

THE INSOLVENCY OR BANKRUPTCY CLAUSE IN AUTOMOBILE INDEMNITY INSURANCE POLICIES

When insurance companies conceived the idea of writing automobile insurance, they at once realized that the hazard of their undertaking would be measured to a large extent by the assured's willingness to cooperate after an accident had occurred, in order to prevent undue loss. Appreciating that human frailty might have a tendency to cause the policy holder to be neglectful about obtaining witnesses and that he might even collude with third persons so that a recovery could be had against him, they set about to create a contract which would make self-service a motivating influence to the desired end. The indemnity insurance policy was the result.

The design of the original undertaking was strict indemnity. Its purpose was to indemnify the assured against loss actually sustained through the payment of a judgment which had been imposed upon him by law because of the ownership, maintenance or use of the insured automobile. By creating this strict relationship of indemnitor and indemnitee and adding further prerequisites to and qualifications of the right to indemnity, the assured was given every possible incentive to protect himself against claims arising out of accidents.

The legal propriety of such contracts was soon recognized universally by the courts. In an early opinion it was said that "After an accident the automobile owner is not grievously concerned about either legal liability or expenses so long as the insurance company must pay the bills. To protect itself against indifference, improvidence, or even collusion and downright fraud, the insurer is obliged to undertake defense and make its own outlay for expenses. Under these circumstances, the insurer is not put to any election to forego these protective measures or give up writing indemnity policies. Until the state interferes, an indemnity policy may lawfully be written which permits the insurer to guard against the rendition of a judgment, when there was no liability, and against the rendition of a collusive or unjust judgment, when there was liability. An automobile owner may take or leave such a policy; but when such a contract is made, the insurer is not required to give up

the one feature in order to enjoy the benefit of the other."¹

While the insured was legally obliged to satisfy the judgment against him before becoming entitled to "reimbursement,"² in practice it did not work out that way. Under the provisions for investigation of accidents and defense of suits, the carrier always took hold of the case and when it saw that the policyholder had cooperated and that he had not violated any condition of the contract, it either effected a settlement of the injured person's claim or paid the judgment returned at the trial, without first requiring the assured to do so. Thus the company was able to determine whether or not the assured was in fact cooperating and at the same time to cultivate his good will either by settling the claim against him or by the immediate payment of a judgment against which it would have no defense at a later time in a policy suit.

However, the various scriveners who were engaged in the preparation of these policies did not all employ the same terminology although it is apparent from a study of the cases that they all intended to adhere to the same form and legal effect. As a consequence, judicial interpretation has set up two different classes of indemnity contracts and the language employed determines the class in which the particular agreement belongs, as well as the resultant obligations of the company and the assured.

These two classes are now well recognized. Generally, the first class, is the strict indemnity, or indemnity against loss contract, and the second is the indemnity against liability contract. The authorities are not entirely in harmony and some confusion exists as to whether a particular policy should be placed in one or the other category.

The distinction between the two is an important and a vital one. Under the strict indemnity or indemnity against loss contract, the company does not become liable to the assured until after the payment by him of the judgment rendered in favor of the injured person in the damage action.³ Under the indemnity

¹ *Emerson v. Western Auto Ind. Assn.*, 105 Kan. 242, 182 Pac. 647 (1919).

² *Barney v. Preferred Auto. Ins. Exchange*, 240 Mich. 199, 215 N.W. 372 (1927).

³ *Nakonieczny v. Commonwealth Cas. Co.*, 111 N.J.L. 137 (Sup. Ct. 1933);

against liability contract the carrier's liability to the assured attaches as soon as the assured's liability for the accident becomes fixed by an adverse judgment in the damage action. In such cases it is not necessary for him to satisfy the judgment before looking to the company for relief.⁴

In the absence of statutes providing otherwise, indemnity policies whether they are of the strict indemnity or of the indemnity against liability type are regarded merely as contracts between the carrier and the assured. They are designed exclusively for the benefit and protection of the assured and no third person, whether he be judgment creditor or not, has any interest whatever in them. When a person who has been injured as the result of the negligent operation of the insured automobile subsequently recovers a judgment, he is in no better position so far as the insurance is concerned than he was before the trial. He is not a party to the contract and it is not designed for his benefit. If at the time of the accident which results in the injury or thereafter the assured is insolvent or bankrupt and is consequently unable to pay the judgment he cannot sustain a loss as contemplated by the policy and the judgment creditor is remediless.⁵ In the event that the assured becomes insolvent or bank-

North v. North & Son, 93 N.J.L. 438 (E. & A. 1919); Moses v. Travelers Ins. Co., 63 N.J.Eq. 260 (E. & A. 1901); Globe Ind. Co. v. Sulpho-Saline Bath Co., 299 Fed. 219 (C.C.A. 1924); Shea v. U. S. F. & G. Co., 98 Conn. 447, 120 Atl. 286 (1923); London & Lancashire Ins. Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529 (1924); Barney v. Preferred Auto Ins. Exch., 240 Mich. 199, 215 N.W. 372 (1927); Luttrell v. Hardin, 193 N.C. 266, 136 S.E. 726 (1927); Malley v. American Ind. Co., 297 Pa. 216, 146 Atl. 571 (1929); Landaker v. Anderson, 145 Wash. 660, 261 Pac. 388 (1927); Eberliew v. Fid. & Dep. Co., 164 Wis. 242, 159 N.W. 553 (1916).

⁴Nakonieczny v. Commonwealth Cas. Co., 111 N.J.L. 137 (Sup. Ct. 1933); Rose v. American Emp. Liab. Ins. Co., 56 N.J.Eq. 41 (Ch. 1897); Slavens v. Standard Acc. Ind. Co., 27 Fed. (2nd) 859 (C.C.A. 1928); Ravenswood Hospital v. Maryland Cas. Co., 280 Ill. 103, 117 N.E. 485 (1917); U. S. F. & G. Co. v. Williams, 148 Md. 289, 129 Atl. 660 (1925); Hoffman v. Professional Und., 259 Mich. 633, 244 N.W. 184 (1932); Capelle v. U. S. F. & G. Co., 80 N.H. 481, 120 Atl. 556 (1922); Eberhard v. Aetna Life Ins. Co., 235 N.Y.S. 445 (1928); Miller v. U. S. Cas. Co., 241 N.Y.S. 753 (1930); Malley v. Amer. Ind. Co., 297 Pa. 216, 146 Atl. 571 (1929); Fentress v. Rutledge, 140 Va. 685, 125 S.E. 668 (1924).

⁵Allen v. Aetna Life Ins. Co., 145 Fed. 881 (C.C.A. 1906); Shea v. U. S. Fid. & Guar. Co., 98 Conn. 447, 120 Atl. 286 (1923); Cushman v. Carbondale Fuel Co., 122 Ia. 656, 98 N.W. 509 (1904); Transylvania Cas. Co. v. Williams, 209 Ky. 626, 273 S.W. 536 (1925); Emerson v. Western Auto Ind. Co., 105 Kan. 242, 182 Pac. 647 (1919); New York Ind. Co. v. Emen, 221 Ky. 114, 298 S.W. 182 (1927); O'Connell v. N. Y., etc. Ry. Co., 187 Mass. 272, 72

rupt the creditor must file his claim like any other claimant and accept his pro rata share of the assets of the bankrupt. If no dividend is declared, he receives nothing. When a dividend is declared the trustee or receiver acquires a cause of action under the indemnity contract, but the recovery is limited to the loss sustained, that is, the dividend paid.⁶

Many judgment creditors finding themselves faced with financially worthless assureds attempted through the medium of various forms of action to satisfy their judgments out of the policy. They were, with rare exceptions,⁷ unsuccessful, because the status of the company and the assured under the contract is firmly established and because the lack of privity of the third person was so generally recognized.

