TRAVELERS' PROTECTIVE ASSOCIATION OF AMERICA *v.* STEPHENS.

Opinion delivered April 25, 1932.

1. INSURANCE—ACCIDENTAL INJURY.—Where insured was accidentally cut while attempting to separate a negro and his companion, the injury was sustained by "accidental means" within the policy.

2. INSURANCE—CONSTRUCTION OF INDEMNITY POLICY.—Where the provisions of a policy of indemnity are reasonably susceptible of two constructions consistent with the object and purpose of the contract, one favorable to the insurer and the other to the insured, that will be adopted which is favorable to the insured.
3. INSURANCE—CONSTRUCTION OF POLICY.—Where an insurance policy contains language susceptible of two constructions, that which will sustain the claim and cover the loss should be adopted.
4. INSURANCE—CONSTRUCTION OF POLICY.—Where an insurance association's constitution and by-laws were made part of an accident policy, the policy, constitution and by-laws must be construed together.
5. INSURANCE—"ACCIDENT" AND "ACCIDENTAL MEANS."—In an action on an accident policy, an instruction defining the terms "accident" and "accidental means" as synonymous *held* not erroneous.
6. INSURANCE—CONSTRUCTION OF POLICY.—Accident policies imposing conditions on insured to be performed in a particular manner are strictly construed against the insurer.
7. INSURANCE—TOTAL DISABILITY.—Where insured at first believed that he was only partially disabled, and presented a claim therefor, this did not preclude him from subsequently claiming that his disability was total.
8. INSURANCE—TOTAL DISABILITY.—Provisions in an accident policy for indemnity, in the event the insured is totally disabled, do not require that the accident shall render the insured absolutely helpless, but only that he be rendered unable to perform substantial and material acts of his occupation in the usual way.
9. COURTS—CONSTRUCTION OF OPINIONS.—The opinions in each case must be construed with reference to the particular facts, and all the cases on a given subject must be read in the light of each other.
10. INSURANCE—TOTAL DISABILITY—AMOUNT OF RECOVERY.—In an action on an accident policy undertaking to pay a fixed sum for 104 weeks in case of total disability, the court properly allowed insured to recover for the full period on proof of total disability, though the trial took place within a shorter period.
11. INSURANCE—TOTAL DISABILITY—EVIDENCE.—In an action on an accident policy evidence *held* to sustain a finding that plaintiff was incapable of pursuing his usual avocation, and therefore was totally disabled.

Appeal from Miller Circuit Court; *Dexter Bush*, Judge; affirmed.

STATEMENT BY THE COURT.

H. P. Stephens sued the Travelers' Protective Association of America to recover $2,600 alleged to be due

him for permanent disability under the terms of a policy of insurance issued to him by the defendant. The suit was defended on the ground that there was no permanent disability, and no liability under the policy. The facts necessary to determine the issues raised by the appeal may be briefly stated as follows: The defendant was a mutual insurance association and had a constitution and bylaws. The benefit certificate sued on was issued by it to the plaintiff on the 19th day of June, 1922. It expressly provided that the constitution and bylaws and articles of incorporation of said association should be a part of the contract of insurance. On the reverse side of the policy it recites that the benefits named are paid subject to the conditions and limitations of the constitution. Nine different subjects are mentioned, commencing with the sum of $10,000, if killed by accident as the result of a wreck; second, $5,000 if killed by accident; continuing, third, fourth, fifth, sixth and seventh provide for sums to be paid in case of the accidental loss of different members of the body. Eighth provides for the payment of $25 per week if totally disabled from accident not exceeding 104 weeks. Ninth provides for $12.50 per week for partial disability following total disability from accident not exceeding five weeks.

Plaintiff was a class A member. Section 5 of article X of the constitution of the association reads as follows: "Whenever a class A member of this association in good standing shall through external, violent and accidental means receive bodily injuries which shall independently of all other causes immediately, continuously and wholly disable him from transacting any and every kind of business pertaining to his occupation as shown by the records of this association, he shall, upon compliance with and subject to the other provisions, conditions and limitations of this constitution, be paid for the loss of time occasioned thereby the sum of $25 per week, not exceeding one hundred and four consecutive weeks, and $12.50 per week for partial disability, not to exceed five consecutive weeks, * * *."

