INSURANCE

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ACCIDENTAL DEATH

The *Cestui que vie* in the case of *McCarty v. National Life and Accident Insurance Company*[1] was found lying upon a sidewalk and taken to a doctor where it was determined that he was dead. The immediate cause of death was asphyxiation due to regurgitation and aspiration of gastric contents. There was a freshly broken tooth, minimal bleeding and minor laceration of the lower jaw. The question was whether the insured's death "resulted, directly and independently of all other causes, from bodily injury effected solely through external violent and accidental means" so as to be covered by an accidental death policy. The plaintiff contended that death was the proximate result of a fall while the defendant argued that the immediate cause of death could not be connected to an accident except by circumstantial evidence. On an appeal from the grant of a motion for summary judgment, the Court of Appeals reversed the trial judge holding that the evidence, although circumstantial, was sufficient to submit the issue to a jury.

The law applicable to this issue of fact was succinctly stated in another case:

> In cases where the facts proven show that the insured met his death by external and violent means which resulted in physical wounds or contusions on the exterior of his body, there is a presumption of accident . . . , but where there is no showing of external violent means producing visible wounds or contusions, if there is a presumption at all, it is that death was due to natural causes, and the burden is on the plaintiff to affirmatively prove accident.[2]

To come within the coverage of a policy provision such as the ones involved in these cases, the insured's death must result from accidental *means* rather than as an accidental *result* from usual ordinary means voluntarily employed.[3]

The life insurance policy involved in the case of *Darby v. Inter-*

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1. 107 Ga. App. 178, 129 S.E.2d 408 (1963).
2. Davidson v. Nat'l. Life and Acc. Ins. Co., 106 Ga. App. 187, 126 S.E.2d 811 (1962).
3. *Ibid.*

state Life and Accident Insurance Company,[4] contained a provision excluding payment for death by accidental means if death resulted "from injuries intentionally inflicted upon the insured . . . by any other person other than burglars or robbers. . . . " The defendant filed a motion for summary judgment based upon the affidavit of one who stated that he intentionally killed the insured. In view of the policy provision, the Court of Appeals held that the trial judge was correct in granting the motion for summary judgment.

APPLICATION—MISREPRESENTATIONS IN

Although the case of *State Farm Insurance Company v. Anderson*[5] was decided on the law as it existed prior to the Insurance Code of 1960 (Georgia Laws, 1960, Page 289), the case was decided upon essentially the same principle which is expressed in Code Section 56-2409.[6] A false representation, knowingly made, material to the acceptance of the risk would be sufficient for an insurance company to avoid liability under a policy of liability insurance. The court reached this result by applying to liability insurance rules which had already been announced in connection with fire and life insurance.[7]

This result was bolstered by a provision of the policy which stated that the insured, by accepting the policy, adopts the declarations of the application.

A person, laboring under no disability, who signs an application for insurance which has been filled out by another, is bound by the answers to the questions given in the application. This is merely a specific application of the general rule that one who signs a written document without reading it, is bound by its contents.

"Any other holding would vitiate the validity of written instrument."[8]

However, if one merely signs the application in blank, it becomes a jury question as to whether he is bound by the contents.[9]

ATTORNEY'S FEES

The reported cases contained as always, considerable discussion of attorney's fees. Lawyers seem to be most anxious that someone should

4. 107 Ga. App. 409, 130 S.E.2d 360 (1963).
5. 107 Ga. App. 348, 130 S.E.2d 144 (1963).
6. Ga. Laws, 1960, pp. 289, 660.
7. Kennesaw Life and Acc. Ins. Co. v. Hubbard, 106 Ga. App. 556, 127 S.E.2d 845 (1962).
8. State Farm Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144 (1963).
9. Tallent v. Safeco Ins. Co. of America, 99 Ga. App. 11, 107 S.E.2d 331 (1959)

pay them for their troubles, and if it can be the other party, so much the better.