Much hue and cry⁸ was raised against what was conceived to be the injustice of the situation, but the courts, although agreeing in many instances, held to the law and declared themselves powerless to act in the absence of an enabling statute.

The result of this agitation was the adoption by many states of the statutory requirement that automobile insurance policies must contain the provision now commonly called the "bankruptcy or insolvency clause". From a practical standpoint, the effect of this legislative mandate was to render the distinction between policies of strict indemnity and indemnity against liability almost academic because thereafter policy suits could be brought directly against the company by the injured person after judgment in the damage action and because in such actions the right of recovery in the event of the assured's bankruptcy or

N.E. 979 (1905); *Poe v. Phila. Cas. Co.*, 118 Md. 347, 84 Atl. 476 (1912); *U. S. Fid. & Guar. Co. v. Williams*, 148 Md. 289, 129 Atl. 660 (1925); *Combs v. Hunt*, 140 Va. 627, 125 S.E. 661 (1924); *Moses v. Travelers' Ins. Co.*, 63 N.J.Eq. 260 (E. & A. 1901); *Amer. Auto Ins. Co. v. Cone*, 257 S.W. 961 (Tex. 1923); *Luger v. Windell*, 116 Wash. 375, 199 Pac. 760 (1921).

⁶ *Moses v. Travelers' Ins. Co.*, 63 N.J.Eq. 260 (E. & A. 1901).

⁷ *Employers Liab. Assurance Corp. v. Bodron*, 65 Fed. (2nd) 539 (C.C.A. 1933); *Blanton v. Kansas City Cotton Mills Co.*, 103 Kan. 118, 172 Pac. 987 (1918); *Griffin v. General Cas. & Surety Co.*, 231 Mich. 642, 204 N.W. 727 (1925); *Reilly v. Linden*, 151 Minn. 1, 186 N.W. 121 (1921); *Anoka Lumber Co. v. Fid. & Cas. Co.*, 63 Minn. 286, 65 N.W. 353 (1895); *Patterson v. Adan*, 119 Minn. 308, 138 N.W. 281 (1912); *Graff v. Continental Auto Ins. Und.*, 35 S.W. (2nd) 926 (1931); *Elliot v. Life Ins. Co.*, 100 Neb. 833, 161 N.W. 579 (1917); *Landaker v. Anderson*, 145 Wash. 660, 261 Pac. 388 (1927).

⁸ *Staggs v. Gotham Min. & Mill Co.*, 208 Mo. App. 596, 235 S.W. 511 (1921).

insolvency is not at all dependent upon the nature of the indemnity contract.

However, irrespective of the inclusion of the insolvency or bankruptcy clause, the rights, duties and obligations of the assured under the policy in the absence of payment of the damage action judgment still depend upon the answer to the inquiry as to whether or not the policy is one of strict indemnity or indemnity against liability.

This insolvency or bankruptcy clause ordinarily takes the following or a similar form:

"Insolvency or bankruptcy of the assured hereunder shall not release the company from the payment of damages for injuries sustained or loss occasioned during the term of this policy, and in case execution is returned unsatisfied because of such insolvency or bankruptcy, in an action brought by the injured, or his or her personal representative in case death results from the accident, then an action may be maintained by the injured person, or his or her personal representative, against the company under the terms of the policy for the amount of the judgment in said action, not exceeding the limits of the company's liability as specified herein."⁹

The statutory requirement was not complied with by insurance companies without a struggle. The acts creating the necessity for such a provision were attacked immediately as unconstitutional. The principal ground urged was that they deprived the insurance carrier of its property without due process of

⁹ States having such statutes are:

Arkansas—P.L. 1927, Act. 196, §1.
 California—Stats. 1919, p. 776.
 Indiana—P.L. 1931, Chap. 180.
 Louisiana—P.L. 1918, Act. 253, as amended P.L. 1930, Act. 55.
 Maine—R.S. 1930, Chap. 60, §178
 (Provision does not have to be in policy).
 Maryland—Code Art. 48A, §54.
 Michigan—§12460, Ins. Law.

Missouri—Rev. Sts. 1929, §5898-99.
 Nebraska—Sts. 44-607.
 New Jersey—P.L. 1924, Chap. 153, p. 354.
 New York—§109, Ins. Law.
 Oregon—P.L. 1927, p. 263.
 Pennsylvania—P.L. 1933, p. 987.
 S. Carolina—(Commissioner's Rule).
 Vermont—P.L. 7085-7093.
 Virginia—Ins. Laws, §4326a.
 Wisconsin—Sts. 204, 30.

States not having such a statute still adhere to the principles stated above.

law. However this objection was soon disposed of by the United States Supreme Court where it was declared that the business of insurance is of such a peculiar character and is so intimately connected with the common good that the state creating insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs so far at least as to prevent them from committing wrongs or injustices in the exercise of their corporate functions. It was further said that such regulation would seem to be peculiarly applicable to that form of insurance which has come into very wide use of late years, that of indemnifying the owners of vehicles against losses due to the negligence of such owners or of their servants in the operation and use of vehicles and that, having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity, it was reasonable for the state, in the interest of the public, whose lives and limbs are exposed, to require that the owner of the contract indemnifying him against any recovery should stipulate with the insurance company that the indemnity by which he saves himself should inure to the benefit of the person who is thereafter injured.¹⁰

Such legislation does not in any way affect the right of freedom of contract or the right to acquire and possess property, since it is prospective in its scope. The insurance contract is the subject of voluntary negotiation between the parties. An insurance carrier is not forced to accept premiums or to issue policies. It may do so or not as it chooses, but if it chooses to accept the premiums the policies issued therefor must conform with reasonable regulatory requirements. With the single exception of the insolvency clause requirement and its accompanying incidents the insured and the insurer are free to make such contracts as they wish, and the scope and validity of such con-

¹⁰ *Merchants Mutual Auto. Lia. Ins. Co. v. Smart*, 277 U.S. 126, 69 L. ed. 538 (U. S. Sup. Ct. 1924), *aff'g*, 230 N.Y. 577, 142 N.E. 290; *Federal Auto. Ins. Co. v. Abrams*, 217 Ala. 539, 117 So. 85 (1928); *Lorando v. Gethro*, 228 Mass. 181, 117 N.E. 185 (1927) (slightly different statute); *O'Connell v. New Jersey Fid. & P. G. Ins. Co.*, 193 N.Y.S. 911, *aff'd*, 235 N.Y. 583, 139 N.E. 744 (1923); *Stacey v. Fid. & Cas. Co.*, 114 Ohio St. 633, 151 N.E. 718, 152 N.E. 794 (1926).

