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INSURANCE

J. Denson Smith*

A problem of first impression was resolved by the court in *Finkelstein v. American Ins. Co. of Newark, N. J.*¹ It was there held that a policy provision in accordance with the standard fire policy imposed by Revised Statutes 1950, 22:691 requiring that suit be brought within twelve months next after "the inception of the loss" meant only that suit would have to be commenced within twelve months after the loss became payable by the company in accordance with other provisions covering the furnishing of proof of loss by the insured. The court favored the liberal interpretation adopted by most courts in other jurisdictions, as opposed to the literal, adopted by some.

In another case of first impression, *Home Insurance Co. v. Highway Insurance Underwriters*,² the court held that an insurance company that had paid a collision loss and had taken a conventional subrogation against the insurance carrier of the other vehicle involved in the collision, might maintain a direct action against the latter on the basis of its subrogation. The court noticed opposing decisions by the Second and First Circuit Courts of Appeal and preferred to follow the latter. Justice LeBlanc, dissenting, favored the view of the former that the direct right of action provided by Act 55 of 1930 was expressly limited to "the insured person or his or her heirs."

The logic of the case seems to be with the dissenting Justice although the majority opinion may be more in keeping with the spirit of the law—if following the spirit can be justified notwithstanding that violence is done to the letter. The reasons given by the majority view, as expressed more fully by the court of appeal, are not convincing. Its position was that the case did not involve an assignment (the Second Circuit had spoken in terms of assignment) but conventional subrogation which was provided for by the Civil Code. And true it is that the plaintiff was relying on a conventional subrogation. However, the opinion contains language unmistakably indicating that the proposition advanced was founded on the theory of legal subrogation. Conventional assignment is recognized by the code no less than

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1. 222 La. 516, 62 So. 2d 820 (1952).

2. 222 La. 540, 62 So. 2d 828 (1952).

conventional subrogation. And the difference between conventional subrogation and assignment is largely nebulous. Although conventional subrogation accompanies payment and is limited to the amount paid it is nevertheless a form of transfer of a credit or right by way of convention or agreement just as is an assignment. In short, if an assignment of a right of action could not vest in the assignee a right of direct action against a tortfeasor, although possessed by the assignor, it is difficult to understand why a conventional subrogation could nevertheless have such effect. Conventional subrogation takes place not by operation of law but by agreement, and carefully circumscribed agreement at that. And so does assignment. What the court seems to have had in mind was, therefore, legal subrogation, a substitution of the subrogee to the legal position of the subrogor by operation of law.

Considerable doubt still obtains concerning an insurer's right to legal subrogation, hence the use of conventional subrogation in the instant case. The reasoning of the court gives added weight to the possibility that insurers are entitled to legal subrogation. May not a collision insurer be bound with another for the payment of the loss?³ The important thing is that the insurer "has an interest in discharging" the obligation. This means that he is not a mere volunteer. A debt of another may be paid by a third person "no way concerned in it," irrespective of the wishes of the creditor, provided that "if he act in his own name, he be not subrogated to the rights of the creditor."⁴ Or the creditor, if he wishes, may subrogate the third person making the payment to his rights, actions, privileges and mortgages. But this is not necessary when the third person, being bound with others or for others for the payment of the debt, has an interest in discharging it, that is, is concerned in it. Legal subrogation then takes place. Surely a collision insurer who is compelled to pay because another has negligently damaged the insured property is in this category. This, the opinion seems to recognize, even to the point of giving the insurer a right of direct action against the wrongdoer. Granting, however, that by legal subrogation the direct right of action given by the statute to the subrogor might vest in the subrogee, it does not follow that conventional subrogation would produce the same

3. See Art. 2161, La. Civil Code of 1870.

4. See Art. 2134, La. Civil Code of 1870.

result. At any rate, if the court indulged in judicial legislation, the chances are the policy of the Legislature was not offended.

An interesting question was presented in *Dupuis v. Prudential Ins. Co. of America*.⁵ The insured failed to make the twentieth and last payment under a 20-payment life policy. The surrender value of the policy, plus a small dividend due, less a loan indebtedness, left a balance of \$350.63. This sum the company applied to the purchase of extended term insurance in an amount less than the full amount of the policy. The insured died shortly after the extended term insurance expired. The principal contention of the widow-beneficiary in her suit against the insurer was that, instead of using the surrender value to purchase extended term insurance, it should have been applied in an amount sufficient to pay the final premium due under the policy, thus converting it into a paid-up policy, the insured not having made any election himself. The court rejected this inviting proposition on the ground that the policy and statute expressly provided what should be done with the surrender value of the policy. It found that the doctrine requiring the insurer to use any credits due on a participating policy so as to keep it in force as originally issued as long as possible was not applicable for the foregoing reason. Nor would it yield to the invitation to find an equitable duty on the company to apply a sufficient amount from the reserve to pay the final premium. The law seems to require the insurer, in applying the surrender value to the purchase of extended term insurance, to maintain the policy in force at its full amount. But even if this be true it would have made no difference in the result.

