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Survival of Action--Liability Insurance--Direct Right Against the Insurer

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The opinion does not disclose any evidence to the effect that defendant was attempting to make a lawful arrest or that deceased knew of such a purpose, other than the single instance of defendant's signaling to the other constable. Had such evidence been introduced the case would then be on all fours with *State* v. *Stockton,* 97 W. Va. 46, 124 S. E. 509, which held that there was no evidence of malice when the accused, making a lawful arrest, shot his prisoner in what he honestly believed to be self defense.

In the next issue it will be submitted that second degree murder would not apply to this case.

—JULIAN G. HEARNE, JR.

SURVIVAL OF ACTION — LIABILITY INSURANCE — DIRECT RIGHT AGAINST THE INSURER.—Plaintiff was injured in a collision between a car in which he was riding, and the car of an individual taxi operator, who had complied with Section 62, Chapter 6, Acts of 1923, by filing with the State Road Commission satisfactory liability insurance for the purpose of indemnifying the public for injuries to person and property resulting from such collisions. The defendant insurance company was his insurer. The taxi operator having died before the plaintiff brought her action, the only available party against whom suit could be brought was defendant company. The plaintiff sued about nine months after the cause of action arose. *Held,* the plaintiff could not proceed against the insurer alone until such claim was liquidated. The court followed principles enunciated in *O'Neal* v. *Transportation Company,* 99 W. Va. 456, 129 S. E. 478, without any discussion. *Criss* v. *United States Fidelity & Guaranty Company,* 142 S. E. 849 (W. Va. 1928).

By this holding the court cut the plaintiff off from any satisfaction whatever. The hardship is due in part to the rule that an action for injuries does not survive against the estate of a deceased tort-feasor. This obviously objectionable common law rule has been remedied by statute in a large number of jurisdictions. See 1 C. J. 196. The WEST VIRGINIA CODE, Chapter 127, Section 2, provided that "If the plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for

a cause of action arising out of contract." But the court has construed this statute to be merely procedural and the action does not survive even where the defendant dies after the action has been begun. *Woodford* v. *McDaniels,* 73 W. Va. 736, 81 S. E. 544.

The hardship of this rule, however, might have been obviated in the principal case if the plaintiff had been given a direct right against the insurer. The generally accepted rule is that a judgment against the insured is a condition precedent to an action against the insurer. *United States Fidelity Company* v. *Maryland Casualty Company,* 182 Ill. App. 438; *Burke* v. *London Guarantee Company,* 93 N. Y. S. 652; *Bowers* v. *Gates,* 201 Mich. 146, 166 N. W. 880; 36 C. J. 1129. The only question is whether the statute changes the rule in this particular type of case. This statute, cited above, reads as follows: "No certificate (license to operate an automobile for hire) shall be issued by the State Road Commission to any applicant until after such applicant shall have filed with the State Road Commission a bond with surety approved by the commission, or liability insurance satisfactory to the commission, and in such sum as the Commission may deem necessary to adequately protect the interest of the public with due regard to the number of persons and the amount of property involved, which bond shall bind the obligors thereunder to make compensation for the injury to persons, and loss of, or damage to property, resulting from the operation of such motor vehicles".

It will be observed that the statute allows the applicant to file either a bond with surety, or liability insurance. In the O'Neal Case, *supra,* which is followed by the principal case, the court makes a distinction between a bond and a liability insurance policy, admitting that the surety and principal may be joined when suing on the bond, but denies such an action where insurance is filed. The distinction is based on the fact that a bond and an insurance policy are different types of obligations with different incidents. The law is apparently settled in this jurisdiction in accord with the principal case. But in other jurisdictions, either by express statutory provision or by a broad construction of similar statutes, a contrary conclusion has been reached, and an action directly against the insurer allowed. *Devoto* v. *Transportation Company,* 128 Wash. 604, 223 Pac. 1050; *Millivon* v. *Dittman,* 180 Cal. 443, 181 Pac. 779; *White* v. *Kane,* 179 Wis. 478, 192 N.

W. 57; *Boyle* v. *Manufacturers Liability Insurance Company*, 96 N. J. L. 380, 115 Atl. 383.

It was urged by the plaintiff's counsel in the instant case that the situation was anomalous, the plaintiff having a right but no remedy. The court's reply was that the plaintiff waited too long to sue. This, of course, is not a satisfactory answer in view of the fact that the statute of limitations on tort actions gives the plaintiff a year. BARNES' CODE, chapter 104, section 12. Even if the action had been begun in the lifetime of the insured, under the Woodford Case, *supra*, there would be no remedy unless judgment had been given prior to his death. The injured party is thus confronted on the one hand with this rule that his action does not survive the defendant's death, and on the other hand with the rule in the O'Neal Case, *supra*.

This case emphasizes the need for an amendment to Section 62 of Chapter 6, Acts of 1923, providing expressly for a direct right against the insurer. This is especially desirable as long as West Virginia has no statute providing for the survival of tort actions against the estates of deceased tort-feasors.

—JAMES E. HOGUE, JR.

INTERSTATE COMMERCE—STATE PROHIBITIONS OF EXPORT OF RESOURCES—SHRIMP.—The petitioners, shrimp packers, of Mississippi, sue to have the State of Louisiana enjoined from enforcing a statute which prohibits the selling of shrimp in other states before the shells and heads are removed. The statute is formally aimed to secure for the state the benefit of the heads and shells for fertilizer. Petitioner claims that this is a feigned motive and that the real purpose is to prevent the Mississippi packers from buying shrimp taken in Louisiana waters and so give this industry to Louisiana. It is shown that only a very small part of the shrimp taken are consumed in Louisiana and that, instead of being used for fertilizer, the heads and hulls are a nuisance to packers, being worth less than one per centum of the value of the edible meat. The statute does not prohibit the sale of shrimp out of the state, but fixes the amount of preparation which they must have before such sale. The injunction is granted on the ground that this statute is in violation of the interstate com-