If, in an action by an insured against his insurance company, the jury finds that the company has acted in bad faith, the attorney's fees which may be recovered by the plaintiff are limited to the attorney's fees in the action against the company on the policy. The cost of litigating a previous declaratory judgment action filed by the company cannot be included.[10]

In adjusting a loss under the terms of a fire insurance policy, an inadequate offer of settlement is equivalent to an absolute refusal to pay. Where there is a considerable gap between the amount of the offer and the evidence regarding the value of the loss, it becomes a jury question whether the offer was so small as to amount to an absolute refusal and, if so, whether such refusal was in bad faith.[11]

The case of *Royal Insurance Company Ltd. v. Cohen*[12] states a rule regarding bad faith and attorney's fees which is often ignored by the court. Where it appears from the evidence that the insurance company's refusal to pay was justified on the basis of the facts appearing to the company at the time of refusal, or if the evidence can be said to have authorized a finding in accordance with the contentions of the insurance company, a finding of bad faith is not authorized. This would seem to be a good rule, but the books are full of countless cases in which both the question of recovery on the part of the claimant and the question of bad faith were left as jury questions.

The *Cohen* case[13] also holds that it is never bad faith for a litigant to insist upon any right afforded to him under the law.

Attorney's fees cannot be returned in a verdict that expressly states that penalty has been found.[14]

Beneficiary Rights

Where the insured in a policy of life insurance has reserved the right to change the beneficiary, the interest of the beneficiary vests at the time of the death of the insured. The beneficiary need not survive the insured long enough to furnish personally a proof of loss and a claim for the proceeds of the policy. If the beneficiary survives the

10. South Carolina Ins. Co. v. Honnicutt 107 Ga. App. 366, 130 S.E.2d 239 (1963).
11. Fireman's Ins. Co. v. Almand, 105 Ga. App. 763, 125 S.E.2d 545 (1962).
12. 105 Ga. App. 746, 125 S.E.2d 709 (1962).
13. *Ibid.*
14. Occidental Life Ins. Co. v. Templeton, 107 Ga. App. 322, 130 S.E.2d 168 (1963); *reversed on other grounds,* 219 Ga. 39, 131 S.E.2d 530 (1963).

insured, however briefly, the right vests, and upon the death of the beneficiary inures to the benefit of his estate.[15]

BONDS

The case of *Ingalls Iron Works Company v. Standard Accident Insurance Company*[16] involves an action against a surety upon a payment bond. The question was the degree of certainty with which a supplier of materials must establish that the materials supplied were actually used in the bonded construction. The court observed that there was a similarity between the law on this matter and the law fixing the rights under a materialman's lien, but that the rules are not identical. The court held that the evidence in this case was sufficient to establish a right in the supplier, and while they did not need to adopt the position unequivocally, the decision seems to approve of the proposition that the supplier has carried his burden if he shows that materials purchased for use in a particular job are actually delivered to the purchaser. It is immaterial whether they be actually used in the construction or not.

CANCELLATION

The plaintiff in the case of *United States Fidelity and Guaranty Company v. Hilliard*[17] executed a note in favor of his insurance agent upon the consideration that the agent advance the entire premium payment to the insurance company. The note authorized the agent to cancel the policy by giving notice to the insurance company if the payments on the note were in arrears. The agent gave such notice and the policy was cancelled shortly before a rather substantial loss.

The plaintiff filed suit against the insurance company under the theory that the agent, by habitually accepting late payments had waived his rights to insist upon prompt payment of the note. The Court of Appeals held that even if this were the case, the insurance company would not be bound. Under the terms of the note, the agent had the authority to cancel the policy by the notice which he gave. In doing so, he was not acting as the agent of the insurance company. Although he was the agent of the company in procuring the issuance of the policy, the agent was not the agent of the insurance company in any of his actions regarding the note taken for the premiums.