H. P. Stephens lived in Texarkana, Arkansas, and the benefit certificate sued on was issued to him in this State. In December, 1930, he was engaged in the buying and selling of secondhand automobiles in that city. He would buy secondhand cars, repair them, and then sell them. He performed manual labor in repairing the cars, and did as much of the work as he was capable of doing. He could do anything in the way of repairing an automobile. On the night he was injured he went to a moving picture show, and then drove around the city of Texarkana with a friend looking for a prospective customer for a car. About eleven o'clock in the night he and his friend crossed the street to the Texas side for the purpose of getting a cup of coffee. After doing so they started back to the car. The plaintiff was in front, and his companion cried out for help. The plaintiff went back and saw his friend in an altercation with a negro. He did not know the negro, and did not see any knife or any kind of weapon in his hand. He caught hold of the negro for the purpose of separating the contending parties, and was acting wholly in the role of a peacemaker. He had no intention of injuring any one. He pulled the negro back in an attempt to separate the two men. He either stumbled or pulled too hard, and plaintiff and the negro both fell back. The negro's arms came around the plaintiff as they fell and they both fell on their backs. In a minute or two after he got up the plaintiff found he had been cut. He made no attempt to strike the negro, and the negro did not strike him. He must have received the cut in the back when they fell. The negro got up and ran away. At the time they fell was the only time that the hand of the negro was near him. The testimony of the plaintiff was corroborated in every respect by that of his companion. On the other hand, the negro testified that he was fighting with the companion of the plaintiff, and that when the latter came up to help his companion he cut him with a knife. In rebuttal it was proved by the plaintiff that the negro went to the sheriff the next morning and reported the fact that he had cut a Mr. Hackett, who was the com-

panion of the plaintiff. The sheriff told him that he had cut two men. The negro said that he did not know that he had cut any one except Hackett. Other facts will be stated under appropriate headings in the opinion. There was a verdict and judgment for the plaintiff in the sum of $2,600, and the case is here on appeal.

Jones & Jones, for appellant.

Will Steel and *Frank S. Quinn,* for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for the defendant that the court should have directed a verdict in its favor. We do not agree with counsel in this contention. Under the evidence adduced by the plaintiff, the injury was brought about without the agency of the insured, and it was accidental, although the injury might have been intentionally inflicted by the negro. According to the testimony of the plaintiff, which was corroborated by his companion, he was accidentally cut while trying to separate the negro and his companion. He did not see any knife or other weapon in the hands of the negro. There was apparently no danger in trying to separate them. The negro was a small man, and the conduct of the plaintiff in trying to separate them was the natural result of any one with human impulses. Hence the injury was accidental, within the meaning of the policy. We have set out its terms in our statement of facts, and we need not repeat them here. *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174, 167 S. W. 845; *Ætna Life Ins. Co.* v. *Little,* 146 Ark. 70, 225 S. W. 298; *Mutual Benefit Life & Accident Association* v. *Tilley,* 176 Ark. 525, 3 S. W. (2d) 320; *Pacific Mutual Life Ins. Co.* v. *Ware,* 182 Ark. 868, 33 S. W. (2d) 46.

It is next contended that the court erred in giving, at the request of the plaintiff, instruction No. 1. It reads as follows: "You are instructed that the terms 'accident' and 'accidental means,' as used in the policy sued upon and in the constitution and bylaws of the defendant association, are used in their ordinary popular sense, as meaning happening by chance; unexpectedly taking place; not according to the usual course of things, or not

as expected. If you find from a preponderance of the evidence that the injury received by the plaintiff happened by chance, or unexpectedly took place, or was not according to the usual course of things, or was not as expected, then you will find that said injury was the result of accident and comes within the terms of the insurance contract, unless you find from a preponderance of the evidence that it falls within one or any of the exceptions in the contract." It is contended on the part of the defendant that there is a technical difference between the term "accident" and the term "accidental means," as used in the policy sued on and in the constitution and bylaws of the association.

Where the provisions of a policy of indemnity are reasonably susceptible of two constructions consistent with the object and purpose of the contract, one favorable to the insurer and the other to the insured, that will be adopted which is favorable to the insured. It has been the settled policy of this court since the beginning of its construction of contracts of insurance to hold that the policy should be liberally construed so as not to defeat, without necessity, the claim for indemnity. The reason is that such policies are written on printed forms prepared by experts employed by the insurance companies for that purpose, and the insured has no voice in the matter. Hence it is fair and reasonable that, where there is ambiguity, or where the policy contains language susceptible of two constructions, that which will sustain the claim and cover the loss should be adopted. *Providence Life Assurance Society* v. *Reutlinger,* 58 Ark. 528, 25 S. W. 835; *American Bonding Co.* v. *Morrow,* 80 Ark. 49, 96 S. W. 613, 17 Am. St. Rep. 72; *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493; *Home Mutual Benefit Association* v. *Mayfield,* 142 Ark. 240, 218 S. W. 371; *Great American Casualty Co.* v. *Williams,* 177 Ark. 87, 7 S. W. (2d) 775; *National Equity Life Ins. Co.* v. *Bourland,* 179 Ark. 398, 16 S. W. (2d) 6; *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S. W. (2d) 611; *Southern Surety Co.* v. *Penzel,* 164 Ark. 365, 261 S. W. 920.

In this connection, it may be stated that the whole policy and the constitution and bylaws of the association must be construed together, and every part read in the light of the other provisions. The constitution and bylaws are expressly made a part of the policy. It would be unreasonable for the court to give a construction to the contract which it is manifest was not contemplated by the parties when the policy was issued and which would defeat the evident object of the contract of insurance. If the association had wished that the terms "accident" and "accidental means" should have had different meanings, the contract of insurance should have given the insured warning of that fact. The court correctly instructed the jury in accordance with the principles of law above announced. If the association used the terms "accident" and "accidental means" as synonymous, it cannot now complain that the court gave them the same construction.

