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the number of trials, in ending delay at the trial and in lessening the expense to the parties.

The procedure will not work effectively unless the judge feels that it can be made to produce the desired results. Further it will not function properly if the bar opposes it. The lawyers must give their full cooperation. Each attorney must fully disclose the facts of his case at the hearing and no longer rely upon surprise tactics of an "ace in the hole" to win his case. There should be a conscientious attempt to eliminate the necessity for proof of matters which are not in dispute. Judges in the federal courts have testified that there is little difficulty in obtaining the cooperation of the bar once it learns that cases are not prejudiced but, in fact, are materially aided by the pre-trial practice.

J. KIMBALL WALKER

QUESTIONING OF JUROR ON VOIR DIRE AS TO INSURANCE

It is commonly believed that juries will render greater damages upon discovering that the loss occasioned by the defendant will be paid by an insurance company. As a result, courts have scrupulously guarded against the injection of the fact of insurance during trial when an insurance company is not a party of record.¹

A more difficult problem arises in personal injury actions against an insured defendant when plaintiff's counsel questions jurors on voir dire examination as to the jurors' possible connection with or interest in the insurance company. Two reasons have been advanced for allowing such questioning: First, to aid the plaintiff in determining if a cause for challenge exists; and second to determine whether or not plaintiff should exercise his peremptory challenge.² The courts are presented with the difficult question of prejudices. The plaintiff is entitled to discover any prejudice or bias of a prospective juror in favor of the insurance company who is the real party in interest and the defendant is entitled to have the prospective jurors unprejudiced against his case upon learning that he is insured.

The great majority of jurisdictions hold that questioning of jurors on voir dire as to their possible connection with or interest in any insurance company³ or their possible connection with or interest in a designated insurance company⁴ is

1. *Watson v. Adams*, 187 Ala. 490, 65 So. 528, Ann. Cas. 1916E, 565 (1914); *Roche v. Llewellyn Iron Works Company*, 140 Cal. 563, 74 Pac. 147 (1903); *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020 (1913); *Simpson v. Foundation Company*, 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321 (1916); *Wilson v. Blair*, 65 Mont. 155, 211 Pac. 289, 27 A. L. R. 1235 (1922); *Vasquez v. Pettitt*, 74 Ore. 496, 145 Pac. 1066, Ann. Cas. 1917A, 439 (1915); *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202 (1904).
2. 56 A. L. R. 1456.
3. *Berry v. Park*, 188 Okla. 475, 110 P. (2d) 902 (1940); *Eldridge v. Clark & Henery Construction Company*, 75 Cal. App. 516, 243 Pac. 43 (1925); *Foley v. Cudahy Packing Company*, 119 Iowa 246, 93 N. W. 284 (1903); *Dow Wire Works Company v. Morgan*, 29 Ky. L. Rep. 854, 96 S. W. 530 (1906). Contra: *Green v. Ligon*, 190 S. W. (2d) 742 Tex. (1945).
4. *Stalcup v. Ruzic*, 51 N. M. 377, 185 P. (2d) 298 (1947); *Riechmann v. Reasner*, 221 Ind. 628, 51 N. E. (2d) 10 (1943); *White v. Teaque et al*, 353 Mo. 247, 182 S. W. (2d) 288 (1944); *Wilson v. St. Joe Boom Company*, 34 Idaho 253, 200 Pac. 884 (1921); *Cripple Creek Mining Company v. Brabant*, 37 Colo. 423, 87 Pac. 794 (1906).

permissible so long as the questioning is conducted in good faith. It is at the lower court's discretion to determine whether or not plaintiff's counsel is acting in good faith and there will be no reversal by an appellate court unless there is an abuse of that discretion.⁵

Courts have used varying criteria in determining what constitutes good faith. The Colorado courts say that knowledge by plaintiff that defendant is insured by a particular company affords the plaintiff's counsel the right to question prospective jurors as to their possible connection with that company.⁶ If the question is put to the court in the absence of jury to determine whether or not the jurors should be questioned as to their connections with an insurance company, the court may find this procedure to show an element of good faith.⁷ When a prospective juror is discovered to be an agent for an insurance company, it is usually held permissible to question that juror to determine if he is an agent for defendant's insurer.⁸ A Wyoming case⁹ held that questioning of a prospective juror as to his interest, either as agent or representative of any company writing policies of indemnity insurance insuring persons against negligent operation of automobiles, would be permissible if the questioning led to an accomplishment of a legitimate end.