It has become customary for life, and health and accident insurers to grant coverage from the date of the application subject to the acceptance of the risk and the issuance of the policy. In *Moll v. Mutual Health Ben. & Acc. Ass'n*⁶ a provision in the application stated, "Premium paid on this application covers insurance to Dec. 1, 1947." Three days before the policy was issued the insured was injured in an automobile accident from which he died five days later. Judgment for the plaintiff was properly affirmed. Also sound was the court's rejection of parol evidence to show that part of the initial premium, which was greater than

5. 222 La. 446, 62 So. 2d 637 (1952).

6. 66 So. 2d 320 (La. 1953).

the regular annual premium, covered a policy fee. There was no ambiguity to be explained and the proffered evidence went beyond the written act.

Section 22:636 of the Revised Statutes subjects the effectiveness of a cancellation of an insurance policy by the insurer to the actual payment or mailing to the insured of any unearned premium. In *Romero v. Maryland Casualty Co.*⁷ the court adopted the reasonable view that where, in accordance with the established practice between a local agent and the insured, the unearned premium is credited to his account with the agent, and he is so informed and acquiesces therein, the requirement of the section is satisfied.

In the preparation of the Insurance Code of 1948 the disjunctive "or," present in prior acts, was omitted in the definition of the different kinds of industrial insurance. This led the court of appeal to conclude in *Mataya v. Delta Life Insurance Co.*⁸ that to be recognized as industrial insurance a policy would have to contain all of the kinds of benefits listed. This view was rejected by the Supreme Court that noted, in passing, a corrective statute adopted in 1952 for the purpose of replacing the word "or" after each of the four categories of industrial insurance.

In *Morelock v. Aetna Life Ins. Co.*⁹ a provision of the Insurance Code requiring an insurer to distribute the proceeds of a life or accidental death policy as if the insured survived the beneficiary where it appears that insured and beneficiary died simultaneously and there is not sufficient proof to the contrary, was held to support the action of an insurer in making payment in accord with the policy provisions applicable where the beneficiary predeceased the insured. There was some reliance by plaintiff upon an agreement between the heirs for equal distribution of the assets of the succession but the court properly held this agreement not binding on the insurer. It reminded that the proceeds of such policies make no part of the estate of an insured.

In *Baldwin v. Tri-State Casualty Ins. Co.*¹⁰ involving the interpretation of certain provisions respecting the use of a ve-

7. 66 So. 2d 849 (La. 1953).

8. 222 La. 509, 62 So. 2d 817 (1953).

9. 222 La. 712, 63 So. 2d 612 (1953).

10. 221 La. 781, 60 So. 2d 408 (1952).

hicle covered by a collision policy, the court held that coverage extended to a loss that occurred during an authorized use notwithstanding that theretofore the limitations on regular or frequent use had been violated. There was nothing in the contract as evidenced by the opinion to support the insurer's contention of forfeiture of the right to make an authorized use of the vehicle in consequence of the prior violation, and the position of the court seems to have been completely sound.

A putative wife who had collected the proceeds of an insurance policy payable to the deceased's "widow" was held under a quasi-contractual obligation to pay one-half thereof to the lawful wife in *Succession of Fields*.¹¹ Other interesting angles to this litigation are dealt with elsewhere in this REVIEW under their appropriate headings.

The case of *Crifasi v. Houston Fire & Casualty Ins. Co.*¹² involved only the question of whether the plaintiff, claimant in a burglary loss, had kept accurate books and records from which the loss could be determined. The careful analysis of plaintiff's evidence by the trial court was adopted by the Supreme Court and the judgment below was affirmed.

In *Fireside Mut. Life Ins. Co. v. Martin*¹³ the petitioning insurer was held bound by a statutory requirement that after a stated date its policies would be subject to the laws and regulations relative to industrial insurers. Its claim that its charter contract was being impaired by the enactment was rejected. The statute merely dealt with the form of policy petitioner could write in the future and constituted a valid exercise of the police power.

MINERAL RIGHTS

*Harriet S. Daggett**

LEASE

In *Esso Standard Oil Co. v. Nesbitt*¹ interpretation of a so-called assignment, which was in reality a sublease since

11. 222 La. 310, 62 So. 2d 495 (1952).

12. 222 La. 247, 62 So. 2d 395 (1952).

13. 66 So. 2d 511 (La. 1953).

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1. 222 La. 661, 63 So. 2d 417 (1953).