tracts are left as before, unaffected by the statute.¹¹

The effect of the statute has been expressed in many ways by different courts. It enables the person suffering the initial damages, out of which grows the loss to the assured, to acquire a lien against the right to damages or indemnity arising under the policy and to enforce it in his own name. It also serves the purpose of having the insurer agree by virtue of the issuance of a policy of liability insurance that the obligation to the assured shall be hypothecated for the benefit of a third person to the extent of a judgment recovered by such third person against the assured for an injury covered by the policy.¹² It confers upon the person injured through those acts of the assured a certain beneficial interest in the policy.¹³ It gives to the injured claimant a cause of action against the insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied;¹⁴ it subrogates the injured party to the rights of the assured upon the contingencies named; and it gives the injured party all the rights which the insured would have had if he paid the judgment or if bankruptcy had not intervened.¹⁵

The legal propriety and general effect of the acts are now generally recognized. So much so, that the insolvency or bankruptcy clause is now in almost universal use by insurance companies regardless of the existence of the statute. However, its absence from an automobile policy in a jurisdiction where the statute applies presents no defense to an action brought thereunder by the injured third party. Since the law requires its inclusion, it is read into the contract, which is then construed as though it were incorporated therein originally.¹⁶ So, too, if the policy contains provisions which are inconsistent with the

¹¹ *Lorando v. Gethro*, 228 Mass. 181, 117 N.E. 185 (1927).

¹² *George v. Employers Liab. Assur. Corp.*, 219 Ala. 307, 122 So. 175 (1929).

¹³ *Globe Ind. Co. v. Martin*, 214 Ala. 646, 108 So. 761 (1926).

¹⁴ *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 160 N.E. 367 (1928); *N. J. Fid. & Plate Glass Co. v. Love*, 43 Fed. (2nd) 82 (C.C.A. 1930); *Royal Ind. Co. v. Morris*, 37 Fed. (2nd) 90 (C.C.A. 1929); *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 Pac. (2nd) 999 (1932).

¹⁵ *New Jersey F. & P. G. Co. v. Clark*, 33 Fed. (2nd) 235 (C.C.A. 1929); *Miller v. Metropolitan Cas. Co.*, 50 R.I. 166, 146 Atl. 412 (1929).

¹⁶ *Perlman v. Independence Ind. Co.*, 235 N.Y.S. 194 (1929); *Meehan v. Commercial Cas. Co.*, 166 S.C. 496, 165 S.E. 194 (1932).

insolvency clause or with the statute requiring it, such provisions are void. Consequently a "no action" stipulation is a nullity so far as the third person judgment creditor is concerned.¹⁷ Also a policy which by its terms is one of strict indemnity is rendered one of indemnity against liability and the assured is deemed to have suffered loss as soon as the adverse judgment in the damage action is entered.¹⁸

While the insolvency or bankruptcy of the assured is spoken of, the application of the statute and consequent clause is not limited to the named assured. Thus when a person is operating the insured vehicle under circumstances which would bring him within the coverage extended by the "omnibus clause," his insolvency or bankruptcy would enable the third person to reach the policy benefits.¹⁹

The authorities are generally agreed that under the ordinary insolvency provision the injured person's right of action against the carrier does not become vested until certain conditions precedent are complied with. First he must obtain a judgment in the damage action and second, a writ of execution must have been issued on the judgment and returned unsatisfied.²⁰

The term insolvency as here employed means general financial irresponsibility;²¹ general inability to answer pecuniary

¹⁷ West v. MacMillan, 152 Atl. 104 (Pa. 1930); A. Rose & Son v. Zurich Genl. Acc. & Lia. Co., 296 Pa. 206, 145 Atl. 813 (1929); Schmidt v. Automobile Underwriters, 244 N.W. 729 (Ia. 1932); Weiss v. N. J. F. & P. G. Co., 228 N.Y.S. 314 (1928).

¹⁸ Union Ind. Co. v. Small, 154 Va. 458, 153 S.E. 685 (1930); Meehan v. Commercial Cas. Co., 166 S.C. 496, 165 S.E. 194 (1932). Rhode Island *contra* see: Anderson v. Amer. Auto. Ins. Co., 50 R.I. 502, 149 Atl. 797 (1930); Degnan v. Rhode Island Mut. Lia. Co., 51 R.I. 366, 154 Atl. 912 (1931).

¹⁹ Maryland Cas. Co. v. Ronan, 37 Fed. (2nd) 449 (C.C.A. 1930); Ocean Acc. Co. v. Schroeder, 48 Fed. (2nd) 727 (C.C.A. 1931); Metropolitan Cas. Co. v. Blue, 219 Ala. 37, 121 So. 25 (1929); Fagiani v. Genl. Acc. Ins. Co., 105 Cal. App. 274, 287 Pac. 377 (1930); Lahti v. Southwestern Auto Ins. Co., 109 Cal. App. 274, 292 Pac. 527 (1930); Kautz v. Zurich, etc. Ins. Co., 212 Cal. App. 576, 300 Pac. 34 (1931); Dickinson v. Maryland Cas. Co., 101 Conn. 36, 125 Atl. 866 (1924); Ocean Acc. v. Schmidt, 46 Fed. (2nd) 269 (C.C.A. 1931).

²⁰ N. J. Fid. & P. G. Co. v. Clark, 33 Fed. (2nd) 235 (C.C.A. 1929); Suydam v. Public Ind. Co., 10 N.J.Misc. 868 (Sup. Ct. 1932); Damiano v. Damiano, 6 N.J.Misc. 849 (Cir. Ct. 1928); Edwards v. Fid. & Cas. Co., 11 La. App. 176, 123 So. 162 (1929); Geitner v. U. S. Fid. & G. Co., 251 N.Y. 205, 167 N.E. 222 (1929); Indemnity Ins. Co. v. Pitts, 38 S.W. (2nd) 883 (Tex. 1931); Royal Ind. Co. v. Watson, 61 Fed. 2nd 614 (C.C.A. 1932).

²¹ Miller v. Union Ind. Co., 204 N.Y.S. 730 (1924); Metropolitan Cas. Co. v. Blue, 219 Ala. 37, 121 So. 25 (1929).

engagements.²² Its meaning is not limited to cases where the insolvency has been declared judicially.²³

The return of a writ of execution unsatisfied is regarded as *prima facie* evidence of the assured's insolvency and as sufficient to cast upon the insurance company the burden of proving otherwise,²⁴ although there is some authority to the contrary.²⁵

This rule has given rise to much loose and unjustifiable practice by judgment creditors. In order to make out the *prima facie* case they simply have the writ issued to the Sheriff or to whatever officer is entrusted with the enforcement thereof and then instruct him to return it unsatisfied without making a levy thereunder. The writ with its notation of "unsatisfied" is received in evidence in the policy suit and the *prima facie* case thus established. This practice should not be sanctioned by the courts since the issuance and return of the writ are meaningless gestures and consequently furnish no proof of financial irresponsibility. When ever such a situation is developed in the plaintiff's case through cross-examination or otherwise, it should be declared that no *prima facie* case has been made out and a motion for dismissal or nonsuit on that ground should be granted.

In this connection it should be kept in mind that the policy language usually is that whenever a writ of execution is returned unsatisfied "because of such insolvency or bankruptcy" an action may be maintained against the carrier. The only conclusion that can be drawn therefrom is that there must be a

²² Horn v. Commonwealth Cas. Co., 105 N.J.L. 616 (E. & A. 1929).

