276

INSURANCE POLICY—WHERE COMPANY AGREES "TO PAY ALL LOSS BY REASON OF THE LIABILITY IMPOSED BY LAW UPON THE ASSURED (AND EXPENSE ARISING OR RESULTING FROM CLAIMS OR SUITS AGAINST THE ASSURED) FOR DAMAGES BASED UPON ALLEGED DISCRIMINATION AGAINST ANY PATRON OR PROSPECTIVE PATRON"—CONTRARY TO COMMON LAW AS AGAINST PUBLIC POLICY WRITING OF SUCH POLICY NOT PERMITTED UNDER SECTION 9607-2 G. C.

SYLLABUS:

A policy of insurance in which the company agrees "to pay all loss by reason of the liability imposed by law upon the assured (and expense arising or resulting from claims or suits against the assured) for damages based upon alleged discrimination against any patron or prospective patron" is contrary to common law as being against public policy and the writing of such is not permitted under Section 9607-2 of the General Code of Ohio.

Columbus, Ohio, June 4, 1945

Hon. Walter Dressel, Superintendent of Insurance
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We would appreciate receiving your opinion whether it is proper for insurance companies authorized by this Division to do insurance business in Ohio, to write insurance as provided in an endorsement reading as follows:

'In consideration of a flat additional premium of———, it is understood and agreed that

(1) This policy is extended to include the following insuring clause:

To pay all loss by reason of the liability imposed by law upon the assured (and expense arising or resulting from

claims or suits against the assured) for damages based upon alleged discrimination against any patron or prospective patron.

(2) The company's total liability to one or all assureds under this endorsement shall not exceed one thousand and 00/100 dollars ($1,000.00) for any one occurrence involving one or more persons."

If this coverage were to be written in Ohio it would be written by companies authorized under Sections 9510, paragraph 2 and 9607-2, paragraph 7 of the General Code.

Section 9510 of the General Code of Ohio, referred to in your letter, provides generally for the kind or kinds of insurance which may be written by stock fire insurance companies. No authority is contained therein to write the kind of insurance in question.

Section 9607-2 of the General Code of Ohio, to which you have also referred, relates generally to mutual fire insurance companies but in some particulars includes stock companies, and provides in part as follows:

"* * * A mutual or a stock company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance, following: * * *

7. Miscellaneous insurance. Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance."

The coverage, concerning which you ask my opinion, if permissible would have to be written under the authority granted by paragraph 7 of the last above mentioned section. The question then resolves itself into the following: Is the hazard set out in the endorsement in your letter, previously referred to, a risk "which is not prohibited by statute or at common law from being the subject of insurance?"

Section 12940 of the General Code, known as the Civil Rights statute, provides as follows:

"Whoever, being the proprietor or his employe, keeper or manager of an inn, restaurant, eating house, barber shop, public conveyance by air, land, or water, theater, store or other place for the sale of merchandise, or any other place of public accommodation or amusement, denies to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full

> enjoyment of the accommodations, advantages, facilities or privileges thereof, or, being a person who aids or incites the denial thereof, shall be fined not less than fifty dollars nor more than five hunderd dollars or imprisoned not less than thirty days nor more than ninety days, or both."

Section 12941 of the General Code provides as follows:

> "Whoever violates the next preceding section shall also pay not less than fifty dollars nor more than five hundred dollars to the person aggrieved thereby to be recovered in any court of competent jurisdiction in the county where such offense was committed."

Section 12942 of the General Code provides as follows:

> "Either a judgment in favor of the person aggrieved, or the punishment of the offender upon an indictment under the next two preceding sections, shall be a bar to further prosecution for a violation of such sections."

A person who violates the civil rights statute becomes liable to three possible causes of action: he is subject to criminal prosecution, to an action for a penalty by the person aggrieved by the violation of the statute, and there is also authority that he is subject to an action for damages, by reason of the fact that where a statute imposes upon any person a specific duty for the protection or benefit of others, the neglect or refusal to perform the duty creates a liability for any injury caused thereby, if the refusal or hurt is of the kind which the statute was intended to prevent. See Volume 7 Ohio Jurisprudence 497, Section 30; 10 American Jurisprudence 918, Section 25.

On the other hand the view has been taken that, where a civil rights statute gives a remedy by action to recover a penalty, such remedy is exclusive. 14 Corpus Juris Secundum, page 1177, Section 17. While the amount recoverable under the statute by the aggrieved party is usually referred to as a penalty, it sometimes is considered as damages. 10 American Jurisprudence, page 917, Section 25.

It would seem, therefore, that clause (1) in the endorsement set out in your letter, "To pay all loss by reason of liability imposed by law * * * for damages based upon alleged discrimination" would be broad enough to include all damage and penalties imposed by law other than the fine mentioned in Section 12940 of the General Code.

It would seem that a violation of Section 12940, General Code, would not only be a crime but would necessarily amount to an intentional wrong committed against the aggrieved party. Is it against common law by reason of being against public policy, to permit the writing of insurance which protects against the consequences of one's own criminal acts or intentional injuries to a third party? In this connection I wish to quote from Couch on Insurance, Volume I, Section 19, page 28, as follows:

> "A number of attempts have been made to insure a person against the results and penalties of criminal acts, but in the main they have been frowned upon by the courts, largely on the ground that they are against public policy. In fact, it has been broadly stated that it is against public policy to agree to indemnify anyone against the consequences of a criminal act."

See also Appleman on Insurance, Volume 7, Section 4252, at page 4, where the following statement is found:

> "However, a policy agreeing to indemnify the insured against damages resulting from the violation of a criminal statute was held to be illegal and void. Although the general terms of an indemnity agreement were broad enough to cover a loss through the indemnitee's immoral, fraudulent, or felonious acts, a loss so caused was treated as excepted. And it has been stated that one cannot insure himself against the consequences of his wilful acts, committed with the intent to inflict injury."

