

negligence to persist and go to the jury, and the bailee must produce enough evidence that he was not negligent to convince the jury of that fact.¹⁶ If we say that the amount of evidence necessary is just enough to counterbalance the presumption, we are still within the limits of the dogma that the burden of persuasion does not shift from the bailor; if we say that to produce enough evidence to convince the jury that there was no negligence does actually shift the burden of persuasion, it would seem that in equity no violence has been done, since the bailee having knowledge of all the circumstances should be able to show that he was not negligent if, in fact, he were not. D. R. T.

INSURANCE

INTERIM INSURANCE ARISING FROM ISSUANCE OF PRELIMINARY RECEIPT

Twenty days before his death, Dell B. Duncan, deceased husband of the plaintiff,¹ applied in writing for a life insurance policy with the John Hancock Mutual Life Insurance Company, paid an advance premium of one dollar and designated the plaintiff, his wife, as beneficiary. The insurance company was investigating the applicant's occupation at the time of his death, but had taken no other action on the application, either by way of acceptance or rejection. In her suit to collect the amount of insurance applied for (\$720.00), the plaintiff contended that the provisions of a preliminary receipt² issued at the time of the application created a present contract of interim or temporary insurance.

The Supreme Court of Ohio construed the receipt³ as providing temporary protection commencing immediately upon the signing of the application and payment of the premium. This interim insurance was to continue until such time as the insurer had considered the application and announced its determination to accept or reject the risk. One clause

¹⁶ Morgan, *Instructing the Jury upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59.

¹ Duncan v. John Hancock Life Ins. Co., 137 Ohio St. 441 (1940).

² The receipt issued by the insurer provided that "it is understood and agreed that no liability is assumed by the company on account of this payment nor until it shall issue a policy, but if death occurs after the date of the application from which this receipt is detached and prior to the date of issue of such policy, payment in accordance with and subject to the conditions and provisions of the policy applied for shall be made; provided the applicant is insurable under the company's rules and the application is approved and accepted by it at its home offices as to plan, premium and amount of insurance. If a policy is issued, the deposit will be applied to payment of the premiums thereon from its date, otherwise the deposit will be returned to the payer thereof upon surrender of this receipt."

³ *Ibid.*

in the receipt stated "but if death occurs after the date of the application . . . and prior to the date of issue of such policy, payment . . . shall be made; . . ." Immediately following the semicolon was another clause which described the further conditions under which the liability of the carrier was to attach.⁴ The court reasoned that "the words 'after the date of the application' were intended to have some meaning and binding force and effect" and if it were the intention of the parties that liability of the insurer would arise only after approval and acceptance of the application, then language to that effect should have been used.⁵

Pending investigation of the risk and consideration of the application by the home office of the life insurance company a necessary delay or period exists between the signing of the application and the delivery of the policy. This interval is a potential source of loss to the life insurance carrier. A decision by the applicant to buy from another company or not to carry any insurance at all during this period may result in a loss to the company to the amount expended for the solicitation, investigation and medical examination of the applicant.⁶ To minimize this loss⁷ it is the practice of most life insurance companies to induce applicants to pay all or part of their first premium, either in cash or in the form of some credit transaction, at the time of the application.⁸ In exchange for the initial payment a printed form containing a special receipt is given to the applicant. Such receipts are known in the insurance business as conditional receipts or as conditional binding receipts.⁹

"Most binding receipts provide that the insurance is to be effective immediately, subject to certain conditions. Either the approval of the application at the home office is made the condition, or it is stated that the company must be satisfied that the applicant was an insurable risk on the date of the application. Another form makes the insurance effective if the applicant is, in the opinion of the company, an insurable risk on the date of the receipt and the application is otherwise acceptable on the plan for the amount applied for. *Occasionally distinctions are drawn based on the exact language of the receipt but for the most part courts have avoided such refinements.*"¹⁰

⁴ *Supra*, note 2.

⁵ *Supra*, note 1, at 447.

⁶ Comment (1935) 44 YALE L. J. 1223.

⁷ *Id.* at 1224: ". . . the prospects of a law suit to affect repayment . . . provides sufficient deterrent to a revocation."