²³ Fried v. London Guarantee, etc. Co., 242 N.Y.S. 60 (1930); Giroud v. N. J. Mfrs. Cas. Co., 106 N.J.L. 238 (E. & A. 1930); Stovall v. N. Y. Ind. Co., 157 Tenn. 301, 8 S.W. (2nd) 473 (1928); Francis v. London Guarantee, etc. Co., 100 Vt. 425, 138 Atl. 780 (1927); Maryland Cas. Co. v. Hoge, 153 Va. 204, 149 S.E. 448 (1929); Odden v. Union Ind. Co., 156 Wash. 10, 286 Pac. 59 (1930); Smith v. U. S. Fid. & G. Co., 109 W. Va. 280, 153 S.E. 584 (1930); Weiss v. New Jersey F. & P. G. Co., 228 N.Y.S. 314 (1928); Gullo v. Commercial Cas. Co., 235 N.Y.S. 584 (1929).

²⁴ Horn v. Commercial Cas. Co., 105 N.J.L. 616 (E. & A. 1929); Saxon v. U. S. Fid. & Guar. Co., 107 N.J.L. 266 (E. & A. 1931); Gee v. Independent, etc., Ins. Co., 109 N.J.L. 563 (E. & A. 1932); McBride v. New Amsterdam Cas. Co., 12 N.J.Misc. 617 (Sup. Ct. 1934); Jusick v. Commercial Cas. Co., 11 N.J.Misc. 869 (Sup. Ct. 1933); Weiss v. N. J. Fid. & P. G. Co., 228 N.Y.S. 314 (1928).

²⁵ U. S. Fid. & G. Co. v. Williams, 140 Md. 289, 129 Atl. 660 (1925); Eagle Ind. Co. v. Diehl, 27 Fed. (2nd) 76 (C.C.A. 1928).

causal relation between the return of the writ unsatisfied and the insolvency or bankruptcy.

A perusal of the cases which propound this *prima facie* case rule, will indicate that the record showed the return of the unsatisfied writ and nothing more. There is nothing to show that an inquiry was made at the trial as to the facts surrounding the issuance of the writ, whether a levy was made, or whether the return was made immediately at the instance of plaintiff's counsel. While it may be that the return of the writ unsatisfied is *prima facie* evidence of insolvency when it stands alone and unquestioned, such should not be the situation when it appears in the plaintiff's case that he just went through the meaningless motions in order to bring himself within the policy.

The practice of ordering the writ returned "unsatisfied" or "nulla bona" without a levy is not unjustifiable in all cases. For instance if a judgment creditor has made an unsuccessful effort to discover property upon which execution may be levied or where he has communicated with the assured demanding payment of the judgment and has been advised of his inability to pay, it should be permissible. However, these matters should be proved in the policy suit in aid of the unsatisfied execution.²⁶

In California the statute requires the policy to contain a stipulation that the insolvency or bankruptcy of the insured shall not release the insurer "and" that in case judgment shall be secured against the assured an action may be brought against the insurer.²⁷ In construing this act the courts declared that it covered two independent subjects connected by the conjunction "and" both of which must be included in the policy and that therefore as soon as a judgment is obtained by an injured person he may proceed under the policy without either alleging or proving the assured's bankruptcy or insolvency.²⁸

Obviously this is a strained construction. A reading of the act in the light of the cases on the subject generally and the con-

²⁶ *Perlman v. Independence Ind. Co.*, 235 N.Y.S. 194 (1929); *Gullo v. Commercial Cas. Co.*, 235 N.Y.S. 584 (1929); *Metropolitan Cas. Co. v. Blue*, 219 Ala. 37, 121 So. 25 (1929).

²⁷ Statutes 1919, p. 776.

²⁸ *Langley v. Zurich Genl. Acc. & Lia. Co.*, 97 Cal. App. 434, 275 Pac. 963 (1929); *Pigg v. International Ind. Co.*, 86 Cal. App. 671, 261 Pac. 486 (1927).

dition sought to be remedied, makes it plain that the word "and" was never intended to separate two independent stipulations. The second phrase was merely intended to render the first more specific and understandable and to indicate the circumstances under which the action would be proper. The probability is that the intent of the Legislature was to set up two prerequisites: (1) judgment in the damage action and (2) insolvency of the assured.

The result of this harsh rule is that a statement in such a policy that "an action may be maintained" thereon "in case judgment shall be secured, but, only in case the insured is insolvent," is void.²⁹ Likewise a requirement that an execution be returned unsatisfied as a condition precedent to the policy suit is void.³⁰

Kentucky has gone to the other extreme. There even though the policy did not require the return of a writ unsatisfied, but simply conferred a right of action on the judgment creditor in the event of insolvency or bankruptcy, it was held that the creditor could not maintain his suit in the absence of proof of the insolvency by having an execution issued and returned "no property found".³¹

In Louisiana the statute makes the unpaid judgment *prima facie* evidence of insolvency; consequently no further proof is required.³²

In addition to the insolvency provision these policies usually provide that no action shall be brought thereon until the amount of the claim or loss shall have been fixed either by final judgment or by agreement. One jurisdiction has adopted the rule that the judgment in the damage action does not become final until the expiration of the time for appeal,³³ and that the judgment is not final where an appeal is pending.³⁴ Policy suits in such instances are accordingly premature. Another says that the cause of action accrues as soon as the right to execute on

²⁹ Marple v. American Auto Ins. Co., 82 Cal. App. 137, 255 Pac. 260 (1927).

³⁰ Malmgreen v. Southwestern Auto Ins. Co., 201 Cal. 29, 255 Pac. 512 (1927).

³¹ New York Indem. Co. v. Ewen, 221 Ky. 114 (1927).

³² Rambin v. Southern Sales Co., 145 So. 46 (La. 1932).

³³ Zurich General Acc. & Ind. Co. v. Langley, 97 Cal. App. 434, 275 Pac. 963 (1929).

³⁴ Jennings v. Ward, 114 Cal. App. 536, 300 Pac. 129 (1931).

the judgment arises and an execution is returned unsatisfied, notwithstanding the pendency of an appeal.³⁵ Still another declares that where the Execution Act requires the posting of a bond to secure the payment of the judgment, in order to stay execution during the pendency of an appeal, failure to post such bond justifies the institution of the policy suit.³⁶

The California rule, which is the first referred to, is the one extreme and that of Louisiana, which is the second, is the other. It does seem that a fair middle course should be adopted. The one which suggests itself is that for purposes of the action against the carrier the judgment should be considered final as soon as entered, unless an appeal is taken. This appeal should act as a stay until the determination of the appeal. The judgment creditor should not be required to wait until the expiration of the time for appeal before suing on the insurance contract, but reason and right dictate that if he does so proceed and an appeal is then taken, his suit should be stayed until the disposition of the appeal. However, in such cases to secure the stay the insurer ought to be required to post a bond to the extent of its policy limit or to pay the limit into court.

The existence of an insolvency clause in an automobile indemnity policy, voluntarily carried, does not deprive the carrier of any defense that it may have against the assured for breach of conditions, either precedent or subsequent, contained therein. The judgment obtained against the assured in the damage action is *res adjudicata* against the company only where there is no defense available under the policy which would bar recovery thereon by the assured.

It will be observed that the statutes and the various policy provisions generally say that in the event of insolvency or bankruptcy the judgment creditor may maintain an action against the company "under the terms and conditions of the policy".

