary could not be prejudiced by a letter from Chandler to the local agent not seen by Vela and that Chandler, due to his position of responsibility, was empowered to alter policies despite the fact he was not named in the policy as having such authority. Hence, when Chandler wrote Vela on December 4 referring to the policy as "your policy", it was an acknowledgment of the validity of the policy and a ratification of Kubena's action.

The Texas Supreme Court reversed the court of civil appeals, avoiding all questions of waiver and of authority of parties by holding that since the application was rejected and a new policy mailed, a counter offer was made; and when it was not accepted, there was no meeting of minds and the policy was never in force. Where an effective date is named in the policy, it is controlling regardless of the date of delivery; and since the policy was never in force, a letter referring to it as "your policy" could not create liability thereon—estoppel being of a defensive character and not such as to create a cause of action.

It appears that the supreme court held correctly despite the harsh result seeming to flow therefrom. Where an application is made for insurance and acceptance is on terms variant from those offered, the application is rejected, and a counter offer is made; for the insurance to become effective the counter offer must be accepted by the insured.² Many cases hold that a mere soliciting agent has no authority to alter or waive terms of a policy³ and that where the policy expressly denies such authority, the insured is bound thereby whether he has read the policy or not.⁴ Under Texas law, where a life policy expressly specifies the date from which the premium period is to be computed and fixes the date

² *Springfield Fire and Marine Ins. Co. v. Hubbs-Johnson Motor Co.*, 42 S. W. 2d. 248 (Tex. Comm. App. 1931), *rev'g* 28 S. W. 2d. 1088 (Tex. Civ. App. 1930).

³ *Indianapolis Life Ins. Co. v. Powell*, 133 Tex. 547, 127 S. W. 2d. 172 (1939); *Moffett v. Texas Employer's Ins. Assn.*, 217 S. W. 2d. 142 (Tex. Civ. App. 1948), *writ of error refused*, *N.R.E.*; TEX. REV. CIV. STAT. (Vernon, 1948) art. 5063.

⁴ *Morrison v. Ins. Co. of North America*, 69 Tex. 353, 6 S. W. 605 (1887); *Great Eastern Casualty Co. v. Thomas*, 178 S. W. 603 (Tex. Civ. App. 1915).

for payment of recurring premiums, such date is controlling as to premium payments irrespective of the date on which the policy is delivered.⁵ While it is true that where an insurer with knowledge of a forfeiture takes action recognizing a policy as in force without having been motivated to act by the insured, it constitutes a waiver of the forfeiture,⁶ this could hardly be contended here where no policy ever became effective. And though a denial of liability on one ground with knowledge of others is a waiver of such other grounds,⁷ it could not affect liability here, since the insurer asserted the only valid defense.

ILLEGAL KILLING AS BAR TO RECOVERY BY BENEFICIARY (TEXAS)

In *Greer v. Franklin Life Ins. Co.*⁸ the proceeds of a life insurance policy were claimed by the named beneficiary and the next of kin of insured, and the insurer filed a bill of interpleader. The court of civil appeals held that the beneficiary should recover, but the supreme court reversed and gave judgment for the next of kin, saying that the beneficiary was precluded from recovery by TEX. REV. CIV. STAT. (Vernon, 1948) art. 5047.

The death of the insured had been caused by the beneficiary, wife of the insured, after he had accused her of immoral conduct and had made a vile threat to do her bodily harm. The wife was convicted of manslaughter, and the finding was made that she acted without sufficient provocation. The statute cited precludes a

⁵ *Henning v. Jefferson Standard Life Ins. Co.*, 129 F. 2d. 225 (C.C.A. 5th, 1942); *Great Southern Life Ins. Co. v. Peddy*, 139 Tex. 245, 162 S. W. 2d. 652 (1942); *Kurth v. Nat. Life and Accident Ins. Co., Inc.*, 79 S. W. 2d. 338 (Tex. Civ. App. 1935), *writ of error refused*.

