COMMERCIAL CASUALTY INSURANCE COMPANY *v.* MCCULLEY.

Opinion delivered March 28, 1932.

1. INSURANCE—ACCIDENT—PROXIMATE CAUSE.—Under an accident policy providing for liability for accident while being on the platform of a conveyance of a common carrier, the insurer is liable for injuries to a passenger on a train suffered when he was, by a sudden jerk, thrown off the platform and struck by a passing automobile.
2. INSURANCE—ALLOWANCE OF ATTORNEY'S FEE.—An allowance of an attorney's fee of $100 in a suit on an accident policy tried

in a justice court and in the circuit court will be sustained when the fee was allowed in contemplation of an appeal to the Supreme Court.

3. INSURANCE—ALLOWANCE OF ATTORNEY'S FEE.—The statutory penalty and attorney's fee allowed in actions against insurance companies do not depend on the companies refusing to pay the judgment or contesting the matter on appeal, but is costs incurred in enforcing the contract.

Appeal from Pike Circuit Court; *A. P. Steel,* Judge; affirmed.

STATEMENT BY THE COURT.

Tom McCulley sued the Commercial Casualty Insurance Company before a justice of the peace to recover $250, alleged to be due upon an accident insurance policy. From an adverse judgment, the company appealed to the circuit court, where the case was tried by the court sitting as a jury.

The insurance policy was introduced in evidence by the plaintiff. It contained a partial disability clause which provided that, if the injuries received should prevent the insured from performing one or more important daily duties pertaining to any business or occupation, the company would pay him an indemnity of $25 per week for not more than ten weeks. The clauses of the policy under which liability is claimed are Nos. 1 and 14, which read as follows:

"1. *While actually riding as a passenger in a place* regularly provided for the transportation of passengers only, within a railroad car, elevated, subway or interurban railroad car, street car or steamboat, provided by a common carrier for passenger service; or

"14. *While getting on or off or being on the step or platform of any conveyance* specified in clause 1 of this part."

After the plaintiff suffered his injury, he made proof thereof, and presented his claim for compensation under the policy within apt time. The plaintiff lives in the State of Arkansas, and the policy was issued there.

The company denied liability under the terms of the policy.

The plaintiff was a witness for himself. According to his testimony, he got hurt by being thrown off of the platform of a train about forty miles north of Fort Worth, Texas. He was looking over that part of the country, and had bought a ticket on an interurban railroad extending north from Fort Worth. When the train stopped, he went out on the platform for the purpose of observation.

The train started suddenly with a jerk and threw him off of the platform onto an adjacent highway, where he was struck by a passing automobile. According to his testimony, his injuries were very severe, resulting in his being disabled from doing any work for more than ten weeks, and continuing up to the time of the trial, which was nearly a year after the accident occurred. A physician who attended him also testified that he was not capable of doing any work for more than ten weeks after the accident.

A practicing attorney of the court where the case was tried testified that $100 would be a reasonable fee for the services performed by plaintiff's attorney.

The court rendered judgment in favor of the plaintiff for $250, and one hundred dollars attorney's fee, and twelve per cent. penalty allowed by the statute. The defendant has appealed.

O. A. Featherston, for appellant.

P. L. Smith, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for the defendant that there is no liability under the terms of the policy because the plaintiff was thrown from the platform of the train on which he was riding, and because a part of his injuries were sustained by being struck by a passing automobile after the train had jerked him onto the adjacent highway.

We have copied clauses 1 and 14 under which liability is claimed in our statement of facts, and need not repeat them here. We think that a reasonable construction of the clauses referred to show liability upon the part of the company. The plaintiff was a passenger riding in a

car of an interurban railway provided for passenger service. He had paid his passage, and, when the train stopped, walked out on the platform to observe the country. He was an able-bodied man and had a right to do this. It will be observed that he was on the platform of the car when he was thrown off by the car being started with a sudden jerk. This brought him within the terms of the policy. It did not make any difference that a part of his injuries were received by being struck by a passing automobile after he had been thrown from the platform of the car onto the adjacent highway. The proximate cause of his injury was being thrown from the platform of the car by the sudden starting of it. *Ætna Casualty & Surety Company* v. *Sengel,* 183 Ark. 151, 35 S. W. (2d) 67.

It is next insisted that the allowance of $100 attorney's fee was excessive. The plaintiff recovered the sum of $250. The case was tried by the circuit court sitting as a jury. It had already been tried in the justice court. The circuit court could tell from the conduct of the parties that the case would be appealed to the Supreme Court on the merits. The record shows that a motion for a new trial was filed by the company on the same day on which the case was tried, and this indicated that the court knew beforehand that the case would be appealed to the Supreme Court on the merits. While a fee of $100 is liberal for the amount recovered, we cannot say that, under the circumstances, the court abused its discretion in allowing it. If the defendant had offered to pay the amount of the judgment, then the court should have allowed a more modest fee. The statute does not make the liability of the company depend upon its refusal to pay the loss or its good faith in contesting the matter. The statute becomes a part of the contract of insurance and the fee is costs to reimburse the plaintiff for expense incurred in enforcing the contract. *American Liberty Insurance Company* v. *Washington,* 183 Ark. 497, 36 S. W. (2d) 963.

We find no reversible error in the record, and the judgment will therefore be affirmed.