Because of this language, the great weight of authority is to the effect that the judgment creditor stands in the shoes of the assured, that his rights can rise no higher than those of the assured and that any defense that would be available against

³⁵ Edwards v. Fid. & Gas Co., 11 La. App. 176, 123 So. 162 (1929).

³⁶ McCusker v. Commonwealth Cas. Co., 106 N.J.L. 116 (E. & A. 1930).

the assured is available against him. The effect of the clause is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but neither is it greater. Both the assured and the claimant must abide by the conditions of the contract.³⁷

No independent contract between the company and the injured person is thereby created. It would be absurd to hold that the injured person who is not a party to the contract acquired rights thereunder which are superior to those of the assured and that the insurer is liable to him even though it is not liable to the person with whom the contract was made.³⁸

One court in defining the rights of the third person declared that upon the contingencies named his rights became vested in the nature of an assignment of a hypothecated claim, subject to the rights of the insurer as agreed in the policy contract.³⁹

It has been suggested that this rule of derivative liability opens the door to collusion between the company and the assured for the purpose of defeating the third persons' claim. Such an argument has been rejected because it opens the same door to the claimant and the assured for the purpose of allowing an unjustified recovery, and because the courts are not at liberty to ignore the plain terms and unambiguous language of the con-

³⁷ *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 160 N.E. 367 (1928); *N. J. Fid. & P. G. Co. v. Love*, 43 Fed. (2nd) 82 (C.C.A. 1930); *Georgia Cas. Co. v. Boyd*, 34 Fed. (2nd) 116 (C.C.A. 1929); *Royal Ind. Co. v. Morris*, 37 Fed. (2nd) 90 (C.C.A. 1929); *Royal Ind. Co. v. Watson*, 61 Fed. (2nd) 614 (C.C.A. 1932); *Schoenfeld v. N. J. Fid. & P. G. Co.*, 197 N.Y.S. 606 (1922); *Guerin v. Ind. Ins. Co.*, 107 Conn. 647, 142 Atl. 268 (1928); *Miller v. Metropolitan Cas. Co.*, 50 R.I. 166, 146 Atl. 412 (1929); *Neilsen v. Amer. Mut. Lia. Ins. Co.*, 111 N.J.L. 345 (E. & A. 1933); *Osborn v. New Amsterdam Cas. Co.*, 111 N.J.L. 358 (E. & A. 1933); *Suydam v. Public Ind. Co.*, 10 N.J.Misc. 868 (Sup. Ct. 1932); *New Amsterdam Cas. Co. v. Mandell*, 115 N.J.Eq. 198 (Ch. 1934); *Damiano v. Damiano*, 6 N.J.Misc. 849 (Cir. Ct. 1928); *Raymond v. Great American Ind. Co.*, 163 Atl. 713 (N.H. 1932); *Snyder v. National Union Ind. Co.*, 65 Fed. (2nd) 844 (C.C.A. 1933); *Fanslau v. Rogan*, 215 N.W. 589 (Wis. 1927); *Ducommun v. Strong*, 212 N.W. 289 (Wis. 1927); *Marcus v. U. S. Cas. Co.*, 249 N.Y. 21, 162 N.E. 571 (1928); *Rohlf v. Great Amer. Mut. Ind. Co.*, 27 Ohio App. 208, 161 N.E. 232 (1927); *Adams v. Mary. Cas. Co.*, 139 So. 453 (Miss. 1932); *Drewek v. Milwaukee Auto. Ins. Co.*, 240 N.W. 881 (Wis. 1932).

³⁸ *Peeler v. U. S. Casualty Co.*, 197 N.C. 286, 148 S.E. 261 (1929)

³⁹ *George v. Employers Lia. Assur. Corp.*, 219 Ala. 307, 122 So. 175 (1929)

tracting parties as they appear in the policy.⁴⁰

The entire effect of the provision may be summed up as follows:

After judgment in the damage action, the judgment creditor steps into the assured's shoes and is subrogated to his position; that position is precisely the same as the assured would have found himself in had he paid the judgment and sought reimbursement from the carrier. It does not make the judgment in the damage action *res adjudicata* against the company on the issue of its liability under the policy but leaves that issue to be determined by the sufficiency of the assured's compliance with policy conditions; it does not impose a new basis of indemnity not contracted for by the insurer; it leaves the ultimate recovery by the injured person subject to the contractual rights created by the policy.⁴¹

There are many cases reported involving the specific application of the general rule. Where the policy requires immediate notice of the accident, failure on the part of the assured to do so will defeat the injured person's recovery against the carrier.⁴² Failure of the assured to forward the suit papers to the company as required, likewise bars his recovery.⁴³ So, too, with refusal of assured to cooperate in defense of the damage claim.⁴⁴

⁴⁰ N. J. Fid. & P. G. Ins. Co. v. Love, 43 Fed. 2d 82 (C.C.A. 1930); Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 Pac. 2d 999 (1932).

⁴¹ Miller v. Metropolitan Cas. Co., 50 R.I. 166, 146 Atl. 412 (1929); Anderson v. Amer. Auto. Ins. Co., 50 R.I. 502, 149 Atl. 797 (1930); Lundblad v. New Amsterdam Cas. Co., 163 N.E. 874 (Mass.) (1928).

⁴² Clements v. Preferred Acc. Ins. Co., 41 Fed. (2nd) 470 (C.C.A. 1930); Metro. Cas. Co. v. Calthurst, 36 Fed. (2nd) 559 (C.C.A. 1930); N. J. Fid. & P. G. v. Love, 43 Fed. (2nd) 82 (C.C.A. 1930); Royal Ind. Co. v. Watson, 61 Fed. (2nd) 614 (C.C.A. 1932); Royal Ind. Co. v. Morris, 37 Fed. (2nd) 90 (C.C.A. 1930); Ind. Ins. Co. v. Forrest, 44 Fed. (2nd) 465 (C.C.A. 1930); Guerin v. Indem. Co., 107 Conn. 649, 142 Atl. 268 (1928); Suydam v. Public Ind. Co., 10 N.J.Misc. 868 (Sup. Ct. 1932); Knabe v. Indep. Ind. Co., 7 N.J.Misc. 93 (Sup. Ct. 1929); Farrell v. Merchants Mut. Auto. Lia. Ins. Co., 196 N.Y.S. 383 (1922); Miller v. Union Indemn. Co., 204 N.Y.S. 730 (1924); Gullo v. Comm. Cas. Co., 235 N.Y.S. 584 (1929); Weiss v. N. J. Fid. & P. G. Co., 228 N.Y.S. 314 (1928); Weatherwax v. Royal Ind. Co., 250 N.Y. 281, 165 N.E. 293 (1929); Peeler v. U. S. Cas. Co., 197 N.C. 286, 148 S.E. 261 (1929); Smith v. U. S. Fid. & G. Co., 109 W. Va. 280, 153 S.E. 584 (1930); Bachhuber v. Boosalis, 200 Wis. 574, 229 N.W. 117 (1930); Columbia Cas. Co. v. Ingram, 154 Md. 360, 140 Atl. 601 (1928).

⁴³ N. J. Fid. & P. G. Co. v. Love, 43 Fed. (2nd) 82 (C.C.A. 1930).