It is right and proper to terminate a policy of insurance according

15. Bair v. Willis, 218 Ga. 563, 129 S.E.2d 774 (1963).
16. 107 Ga. App. 454, 130 S.E.2d 606 (1963).
17. 107 Ga. App. 266, 129 S.E.2d 559 (1963).

to the manner of termination contained in the policy. If the policy provides that the insurance will be terminated "at any time at the request of the insured," then the policy is automatically cancelled when the agent receives a postcard from the insured telling him to cancel the policy. If the ex-insured's house burns to the ground two days later and before the company has taken any further action, this is unfortunate but it does not change the law.[18]

If an insurance policy provides that the company may effect cancellation by mailing a notice of cancellation to the insured at the address shown on the policy, evidence that the notice was mailed is sufficient to authorize a finding that the policy was cancelled although the insured never in fact received the notice.[19]

CASH SURRENDER OPTION

The insured in the case of *Occidental Life Insurance Company of California v. Templeton*[20] had made application to the company for the cash surrender value of the policy. The policy provided that the company could pay the cash surrender value at any time within six months after the filing of an application. After the filing of an application, but before the company had paid the cash surrender value, the insured died. The Court of Appeals held that the insurance was still in effect until the company acted upon the insured's application. Therefore, the beneficiaries were entitled to the face amount of the policy.

The Supreme Court granted certiorari and *reversed*,[21] holding that the right to a cash surrender value is a continuing offer by the company which is accepted by the insured's application for same. Thus the obligation of the company became fixed upon the filing of the application and was not altered by the insured's subsequent death.

CONSTRUCTION OF POLICY

Although any ambiguity in a policy will be construed most strongly against the insurer,[22] it would be improper for the court, by strained

18. De La Perriere v. American Home Assur. Ins. Co., 106 Ga. App. 516, 127 S.E.2d 478 (1962).
19. Anderson v. Preferred Risk Mut. Ins. Co., 107 Ga. App. 293, 129 S.E.2d 816 (1963).
20. 107 Ga. App. 322, 130 S.E.2d 168 (1963).
21. 219 Ga. 39, 131 S.E.2d 530 (1963).
22. Key Life Ins. Co. v. Hodges, 106 Ga. App. 735, 128 S.E.2d 367 (1962).

construction of the policy, to discover an ambiguity,[23] or to create a contract different from that clearly intended by the parties.[24]

COVERAGE—LIMITATIONS

When restrictions in an insurance policy limit its application to losses incurred while the insured vehicle is hauling for a particular named concern, there will be no coverage for losses incurred while the vehicle is being used to haul for someone else.[25] This case is specifically distinguished from that of *Dunn v. Travelers Indemnity Company*,[26] which arose out of the same loss, on the ground that the Travelers policy was ambiguous and subject to a different interpretation.

The case of *Douglas v. American Casualty Company*[27] was an action upon a hospitalization policy which covered only specifically named diseases. Since the evidence indicated that the diagnosis of the plaintiff's illness was indefinite, there could be no recovery under such a policy.

COVERAGE—DURATION

Georgia Code section 56-2429[28] provides that a policy of insurance shall run from midday of the date of the policy or contract. If no time for the commencement of risk is fixed in the contract, the provisions of this Code Section will apply.[29]

CREDIT LIFE INSURANCE

The case of *Murry v. Life Insurance Company of Georgia*[30] is authority for the proposition that a debtor has no standing to sue the insurance company which has issued a policy of insurance payable to the creditor bank in the event of the death or disability of the debtor. The court stated that the application for insurance was filed by the creditor, the premiums paid by the creditor, and that the proceeds were payable to the creditor, therefore, the court concluded that the policy was for the benefit of the creditor alone, notwithstanding the

23. Shaw v. State Farm Mut. Auto. Ins. Co., 107 Ga. App. 8, 129 S.E.2d 85 (1962).
24. National Life and Acc. Ins. Co. v. Wilson, 106 Ga. App. 504, 127 S.E.2d 306 (1962).
25. Utica Mut. Ins. Co. v. Dunn, 106 Ga. App. 877, 129 S.E.2d 94 (1962).
26. 217 Ga. 426, 122 S.E.2d 518 (1961).
27. 106 Ga. App. 744, 128 S.E.2d 560 (1962).
28. Ga. Laws, 1960, pp. 289, 671.
29. Pilgrim Health and Life Ins. Co. v. Milledge, 107 Ga. App. 77, 129 S.E.2d 80 (1962).
30. 107 Ga. App. 545, 130 S.E.2d 767 (1963).

