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Insurance

J. Denson Smith

vail over the less generous provisions for specific losses in Section 8 (d).[28]

V. INSURANCE

*J. Denson Smith**

In the field of insurance, some interesting cases were before the court during the 1948-1949 session.

The troublesome question of whether the defense of lack of coverage is available despite an incontestability clause in the policy and Act 140 of 1938[1] was up for decision in *Gordon v. Unity Life Insurance Company.*[2] The court ruled that the incontestability clause in question did not operate to extend coverage to a risk excluded under the policy and specifically excepted from the operation of the clause, that is, death by venereal disease. It distinguished the earlier cases of *Bernier v. Pacific Mutual Life Insurance Company of California*[3] and *Garrell v. Good Citizens Mutual Benefit Association, Incorporated.*[4] Justice McCaleb filed a persuasive concurring opinion in which he argued that the *Garrell* case had incorrectly applied the *Bernier* case and that the court should have taken advantage of the opportunity to correct it. The basic holding that the incontestability clause and Act 140 of 1938 do not relate to risks excluded from coverage, unless an ambiguity is created by the wording of the policy, was concurred in by the whole court.

Whether the insurer should have credited to certain insurance policies dividends declared for the year 1942 and payable on policy anniversaries in 1943, "provided premiums shall have been paid in full to such anniversaries and the policies are then in full force" was the question in *Oil Well Supply Company v. New York Life Insurance Company.*[5] By crediting the dividends, the life of the policies would have been extended beyond the death of insured.

The court found that the 1943 anniversary date of each policy was, in keeping with an election by the assured at the time of

28. This rule was conclusively established in Robichaux v. Realty Operators, 195 La. 70, 196 So. 23 (1940). See generally The Work of the Louisiana Supreme Court for the 1946-1947 Term—Torts and Workmen's Compensation (1948) 8 LOUISIANA LAW REVIEW 248, 253 et seq.

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1. Dart's Stats. (1939) § 4134.4.
2. 215 La. 25, 39 So.(2d) 812 (1949).
3. 173 La. 1078, 139 So. 629 (1932).
4. 204 La. 871, 16 So.(2d) 463 (1943).
5. 214 La. 772, 38 So.(2d) 777 (1949).

application, June 30th. The evidence also showed that the quarterly premiums due on March 30, 1943, with respect to two of the policies and on December 30, 1942, with respect to the other, had not been paid. It was the contention of plaintiffs that it was the duty of the company to credit the dividends declared for the policy year 1942 to the policies which would have operated to extend them beyond the date of insured's death, in April. The company's position was that dividends were to be credited only to those policies as to which premiums had been paid *in full* for the policy year current on December 31, 1942, that is, for the policy years ending June 30, 1943, and that since insured's policies had lapsed for non-payment of premium before such date, therefore, under the terms of the resolution and Act 88 of 1906[6] the dividends were not payable and so could not extend the life of the policies. The majority of the court agreed with this view and rendered judgment for the defendant company dismissing the suits. Justice Hamiter dissented, saying that the court had failed to distinguish between the earning of a dividend, and the payment thereof; that the dividends had been earned during the year 1942 and while the policies were in full force and effect, notwithstanding that they were not payable until June, 1943.

There is much to be said in favor of the view taken by Justice Hamiter, yet the opinion of the majority was a literal application of Act 88 of 1906 and the company's action based thereon. If Justice Hamiter's view is the just one, the legislature may adopt it by an appropriate amendment to the cited act.

Prior Louisiana cases have established the rule that the so-called omnibus clause of an automobile liability policy covering the use of the automobile "with the permission of the named insured" covers its use in violation of authority given if there was initial authority to use it on the occasion in question. The court, but not without dissent, has now extended this rule to cover the case where the vehicle is removed for an unauthorized purpose from its place of storage on property belonging to the employer by the one whose duty it was to store it there when the day's work was done. *Waits v. Indemnity Insurance Company of North America.*[7] The protection of those injured by such operation may be good public policy but the decision makes it increasingly apparent that, when used by insurers, words may have a very uncommon and unusual signification.

6. Dart's Stats. (1939) § 4104.
7. 215 La. 349, 40 So. (2d) 746 (1949).

The question of when a planter or farm manager is totally and permanently disabled within the meaning of an insurance policy was presented to the court in *Pearson v. Prudential Insurance Company of America.*[8] It was found that the insured had had an attack of coronary thrombosis which had left him in such a condition that it was not safe for him to carry on his former physically strenuous activities. It also appeared, however, that insured was the owner of about 850 acres of land for the operation of which he employed managers, assisted by his wife and brother. The court followed the *Boughton* case[9] in holding that if the disability is such that the insured is rendered unable to perform the substantial and material acts of his business or occupation in the usual and customary way, it is total and permanent.

In *Stovall v. Empire States Insurance Company*[10] the court found no reason for holding a fire policy void on the ground that the insured had withheld material facts where all the facts were either known to the agent or subject to discovery on inquiry prior to the loss. It also held that the plaintiff had not lost his insurable interest in the property by forming a corporation to which he had never transferred it.

VI. CRIMINAL LAW AND PROCEDURE

*Dale E. Bennett**

A. CRIMINAL LAW

Definition of Crimes—Certainty Required

General language, as distinguished from detailed specification and enumeration, may be used in defining crimes—provided the words employed are of definite well-understood application. For example, "reasonable care" to avoid injuring others traveling upon the streets was held by the Maryland court to constitute a "flexible but reasonably certain" standard of conduct.[1] In the

8. 214 La. 220, 36 So.(2d) 763 (1948).

9. Boughton v. Mutual Life Ins. Co. of New York, 183 La. 908, 165 So. 140 (1936).

10. 215 La. 100, 39 So.(2d) 837 (1949).

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1. State v. Magaha, 182 Md. 122, 129-130, 32 Atl. (2d) 477, 480-481 (1943). In this case Judge Delaplaine epitomized the policy underlining his and many other similar decisions when he declared "It is desirable, of course, that penal statutes and ordinances should be expressed in language as specific as the subject matter will permit, but it is obviously impossible to define some types of crime by a detailed description of all possible cases that may arise. The prohibited act may be characterized by a general term without definition, if the term has a settled common-law meaning and a commonly understood