⁴⁴ Bradford v. Commonwealth Cas. Co., 10 N.J.Misc. 301 (Sup. Ct. 1932); Hutt v. Travelers Ins. Co., 110 N.J.L. 57 (E. & A. 1933); Royal Ind. Co. v. Morris, 37 Fed. (2nd) 90 (C.C.A. 1930); U. S. F. & G. v. Wyer, 60 Fed. (2nd)

Carriage of passengers for hire, where specifically excluded, not only defeats the claim of those persons so carried,⁴⁵ but also of any person injured as a result of the operation of the vehicle.⁴⁶ Where the operation is without the permission necessary to bring it within the "omnibus" clause,⁴⁷ or where the operation is beyond the scope or limit of the permission⁴⁸ the carrier cannot be made to pay. If the policy excludes or excepts or prohibits towing,⁴⁹ rental of insured vehicle,⁵⁰ use in "auto tours,"⁵¹ operation under the age fixed by law or a minimum age set forth herein,⁵² or if at the time of the accident the auto-

856 (C.C.A. 1932); *Rochon v. Preferred Accident Ins. Co.*, 114 Conn. 313, 158 Atl. 815 (1932); *Glade v. General Mut. Ins. Co.*, 246 N.W. 794 (Iowa 1933); *Medico v. Emp. Liab. Ins. Co.*, 172 Atl. 1 (Maine 1934); *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 160 N.E. 367 (1928); *Schoenfeld v. N. J. F. & P. G. Co.*, 197 N.Y.S. 606 (1922); *Conroy v. Com. Cas. Co.*, 292 Pa. 219, 140 Atl. 905 (1928); *Ind. Ins. Co. v. Davis*, 150 Va. 778, 143 S.E. 328 (1928).

⁴⁵ *Neilsen v. Amer. Mut. Lia. Ins. Co.*, et al., 111 N.J.L. 345 (E. & A. 1933); *Raymond v. Great Amer. Ind. Co.*, 163 Atl. 713 (N.H. 1933); *Beatty v. Employers Lia., etc., Corp.*, 168 Atl. 919 (Vt. 1933); *Cartos v. Hartford Acc. & Ind. Co.*, 169 S.E. 594 (Va. 1933); *Goff v. Benson*, 190 N.E. 16 (Mass. 1934); *Bryson v. International Indem. Co.*, 88 Cal. App. 100, 262 Pac. 790 (1928).

⁴⁶ *Neilsen v. Amer. Mut. Lia. Ins. Co.*, 111 N.J.L. 345 (E. & A. 1933).

⁴⁷ *Sauriolle v. O'Gorman*, 163 Atl. 717 (N.H. 1933); *Snyder v. Natl. Union Ind. Co.*, 65 Fed. (2nd) 844 (C.C.A. 1933); *Kazdan v. Stein*, 118 Ohio St. 217, 160 N.E. 704, *aff'd.* 160 N.E. 506 (1927); *Stovall v. N. Y. Ind. Co.*, 8 S.W. (2nd) 473 (1928); *Trotter v. Union Ind. Co.*, 33 Fed. (2nd) 363, *aff'd.* 35 Fed. (2nd) 104 (1929); *Wigington v. Ocean Acc. & Guar. Corp.*, 231 N.W. 770 (Neb. 1930); *Giroud v. N. J. Mfrs. Cas. Co.*, 106 N.J.L. 238 (E. & A. 1930); *Fagg v. Mass. Bonding & Ins. Co.*, 19 Pac. (2nd) 413 (1933); *Jones v. Gella*, 187 N.E. 294 (Mass. 1933); *Rhodes v. Ocean Acc. Corp.*, 266 N.Y.S. 681 (1933); *Morin v. Travelers' Ins. Co.*, 85 N.H. 471, 160 Atl. 482 (1932); *Ind. Ins. Co. v. Jordan*, 164 S.E. 539 (Va. 1932); *Globe Ind. Co. v. Nodlere*, 69 Fed. (2nd) 955 (C.C.A. 1934); *Jetton v. Polk*, 68 S.W. (2nd) 127 (Tenn. 1934).

⁴⁸ *Sauriolle v. O'Gorman*, 163 Atl. 717 (N.H. 1933); *Nicholas v. Independence Ind. Co.*, 11 N.J.Misc. 344 (Sup. Ct. 1933); *Denny v. Royal Ind. Co.*, 159 N.E. 107 (Ohio 1927).

⁴⁹ *Maryland Cas. Co. v. Adams*, 131 So. 544, *aff'd.* 139 So. 453 (Miss. 1932); *Coolidge v. Standard Acc. Ins. Co.*, 300 Pac. 885 (Cal. 1931).

⁵⁰ *Koury v. Providence-Washington Ins. Co.*, 50 R.I. 118, 145 Atl. 448 (1929); *O'Donnell v. New Amsterdam Cas. Co.*, 50 R.I. 269, 146 Atl. 410 (1929).

⁵¹ *Davis v. Cal. Highway Ind. Exch.*, 5 Pac. (2nd) 447 (Cal. 1931).

⁵² *Sears v. Illinois Ind. Co.*, 9 Pac. (2nd) 245 (Cal. 1932); *Gerka v. Fid. & Cal. Co.*, 231 N.Y.S. 319 (1928); *Hudak v. Union Ind. Co.*, 108 Conn. 598, 143 Atl. 885 (1928); *Wagoner v. Fid. & Cas. Co.*, 213 N.Y.S. 188, *aff'd.* 253 N.Y. 608, 171 N.E. 803 (1930); *Jones v. Amer. Emp. Ins. Co.*, 252 N.Y.S. 250 (1931); *Fidelity & Guaranty Co. v. Guenther*, 281 U.S. 34 (C.C.A. 1930); *Maryland Cas. Co. v. Friedman*, 45 Fed. (2nd) 369 (C.C.A. 1930); *Morrison v. Royal Ind. Co.*, 167 N.Y.S. 732 (1917); *Letson v. Sun Indemnity Co.*, 264 N.Y.S. 519 (1933); *Weiss v. Preferred Acc. Ins. Co.*, 268 N.Y.S. 275 (1933); *Cullen v. Travelers' Ins. Co.*, 253 N.W. 382 (Wis. 1934); *U. S. Fid. & Guar.*

mobile was being used for a purpose other than that specified in the policy,⁵³ the judgment creditor cannot recover.

A policy issued to a partnership does not protect an individual partner for a tort committed in his private affairs,⁵⁴ and when it is issued to one partnership it does not cover another which is composed of the same members and one other although the vehicle mentioned therein is being used.⁵⁵

When an assured warrants that he is the owner of the insured automobile and it appears after an accident that he is not, the injured person cannot collect under the policy a judgment recovered either against the assured or against one operating with his permission,⁵⁶ nor can the company be held where the policy was procured by material misrepresentations or false warranties.⁵⁷

The general principle which recognizes the right of the insurer to decline to pay the claims or judgments of injured persons where the assured has defaulted under his agreement, is more favorable in theory than in practice. The practical difficulty arises from the fact that oftentimes the ground for the disclaimer of liability comes from the assured in the form of a written statement or a conversation with an adjuster following an accident. This statement or conversation furnishes the only evidence of the breach of conditions. For example an assured

Co. v. Guenther, 281 U.S. 34, 74 L. ed. 683 (C.C.A. 1930); Floyd v. Consolidated Ind. Co., 261 N.Y.S. 61 (1932).