"incidental" benefit to the debtor that payment under the policy would cancel his debt. This decision would probably come as a shock to the many debtors from whom lending institutions have regularly been collecting insurance premiums for transmittal to the insurance company.

The remedy of a debtor, or his heirs, in such a case seems to be against the lender. If a creditor contracts to provide credit life insurance, and fails to do so, the debtor or his estate may bring an action to enjoin the creditor from enforcing his rights against the debtor, after the incident has occurred which would have paid off the note under the credit life insurance.[31]

DAMAGES

When an insurance carrier, under the terms of a property damage policy, elects to repair a damaged automobile and does so inadequately, the measure of damages is reached by subtracting from the value of the automobile before the collision its value immediately after being repaired plus the deductible provided in the policy.[32]

DECLARATORY JUDGMENT

When there is a question of the coverage of a liability insurance policy, the insurance company may file suit for a declaratory judgment. This may be done in the event of either pending or threatened litigation against the alleged insured, and the company need not wait until after the injured party has asserted a claim against the insurer.[33]

But where the only question at issue is whether the company is a primary insurer or only liable as an excess carrier, the petition shows no grounds for summary judgment. In either case, the company's obligation to defend its insured is the same. Thus there is no immediate issue which requires determination.[34]

DEFENSE—LIABILITY INSURER'S OBLIGATION TO EXTEND

In considering the question of when an insurance company is obligated to defend a suit brought against its insured, the case of *Loftin v. United States Fire Insurance Company*[35] points out the following

31. Consumers Financing Corp. v. Lamb, 128 Ga. 343, 127 S.E.2d 914 (1962).
32. Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962).
33. Pennsylvania Threshermen and Farmers Mut. Cas. Ins. Co. v. Wilkins, 106 Ga. App. 570, 127 S.E.2d 693 (1962).
34. United States Fid. and Guar. Co. v. Watson, 106 Ga. App. 748, 128 S.E.2d 515 (1962).
35. 106 Ga. App. 287, 127 S.E.2d 53 (1962); *noted* 25 GA. BAR JOURNAL 300, February, 1963.

rules: By a standard provision contained in most policies, a company agrees to defend even groundless suits brought against the insured. A "groundless" suit is one which alleges untrue facts which establish an incident within the coverage of the policy. This is to be distinguished from an action which alleges true facts which are not within the coverage of the policy. In the latter instance, of course, there is no obligation upon the company. A third situation arises when the allegations of the petition establish an event which would be excepted from coverage although, under the true facts, the event would be covered by the policy. Under these circumstances, the company would owe its insured a defense. There is a strong dissent by Judges Felton and Frankum contesting the soundness of the majority's conclusions.

If there are several grounds set forth in a petition as a basis for a claim against the insured, some grounds being within the policy coverage and some not, the insurer by defending the actions on all grounds is not estopped from asserting a defense under the policy against the insured if recovery against the insured is on a ground outside the policy coverage.[36]

Once an insurance company has paid out the limits of the policy, it is no longer obligated to extend a defense to its insured. As a matter of fact, it was suggested, but not decided, that for the company to do so would be illegal as the corporate practice of law.[37]

DEFINITIONS

FACE OR BODY OF POLICY

In an action by an insured against his insurance company the law requires that the plaintiff attach to his petition a copy of "what appears upon the face or in the body of the policy.[38] The case of *National—Ben Franklin Insurance Company v. Prather*[39] points out that this language has been held to mean "all stipulations embraced in that part of the policy which precedes the signatures of the company's officers by whom it was executed." In most cases, this would include the entire policy of insurance.