⁸ In *Whelock v. Clark*, 21 Wyo. 300, 131 Pac. 35 (1913), a note was given for the first premium of a life insurance policy. Prior to acceptance of the application the applicant notified the insurer to cancel the policy and return the note. Subsequent to such notice a policy was tendered to the applicant but refused by him. In a suit to recover on the note by the general agent of the insurer recovery was denied. See *Travis v. Nederland Life Ins. Co.*, 104 Fed. 486, at 488 (C.C.A. 8th, 1900).

⁹ 37 A.L.R. 332, at 333.

¹⁰ Comment (1938) 33 ILL. L. REV. 180, at 182. (Italics added).

Due largely to the fact that the agent's authority and the particular facts of each case vary, the reported decisions are not in accord as to the effect of such receipts on the legal relations of the parties during the period between the issuance of the receipt and the approval of the policy at the home office.¹¹ Writers on the subject are not in complete agreement as to the name by which these receipts should be called. One author says that they are "conditional receipts" and it is incorrect to recognize them as "binding receipts."¹² Other writers, however, consistently maintain that such acknowledgments are known in the insurance business as "binding receipts."¹³ To add to the confusion some courts have said "binding receipts" in the strict sense of the term¹⁴ are not ordinarily issued by life insurance companies.¹⁵

It is held by a group of courts that as a matter of law these instruments are ineffectual in providing protection to the applicant until the application is approved or accepted.¹⁶ Many of the cases on this point regard the application or receipt as a mere proposal to become insured by the carrier, *i.e.*, as an offer¹⁷ by the applicant for a contract of insurance, which like any other offer does not become a contract until accepted during the lifetime of the offeror.¹⁸ Some courts, perhaps feeling that the language of the receipt or application is inconclusive standing

¹¹ I COUCH ON INSURANCE, sec. 91, p. 164.

¹² MACLEAN, LIFE INSURANCE (5th ed. 1939) 514.

¹³ PATTERSON, ESSENTIALS OF INSURANCE LAW (1st ed. 1935) sec 20; VANCE, INSURANCE (2d ed. 1930) sec. 66.

¹⁴ According to Vance, (2d ed. 1930) p. 194, "the binding slip is merely a written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer, or until the issue of a formal policy. By intendment it is subject to all the conditions in the policy to be issued." Where, however, the receipt or binding slip is conditional upon the acceptance of the application by the insurer, a "looser" construction or interpretation of the receipt may be possible. See 29 AM. JUR. sec. 144.

¹⁵ Ann. Cas. 1915B, 652, at 657.

¹⁶ 81 A.L.R. 332; 107 A.L.R. 194; Ann. Cas. 1915B 652, at 657.

¹⁷ Where application is accompanied by a cash payment of the premium, it is an offer to make a unilateral contract, as the act of payment is to be exchanged for the insurer's promise of coverage. Where application is accompanied by a promissory note or even an oral promise of the insured, an application accompanied by such promise is an offer to make a bilateral contract. Where no oral promise, note or cash accompanied the application, it is merely an invitation to an offer. PATTERSON, ESSENTIALS OF INSURANCE LAW (1st ed. 1935) sec. 13, p. 50.

¹⁸ Mutual Life Ins. Co. v. Young, 23 Wall. (90 U.S.) 85, at 107, 23 L.Ed. 152 (1857); Paine v. Pacific Mutual Life Ins. Co., 51 Fed. 689, at 691 (C.C.A. 8th, 1892); Northwestern Mutual Life Ins. Co. v. Neafus, 145 Ky. 563, syl. 3, 140 S.W. 1026 (1911); Olson v. American Central Life Ins. Co., 172 Minn. 511, at 513, 216 N.W. 225 (1927); Muhlbach v. Omaha Life Ins. Co. of Omaha, 107 Neb. 206, 185 N.W. 447 (1921); Beaty v. Southland Life Ins. Co., 28 S.W. (2d) 895, at 898 (Tex. Civ. App. 1930); Gonsoulin v. Equitable Life Ass. Soc., 152 La. 865, 94 So. 424, at 427 (1922); Kennedy v. Mutual Benefit Life Ins. Co., 205 Fed. 677, at 678 (1913); see Wheelock v. Clark, 21 Wyo. 300, at 307, 131 Pac. 35 (1913); Steinle v. New York Life Ins. Co., 81 Fed. 489 (C.C.A. 5th, 1897).

