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Learned Hand has said, "offers an easy escape from embarrassing chores,"²⁹ it is submitted that the decision in the principal case did not serve the ends of substantial justice.

It remains to be noted whether, when dealing with the exclusionary rule and jury misconduct which bears on the evidence considered by the jury, a distinction should be made between civil and criminal cases. In civil cases the quantum of proof is less than in criminal cases, and jury misconduct might reasonably be given less weight in determining if the verdict ought to be impeached. On the other hand, the requirement of proving guilt beyond a reasonable doubt in a criminal case would indicate that any misconduct which could reasonably affect a juror's vote should be thoroughly investigated. In addition, a unanimous verdict is seldom required in civil cases, and it would seem reasonable to disregard a civil juror's misconduct if his vote was not essential to the verdict. On the other hand, jurors who receive unauthorized evidence often communicate their misappropriated knowledge to other jurors, and the misconduct of one juror may taint the verdict of all. It is apparent that, in order to effectuate a distinction between civil and criminal cases in application of the exclusionary rule, a court would be required to undertake a close investigation of the jurors' activities both within and without the juryroom. It is doubtful that a court in either a civil or criminal case would be willing to undertake such an investigation, which might involve violations of juryroom secrecy.

LIMITING LANGUAGE IN UNPURCHASED POLICY PROVISION DOES NOT APPLY TO PURCHASED COVERAGE

Plaintiff's truck was hit by a tree felled by a logging contractor's employee. The truck was insured by defendant insurance company against damage due to collision,¹ but plaintiff had not purchased coverage under the comprehensive clause.² Plaintiff brought an action

²⁹ *Jorgenson v. York Ice Mach. Corp.*, 160 F.2d 432, 435 (2d Cir. 1947).

¹ "Coverage E—Collision or Upset: To pay for direct and accidental loss of or damage to the automobile ... caused by collision of the automobile with another object" *Jones v. Virginia Sur. Co.*, 401 P.2d 570, 571 (Mont. 1965).

² "Coverage D—Comprehensive Loss or Damage to the automobile, Except by Collision or Upset: To pay for direct and accidental loss of or damage to the automobile ... except loss caused by collision of the automobile with another object Breakage of glass and loss caused by ... falling objects ... shall not be deemed loss caused by collision or upset." *Ibid.*

against defendant insurer for the loss. Relying upon the language of the unpurchased comprehensive clause, the trial court held that defendant's liability did not include loss caused by falling objects. On appeal, a divided Montana Supreme Court reversed. *Held*: When an insured does not purchase one form of insurance coverage, the insurer may not deny liability on the basis that the loss was excluded from the purchased coverage by the unpurchased provision. *Jones v. Virginia Sur. Co.*, 401 P.2d 570 (Mont. 1965).³

Because the collision clause in the policy contained no exceptions to coverage, the falling tree constituted a covered "collision" unless the comprehensive clause could be considered as limiting the collision coverage.⁴ In determining which clauses of the policy constituted the contract between the parties in the principal case, the court was faced with a choice between two conflicting lines of authority, one holding that all coverages offered in the policy—whether purchased or not—constitute the contract and are considered in determining the extent of coverage purchased,⁵ and the other holding that only those provisions actually purchased are a part of the contract.⁶

The majority of the court reasoned that it was "wise and just" not to consider the failure to purchase comprehensive coverage as an indicium of intent, as to do so would require the unwarranted assumptions that an insured reads all coverages offered in a particular policy and that he reads them as mutually exclusive. The ambiguity created by the existence of apparently contradictory clauses was resolved

³ 41 NOTRE DAME LAW. 262; 17 S.C.L.Q. 639 (1965).