GROSS RECEIPTS

The term "gross receipts" as used in an insurance policy in providing a method for the computation of premiums to be paid, is not

36. United States Fid. and Guar. Co. v. Watson, 106 Ga. App. 748, 128 S.E.2d 515 (1962).
37. Mead Corp. v. Liberty Mut. Ins. Co., 219 Ga. 6, 129 S.E.2d 162 (1963).
38. GA. CODE §81-105.
39. 106 Ga. App. 311, 126 S.E.2d 834 (1962).

an ambiguous term. It means the whole, entire receipts, as opposed to "net receipts."[40]

ISSUED

The word "issued" when used in a petition in reference to an insurance policy will be considered to mean, when the petition is construed most strongly against the pleader, merely that the policy was written but not that it was delivered so as to convert the insured from an applicant to an insured.[41]

NON-OWNED AUTOMOBILE

The policy of automobile liability insurance involved in the case of *State Farm Mutual Auto Insurance Company v. Bates*[42] excluded the insured from coverage while he was driving a "non-owned automobile . . . furnished to the named insured . . . for regular use. . . . " The insured, an Air Force Sergeant, was involved in a collision while driving a military vehicle in the line of duty.

This seems to be the first Georgia case to construe this particular insurance provision, and the court devoted considerable time to analyzing foreign decisions. It was held to be a jury issue whether, under the particular facts, the vehicle in question was "furnished" for the insured's "regular use."

WINDSTORM

The case of *Cotton States Mutual Insurance Company v. Stephens*[43] gives a rather unusual treatment to a case which was initially reported in the last survey.[44] As we reported last year, the first appeal of the case gave a rather questionable treatment to certain policy provisions defining "windstorm" and "snowstorm" coverage. In the second appeal, decided by a different division of the Court of Appeals, the court avoids approving the previous decision as a correct statement of the law. They hold instead that it is the *law of the case,* and uphold a judgment against the insurance company. The division which decided the second appeal does well to question the first decision. It is nevertheless unfortunate that such situations arise. It will probably take an-

40. Sheriff v. Moore, 105 Ga. App. 833, 125 S.E.2d 729 (1962).
41. Occidental Life Ins. Co. of Cal. v. Templeton, 107 Ga. App. 322, 130 S.E.2d 168 (1963).
42. 107 Ga. App. 449, 130 S.E.2d 514 (1963).
43. 106 Ga. App. 145, 126 S.E.2d 645 (1962).
44. Stephens v. Cotton States Mut. Ins. Co., 104 Ga. App. 431, 121 S.E.2d 838 (1961).

other two or three appeals before anyone can be sure just what interpretation the entire Court of Appeals will place upon the term "windstorm," and the appellant in the present case may well have been denied justice upon a technicality.

Delivery of Policy

A provision in an insurance policy which provides that the policy shall not become effective unless the insured is alive and in sound health on the date of its issue, is valid and binding. "Sound health" as used in such a provision means that

> The insured enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause reasonable apprehension of such derangement, and to ordinary observation and to outward appearance his health is reasonably such that he may with ordinary safety be insured upon ordinary terms, and that he apparently has no grave impairment or serious disease or other ailment that seriously effects the general soundness and healthfulness of the system.

Unsound health which will avoid a policy under this provision, however, must arise from a change in health between the time of taking the application for the insurance and the date of issuance and delivery of the policy. Neverthless, if the insured is, to all appearances, in sound health on the date of the application and discovers the existence of a fatal disease before the policy is issued, the policy will be avoided even though the disease may have existed without symptoms prior to the application. This is one of those cases where appearance, and not fact controls the result.[45]

Insurance Code Not Retroactive

The Georgia Insurance Code of 1960 does not have any retrospective effect.[46]

Judgment in Excess of Policy Limits—Company's Liability

The capricious refusal of a liability insurance company to entertain an offer of compromise within the policy limits made on behalf of the injured party constitutes an act of bad faith which will expose the company to liability for the full amount of the judgment recovered

45. Liberty Nat'l. Life Ins. Co. v. Hopkins, 106 Ga. App. 829, 128 S.E.2d 339 (1962).
46. Insurance Co. of St. Louis v. Bray, 105 Ga. 675, 125 S.E.2d 691 (1962).

against the insured. Even so, a cause of action cannot be based upon nothing more than the failure of the insurance company to solicit or to make an offer of settlement to the third party claimant.[47]

Limitation in Policy—Time for Suit

Ordinarily a provision in an insurance policy which limits the time in which an action may be brought is valid and enforceable.[48] A denial of liability or a refusal to pay on the part of the company will not waive such a provision. However, if a copy of the policy has never been delivered to the insured, although the policy is in effect, the insured will not be bound by such a limitation which he had no reasonable way of discovering.[49]

