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the procuring spouse from pleading the invalidity of the Mexican decree, especially where all interested parties have acted in reliance on that decree.

Where both spouses have personally appeared in the Mexican action, they certainly had the opportunity at that time to litigate the question of jurisdiction.

Another method of treating Mexican divorces would be to give them the same effect in the United States that they would have in Mexican state or federal courts. As has been indicated before, lax practices of the state courts are being eliminated. This would mean that American courts would have to delve into Mexican law to determine the effect of the Mexican divorce according to the applicable Mexican law. Although they have shown, with few exceptions, an extreme reluctance to do so, our courts could then give meaning to the doctrine of comity with a freer judicial conscience.

And finally, should there be a “moral difference between a person in moderate circumstances securing a Mexican decree and a more affluent person securing a Nevada divorce. . . . It would disregard the fact that in our society Mexican and Nevada divorces both pose as being more or less respectable and representative of the mores of the day.”

Hillery Silverman.

INSURANCE—DETERMINATION OF TOTAL DISABILITY

In general the courts experience difficulty in determining what is total disability within the meaning of insurance disability clauses; this is due in part to variations in the language of the disability provisions, which in many instances are circumscribed and restricted by qualifying words and phrases, and in part to the variant factors in the individual situations to which the courts are asked to apply disability provisions.

It has long been the rule that the total disability contemplated by an accident policy, or a life insurance policy containing a disability clause, does not mean a state of absolute helplessness, but rather an

106. Vieira, Efectos de les sentencias de divorcio en los paises extranjeros, 3 RIVISTA DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES 557, 569 (Uruguay 1953) (Suggesting that recognition be granted only to divorce decrees rendered by courts competent “according to international principles”).


1. A typical disability clause reads: “Benefits will be paid when insured has become totally disabled as the result of bodily injury or disease occurring after the issuance of this agreement, so as to be prevented from engaging in any business or occupation and performing any work for compensation, gain or profit.”

inability to do all the substantial and material acts necessary to the pursuit of the insured's work or business. This well settled rule rests on sound logic, for it is the purpose of these policies to indemnify the insured against disability and the subsequent loss of wages. With this in mind, courts have liberally construed these policies toward that end.

Since a strict construction of the total and permanent disability clause would require an absolute state of complete paralysis ending only in certain death, it becomes apparent that neither party intended such a meaning. The problem, however, arises in selecting that middle ground—that line beyond which total disability ceases and partial disability appears; or, to what extent must an insured be disabled in order to come within the total and permanent disability clause, keeping in mind uppermost and always, what the intention of the parties was at the time of the creation of the contract. To select this ground, or line, courts will often look to other provisions in the contract.

**PARTIAL ABILITY TO WORK**

A common defense available to the insurance company lies in the insured's partial ability to work. This defense, however, is greatly tempered by almost universal jurisdictional unanimity that the insured must not only be physically equipped but also properly educated and of similar social station before his partial ability to work can mature into "work." A further qualification of this defense is that the insured, though able to partially perform, must necessarily be able to do the essential acts necessary to the exercise of his profession or of any profession or vocation to which he may reasonably be suited by reason of education, income, and social position. Note, however, that mere inability at infrequent intervals to perform some of the acts required in the conduct of business or occupation, is not total disability within the meaning of the policy.

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THE HOUSE CONFINEMENT CLAUSE

A further condition set up by the insurer, the compliance with which is a necessary incident before disability can be termed total, is the house confinement clause. Naturally, this clause applies only in sickness claims, and has no application to accident cases. As in the total and permanent disability clause, courts construe the confinement clause liberally in the insured's favor, and rightly so, for an opposite construction would require absolute confinement to the house; obviously, such confinement cannot always lend itself to a speedy or desired recovery, for in the treatment of some ills, fresh air, sunshine, and slight exercise are necessary elements. The weight of authority indicates that courts treat house confinement clauses as mere evidence that there is total disability and not as a condition precedent to the insured's eligibility to collect within the total disability clause. The language in *Rice v. American Protective Health and Acc. Co.*, wherein the court speaks of substantial confinement as meeting the terms of the clause reflects this view and it is by far the prevailing view in the various states.

REGULAR ATTENDANCE BY PHYSICIAN

Closely akin to the house confinement clause, is the condition that an insured must have the attendance of a physician, regularly, in order to come within the total and permanent disability clause. As in the house confinement clauses, courts are in almost unanimous agreement that this clause be treated as evidentiary and not as a condition precedent that requires strict compliance. Such a construction lends itself favorably towards achieving the purpose for which the clause was intended; namely, to guard against fraudulent claims. Any other construction would serve no useful purpose and would merely enforce an idle formality to the detriment of the insured. However, in *Mutual Ben. Health & Acc. Ass'n v. Cohen*, the court held the terms were clear and unambiguous

8. A typical clause reads: "A disability to constitute claim for indemnity for sickness only, shall be continuous, complete and total, requiring absolute necessary confinement to the house."