⁵³ Drewek v. Milwaukee Auto. Ins. Co., 240 N.W. 881 (Wis. 1932); Peterson v. Universal Auto. Ins. Co., 20 Pac. (2nd) 1016 (Idaho 1933); Raymond v. Great Amer. Ind. Co., 163 Atl. 713 (N.H. 1933); Nicholas v. Indep. Ind. Co., 11 N.J.Misc. 344 (Sup. Ct. 1933); Snyder v. Nat'l. Union Ind. Co., 65 Fed. (2nd) 844 (C.C.A. 1933); Basta v. U. S. Fid. & G. Co., 107 Conn. 446, 140 Atl. 816 (1928); Johnston v. New Amsterdam Cas. Co., 200 N.C. 763, 158 S.E. 473 (1931); General Tire Co. v. Standard Acc. Ins. Co., 65 Fed. (2nd) 237 (C.C.A. 1933); Continental Cas. Co. v. Carver, 14 Pac. (2nd) 181; Heritier v. Century Ind. Co., 109 N.J.L. 313 (E. & A. 1932); Bohnsack v. Huson-Ziegler Co., 248 N.W. 764 (Wis. 1933); Loughran v. Rea, 250 N.W. 389 (Wis. 1933); Matthews v. Bloomfield, 246 Mass. 510, 141 N.E. 494 (1923).

⁵⁴ Jacobs v. Maryland Cas. Co., 191 N.Y.S. 692 (1921); Geitner v. U. S. Fid. & G. Co., 251 N.Y. 205, 167 N.E. 222 (1929); Maryland Cas. Co. v. Cole, 158 S.E. 873 (Va. 1931).

⁵⁵ Hartigan v. Cas. Co. of Amer., 227 N.Y. 175, 124 N.E. 789 (1919).

⁵⁶ Whitney v. Employers Ind. Corp., 200 Iowa 25, 202 N.W. 236 (1925); Hudson Cas. Co. v. Garfinkel, 11 N.J.Eq. 70 (E. & A. 1932); Georgia Cas. Co. v. Boyd, 34 Fed. (2nd) 116 (C.C.A. 1929).

⁵⁷ General Acc., etc., Corp. v. Ind. Acc. Com., 196 Cal. 179, 237 Pac. 33 (1925).

may advise the company in writing or orally in effect that he was carrying passengers for hire, or for a consideration express or implied at the time of the collision, out of which the injury claims arise. A disclaimer is followed by a policy suit in which the judgment creditor is plaintiff. In a great many instances when the assured is placed on the stand he will not testify that he was receiving remuneration for transporting his passengers or else he denies it. If, on a plea of surprise the statement is produced or he is questioned about the oral admission, he cannot remember or he denies its truth. Rebuttal proof on the subject serves only to neutralize his testimony and not as substantive proof of the carriage for hire. Consequently a directed verdict against the company follows.

There is a simple remedy for this situation and one which should be recognized by the courts. The carrier should not be required to produce the assured at all in the policy suit. The statement, written or oral, which forms the basis of the denial of liability should be admissible in evidence against the judgment creditor as substantive proof of the facts therein contained. The hearsay rule at once suggests itself but consideration of the problem makes it manifest that the privity of interest exception removes that objection.

Obviously, if the assured were plaintiff, the statement would be evidential as an admission against his interest. It must be conceded also that under the well-known exception to the hearsay rule it would be receivable against any third person in privity of contract or better, privity of interest with him. Since the judgment creditor's statutory or contractual right against the insurer is "under the terms" of the policy and therefore, a derivative one, one which he takes *cum onere* and one which is subject to all the defenses open against the assured, he should be considered in such privity of interest as to make the vicarious admission receivable.

It might be suggested that the adoption of such an evidentiary rule would open the door to possible collusion between the carrier and the assured. A moment's analysis will destroy this collusion psychosis that so many seem to suffer from. If the company is going to enter or has entered into a collusive agree-

ment to defeat the injury claim why would it be necessary to put the statement in evidence? Would not the more reasonable course under the circumstances be to produce the assured and have him testify according to the collusive bargain? The fact that the defense is reduced to offering the vicarious admission is the strongest possible evidence against the existence of such a bargain.

In New York such a signed statement was permitted to go into evidence. The company was defending on the ground that the policyholder had failed to cooperate. The basis of the defense was that he had given a written version of the accident immediately thereafter which exculpated him from responsibility and that he had testified differently in the damage action, to the insurer's prejudice. It was necessary, of course, to put in evidence the original signed account of the collision in order that it might be contrasted with his testimony given at the trial. The opinion, declaring its admissibility, was predicated on the theory of proof of the independent fact in issue; namely, the assured's failure to cooperate,⁵⁸ although the court also said that "no ground" existed upon which it could be excluded properly.

A distinction may be seen between cases of failure to cooperate and those involving other breaches of the policy. The defense of failure to cooperate is susceptible of proof in most cases only by a comparison between what was said by the assured during the investigation which followed the accident and what he said at the trial of the damage action. In other words the original statement takes a legal form somewhat similar to a verbal act and is admissible as such. However, the peculiar nature of this type of defense and the rule adopted to meet its unusual character should not militate against the privacy of interest theory; rather that theory should be strengthened by the recognition of an additional reason for the admissibility of the assured's statements against his interest generally.

There is little judicial thought on the subject to be found throughout the country. Aside from New York, the only other jurisdiction where the problem has been considered is New

⁵⁸ *Solomon v. Preferred Acc. Ins. Co.*, 229 N.Y.S. 257 (1928).

Jersey. There the trial court allowed in evidence in the policy suit a signed statement of the assured and his oral admissions indicating that he was transporting passengers for a consideration at the time of the accident. Their evidential quality was based squarely upon an asserted privity of interest between the plaintiff and the assured. It was said that for the purpose of determining the issues before the court, the situation was the same as though the assured were a party. With nothing in the case supporting the breach of the policy contract except these statements, a judgment was rendered in favor of the company.⁵⁹ However, the appellate court promptly reversed.

The reversal was predicated almost entirely upon an earlier case which, examination will disclose, is not legally analogous.⁶⁰ There a garage company sold an automobile to an individual under a conditional bill of sale. The insurance company then issued an indemnity and collision loss policy in which the conditional vendor and vendee were named assureds. Subsequently, the vehicle was destroyed in a collision and the insurer refused to pay on the ground that at the time the conditional vendee was carrying passengers for compensation in violation of the terms of the policy. Suit was then instituted by the conditional vendor, as an assured, under the policy.

At the trial, in order to substantiate the disclaimer, the company called the vendee as its witness and attempted to prove through him that a few days after the accident he had signed a statement in which he admitted that he was using the insured car for hacking purposes at the time. The witness admitted his signature but denied the contents of the statement and denied that he had ever said that the car was being put to such use.

The defendant company in calling the vendee as its witness vouched for his veracity, was bound by his testimony and could not impeach him. The record at this point, therefore, was barren of proof of carriage of passengers for hire.

Under the law generally, while one's witness cannot be impeached, his testimony can be neutralized on a plea of surprise. Doing this has the effect of denuding the record of that witness'

⁵⁹ *Dziadosc v. American Casualty Co.*, 12 N.J. Misc. 205 (Sup. Ct. 1934).