When a policy of liability insurance contains a provision requiring that suit be filed against the company within one year after loss, this provision is also applicable to a garnishment filed by a third party who has recovered a judgment against the insured. In such a case the third party cannot recover on the garnishment unless the garnishment is filed within one year of the loss.[50]

Loan Receipt

The Court of Appeals held that the loan receipt, apparently a standard one, used in the case of *Lydick v. Napier*[51] did not authorize an attorney employed by the insurance company to file suit on behalf of the insured. The loan receipt obligates the insured to bring suit in his own name. This is not the same thing.

Loss—Payee

A "loss-payable" clause, often found in insurance contracts, designates a mortgagee to whom the insurance company is to pay the indemnification for a loss up to the extent of the secured debt. Such a provision, unlike the New York standard or union mortgage clause, does not make the mortgagee an additional insured. It merely provides him with security for his debt. When the damage to the insured property is caused by the negligence of the loss payee, the insurance

47. Cotton States Mut. Ins. Co. v. Fields, 106 Ga. App. 740, 128 S.E.2d 358 (1962).
48. Aiken v. Northwestern Mut. Ins. Co., 106 Ga. App. 220, 126 S.E.2d 630 (1962).
49. Lanier v. Coastal States Life Ins. Co., 106 Ga. App. 802, 128 S.E.2d 550 (1962).
50. Kilpatrick v. Aetna Ins. Co., 105 Ga. App. 816, 125 S.E.2d 791 (1962).
51. 105 Ga. App. 820, 125 S.E.2d 701 (1962).

company may still exercise its subrogation rights and proceed against the loss payee to recover any payment made for the loss.[52]

A mortgagee named as loss payee in a contract of automobile insurance is a necessary party in an action against the company to recover for damages to the vehicle.[53] However, a plaintiff's failure to make a loss payee a party to an action is a defect which should be pointed out and corrected by a special demurrer.[54]

Named Insured Rights

The named insured, injured while a passenger in his own automobile, cannot recover damages from his own insurance company for injuries arising out of the negligence of the person driving with his permission, even though such a driver would be an additional insured as to third persons.[55]

Notice to Produce

A litigant has at least a qualified right to obtain information as to the defendant's insurance coverage, for the purpose of purging the jury. However, if the policy is not produced, the plaintiff cannot complain of this by a special ground of a motion for new trial, unless he can show that the failure to produce the policy resulted in the selection of a disqualified juror. The court does not state what the plaintiff's remedy would be. Perhaps he has none unless he can show injury.[56]

If a defendant supplies the plaintiff with the name of his liability insurance carrier, he need not thereafter respond to a notice to produce the policy, if the sole materiality of the policy is the discovery of the name of the carrier for the purpose of qualifying the jury.[57]

Proof of Loss

Most insurance policies provide that, as a condition precedent to recovery, the insured must file a sworn proof of loss within a given time after the loss occurred. When this is affirmatively shown by the petitioner, the petition must also allege either performance or a sufficient

52. Insurance Co. of North America v. Gulf Oil Corp., 106 Ga. App. 382, 127 S.E.2d 43 (1962).
53. Simmons v. American Security Ins. Co., 107 Ga. App. 364, 130 S.E.2d 391 (1962).
54. Reserve Ins. Co. v. Campbell, 107 Ga. App. 311, 130 S.E.2d 236 (1962).
55. Shaw v. State Farm Mut. Auto. Ins. Co., 107 Ga. App. 8, 129 S.E.2d 85 (1962).
56. Patillo v. Thompson, 106 Ga. App. 808, 128 S.E.2d 656 (1962).
57. Y.M.C.A. of Atlanta v. Bailey, 107 Ga. App. 417, 130 S.E.2d 242 (1963).