⁶ *Equitable Life Assur. Society of U. S. v. Ellis*, 105 Tex. 526, 152 S. W. 625 (1931); *Bankers Life and Loan Ass'n of Dallas v. Ashford*, 139 S. W. 2d. 858 (Tex. Civ. App. 1940); *Sovereign Camp, W.O.W. v. Sunday*, 103 S. W. 2d. 484 (Tex. Civ. App. 1937); *Continental Casualty Co. v. Bridges*, 114 S. W. 170 (Tex. Civ. App. 1908).

⁷ *American Employee's Ins. Co. v. Brock*, 215 S. W. 2d. 370 (Tex. Civ. App. 1948), *writ of error refused, N.R.E.*; *Great American Accident Ins. Co. v. Roggen*, 144 S. W. 2d. 1115 (Tex. Civ. App. 1940); *Great American Indemnity Co. v. McMenasius*, 134 S. W. 2d. 370 (Tex. Civ. App. 1939), *writ of error dismissed*; *National Aid Life Ass'n v. Murphy*, 78 S. W. 2d. 223 (Tex. Civ. App. 1935), *writ of error dismissed*.

⁸ ———Tex.———, 221 S. W. 2d. 857 (1949), *rev'g* 219 S. W. 2d. 137 (Tex. Civ. App. 1949).

recovery by the beneficiary on a policy where the beneficiary has "wilfully" brought about the death of the insured. The court said that "wilfully", as used in the statute, requires both an intent to kill and an illegal killing in order to defeat a recovery but needs not have the meaning of "maliciously", as used in the criminal cases. Almost all the courts passing on the question here involved have held that where the beneficiary is illegally⁹ responsible for the death of the insured, there can be no recovery—most of these courts stating the requirements to be an intention to kill plus an illegal killing.¹⁰ Thus, the Texas Supreme Court held under the statute in accordance with the general rule. The probable intention of the legislature in passing Article 5047¹¹ was to provide for a statutory disposition of the proceeds while making no change in the substantive law as developed in many courts.

FALSIFICATION BY AGENT NO DEFENSE TO INSURER (ARKANSAS)

In *Pyramid Life Ins. Co. v. Trantham*¹² the Arkansas Supreme Court held that a company could not avoid liability on non-medical policies where evidence supported a finding that the insured made a full disclosure to the soliciting agent at the time of making the application but the agent omitted the disclosures and inserted false statements concerning applicant's health.

Generally, where there is no fraud or collusion between the insured and the agent of the insurer and there is no limitation on the authority of the agent stated in the policy, the cases hold that the knowledge of the agent is imputed to the insurer.¹³ Some

⁹ While of sound mind and not in self-defense.

¹⁰ *Metropolitan Life Ins. Co. v. McDavid*, 39 F. Supp. 228 (Dist. Ct. E. D. Mich. N. D. 1941), and cases cited therein.

¹¹ The decision in *Murchison v. Murchison*, 203 S. W. 423 (Tex. Civ. App. 1918), recognizing the injustice of allowing the beneficiary to recover on a policy when she had murdered the insured, resulted in the enactment of what is now Article 5047.

¹² 214 Ark. 791, 217 S. W. 2d. 924 (1949).

¹³ *Union Life Ins. Co. v. Evans*, 193 Ark. 627, 101 S. W. 2d. 778 (1937); *Hart v. Prudential Ins. Co. of America*, 47 Cal. App. 2d. 298, 117 P. 2d. 930 (1941); *American Life Ins. Co. v. Stone*, 78 Ga. App. 98, 50 S. E. 2d. 231 (1948); *Liberty Nat. Life Ins. Co. v. Stinson*, 61 Ga. App. 344, 6 S. E. 2d. 199 (1939); *Bordelon v. National Life and Accident Ins. Co., Inc.*, 187 So. 112 (La. App. 1939); *Longo v. John Hancock*

of these cases hold that where a limitation on the power of the agent is stated in the application, it does not bind the insured unless he has read the application.¹⁴ These cases prevent the insurer from asserting the falsity of the statements as an avoidance of liability on the theory of the insurer's "constructive notice",¹⁵ or of waiver of the defense of breach of warranty,¹⁶ or of "equitable estoppel".¹⁷

