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# Contracts—Future Installments—Declaratory Judgments

116. The protest of the passenger for slower speed may not be sufficient to entitle him to this protection. *Wachtel v. Bloch* (1931) 43 Ga. App. 756, 160 S. E. 97. In Massachusetts in cases when death has resulted the rule of ordinary care is applied by statute. *Gallup v. Lazatt* (1930) 271 Mass. 406, 171 N. E. 658. It is difficult to find convincing reasons for the proposition that while the plaintiff is a member of the general public, the driver owes him the duty of ordinary care, but upon entering the automobile, the driver's duty immediately shifts to that of slight care. One justification urged has been that the guest is favored. Although the argument may be forceful when applied to this type of case, such a conclusion is not applicable where the relationship is for the benefit and convenience of the driver or their mutual benefit. See White, *The Liability of an Automobile Driver to a Non-paying Passenger* (1912), 18 Va. L. R. 342, et seq. It will not do to say that the driver owes no more duty to the guest than a gratuitous bailee owes to a block of wood. *Munson v. Rupker*, supra.

J. L. A. '37.

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CONTRACTS—FUTURE INSTALLMENTS—DECLARATORY JUDGMENTS.—In an action on an accident insurance policy providing for monthly installments to the insured during total disability, plaintiff seeks to recover accrued installments to the commencement of his action, installments accruing between the commencement of the action and the trial, and to be granted a declaratory judgment as to installments as they come due in the future. The lower court gave judgment for the plaintiff on all three grounds. *Held*, on appeal, plaintiff is entitled to installments accrued at the commencement of his action and to those accruing between the commencement of the action and the trial, but he cannot recover, by resort to a declaratory relief statute, installments due in the future. *Brix v. Peoples Mutual Life Insurance Co.* (Calif. Sup. Feb. 20, 1935). 41 Pac. (2nd) 537.

Authority as to the right to judgments for future installments under such an insurance policy is conflicting. In some jurisdictions, notably Kentucky, they have been granted without the invocation of declaratory relief statutes; usually contingent upon the continuation of the insured's disability. *Prudential Life Insurance Co. of America v. Hampton* (1933) 252 Ky. 145, 65 S. W. (2nd) 980; *Equitable Life Insurance Society of the United States v. Branham* (1933) 250 Ky. 472, 63 S. W. (2nd) 498. Where the insurer has clearly indicated his intention not to perform in the future the majority of states permit an action for breach of the entire contract. *Lovell v. St. Louis Mutual Life Insurance Co.* (1884) 111 U. S. 264; *McKee v. Phoenix Life Insurance Co.* (1859) 28 Mo. 383; *Indiana Life Endowment Co. v. Carnithan* (1915) 62 Ind. App. 567, 109 N. E. 851; Freeman, *On Judgments* (5th Ed. 1925), Vol. 3, pp. 2780-2792; Williston on Contracts (1920), Vol. 3, Sec. 1328. In the absence of such repudiation by the insurer, the general rule is that recovery may be had only for accrued installments. *Green v. Inter-Ocean Casualty Co. of Cincinnati.* (1932) 203 N. C. 767, 167 S. E. 38; *Mid-Continent Life*

*Insurance Co. v. Christian* (1932) 164 Okl. 161, 23 Pac. (2nd) 672; *Robinson v. Exempt Fire Co. of San Francisco* (1894) 103 Cal. 1, 36 Pac. 955; *Bonslett v. New York Life Insurance Co.* (Mo. 1916) 190 S. W. 870. And in a few jurisdictions there may be no recovery for future installments even though the insurer has repudiated the contract. *Porter v. Supreme Council* (1903) 183 Mass. 326, 67 N. E. 238; Freeman, *On Judgments*, supra. One reason for the courts' refusal to grant judgments for future damages under this type of contract has been the difficulty of accurately assessing damages. *Allen v. National Life and Accident Insurance Co.* (Mo. 1934) 67 S. W. (2nd) 534; *Chipley v. National Life and Accident Insurance Co.* (Mo. 1934) 67 S. W. (2nd) 992. The use of mortality tables has occasionally been justified. *Federal Life Insurance Co. v. Rascoe* (C. C. A. 6, 1926) 12 Fed. (2nd) 693.