alone,¹⁹ reason that the death of the applicant before his application is accepted revokes the offer to become insured²⁰ or "that the death of the subject of insurance renders the making of the proposed contract impossible."²¹ Reaching substantially the same result and using substantially the same language as the previous cases referred to, some courts have construed these "binding receipts" to be either "conditional or qualified acceptances depending upon approval by the home office of the insurer"²² or to be "agreements to insure at some future time, to wit, on approval of the application."²³

The leading case of *Insurance Company v. Young*²⁴ is cited by later decisions²⁵ for the proposition that the receipt "reserves the absolute right to the company to reject or accept the proposition which it contained . . . and that the entire subject is both affirmatively and negatively within its choice and discretion."²⁶ Some state courts, however, have felt that the company "cannot arbitrarily or unreasonably reject or withhold its approval, and thereby avoid its liability, under the clause in the binding slip requiring the approval of the application . . . by the company before the insurance shall take effect."²⁷

The receipt in the case of *Muhlbach v. Omaha Life Insurance Company*²⁸ contained a promise to return the entire amount of premium paid, "if the policy as applied for shall not be issued." The court held that because of this proviso "no consideration whatever remained for insurance of a temporary nature during the time intervening between the date of the application and the approval or rejection of the risk. . . ."

¹⁹ *Supra*, note 6, at 1226.

²⁰ *Paine v. Pacific Mutual Life Ins. Co.*, 51 Fed. 689 (C.C.A. 8th 1892); *Braman v. Mutual Life Ins. Co. of N.Y.*, 73 F. (2d) 391 (C.C.A. 8th, 1934); *Cooksey v. Mutual Life Ins. Co. of N.Y.*, 73 Ark. 117, 83 S.W. 317 (1904); *Field v. Missouri Life Ins. Co.*, 77 Utah 45, at 56, 290 S.W. 979 (1930); *Gonsoulin v. Equitable Life Ass. Soc.* 152 La. 865, 94 So. 424 (1922).

²¹ *Paine v. Pacific Mutual Life Ins. Co.*, 51 Fed. 689 (C.C.A. 8th, 1892); *See Braman v. Mutual Life Ins. Co. of N.Y.*, 73 F. (2d) 391 (C.C.A. 8th, 1934).

²² *Hughes v. John Hancock Mutual Life Ins. Co.*, 297 N.Y.S. 116, at 122 (1937). *Accord*, *Mohrstadt v. Mutual Life Ins. Co. of N.Y.*, 115 Fed. 81 (C.C.A. 8th, 1902).

²³ *Braman v. Mutual Life Ins. Co. of N.Y.*, 73 F. (2d) 391, at 396 (C.C.A. 8th, 1935).

²⁴ 23 Wall. (90 U.S.) 85, 23 L.Ed. 152 (1874). *Supra*, note 18.

²⁵ *Mohrstadt v. Mutual Life Ins. Co. of N.Y.*, 115 Fed. 81, at 82 (C.C.A. 8th, 1902); *Hughes v. John Hancock Mutual Life Ins. Co.*, 297 N.Y.S. 116, at 123 (1937).

²⁶ *Supra*, note 25, at 106.

²⁷ *Gardner v. North State Mutual Life Ins. Co.*, 163 N.C. 367, 79 S.E. 806, at 808, 48 L.R.A. (N.S.) 74, Ann. Cas. 1915B 652; *Cf. Grier v. Mutual Life Ins. Co. of N.Y.*, 132 N.C. 542, 44 S.E. 28 (1903). The receipt in the case of *Reynolds v. Northwestern Mutual Life Ins. Co.*, 189 Iowa 76, 176 N.W. 207 (1920) permitted the insurer to reject the application if it was not "satisfied" as to the applicant's insurability as of the date of the medical examination. The distinction between "satisfaction" and "approval" was not accepted in *Gerib v. Northwestern Mutual Life Ins. Co.*, 256 Ill. App. 506 (1930).

²⁸ 107 Neb. 206, 185 N.W. 447 (1921). *Contra*, *Albers v. Security Mutual Life Ins. Co.*, 41 S.D. 270, 170 N.W. 159 (1918), cited *infra*, note 48.