Most courts probably hold that the insurer cannot avoid liability on a policy where the insured makes full disclosures and the agent fraudulently misstates them,¹⁸ especially where there has been no opportunity afforded the insured to read the application. Thus, where by reason of fraud, mistake or negligence of a soliciting agent the truthful answers of an insured given at the time of his application have been incorrectly entered in the form used for reporting the state of the health of the insured, the insurer is estopped to set up the falsity of such answers as a defense to an action on the policy. This is true whether the error was committed by the general agent or the soliciting agent. In either event, he is the agent of the insurer not the insured, notwithstanding the application may stipulate to the contrary.¹⁹

Mut. Life Ins. Co., 153 S. W. 2d. 805 (Mo. App. 1941); *Dace v. John Hancock Mut. Life Ins. Co.*, 148 S. W. 2d. 93 (Mo. App. 1941); *Deval v. John Hancock Mut. Life Ins. Co.*, 262 App. Div. 933, 28 N.Y.S. 2d. 919 (1941).

¹⁴ *Deval v. John Hancock Mut. Life Ins. Co.*, 262 App. Div. 933, 28 N.Y.S. 2d. 919 (1941).

¹⁵ *Friedman v. John Hancock Mut. Life Ins. Co.*, 168 S. W. 2d. 956 (Mo. App. 1941).

¹⁶ *Rakowski v. Metropolitan Life Ins. Co.*, 324 Ill. App. 583, 59 N. E. 2d. 514 (1945).

¹⁷ *Columbian Nat. Life Ins. Co. v. Rodgers*, 116 F. 2d. 705 (C.C.A. 10th, 1940), *cert. den.*, 313 U. S. 561 (1941).

¹⁸ *Union Life Ins. Co. v. Evans*, 193 Ark. 637, 101 S. W. 2d. 778 (1937); *Gavenis v. John Hancock Life Ins. Co.*, 284 Ill. App. 644, 2 N. E. 2d. 578 (1936); *Prudential Ins. Co. of America v. Lawnsdive*, 235 Iowa 123, 15 N. W. 2d. 880 (1944); *Tyson v. Victory Industrial Life Ins. Co.*, 4 So. 2d. 603 (La. App. 1941); *Boston Ins. Co. v. Rainwater*, 197 S. W. 2d. 118 (Tex. Civ. App. 1946). *But cf. Home Ins. Co. v. Lake Dallas Gin Co.*, 127 Tex. 497, 93 S. W. 2d. 388 (1936).

¹⁹ *Union Life Ins. Co. v. Johnson*, 197 Ark. 241, 133 S. W. 2d. 841 (1939); *Hever v. Truck Ins. Exchange*, 51 Cal. App. 2d. 497, 125 P. 2d. 90 (1942); *Hart v. Prudential Ins. Co. of America*, 47 Cal. App. 2d. 298, 117 P. 2d. 930 (1941).

AUTOMOBILE INSURANCE—LACK OF TITLE A DEFENSE
(ARKANSAS)

In *Southern Farmers Mut. Ins. Co. v. Motor Finance Co.*²⁰ Hendrix brought suit on an insurance policy covering his car against upsets and other hazards. The only defense to the suit was that Hendrix was not the sole and unconditional owner of the car as stated in the policy. The car had been stolen in another state from the real owner and had been sold to Welch, then to Webb, then to the F & F Motor Co., and finally to Hendrix. All these parties acted in good faith and without knowledge that the car had been stolen. After the car had been damaged, the Agricultural Insurance Company, insurer of the original owner against theft (having paid him and having become subrogated to his rights), took the car without objection.

The trial court instructed that if Hendrix bought in good faith without knowledge of the theft, the jury should find for him, but the court went on to instruct that if the car was stolen, the jury should find for the insurance company. The Arkansas Supreme Court said that decisions in other states holding that after loss, lack of ownership could be asserted only by the real owner were correctly decided, provided the claimant was in good faith without knowledge of the theft. But in this case, where the real owner had not only asserted his claim but had removed the car without objection, the insurance company, on proof that the car had actually been stolen, was entitled to a directed verdict. The court mentioned that there were statements in some cases contrary to the result reached here but that the clear majority of courts seemed to be in accord with the views expressed in the principal case.