Declaratory Judgment Acts, where they have been adopted, usually contain a clause which makes them applicable to contracts. The California statute, while not that recommended by the Commissioners on Uniform State Law, is not dissimilar in its implications in the instant case. California Code of Civil Procedure of 1923, sec. 1060. The Uniform Act and current trends in the declaratory judgment movement are discussed by E. M. Borchard, *The Declaratory Judgment in the United States* (1931), 37 W. Va. Law Quarterly 127. Included in the California laws is a statute making the granting of declaratory relief discretionary in the court. Calif. Code Civil Pro., supra, sec. 1061. No authority is found for the application of declaratory judgment statutes to future installment payments under disability insurance contracts.

*Green v. Inter-Ocean Cas. Co.*, supra, held that they must be refused because declaratory relief can be granted only where damages in the future are the proximate result of the tort or breach of contract on which the action was based. In *Brix v. Peoples Mutual* there was no breach of the contract in its entirety. Declaratory judgments have been refused in one great class of cases, including to some extent the instant case, where the rights of the parties are future, contingent, or uncertain. *Dobson v. Ocean Accident and Guarantee Corp.* (1933) 124 Neb. 652, 247 N. W. 789; *Washington-Detroit Theatre Co. v. Moore* (1930) 249 Mich. 673, 229 N. W. 618.

The decision of the instant case is thus backed by the weight of authority as to its refusal to grant declaratory relief where the rights of parties are in some degree contingent, but, in the dicta of the court, there is a hint as to a possible future role of the Declaratory Judgment Act in such cases. The court grants the plaintiff a judgment for installments accruing between the commencement of the action and the actual trial on the ground that refusal would not be in harmony with modern procedure, which seeks to enable parties to settle in a single action all controversies growing out of the same subject matter. The determination of the parties' rights as to future installments, contingent upon the continuation of the plaintiff's total disability, would be another step in this direction. The tendency is toward a more liberal interpretation of the scope of the ap-

plicability of declaratory relief. *Sigal v. Wise* (1932) 114 Conn. 297, 158 Atl. 891. In that case it was said that one great purpose of the acts is to enable parties to settle their differences in advance of any invasion of rights so as to avoid the expense and disturbance of lawsuits. . . . "Fully to carry out" these purposes "it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening." In *Post v. Metropolitan Life Insurance Co.* (1929) 237 N. Y. Supp. 64, it was said that the Declaratory Judgment Statute "was designed to supply the need for a form of action that would set controversies at rest before they led to the repudiation of obligations, the invasion of rights, and the commission of wrongs. The benevolent purposes of the statute should not be thwarted by narrow and technical construction."

J. W. '37.

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EVIDENCE—MOTION PICTURES.—The plaintiff sued for damages for injuries to his nervous system, claiming total and permanent disability, and his physician testified that the plaintiff's condition "will get progressively worse" and "will manifest more organic signs as time progresses." Defendant introduced motion pictures taken while plaintiff was unaware, showing him doing various chores, including taking down a cherry tree ten feet high. This evidence was *held* admissible to prove the complete manual dexterity of the plaintiff and the likelihood of his speedy rehabilitation. *Smalley v. New York Central Ry. Co.* (D. C., E. D. N. Y., No. L-6235, Feb. 11, 1935) U. S. Law Week, Feb. 26, 1935, p. 14.

During the earlier development of motion pictures the courts hesitated to recognize their validity as evidence. The first New York case was *Gibson v. Gunn* (1923) 202 N. Y. Supp. 19, a suit by a dancer for personal injuries. As the defendant, in order to prove that the actual damage he had caused was slight, relied upon the fact that before the accident the plaintiff's leg had been amputated, the plaintiff showed a motion picture, portraying her in various dances, proving that in spite of her artificial leg she had been an expert dancer before her injury by the defendant. The appellate court held such evidence inadmissible for the reasons that motion pictures in themselves present fertile field for exaggeration of one's emotions and actions, that plaintiff had offered no evidence as to how this picture had been prepared, and that the evidence was irrelevant and hearsay. Thus, under the first reason given, it would seem that all motion pictures must be excluded, a view limited by later decisions. Despite the court's unsupported statement to the contrary, it appears clear that the evidence was neither irrelevant nor hearsay.

Later cases excluding motion pictures as evidence based their decisions on grounds not in conflict with *Smalley v. N. Y. Cent. Ry., supra.* In *Massachusetts Bonding & Ins. Co. v. Worthy,* (Tex. Civ. App. 1928) 9 S. W. (2nd) 388, an action on an insurance policy, the court sustained exclusion of motion pictures disproving plaintiff's claim of total disability, for the reason that the defendant had failed to identify them or verify their ac-