Bad faith of plaintiff's counsel in questioning of a juror may be evidenced by persistent questioning either in regard to an indefinite¹⁰ or designated company.¹¹ Bad faith may be shown by questioning in regard to an insurance company when the defendant is not insured,¹² or it may be shown when a question is asked that directly suggests that the defendant is insured.¹³

Some courts have gone to the other extreme and have held that any questioning of prospective jurors as to their possible connection with the insurance company is prejudicial error.¹⁴

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5. *M. O'Connor Company v. Gillaspay*, 170 Ind. 428, 83 N. E. 738 (1908); *Braman v. Wiley*, 119 F. (2d) 991 (C. C. A. 7th 1941); *Olguin v. Thygesen*, 47 N. M. 377, 143 P. (2d) 585 (1943); *Engle v. Bowen et al*, 122 Kan. 283, 251 Pac. 1108 (1927).
 6. *Rains v. Rains*, 97 Colo. 19, 46 P. (2d) 740 (1935); *Vindicator Consolidated Gold Mining Company v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, 10 Am. & Eng. Ann. Cas. 1108 (1906).
 7. *Girard v. Grosvenordale Company*, 82 Conn. 271, 73 Atl. 747 (1909); *Heath v. Stephens et ux*, 144 Wash. 140, 258 Pac. 321 (1927); *Grant v. Matson*, 68 S. D. 402, 3 N. W. (2d) 118 (1942).
 8. *Lidfors v. Pflaum*, 115 Ore. 148, 236 Pac. 1059 (1925); *Andrews v. Hotel Sherman*, 138 F. (2d) 524 (C. C. A. 7th 1943).
 9. *Eagan v. O'Malley*, 45 Wyo. 505, 21 P. (2d) 821 (1933).
 10. *Ewing-Von Ollmen Dairy Company v. Godwin*, 304 Ky. 161, 200 S. W. (2d) 103 (1947); *Schwalen v. W. P. Fuller & Company*, 107 Wash. 476, 182 Pac. 592, 10 A. L. R. 296 (1919).
 11. *Vasquez v. Pettit*, 74 Ore. 496, 145 Pac. 1066 (1915); *Morrison v. Perry*, 104 Utah 151, 140 P. (2d) 772 (1943).
 12. *Carter v. Rock Island Bus Lines Inc.*, 345 Mo. 1170, 139 S. W. (2d) 458 (1940). *Contra: Silvestro v. Walz*, 222 Ind. 163, 51 N. E. (2d) 629 (1943).
 13. *Wilson v. St. Joe Boom Company*, 34 Idaho 253, 200 Pac. 884 (1921); *Saltas v. Affleck et al*, 99 Utah 381, 105 P. (2d) 176 (1940).
 14. *Putnam v. Pacific Monthly Company*, 68 Ore. 36, 130 Pac. 986, 45 L. R. A. (NS) 338, Ann. Cas. 1915C, 256 (1913).

Under a Vermont statute¹⁵ the Vermont Supreme Court held that plaintiff could not inquire as to the juror's connection with a designated insurance company even though that company was conducting the defense.¹⁶

In most of the jurisdictions the plaintiff's counsel cannot ask a juror as to his possible connection with an insurance company for the sole purpose of informing the jury that the defendant is insured.¹⁷ Differences arise among the courts as to the necessary elements to show that the counsel's questioning is in good faith.¹⁸ Bad faith is strongly indicated if a juror is questioned in regard to an insurance company when defendant is not insured, or if the juror is questioned as to a designated company when defendant is insured by a different company. The form of the questions often shows the presence or lack of good faith on the part of counsel.¹⁹

Policy dictates that an arbitrary line should not be drawn by the courts in determining whether or not the questioning is permissible. This practice would afford equal protection to the plaintiffs whether they are pursuing lines of questioning either in good or bad faith. A twilight zone exists at the meeting of the extremes. It is at the discretion of the trial judge in the circumstances of each case to limit the extent of the questioning. He should guard closely against improperly framed questions in an effort to determine whether or not the plaintiff's counsel is acting in good faith. Plaintiff's counsel should, in good faith, exercise caution in framing the questions so that the least possible inference is carried to the jury concerning the insurance of the defendant.

DONALD N. SHERARD

DETERMINING STATE LAW UNDER THE DOCTRINE OF *ERIE R.R. v. TOMPKINS*

Plaintiff sought in a state court of South Carolina to recover as beneficiary under a policy of insurance issued by defendant. On defendant's motion the case was removed to a federal district court. The district court recognized that under *Errie RR. v. Tompkins*,¹ South Carolina law should control the issues and that according to such law ambiguities in a contract of this nature are to be construed against the insurer.² Two months later plaintiff recovered on a similar insurance contract from another company in the Court of Common Pleas for South Caro-

15. Laws of Vermont 1935, No. 47 states that a policyholder is not disqualified to sit as a juror because the insurance company is an insurer of a party to the action.

16. *Glass v. Bosworth*, 113 Vt. 303, 34 A. (2d) 113 (1943).

17. *Eldridge v. Clark & Henery Construction Company*, 75 Cal. App. 516, 243 Pac. 43 (1925); *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202 (1904); *Cameron v. Pacific Lime Company*, 73 Ore. 510, 144 Pac. 446 (1914); *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778 (1913).

18. Cases cited notes 6, 7, 8, 9, supra.

19. 56 A. L. R. 1462.

1. 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938), cert. denied, 305 U. S. 637 (1938), rehearing denied, 305 U. S. 673 (1938).

2. Plaintiff's husband, the insured, had made an emergency landing at sea. He was alive and comparatively safe when an accompanying plane left two and one-half hours after the accident. One hour later he was found dead by a rescue squad. The policy of insurance exempted the insurer from liability for "death resulting from participation . . . in aviation." Plaintiff alleged that death did not result from aviation but rather from exposure. This was the ambiguity to be construed.