There is a group of cases in which the company did not accept or reject the application but forwarded a policy which departed from or modified the terms of the application or receipt.²⁹ It has been uniformly held that the issuance of the revised policy does not constitute an acceptance of the applicant's offer or proposal to become insured but is a counter offer which must be accepted by the insured during his lifetime in order to become binding upon the parties.³⁰

The general purport of the cases reviewed thus far is that the approval or acceptance of the application by the insurer during the lifetime of the applicant is a condition precedent to be performed before the liability of the insurer arises.³¹ It appears, therefore, that the binding slip does not insure of itself and does not operate as a present contract of insurance effective in case of the death of the applicant pending action on his application.³² The only vitality given to the binding slips by these courts is retroactively derived from an approval of the application and where the application is not accepted, the binding receipt ceases *eo instanti* to have any effect.³³

Some courts, however, have viewed the provisions of the application or the binder as conditions subsequent requiring affirmative action by the insurer to avoid liability upon the interim receipt.³⁴ These decisions allowed the beneficiaries to recover regardless of the ultimate action of the carrier. According to these courts it is the "intention of the parties" to effect interim or temporary insurance for that period of time between the making of the application and its approval or rejection by the company. The elements establishing the intention of the parties may be gathered from the wording of the receipt, the payment of the premium, the reasons for such receipts and the reasonable inferences to be drawn from their issuance.

²⁹ Mutual Life Ins. Co. v. Young, 23 Wall. (90 U.S.) 85, 23 L.Ed. 152 (1874); State *ex rel.* Equitable Life Assur. Soc. of U.S. v. Robertson, 191 S.W. 989 (Mo. 1916); Goring v. Prudential Ins. Co. of America, 288 N.Y.S. 661, 8 N.E. (2d) 338 (1937); Mohrstadt v. Mutual Life Ins. Co. of N.Y., 115 Fed. 81 (C.C.A. 8th, 1902).

³⁰ *Ibid.*

³¹ Mutual Life Ins. Co. v. Young, 23 Wall. (90 U.S.) 85, 23 L.Ed. 152 (1874); Braman v. Mutual Life Ins. Co. of N.Y., 73 F. (2d) 391 (C.C.A. 8th, 1935); Cooksey v. Mutual Life Ins. Co. of N.Y., 73 Ark. 117, 83 S.W. 317 (1904); Northwestern Mutual Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S.W. 1026 (1911); Olson v. American Central Life Ins. Co., 172 Minn. 511, 216 N.W. 225 (1927).

³² See Grier v. Mutual Life Ins. Co. of N.Y., 132 N.C. 542, 44 S.E. 29 (1903); Gardner v. North State Mutual Life Ins. Co., 163 N. C. 367, 79 S.E. 806 (1913).

³³ *Ibid.*

³⁴ Starr v. Mutual Life Ins. Co., 41 Wash. 228, 83 Pac. 116 (1905); Hart v. Travelers' Ins. Co., 236 App. Div. 309, 742, 258 N.Y.S. 711, *aff'd*, 261 N.Y. 563, 185 N.E. 739 (1933); Buono v. Prudential Ins. Co. of America, 74 App. Div. 898, 267 N.Y.S. 972 (1933); Howard v. Prudential Ins. Co. of America, 18 Ohio L. Abs. 688 (1935); Stonsz v. Equitable Life Assur. Soc., 324 Pa. 97, 187 Atl. 403 (1936); Albers v. Security Mutual Life Ins. Co., 41 S.D. 270, 170 N.W. 159 (1918).

In *Starr v. Mutual Life Insurance Company*³⁵ it was held that a receipt containing the words "policy to take effect from date" effected a contract of present insurance and prevailed over provisions in the application that it should so operate only in the event of its acceptance.³⁶ This holding constitutes a clear repudiation of the view that the application and binding receipt merely evidence an offer.³⁷ In two New York cases³⁸ the receipt evidencing payment contained two clauses: the first clause standing alone and unqualified provided the insurance was effective from the date of the application; the condition of approval or acceptance was found in a second clause, separate from and independent of the first clause. The New York court in both instances considered the terminology of the conditional receipt involved ambiguous. Since all doubts and ambiguities are resolved in favor of the applicant or insured,³⁹ the beneficiaries recovered the face value of the policies. A similar approach was adopted by the Supreme Court of Ohio in the *Duncan* case.⁴⁰ The wording of the binding receipt in the case of *Stonsz v. Equitable Life Assurance Society*⁴¹ was used to make the insurer liable on a policy containing terms different from those in the application. Although this was a case where the plaintiff suffered injuries resulting in his total disability pending action by the carrier on his application rather than one where the applicant for insurance died before delivery of the policy, "the opinion is significant as indicating the judicial attitude toward binding receipts,"⁴² *i.e.*, "as binding during the interim regardless of the ultimate action of the carrier."⁴³

³⁵ 41 Wash. 228, 83 Pac. 116 (1905).