excuse for not performing such a condition. Otherwise, the petition is subject to general demurrer.[58] If, however, the insurance company, within the time allowed, absolutely refuses to pay any sum, the requirement of a proof of loss is waived. An offer to pay an extremely small percentage of the loss usually has the same effect, but it becomes a jury question as to whether the amount offered was so small as to amount to an absolute refusal. In order for the insured to rely upon such a waiver, he must plead and prove that the denial took place within the time in which a proof of loss might have been filed. His failure to do this will bar his right to recover.[59]

RELEASES

The plaintiff in the case of *Sorrells v. Atlanta Transit System, Inc.*[60] had been involved in a collision with a trackless trolley. As a result, they had a claim against the defendant based upon negligence and a claim against their collision insurance carrier for the damage to their automobile based upon the terms of the insurance contract. Relying upon the representations of the defendant's claims adjuster that their actions would not bar their right to recover under their collision coverage, the plaintiffs signed a release which they did not bother to read. Because it was a general release, they extinguished their insurance carrier's subrogation rights, and therefore forfeited their right to recover under the insurance policy. When they discovered what they had done, they filed suit against the Transit System for cancellation of the release. The Supreme Court held that there were no grounds for such a cancellation. In the first place, being able to read, they should have read the release. In the second place, there was no confidential relationship between the parties. And in the third place, any representation regarding the legal effect of the release would not be fraud. Such representations as to a question of law are ordinarily regarded as mere expressions of opinion and do not constitute remediable fraud.

The case of *Aetna Casualty & Surety Co. v. Brooks*[61] contributes some new law—and raises some new questions—regarding a release taken by an insurance company and its effect upon a subsequent suit filed by its insured against the party who has given the release.

It is well settled law that there can be but one satisfaction of the

58. Harris v. Towns, 106 Ga. App. 217, 126 S.E.2d 718 (1962).
59. Reserve Ins. Co. v. Campbell, 107 Ga. App. 311, 130 S.E.2d 236 (1963).
60. 218 Ga. App. 623, 129 S.E.2d 846 (1963).
61. 106 Ga. App. 427, 127 S.E.2d 183 (1962).

same damage or injury. For example, where *A* and *B*, drivers of two automobiles, have a collision and *A* gives *B* a release supported by consideration, the release extinguishes not only *A's* claim against *B*, but any claim *B* might have against *A*. Because of this, it has been held that if *B* subsequently files suit against *A* and then, in defense of *A's* cross-action, files a plea of release, the petition would be subject to a motion to dismiss. The release relied upon by *B* has the effect of extinguishing *B's* cause of action.[62] The Court of Appeals held that if such a release, instead of being taken by *B*, is taken from *A* by *B's* insurance company, *B* can refuse to ratify the same, can prevent his insurance company from pleading it as a defense to a cross-action filed by *A*, and proceed with an action against *A*. This was new law. The Supreme Court granted certiorari and *reversed*,[63] holding that under the terms of an insurance contract, the company had authority from the insured to negotiate and settle any claims arising out of the collision. Thereafter, the company has an absolute right to plead any release taken as a defense to a cross action filed by a claimant in a suit instituted by the insured. This is so even if it has the effect of terminating not only the cross-action but the main action as well. Under this decision, the insured's cause of action, however good, could be extinguished by his insurance company effecting a settlement, however nominal, without the consent of the insured and against his will.

At this point the legislature stepped into the picture and provided that the claims of third persons could be settled by the insurance company without prejudicing the insured's cause of action as long as full disclosure was made that the settlement was without the consent of the insured.[64]

Settlement by Insured After Company Denies Liability

When an insurance company denies liability and refuses to defend an action against an alleged insured, the insured may proceed to settle his liability without litigation and then proceed with an action to compel the insurance company to reimburse him for the amount of the settlement plus expenses and attorney's fees. The only requirement is that the insured act in good faith. In the case of *Rutledge v. Dixie Automobile Insurance Co.*[65] the insurance company denying liability was a co-insurer with another company which did not deny coverage. The company which accepted its obligation settled the claim, paying

62. Cochran v. Bell, 102 Ga. App. 617, 117 S.E.2d 645 (1960).
63. 218 Ga. 593, 129 S.E.2d 798 (1963).
64. Ga. Laws, 1963, p. 643.
65. 106 Ga. App. 577, 127 S.E.2d 683 (1962).

half of the settlement under an agreement with the insured which may be best described as a modified loan receipt. The company "loaned" to the insured a sufficient sum to pay half the settlement with the agreement that the loan would be repaid by the insured out of any sums collected from the company which had denied coverage. The Court of Appeals held that a petition stating these facts alleged a cause of action against the insurance company which had denied coverage.