⁶⁰ *Center Garage Co. v. Columbia Ind. Co.*, 96 N.J.L. 456 (E. & A. 1921).

evidence and leaving it as though he had never testified. To do this the adjuster who had taken the statement was called. He identified it, asserted that the facts contained therein were given to him by the conditional vendee, and it was then admitted in evidence. When received for this purpose it did not make out affirmative proof of the fact of carriage of passengers for hire. Since the vendee had testified for the defendant, its only effect was to neutralize his denial. There can be no doubt that written assertions used to discredit or to neutralize the testimony of a witness have no probative force toward establishing the ultimate fact in issue.

It was also pointed out in this early case that the vendee was not the "agent or representative of the vendor either actually or apparently authorized to bind it by admissions made after the accident". This language is pertinent only to the facts then before the court. The vendor there did not claim through the vendee or by representation under the policy. It did not stand in the vendee's shoes and derive its rights through him. On the contrary, it was a separate and named assured. It claimed in its own right as an assured under a consideration running directly from it to the defendant company. Obviously, therefore, the vendor had an interest in the policy separate and apart and distinct from that of the vendee and the mutuality of interest or privity of interest or interest by derivation which ordinarily exists between an assured and judgment creditor was not present.

Irrespective of the criticism which may be leveled against the opinion in the *Dziadosc* case, the fact remains that New Jersey now holds that neither written nor oral admissions against the interest of an assured are evidential in a policy suit against the judgment creditor. The precedent having thus been set, it is probable that the other states, all of which seem to be adherents of the strict construction theory, will take the easiest course and fall in line.

There are a few jurisdictions wherein the right of the injured person judgment creditor to have recourse to the policy is recognized regardless of the nonperformance of conditions by

the assured.⁶¹ They declare that it was the purpose of the statute to create a cause of action against the insurer immediately upon the happening of the accident and that the right to enforce it is dependent upon the obtaining of a judgment in the damage action and the failure to collect it against the assured. It would be unfair (they say) to make the injured subject to the assured's fulfillment of policy conditions because he has no control over the assured's conduct in that regard. The language of the contract that the right of recovery shall be "under the terms and conditions of the policy" is construed to mean that the recovery shall be measured by the limit of the policy and the conditions which are within the power of the injured to perform. This ruling is a deliberately narrow and constricted view of the contract; it loses sight entirely of the fundamental theory of indemnity insurance; it places the company at the whim and caprice of the assured; and it transforms the voluntary insurance policy in effect into a compulsory one.

While the carrier may successfully defend against the injured person because of the assured's violation of policy conditions it cannot defeat his claim by collusion or voluntary agreement with the assured or by any other voluntary act, after the accident has occurred.⁶² The payment to the insured of a sum of money after a collision in settlement of his contingent claim for indemnity and the return of the policy by him for cancellation, will not enable the company to avoid compensating the injured.⁶³ An agreement between the assured and the company made because of a dispute as to the coverage, by which in consideration of a free defense in the damage suit, the assured agrees to pay any verdict rendered therein and to save the company harmless from such verdict, is void. One jurisdiction holds that it violates its public policy as expressed in the statute requiring the inclusion of insolvency clause.⁶⁴

⁶¹ *Edwards v. Fid. & Cas. Co. of N. Y.*, 11 La. App. 176, 123 So. 162 (1929); *Metropolitan Cas. Co. v. Albritton*, 214 Ky. 161, 282 S.W. 187 (1926); *Finkelberg v. Continental Cas. Co.*, 126 Wash. 543, 219 Pac. 12 (1923).

⁶² *Georgia Cas. Co. v. Boyd*, 34 Fed. (2nd) 116 (C.C.A. 1929); *Schoenfeld v. N. J. Fid. & P. G. Co.*, 197 N.Y.S. 606 (1922).

⁶³ *Finkelberg v. Continental Cas. Co.*, 126 Wash. 543, 219 Pac. 12 (1923); *Osborn v. New Amsterdam Cas. Co.*, 111 N.J.L. 358 (E. & A. 1933).

⁶⁴ *Osborn v. New Amsterdam Cas. Co.*, 111 N.J.L. 358 (E. & A. 1933).

The measure of the injured person's recovery under the insolvency clause is the limit of the policy; that is, he may recover the sum that the assured might claim by way of indemnity. Specifically this is the amount of the judgment not exceeding the policy limit plus the taxed costs and interest either from the date of the entry of judgment⁶⁵ or from the date of issuance of execution.⁶⁶ Considered strictly it would seem that the right to interest in such cases (in the absence of a provision allowing it) should come into being with the return of an execution unsatisfied and a demand and refusal of payment, because the policy action is not proper ordinarily until these pre-requisites appear. In some instances where it is expressly stipulated that payment of "all interest after entry of judgment" will be made, the company is liable for interest on the full judgment from the date of its entry, even though the judgment is in excess of the policy limit.⁶⁷

There is no need for the injured person in suits under this provision to go through any legal contortions to get at the insurance fund. He is given a direct right of action against the company upon the contingencies named. However, he may sue if he wishes, in the name of the assured to his use.⁶⁸ If a trustee in bankruptcy has been appointed for the assured, the trustee need not be joined.⁶⁹

There can be no doubt that the inclusion of the insolvency or bankruptcy clause in automobile indemnity policies was required to be done in the interest of a worthy cause. While the carrier obviously had the one intention in writing this type business, namely strict indemnity for the policyholder, it is equally likely that the assured had in mind the creation of protection for himself and also for any member of the public whom he might happen to injure.

The probability is therefore that if the contract in its orig

⁶⁵ *Roth v. General Cas. & Surety Co.*, 106 N.J.L. 516 (E. & A. 1929); *N. J. Fid. & P. G. Co. v. Clark*, 33 Fed. (2nd) 235 (C.C.A. 1929); *Strafnotis v. Cal. Highway Ind. Exch.*, 107 Cal. App. 522, 290 Pac. 628 (1930); *Cleghorn v. Ocean Acc., etc. Co.*, 244 N.Y. 166, 155 N.E. 87 (1926).

⁶⁶ *Maryland Cas. Co. v. Ronan*, 37 Fed. (2nd) 449 (C.C.A. 1930).

⁶⁷ *Roth v. General Cas. Surety Co.*, 106 N.J.L. 516 (E. & A. 1929).

⁶⁸ *A. Rose & Son v. Zurich, etc., Lia. Co.*, 296 Pa. 206, 145 Atl. 813 (1928).

⁶⁹ *Lawrason v. Owners' Auto. Ins. Co.*, 172 Ala. 1075, 136 So. 57 (1931).

inal form were at all ambiguous, the courts in construing it most strictly against the company would have recognized the right of an injured third person to maintain an action on it. However, since the language employed was clear and its meaning unambiguous, they were forced to construe it as an agreement of indemnity. Thus the intention of the assured was thwarted in part at least.

The result was that the only person who really obtained the sought for protection was he who was in a position to pay any judgment that might be recovered against him. The individual, who purchased a policy to protect himself because of an inability to satisfy a judgment of any size, found himself as far from protection as he was before paying the premium. If the company chose to stand upon its strict legal right (which was not done very often, it must be admitted) no recourse could be had against the policy.

The insolvency provision now eliminates this difficulty almost entirely. Strictly speaking, no change is affected in the assured's right of action. All of the old rules of indemnity still apply to him but since the judgment creditor is vested with such a complete remedy under the policy, the assured has in effect achieved his real intention, i.e., immunity for himself and protection for the public.

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