⁴ In *T.C. Power Motor Car Co. v. United States Fire Ins. Co.*, 69 Mont. 563, 223 Pac. 112 (1924), 35 A.L.R. 1028 (1925), the Montana Supreme Court held that, in policies which insure against collision with other objects without limitation, coverage is provided for any loss caused by contact with anything that can be described as an object, irrespective of whether the object was moving or stationary. The court held that an object is anything tangible and visible, and is not confined to objects similar to an automobile or other vehicle. Under this broad definition of "collision," the court in the principal case had little difficulty in finding that a collision had occurred. Similarly, under most authorities it is irrelevant whether both bodies are in motion, or only one, or whether the automobile is moving or stationary. *E.g.*, *Saint Paul Fire & Marine Ins. Co. v. American Compounding Co.*, 211 Ala. 593, 100 So. 904 (1924); *Rea v. Motors Ins. Corp.*, 48 N.M. 9, 144 P.2d 676 (1944). See generally 5 APPLEMAN, INSURANCE LAW AND PRACTICE § 3201 (1943); 6 COOLEY, BRIEFS ON INSURANCE 4993-5000 (2d ed. 1928); 11 COUCH, INSURANCE 2d §§ 42:192-94 (1963); 2 RICHARDS, INSURANCE § 288 (5th ed. 1952).

⁵ *E.g.*, *Saul v. Saint Paul Mercury Indem. Co.*, 173 Kan. 679, 250 P.2d 819 (1952); *Fisher v. California Ins. Co.*, 236 Ore. 376, 388 P.2d 441 (1964); *Iowa Mut. Ins. Co. v. Faulkner*, 157 Tex. 183, 300 S.W.2d 639 (1957); *Providence Wash. Ins. Co. v. Proffitt*, 150 Tex. 207, 239 S.W.2d 379 (1951); *Glen Falls Ins. Co. v. McCown*, 149 Tex. 587, 236 S.W.2d 108 (1951).

⁶ *E.g.*, *Barnard v. Houston Fire & Cas. Ins. Co.*, 81 So. 2d 132 (La. App. 1955), 54 A.L.R.2d 374 (1957), 24 U. CHI. L. REV. 170 (1956); *Central Nat'l Ins. Co. v. Adams*, 45 Tenn. App. 23, 319 S.W.2d 486 (1958).

against the insurer by application of the doctrine that insurance policies are read most strongly against those who have written the terms. Therefore the court looked only to the purchased provision, and refused to allow the insurer to escape liability on the basis that coverage under the policy was controlled by an unpurchased clause.

The leading case upholding the "all-clauses included" position is *Saul v. Saint Paul Mercury Indem. Co.*⁷ The insured, whose truck was destroyed by flood waters, had purchased coverage against collision and against external discharge or leakage of water, but had not purchased provisions for coverage against damage by flood or rising water. The court held that all coverages contained in the policy form should be considered in determining the extent of coverage purchased. The court, considering the issue to be identification of the contract between the insured and his insurer—rather than interpretation of that contract—stated:

[T]he policy did not confuse the subject of damages from "external discharge or leakage of water" with damages from "flood or rising waters" but that on the contrary it listed them as separate and distinct coverages. Plaintiff did not buy and defendant did not assume the latter risks.⁸

One of the problems presented by these cases is that they have failed to indicate whether any reasonable limitation exists as to the location of a clause which would be effective to limit liability. Some cases seem to indicate that a statement that loss due to falling objects is not a collision, contained in an obscure and unpurchased provision such as "medical payments" or "uninsured motorist," would effectively limit liability under a purchased collision coverage.⁹ Theoretically, then, an insurance company could grant coverage in one clause and then, in another obscure and specialized part of the policy which was not purchased, limit the purchased coverage.

⁷ 173 Kan. 679, 250 P.2d 819 (1952).

⁸ *Id.* at 823.

⁹ In *Saul v. Saint Paul Mercury Indem. Co.*, *supra* note 7, at 822, the court stated:

[T]he accepted rule is that the intent of the parties must be determined by a consideration of the contract as a whole and not by lifting some one sentence or provision from the policy.... The court must look to the entire contract of insurance for a true understanding of what risks are assumed by the company and what risks are excluded.