It is also contended that the court erred in submitting to the jury the question of total disability. The first ground for the contention is that two claims were presented to the association. The first one was presented on January 19, 1931, which was a few days after the injury was received. In that claim partial disability only was asked for by the plaintiff. The second claim was filed on February 14, 1931, and was for total disability. There is no inconsistency in this respect. As we have already seen, insurance policies are framed by the insurance companies with great care with the view of limiting their liability as much as possible, and usually impose conditions on the insured to be performed in a particular manner. These provisions are strictly construed against the insurer. Here the plaintiff gave notice within the time required by the policy. According to his testimony, when he made the claim for partial disability, he did not know that he was wholly disabled. He did not make any claim for total disability until he had ascertained and believed that he was wholly disabled. It would be at variance to the principles of law and justice

to hold that his honest act in attempting to comply with the terms of the policy by giving notice as required by it should deprive him of what he was honestly and reasonably entitled to under the terms of the policy. *American Life & Accident Association* v. *Walton,* 133 Ark. 348, 202 S. W. 20.

The second ground of their contention is that there is no evidence upon which to base a submission of the question of total disability to the jury. Our decisions support the view that provisions in accident policies for indemnity in the event the insured is totally or wholly disabled do not require that the accident shall render the insured absolutely helpless, but such provisions are construed as meaning such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way. *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Missouri State Life Ins. Co.* v. *Snow, ante* p. 335; *Mutual Benefit Health & Accident Association* v. *Bird, ante* p. 445. As pointed out in the Spencer case, our rule on this subject is in accord with the general trend of authority. It is claimed by counsel for the defendant that other decisions of our court are somewhat at variance with the rule announced in the cases cited. We do not think so, but no useful purpose could be served by pointing out in detail the differences in the cases. Isolated sentences of a particular case may always be used in apparent contradiction of expressions announced in other cases by the same court where the facts are different. Each case must be construed with reference to the particular facts, and all the cases on a given subject must be read in the light of each other. When this is done, it does not appear to us that we have ever varied from the rule announced in the cases above cited. If any mistake was made, it was in the application of the rule itself to the facts of the particular case.

There are certain exceptions to the risk as appears from the constitution of the association. They may be summarized as follows:

"1. Received while under the influence of intoxicating liquor or narcotics;

"2. From fighting or wrestling;

"3. From a hazardous adventure or an altercation;

"4. From intentional injury;

"5. While fighting, resisting arrest, or violating the law."

It is not claimed by the defendant that the plaintiff was under the influence of intoxicating liquor or narcotics as provided in subdivision 1. The contention of the defendant as to the other four subdivisions with regard to whether the injury was received while the plaintiff was fighting or engaged in a hazardous adventure, or from an intentional injury, was submitted to the jury under instructions prepared by the defendant in its own behalf. The jury found that issue in favor of the plaintiff, and no useful purpose could be served by setting out and reviewing the instructions in detail.

It is strongly insisted by the defendant that the court erred in allowing the plaintiff to recover for total disability for 104 consecutive weeks, as provided in the policy, when the trial of the case took place a shorter period of time. Defendant's contention now is that it was entitled to a reduction of the amount recovered to the value at the time the trial was had. We do not agree with defendant in this contention. The defendant denied that it was liable to the plaintiff in any amount under the terms of the policy. It did not offer to pay him the weekly indemnity for total disability as long as such disability should continue. It sought to defeat his claim altogether. The jury only allowed the plaintiff to recover for the period of time provided for in the policy. In railroad damage cases recovery for permanent disability is allowed for a period of time according to the life expectancy of the plaintiff shown by mortality tables prepared by insurance companies. In the case at bar

defendant was only required to pay for the time it agreed to do so in its contract of insurance.

Finally, it is insisted that there is no testimony upon which to base the question of total disability because the physician only gave it as his opinion that the plaintiff was wholly disabled. The plaintiff was engaged in the business of buying and selling secondhand automobiles. In the course of his avocation he was required to repair and put in condition the secondhand cars before he would sell them. He had a small business and performed most of the labor himself. According to a reputable physician, he examined plaintiff in June after the injury and found adhesions. The knife cut caused a serious wound. The plaintiff had a hemorrhage in the pleural cavity between the lungs and the wall. Adhesions caused him to breathe heavily and suffer great pain when he performed manual labor. That condition would prevail until removed by surgical operation, and the physician considered it permanent. By adhesions witness means the pleural sac growing together, which would lessen the ability of the plaintiff to do manual labor. Under these circumstances, the jury had a right to consider the opinion of the physician and to find that the plaintiff was not capable of pursuing his usual avocation within the meaning of the rule announced above.

Other assignments of error are urged for the reversal of the judgment, but we believe that they are fully covered by the principles of law above announced and do not merit a separate discussion.

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