The case of *American Casualty Company of Reading, Pennsylvania v. Griffith*[66] involved a somewhat similar attempt, but reached a different result. In that case, when the insurance company refused to accept responsibility for a claim, the insured settled with the third party by giving him a note which was to be repaid solely out of any judgment which the insured could recover in an action against the company. The note specifically provided that it was not negotiable and not to be enforced against the maker individually. In the subsequent action against the insurance company, the Court of Appeals held that the obligation of the company was limited to sums which the insured became obligated to pay. Since by the terms of the note, the insured was never obligated to pay the same, there was no obligation on the part of the company.

The difference between these two cases would seem to be primarily one of form. The insured was not out any money in either case, and no more obligated to repay the "loan" in the one than the "note" in the other. But the law still makes much of formalities.

INCONTESTABLE CLAUSE

A clause in an insurance policy which provides that "the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from the date of issue, except for non-payment of premiums" is a valid and enforceable provision. However, such a provision does not mean that the insurer cannot contest whether a hazard insured against has or has not occurred, or whether a hazard is or is not within the scope of the risks covered by the policy.[67]

66. 107 Ga. App. 224, 129 S.E.2d 549 (1963).
67. National Life and Acc. Ins. Co. v. Chapman, 106 Ga. App. 375, 127 S.E.2d 157 (1962).

VENUE

In the case of *Dependable Insurance Company v. Gibbs*,[68] Georgia Code section 56-201 (4)[69] which provides that an insurance company may be sued in the county where the insured property lies, was subjected to multiple constitutional attacks and survived them all. Although article VI, paragraph 6, section 14 of the Constitution[70] provides that an action must be brought "in the county where the defendant resides," the court held that it was within the authority of the legislature to declare the residence of a corporation to be wherever it wished without regard to the facts involved.

STATUTES

Reference has already been made to the legislation regulating the settlement of claims by liability insurers.[71] In relation to this statute, a warning is in order. Although the legislature probably had no such intent, the last paragraph of this statute may have the effect of abolishing the distinction between a covenant not to sue and a release, when the document is executed by the claimant with knowledge that the insured does not consent to the settlement. The only reason to execute a covenant not to sue instead of a release is to allow the claimant to continue to press his claim against others whom he considers to be jointly liable. However, the language of this statute makes the execution of a covenant, "a bar to the further assertion by such third person of such claims against all persons whomsoever." Although the logic for a distinction between a covenant and a release is questionable, the distinction has existed and serves a valuable practical purpose. It is hoped that the 1964 legislature will enact an appropriate amendment to avoid this unintended change.

The legislature has provided that no policy of liability insurance may be issued after the effective date of the legislation which does not,

(a) Provide limits of ten thousand dollars for injury or death of any one person, twenty thousand dollars for injuries arising out of any one accident, and five thousand dollars for property damage. These limits must be for the protection of the named insured, any member of his household and any permissive user.

(b) Provide for coverage to protect the insured should he be involved in a collision with an uninsured motorist. However, this type

68. 218 Ga. 305, 127 S.E.2d 454 (1962).
69. Ga. Laws, 1960, p. 500.
70. GA. CODE §2-4906.
71. Ga. Laws, 1963, p. 643.

of coverage need not be issued if it is rejected in writing by the applicant for insurance.[72]

Municipalities with populations of not less than 116,500 and not more than 119,500 persons, according to the 1960 census, or any later census, may now become self-insurers.[73]

The limitation upon the maximum amount of group insurance which may be written upon any one person has been abolished.[74]

72. Ga. Laws, 1963, p. 588.
73. Ga. Laws, 1963, p. 2366.
74. Ga. Laws, 1963, p. 451.