13. But see, *Mutual Benefit Health and Acc. Ass'n v. Cohen*, 194 F.2d 232 (8th Cir. 1952), where the court held the clause clear, unambiguous and not in contravention of public policy as attempting to prescribe a rule of evidence. In this case, strict compliance with the clause was a prerequisite to recovery.

14. A typical clause reads: "The insured might receive benefits if continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon."


18. 194 F.2d 232 (8 Cir. 1952).
and treated the clause as a condition precedent requiring strict compliance as a prerequisite to recovery. 19

**Other Income**

The purpose of disability insurance is to provide necessities, not income. Most insurers only allow an amount of insurance based on a percentage of an insured's net income—usually 50%. It is common for an insurer to pro-rate the benefits it will pay based on the amount the insured receives from other accident and health policies he holds. The problem arises as to whether insured may receive benefit payments if he is disabled but receives income from other sources, such as investments or sick leave pay. Courts favor insured here, if in fact, insured is disabled. 20 But, if insured is receiving his full salary (as distinguished from sick pay), it is almost universally held he is not totally and permanently disabled within the meaning of the contract, 21 unless insured is in fact the owner of the company that is paying him.

**Surgery**

Often times, the disability arising out of certain types of injuries or sicknesses can be corrected by surgery. To guarantee a compliance in this area, an insurer may insert a clause to that effect, thus making corrective surgery a condition precedent, the compliance with which is a necessary incident to recovery. 22 The problem, however, exists in those cases wherein the policy is silent as to surgery. Most states now hold that if the policy does not expressly so provide, the insured does not have to submit to surgery. 23 The rationale for this view is aptly stated in *Pacific Mutual Life Ins. Co. v. Katz*: 24 "The insured is under no obligation, contractual or otherwise to so submit and thereby incur expense and risk of his life so that insurer might be relieved of its liability to him." Note, however, that where an insured voluntarily undergoes corrective surgery and a portion of the disabled limb or part is removed and normal function of the part or limb is restored with an artificial aid (as in a removal of defective lens in eyes for cataract condition and thereafter 'with glasses' insured gets a job and has full use of sight) then notwithstanding the fact that the insured has absolutely no use of the limb or part without the artificial aid the insured cannot recover 25—the rationale being that the coverage contracted for was limited to loss of

19. *But see,* DeSoto Life Ins. Co. v. Barham, 210 Ark. 467, 196 S.W.2d 592 (1946), where insured was deemed to have waived this condition by making payments under the policy.
22. Interestingly enough, this clause, if present in the contract, is always treated as a condition precedent, as contrasted to the other clauses discussed above.
24. 102 Colo. 587, 81 P.2d 775 (1938).
25. See note 23 supra.
function of the part or limb and not loss of the physical portion of the part or limb. Contrast this with the holding in Continental Cas. Co. v. Baros where it was held the insured could not recover for loss of his hand where the contract called for indemnification for loss of hand at or above the wrist. In the Baros case, the court applied the converse rationale—that is, indemnification for loss of the part rather than the function of the part.

**Artificial Correction**

Closely related to the problem of when an insured must undergo surgery to correct his disability, is the problem of corrected disability by artificial means. May an insured still receive benefits for a lost hand that has been replaced by a hook? It has been held that he can, notwithstanding the fact he can now perform some acts with the hook. Curiously enough, however, eyes restored to normal vision by glasses are not within the range of this view. Apparently, the question turns on whether or not the artificial device is normally considered a usual part of the person's habiliment. An interesting question arises in an injury to an artificial limb—could an insured recover for such an injury? A case not precisely on all fours would seem to indicate no recovery, based on the theory that such an injury is not a personal or bodily injury, but rather a property injury, and thus not within the protection of "bodily injury" policies.

In most cases, compliance with or fulfillment of the above mentioned factors affecting total and/or permanent disability is not an either-or proposition. That is, mere fulfillment of one or more of the factors does not necessarily lead to total disability. In some cases, all the conditions must be met, while in others, a case will succeed or fail on the fulfillment of just one factor.

From an observation of the cases, a trend in favor of the insured is readily discernible. Through the years, the attempts of insurers to limit their liability or define total disability have met with judicial hostility. This hostility has manifested itself either under the guise of public policy, or as a defense against the insurer's attempts to prescribe rules of evidence. Thus, have the courts been able to exercise much discretion, even to the extent of promoting a policy, in a field which is technically termed "contract".

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26. Continental Casualty Co. v. Baros, 72 Fla. 17, 72 So. 278 (1916), where all that remained of insured's hand was a small unusable stub.
29. Trachtenberg v. Home Indem. Co., 204 Misc. 644, 121 N.Y.S.2d 911 (1953), where the insured's denture was in insured's shirt pocket when an auto accident resulted in injury to the insured and resulted in breaking of the denture, it was held not to be a bodily injury.