It was observed that cases in jurisdictions holding that a defendant insurance company could not raise the defense of lack of sole and unconditional ownership were careful to state an ex-

²⁰ —Ark.—, 222 S. W. 2d. 961 (1949).

ception that such defense could be raised by the real owner.²¹ Thus, where the insurer had become subrogated to the rights of the real owner, had claimed the car, and had taken physical possession of it apparently without objection, the case was clearly within the exception. All the cases holding that where the insured was in good faith without knowledge of the theft at the time of securing the policy, a recovery could be had on the policy, were cases where the car was never recovered and no claim was made by the real owner.²² Numerous cases have held that good faith alone is not sufficient and that it is the falsity of the warranty which renders the policy voidable.²³ Thus, the case is in accord with the principle that insurable interest is a condition precedent to liability on a policy²⁴ and that rights acquired in a car through theft do not constitute such an insurable interest, although the car has been purchased in good faith without knowledge that it has been stolen.

GROUP INSURANCE—RIGHTS OF BENEFICIARY (OKLAHOMA)

*Spartan Aircraft Company v. Coppick*²⁵ was concerned with a group policy secured by an employer covering all his employees. One provision stipulated that the policy should terminate immediately upon termination of employment for any reason, but the employee had an opportunity to reinstate the policy immediately, subject to his being insurable. Subsequently insured's union made a contract with the employer under which the employees were not to be discharged because of illness. The

²¹ *Savarese v. Hartford Fire Ins. Co.*, 99 N.J.L. 435, 123 Atl. 763 (1924); *Norris v. Alliance Ins. Co. of Philadelphia*, 1 N. J. Misc. 315, 123 Atl. 762 (1923); *Mechanics' and Traders' Ins. Co. of New Orleans v. Local Building and Loan Ass'n*, 128 Okla. 71, 261 Pac. 170 (1927); *Barnett v. London Assur. Corp.*, 139 Wash. 673, 245 Pac. 3 (1926).

²² *Giles v. Citizens Ins. Co. of Missouri*, 32 Ga. App. 207, 122 S. E. 890 (1924); *Hessen v. Iowa Automobile Mut. Ins. Co.*, 195 Iowa 141, 190 N. W. 150 (1922); *Continental Ins. Co. v. Bunn*, 144 Md. 429, 125 Atl. 232 (1924); *Savarese v. Hartford Fire Ins. Co.*, 99 N.J.L. 435, 123 Atl. 763 (1924).

²³ *Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113 (1915); *Affleck v. Kean*, 50 R. I. 405, 148 Atl. 324 (1929).

²⁴ *Harvey v. Pawtucket Mut. Fire Ins. Co.*, 250 Mass. 164, 145 N. E. 35 (1924).

²⁵ ———Okla.———, 207 P. 2d. 790 (1949).

insured became ill, was discharged in violation of the union contract, and was given notice of the termination of the policy and his privilege to reinstate. The insured took no action. His illness resulted in death. Plaintiff beneficiary sued the employer for damages in the full amount of the policy.

The court held that the employer owed no duty to continue payments in order to keep the policy in force; that since the contracts were entered into separately they would not be construed together; that the union contract was not for the benefit of the plaintiff but for the benefit of the employee and, therefore, plaintiff could not maintain the action.

This case is one of first impression. Notably absent is the citation of Oklahoma authority to support the decision. The first question presented is, what is the duty of the employer to the beneficiary? The rule is that the employer owes no duty to the beneficiary to continue the policy in force.²⁶ The courts have further held that even when the employer takes the premium from the earnings of the employee, the employer is not liable for allowing the policy to lapse without notice to the beneficiary.²⁷ The basic reason for this holding is that the act of the employer is, at most, a gratuity.

