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Insurance—Other Insurance—Interest

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and in *Klein v. Thompson*, 19 Ohio St. 569, plaintiff recovered the amount of a surgeon's bill, though it was paid by others without his request. But in some states, including Missouri, not even the reasonable value of gratuitous nursing and medical attendance can be recovered by the plaintiff in a personal injury action. *Morris v. Grand Ave. Ry. Co.*, 144 Mo. 500, 46 S. W. 170; *Gibney v. St. Louis Transit Co.*, 204 Mo. 704, 103 S. W. 43; *Baldwin v. Kansas City Rys. Co.* (Mo. App.), 218 S. W. 955; *Chicago, B. & Q. R. Co. vs. Johnson*, 24 Ill. App. 468; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 A. 191. It is worthy of notice, also, that the rule that the injured party may recover for nursing gratuitously rendered has been held not to apply to actions under a Workmen's Compensation Act, in *City of Milwaukee v. Miller et al.* (Wis.), 144 N. W. 188. F. W. F., '27.

INSURANCE—OTHER INSURANCE—INTEREST.—*Dietzel et al. v. Patron's Mutual Fire Insurance Co. of Michigan*, 205 N. W. 149 (Supreme Court of Michigan, Oct. 1, 1925).

Herbert and Ferdinand Dietzel, owners of a large farm, made mention in their application to the defendant company for a \$19,600 fire insurance policy of \$5,000 policies carried by the Flint Company on the interest of each, it being expected that they would both be cancelled. Shortly thereafter the Flint Company was requested in writing to cancel the two policies, but through some mistake only the policy issued to Herbert was cancelled. A fire loss having been sustained, the Flint Company paid the loss on articles not covered by the defendant company's policy, the defendant company paid the other loss, and the plaintiffs assigned their claim against the Flint Company to the defendant company. Thereafter, the defendant company issued a policy for \$3,900 to the brothers, who represented in their application that they did not carry any other insurance. All of the policies had pro rata clauses. A little over a year later plaintiffs claimed a loss of \$6,375.12 from another fire, but the defendant company sought to adjust this loss at \$3,657.10; and the plaintiffs gave notice of an appeal to a board of arbitration, which made an award of \$2,022.59, which the defendant company tendered to the plaintiffs. This reduction was made because the arbitrators learned that the policy of the Flint Company, issued to Ferdinand, had not been cancelled, and insisted upon prorating the insurance; although

the Flint Company contended that its policy was automatically suspended by reason of a provision in it to that effect, in case other insurance should be obtained without the Flint Company's written consent.

On appeal, it was held that in deciding whether the defendant company had the right to prorate the insurance it was unnecessary to decide just what the status was between the Flint Company and Ferdinand, for if that policy was still a valid one, it covered only his interest, and did not inure to the benefit of the Dietzel brothers. The court then quoted from *Lubetsky v. Standard Fire Insurance Co.*, 217 Mich 654, 187 N. W. 260, citing 14 R. C. L. 1310:

“A provision in a policy that in case of any other insurance on the property insured made prior or subsequent to the policy, the assured shall be entitled to recover no greater proportion of the loss than the sum insured bears to the whole amount so insured therein, applies only to cases where the insurance covers the same interests, and can have no application to insurance obtained upon another distinct insurable interest in the property.”

The trial judge having been of the opinion that the board of arbitration had no right to prorate the insurance, and that the value fixed by adjustment was fair, the decree was affirmed.

The doctrine of the principal case, as to recovery on independent interests, is a general one; and has been applied in the case of insurance obtained by the mortgagor and by the mortgagee of property on their separate interests. Thus, it was held in *Home Fire Insurance Company v. Weed*, 55 Neb. 146, 75 N. W. 539, that in such a case a *pro rata* clause did not reduce the amount recoverable on a policy taken out by the owner. And so it was held in *Home Insurance Company v. Koob*, 113 Ky. 360, 68 S. W. 453, that double insurance procured without the knowledge or consent of the policyholder would not constitute a breach of a condition against double insurance. In *Traders' Insurance Company v. Pacaud*, 150 Ill. 245, 37 N. E. 460, insurance obtained by a third person upon a distinct and insurable interest was held not to constitute “other insurance,” notwithstanding the *pro rata* clause of the policy. It is apparent that the rule is a general one, but the principal case is nevertheless of some interest because of the rule being applied to a somewhat new set of facts for this class of cases.

However, in *Liverpool, London and Globe Insurance Company*, 33 Mich. 138, decided in 1876, it was held that where a policy in another company had been taken in the individual name of one of

the partners prior to the formation of the partnership, and had never been assigned to the firm, contrary to the partnership agreement, but which both the firm and the company had treated and dealt with as a partnership policy, the policy in suit providing for averaging the loss, the first policy could be drawn into the adjustment. This right to contribution from co-insurers has been asserted in *Lucas v. Insurance Company*, 6 Cow. (N. Y.) 635; and in *Millandon v. Insurance Company*, 9 La. 27. The holding of *Williamsburg City Fire Insurance Co. v. Gwinn*, 88 Ga. 65, 13 S. E. 837, was that one recovery bars a subsequent action against a co-insurer.

A Pennsylvania doctrine, set forth in *Clarke v. Assurance Company*, 146 Pa. 561, 23 A 248, 15 L. R. A. 127, is that insurance is not deemed concurrent unless it is also co-extensive; but *Ogden v. Insurance Company*, 50 N. Y. 388, is contra. The modern rule is probably correctly stated in *Turk et al v. Newark Fire Insurance Company*, 4 F (2d) 142, decided Jan. 8, 1925, to the effect that in order to constitute "other" or "contributing" insurance, the policies must cover the same interest, the same property, and the same risk.

J. T. B., '26.

TORTS—RES IPSA LOQUITUR—*Nelson v. Zamboni et al.* Supreme Court of Minnesota, 204 N. W. 943.

An interesting application of the doctrine of *res ipsa loquitur* is furnished by the recent decision of the Supreme Court of Minnesota in an action brought to recover for the death of the plaintiff's decedent. An explosion occurred in an automobile filling station operated by the defendants. The explosion resulted in the death of the plaintiff's decedent, a passing autoist who had stopped and was inside of the station when the explosion occurred. There was no direct evidence as to the actual cause of the explosion. The lower court had dismissed the action at the close of the plaintiff's case. On the appeal to the Supreme Court the only question presented and the only question passed upon by that tribunal was the question regarding the application of the doctrine of *res ipsa loquitur* to the facts of the case. *Held*: That the doctrine of *res ipsa loquitur* was applicable to the facts of the case on the theory that an explosion in a gasoline filling station was the type of accident which would not ordinarily happen if those in control of the "instrumentality" had used the degree of care commensurate with the danger.