In *Fisher v. California Ins. Co.*, 236 Ore. 376, 388 P.2d 441, 444 (1964), the court stated: "We do not think it is reasonable to say that the insured is required to read only that part of a policy which directly deals with the coverage he seeks." See also *Glen Falls Ins. Co. v. McCown*, 149 Tex. 587, S.W.2d 108, 111 (1951): "The coverages offered but rejected are in the policy... the same as those offered and accepted, therefore it is proper to consider all of them in determining the respective obligations and rights of the parties."

A further problem presented is that an insured, in reading his purchased clause, often finds no internal reference to other clauses as limiting his purchased coverage. Even if an insured does read the unpurchased comprehensive clause, there is often no express indication that the limiting language applies to the collision clause. Such was the situation in the principal case. In short, this first line of cases examines the insurance transaction in its complete context, recognizing that a purchaser of insurance has a choice of provisions to purchase, and assumes that the failure to purchase certain policy provisions evidences a rejection of those provisions and the coverage they provided.¹⁰ When the insured later tries to recover for loss from the rejected risks, these courts refuse to allow it.

The leading decision in the second line of cases, holding that an unpurchased clause is not part of the insurance contract, is *Barnard v. Houston Fire & Cas. Ins. Co.*,¹¹ in which the fact situation was identical to that in the principal case. Allowing the insured to recover under the collision clause, despite the limitation contained in an unpurchased comprehensive clause similar to that in the principal case, the court stated:

Plaintiff's rights are governed by the provisions of [the] clause . . . pertaining to collision or upset. There is no provision there for excluding damage or loss caused by "falling objects." . . .

. . . It is sufficient for the purpose that no positive and definite exclusion was provided Neither would the fact that under other provisions of the policy plaintiff could have also obtained protection against loss and damage through the happening of the accident involved relieve the insurer. . . .¹²

The reasoning of the second line of decisions, which was adopted by the court in the principal case, rejects the theory that an insured, by purchasing on provision, intends to exclude all other coverages offered in the same policy. Rather, the purchased provisions are regarded as the complete integration of the insurance transaction, and only that which is stated in the purchased provisions affects the rights of the

¹⁰ *Saul v. Saint Paul Mercury Indem. Co.*, *supra* note 7, at 822: "[I]t plainly appears in the policy various types of insurance are available and that the insured declined to purchase the kind of insurance which would have afforded the protection he now claims."

¹¹ 81 So. 2d 132 (La. App. 1955).

¹² *Id.* at 137, 138.

parties.¹³ The courts refuse to give effect to limitations which were not written into the purchased provision, and do not accept the argument that the insured's selection of coverage amounted to an intention to have the unpurchased provisions be considered part of the contract.¹⁴ Thus, under the rule of the principal case, a party who has purchased only collision coverage gets some of the same coverage obtained by a party who purchased only comprehensive coverage. However, consumer protection in buying insurance would be furthered if shoppers for insurance could compare the cost of one kind of coverage with that of another from the same insurer, as well as costs of identical kinds of coverage from different insurers. When part of a coverage other than that apparently purchased is judicially included in the purchased provisions, the difficulty in accurately comparing the cost of insurance is increased. If the principal case had been decided differently a cost comparison by a prospective insured would be meaningless unless he first determined whether there was coverage stated in the policy but not expressly included in the purchased provision.

Under the approach adopted in the principal case, the lack of internal reference between clauses granting coverage and clauses limiting coverage created an ambiguity to be resolved by the rules of interpretation of ambiguous contracts.¹⁵ The court resolved this ambiguity in plaintiff's favor, by use of the principle of construing ambiguous terms of a contract most strongly against the party drafting them,¹⁶ a principle frequently applied to insurance policies.¹⁷ The rationale behind the use of this principle of construction in the insurance field is

¹³ *E.g.*, *Barnard v. Houston Fire & Cas. Ins. Co.*, *supra* note 11, at 138: "Neither would the fact that under provisions of the policy plaintiff could have also obtained protection against loss and damage through the happening of the accident involved relieve the insurer . . ."