The next question is, should these writings be construed together? It is a well established rule that instruments, though separate, if made at the same time and for the same purpose, will be construed together.²⁸

In view of the rules alluded to, it is believed that the Supreme Court of Oklahoma reached a correct result. Several reasons may be stated: (1) The employer owes no duty to the beneficiary, having gratuitously undertaken to perform an act; (2) the employer

²⁶ *Gallagher v. Simmons Hardware Co.*, 214 Mo. App. 111, 258 S. W. 16 (1924); *Thull v. Equitable Life Assur. Soc.*, 40 Ohio App. 486, 178 N. E. 850 (1931); *Thompson v. Pacific Mills*, 141 S. C. 303, 139 S. E. 619 (1927).

²⁷ *Myerson v. New Idea Hosiery Co.*, 217 Ala. 153, 115 So. 94 (1927).

²⁸ *Mid-Continent Life Ins. Co. v. Goforth*, 193 Okla. 312, 143 P. 2d. 154 (1943); *Hud Oil and Refining Co. v. Smith*, 179 Okla. 412, 65 P. 2d. 1011 (1937); *Phillips Petroleum Co. v. Widick*, 175 Okla. 376, 52 P. 2d. (1936).

could at any time terminate the insurance, at his caprice, without incurring liability to the beneficiary, because of the provisions of the original agreement; (3) the union contract was made for the benefit of the employee, not the beneficiary; (4) the two contracts cannot be construed together because they were made at different times, were dealing with different parties, and covered different, but not entirely new, subject matter; (5) any cause of action resulting from the breach of the union contract would not run to the beneficiary, but would descend to the heirs of the employee.

HAIL INSURANCE—LIMITATION PROVISION VOIDED (OKLAHOMA)

*Connecticut Fire Insurance Company v. Horne*²⁹ dealt with a fire insurance policy with a supplement covering loss occasioned by hail and other hazards. The fire policy contained a one-year limitation clause. Plaintiff's home suffered damage from hail on April 9, 1944, and his action was brought on January 26, 1946. The express limitation provision of the insurance contract was set up as a defense.

The court held the limitation provision did not apply to a loss occasioned by hail. The court observed that in 1909 the legislature passed an act to permit fire insurance companies to write policies covering loss by fire and tornado, under which act there was allowed a special limitation provision. In 1917 the legislature authorized fire insurance companies to write policies covering loss from hail and other hazards but made no mention of the special limitation provision. The court said:

"There is no language in the title or in the body of the 1917 Act which in any manner refers to or adopts the limitation provision in the standard form of fire insurance policy and since this Act was the first authority which fire insurance companies had to write hail insurance policies in this state we think the absence of any reference to or adoption of any provision of the standard form of fire insurance policy is strongly indicative that the Legislature had no intention of authorizing fire in-

²⁹ ——— Okla.———, 207 P. 2d. 931 (1949).

surance companies in issuing policies covering loss by hail to make any other limitation than the general limitation apply to such policies of insurance."³⁰

Further, the court reasoned, public policy does not permit extension of the exception to the general five year statute of limitation by private contract, unless the contract is clearly within the purview of the exception.

The court's reasoning and conclusions are believed to be correct and in line with prior decisions. It has been held that it is only by reason of the specific provisions allowing a shorter limitation period, provided for under the standard form statute, that there can be a shorter period in which a claimant must maintain an action.³¹ The maxim *expressio unius est exclusio alterius* has been applied to the provisions of the limitation statutes, the court saying in effect that the expression of the exception excludes other exceptions of a similar nature not expressed.³² A federal court has held that a provision limiting the time in which an action may be brought is void which is not within the purview of the exception.³³

John Kenneth Bowlin.
Calvin W. Holder.

³⁰ 207 P. 2d. at 933.

³¹ *Niagara Fire Ins. Co. of New York v. Nichols*, 96 Okla. 96, 220 Pac. 920 (1923).

³² *Cummings v. Board of Education of Oklahoma City*, 190 Okla. 533, 125 P. 2d. 989 (1942).

³³ *Utilities Ins. Co. v. Smith*, 129 F. 2d. 798 (C.C.A. 10th, 1942), construing 15 OKLA. STAT. ANN. (Perm. Ed.) § 216.