³⁶ The court indicated, however, that it would have held there was no contract of insurance unless the application had been approved and a policy issued during the lifetime of the insured "if the receipt issued . . . contained the same provision as the application . . ." See 41 Wash. 228, at 231, 83 Pac. 116, at 117.

³⁷ *Supra*, note 10, at 184.

³⁸ *Hart v. Travelers' Ins. Co.*, 236 App. Div. 309, 742, 258 N.Y.S. 711, *aff'd* 261 N.Y. 563, 185 N.E. 739 (1939); *Buono v. Prudential Ins. Co. of America*, 74 App. Div. 898, 267 N.Y.S. 972 (1933).

³⁹ See Mr. Justice Maxey, dissenting in *Stonsz v. Equitable Life Assur. Soc.*, 324 Pa. 97, at 124, 187 Atl. 403, at 415 (1936), *infra*, note 41, where he criticizes the majority's holding in regard to the legal effect of the binding receipt involved by the following excerpt: "In a number of cases elsewhere, the court created the 'doubt' by a species of argument which would not be tolerated in any other kind of contract, and then, having thus found the 'doubt,' resolved it in favor of the insured."

⁴⁰ *Supra*, note 1.

⁴¹ 324 Pa. 97, 187 Atl. 404, 107 A.L.R. 178 (1937). This decision has been the subject of some criticism for extending the rule that insurance contracts should be construed against the insurer "to a point where the elementary principles of contract are disturbed." 14 N.Y.U. L.Q. REV. 396. More comments or criticisms may be found in 33 ILL. L. REV. 180, *supra*, note 10; 22 IOWA L. REV. 585; 3 U. OF PITTS. L. REV. 699.

⁴² *Supra*, note 10, at 185.

⁴³ *Supra*, note 41, 324 Pa. 97, at 102, 187 Atl. 404, at 405, 107 A.L.R. 178, at 182 (1937).

The fact that the applicant paid the first premium when a binding receipt was delivered to him has been stressed in all of these opinions. These courts reason that by the payment of the premium for one year the insured is entitled to insurance for one year and that a rule rendering the receipt ineffective as evidence of a present contract of insurance operates harshly in that the insured is paying for insurance for a period during which he is not insured at all. Since the insured should pay only for the protection he actually receives, his first payment would be payable only on the date that his protection commences.

The minority jurisdictions conclude that if there is to be no contract of insurance until the application is approved, then the chief object or reason for the issuance of such receipt is to enable the company to collect premiums for a period during which there is no risk to the company.⁴⁴ The receipt is said undoubtedly to provide an inducement for the payment of the first premium⁴⁵ making funds available to the insurer to use and invest in addition to securing, for all practical purposes, a definite customer rather than an intangible prospect.⁴⁶

The jurisdictions which require affirmative action by the insurer to divest itself of liability assume that the only reasonable inference to be drawn from the issuance of the binding receipt is that the parties intended to provide interim insurance to the applicant.⁴⁷ The receipt involved in the case of *Albers v. Security Mutual Life Insurance Company*⁴⁸ contained a proviso that the applicant could not withdraw his application and was obligated to pay the first premium even if he decided not to take the insurance before the company approved. The Court held that the parties intended to create a present contract of temporary insurance or else there could be no consideration for the proviso, prepayment of the premium or antedating of the policy. Other courts have reasoned that if the language of the receipt means "that no protection is afforded at all, then the language is meaningless"⁴⁹ and the receipt is a nullity.⁵⁰ "If the insured had lived until the application was approved and a policy issued, it would be immaterial to him if the contract related back and whether he was insured in the interim. On the other hand, if he died before the application was approved, there would be no advantage to him in paying his premium in advance and his beneficiary would derive no benefit from the insurance."⁵¹

L. S. F.

⁴⁴ *Supra*, note 35.