¹⁴ "Statement of defendant's liability under this [collision] coverage . . . is not affected by apparently contradictory expressions under other, and distinct clauses . . ." *Id.* at 137.

¹⁵ Notwithstanding the numerous technical phrases which are usually inserted in insurance policies, they remain written contracts to be interpreted by the same rules which apply to other contracts. 2 COOLEY, *BRIEFS ON INSURANCE* 961 (2d ed. 1927); 1 COUCE, *INSURANCE* 2d § 15:15 (1963); 3 RICHARDS, *INSURANCE* § 391 (5th ed. 1952).

¹⁶ See 3 CORBIN, *CONTRACTS* §559 (1960); 4 WILLISTON, *CONTRACTS* § 621 (3d ed. 1961); *RESTATEMENT, CONTRACTS* § 236(d) (1932).

¹⁷ "This rule finds frequent application in regard to policies of insurance, which are ordinarily prepared solely by the insurance company, and therefore, the words of the policies are construed most strongly against it." *RESTATEMENT, CONTRACTS* § 236, comment *d* (1932). Some courts have refused to use this principle in interpreting insurance policies, relying on other principles to reach an equitable result. *E.g.*, *Landwehr v. Continental Life Ins. Co.*, 159 Md. 207, 150 Atl. 732 (1930) (the intent of the parties as gathered from the whole instrument); *McGinley v. John Hancock Mut. Life Ins. Co.*, 88 N.H. 108, 184 Atl. 593 (1936) (what a reasonable

that "policies of insurance are made on printed forms carefully prepared in the light of wide experience, by experts employed by the insurer, and in the preparation of which the insured has no voice."¹⁸ Other reasons which have been given to justify application of the rule are, first, that policies are rarely understood by an insured and he should be protected from his own ignorance under such circumstances,¹⁹ and second, to effectuate the basic purpose of an insurance contract, *i.e.*, protection of the insured.²⁰

Perhaps the most cogent resolution of the problem presented by the principal case was in *Providence Wash. Ins. Co. v. Proffitt*.²¹ Holding that an unpurchased comprehensive clause in a policy should be considered in determining the extent of the purchased collision coverage, the court interpreted the language of the unpurchased clause as not restricting the purchased coverage.²² Instead of resorting to the rule of strict construction against the insurer, the court held that one clause in the policy may not limit another unless there is an internal reference in the clauses to that effect. Because of poor draftsmanship by the insurance company, the court found that the instrument as a whole represented the collision clause to be unrestricted, and that the parties so intended. The court in *Proffitt* told the insurance companies what could be done to limit liability, guidance which the other decisions have failed to furnish: move the limitation on coverage from the comprehensive clause to the collision clause.

person in the position of the insured would understand the words of the policy to mean). For a criticism of the rule of strict construction, see Kuvin, *Misconstruction of Insurance Policies*, 433 INS. L.J. 102 (1959).

¹⁸ 1 COUCH, INSURANCE 2d § 15:77 (1959).

¹⁹ *Id.* at § 15:78.

²⁰ *Id.* at § 15:80.

²¹ 150 TEX. 207, 239 S.W.2d 379 (1951).

²² *Id.* at 381.

The provision of Coverage A [comprehensive] that loss caused by... falling objects... shall not be deemed loss caused by collision or upset cannot be used to defeat a recovery under Coverage B-1 [collision]. The obvious purpose of this provision was to enlarge the liability of petitioner [insurer] under Coverage A and was not to restrict the liability of petitioner under Coverage B-1. To those who paid for Coverage A petitioner obligated himself to pay for *all* loss or damage to the automobile *except* loss or damage caused by collision or upset. By the quoted language it then removed any possibility of defeating recovery for loss or damage resulting from the causes named.... If petitioner had intended the language used in the last sentence of Coverage A (enlarging its liability under that coverage) to be used also to restrict its liability under coverage B-1, the same language could have been written into Coverage B-1 as a limitation of liability.