In the case of Travelers Insurance Company v. Reed Company, 135 S. W. (2nd), page 611 (Court of Civil Appeals of Texas), the court on page 617, says:

> "One cannot insure himself against the consequences of his wilful acts, committed with the intent to inflict injury."

And to the same effect, see the case of Richardson v. The Fair, Ind., 124 S. W. (2nd), page 885.

Let us assume that such insurance, as mentioned in your letter, is in force and effect and there has been a discrimination followed by a judgment in favor of the aggrieved party against the wrongdoer, and a failure on his part to pay. The aggrieved party has no direct cause of action against the insurance company. The remedy provided for under Section 9510-4, General Code, of applying the insurance money to the judgment is not available to the aggrieved party since his claim is not for loss or

damage on account of bodily injury or death as set forth in Section 9510-3, General Code. See Casualty Company v. Madler, 115 O.S. 472. Let us further assume that the insured wrongdoer pays the judgment and then seeks indemnity from the insurance company, a complete defense could be predicated and sustained on grounds of public policy that he could not profit by securing indemnity for his intentional wrongdoing. See New Amsterdam Casualty Co. v. Jones, 135 Fed. Rep. 2nd Series, page 191 (Circuit Court of Appeals, Sixth District, decided April 23, 1943).

It is generally held that automobile liability insurance is valid and not against public policy which protects against negligence, although such negligent acts may also amount to the commission of a crime where the party had intended to commit the crime but had not intended to injure a third party. This is illustrated in cases where by driving an automobile in violation of a safety code and thereby subjecting the offender to criminal prosecution, and injury results to a third party. The case of Tinline v. White Cross Insurance Association (1921); 3 K.B. (Eng.) 327, was a case involving manslaughter as a result of illegal operation of a motor vehicle. The court held the insurance contract not void as against public policy, saying:

> "It must, of course, be clearly understood that if this occurrence had been due to an intentional act on the part of the plaintiff, the policy would not protect him."

The Tinline case and other English cases are discussed in an article in Vol. 189 The Law Times, page 140 (March 9, 1940).

The same distinction was made by Judge Cardozo in the case of Messersmith v. American Fidelity Company (New York Court of Appeals) (1921) reported in 19 A.L.R. 876, involving the validity of insurance where the automobile was entrusted by the owner to a child under the age permitted by statute, wherein he said:

> "The defendant does not greatly dispute that there may be indemnity against the consequences of negligence. It argues, however, that in this case the plaintiff's liability was the product, not of negligence, but of wilfulness. Undoubtedly the policy is to be confined to liability for injuries that may be described as accidental. Even if its terms did not so limit it, the fundamental principle that no one shall be permitted to take advantage of his own wrong would import the limitation. But the extension of the policy to this case is no departure from its restriction to injuries

that are the product of accident or negligence. The plaintiff, in intrusting his car to a youth under eighteen, did not desire or intend that there should be an injury to travelers. The act of so intrusting it was wilful, but not the ensuing conduct of the custodian, through which injury resulted. Indeed, the violation of the statute would have been the same, though the driver's age had been unknown. What was wilful was not actionable, except as it became so in the sequel, through what was unintended or fortuitous.

Injuries are accidental or the opposite, for the purpose of indemnity, according to the quality of the results rather than the quality of the causes. The field of exclusion would be indefinitely expanded, if the defendant's argument were pursued to the limit of its logic. Every act, if we exclude, as we must, gestures or movements that are automatic or instinctive, is wilful, when viewed in isolation and irrespective of its consequences. An act ex vi termini imports the exercise of volition. Holland, Jurisprudence, 8th ed. pp. 93, 94. Even so, if the untoward consequences are not adverted to,—at all events, if the failure to advert them is not reckless and wanton,—liability for the consequences may be a liability for negligence. A driver turns for a moment to the wrong side of the road, in the belief that the path is clear and deviation safe. The act of deviation is wilful, but not the collision supervening. The occupant of a dwelling leaves a flowerpot upon the window sill, and the pot, dislodged by wind, falls upon a passing wayfarer. The position of the flowerpot is intended, but not the ensuing impact. The character of the liability is not to be determined by analyzing the constituent acts, which, in combination, make up the transaction, and viewing them distributively. It is determined by the quality and purpose of the transaction as a whole."

Public policy has been defined in Ohio as follows:

"Public pólicy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. To be against public policy a contract must contravene public right or the public welfare. It must be shown to have mischievous tendency as regards the public. And this should clearly appear. A contract will not be held to be void as against public policy unless the public injury is clear; it is not sufficient that the public injury be a matter of opinion. It is clear that the thing that vitiates a contract under a principle of the law which we call 'public policy,' is not an intent to injure the public, but a tendency to the prejudice of the public. Actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations."

(9 O. Jur., Section 132, Contracts.)

The purpose of the Civil Rights statute is certainly to discourage and eliminate discrimination between the races while the writing of insurance to protect against acts of discrimination would have a tendency to foster and encourge such discrimination by an intential wrongdoer who protected by such insurance, would suffer no financial loss by reason of damage or penalties imposed by law. Such contracts of insurance would surely have mischievous tendencies as regards the public, would encourge unlawful conduct and would be against public policy as heretofore defined in Ohio.

I am therefore of the opinion that a policy of insurance in which the company agrees "to pay all loss by reason of the liability imposed by law upon the assured (and expense arising or resulting from claims or suits against the assured) for damages based upon alleged discrimination against any patron or prospective patron" is contrary to common law as being against public policy and the writing of such is not permitted under Section 9607-2 of the General Code of Ohio.

Respectfully,

HUGH S. JENKINS

Attorney General