⁴⁵ *Hart v. Travelers' Ins. Co.*, 236 App. Div. 309, 742, 258 N.Y.S. 711, *aff'd* 261 N.Y. 563, 185 N.E. 739 (1939).

⁴⁶ *Stonsz v. Equitable Life Assur. Soc.* 324 Pa. 97, 187 Atl. 403 (1936).

⁴⁷ *Howard v. Prudential Ins. Co. of America*, 18 Ohio L. Abs. 688 (1935).

⁴⁸ 41 S.D. 270, 170 N.W. 159 (1918).

⁴⁹ *Supra*, note 47, at 691.

⁵⁰ *Supra*, note 46.

⁵¹ *Supra*, note 35.

INSURANCE — DEATH OR INJURY BY "ACCIDENTAL MEANS"

The insured administered to himself an enema by attaching a rubber tube to the faucets of a bathtub, intending to control the water pressure by turning the water faucet, but the pressure of the water caused the insured to suffer a ruptured sigmoid from which he died several hours later. In an action brought by the beneficiary named in deceased's life insurance policy against the New York Life Insurance Company, the Supreme Court of Ohio reversed the Court of Appeals of Franklin County, holding that such death was not effected by accidental means within the meaning of the policy which provided for double indemnity if the death of the insured "resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means."¹

Under the older policies which insured against "accidental death" or "accidental injury," recovery could be had upon showing that the resulting death or injury was unforeseen, unexpected, or unusual.² But the clauses contained in the modern policies, as is the case here, insure against death or injury due to "external, violent or accidental means." Some of the cases have permitted recovery here as though the "accidental death" or "accidental injury" clause had not been changed;³ while in the more strictly construed cases, the plaintiff has not prevailed unless he has shown that something unforeseen, unexpected or unusual occurred in the act preceding the injury, it making no difference that the result was unforeseen, unexpected or unusual.⁴ In the often quoted case of *United States Mutual Accident Association v. Barry*,⁵ the Supreme Court of the United States approved a charge to the effect that if the act preceding the injury was carried out in the exact manner as intended by the insured, regardless of the fact that the result was unforeseen, unexpected or unusual, the injury would not be by accidental means. The Court then set forth a test for "accidental means"⁶ which

¹ *Mitchell v. New York Life Insurance Company*, 136 Ohio St. 551, 27 N.E. (2d) 243, 17 Ohio Op. 229 (1940); *reversing* 62 Ohio App. 54, 28 Ohio L. Abs. 653, 15 Ohio Op. 406 (1939).

² *Pledger v. Business Men's Accident Association of Texas*, 197 S.W. 389 (Texas Civ. App. 1917); *Francis v. International Association*, 260 S.W. 938 (Texas Civ. App. 1926).

³ *Elsev v. Fidelity & C. Co.*, 187 Ind. 447, L.R.A. 1918F, 646, 120 N.E. 42 (1918); *Continental Casualty Company v. Bruden*, 178 Ark. 683, 11 S.W. (2d) 493, 61 A.L.R. 1192 (1928).

⁴ *Landress v. Phoenix Mutual Life Insurance Company*, 291 U.S. 491, 18 L.Ed. 934, 54 Sup. Ct. 461 (1933).

⁵ 131 U.S. 100, 33 L.Ed. 60, 9 Sup. Ct. 755 (1889).

⁶ *Id.* at 121 "If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means."

has been subject to such varying interpretations that the decisions are now in a state of hopeless conflict.⁷ Speaking of this situation, the late Justice Cardozo said: "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog."

Nor has Ohio escaped from the reaches of this "Serbonian Bog." Injury and death by freezing have been held to be within the protection of the "accidental means" clause;⁸ while a death from heart dilation resulting from a cold bath has been held to be beyond the coverage of such clause.⁹ Death from drownings have been declared actionable under the "accidental means" provision;¹⁰ while recovery was denied under the clause where the insured died of amoebic dysentery resulting from taking a drink of water which had unknowingly been contaminated by a break in the hotel sewer pipe.¹¹ Thus, we see that opposite results have been reached in decisions based on factual circumstances of marked similarity. This conflict can only be explained by observing the tests for "accidental means" applied by the courts. In the *Wheeler* case, the court applied the more liberal view, saying that as "the result (death by freezing) was wholly unexpected and did not follow as 'the usual effect of a known cause'" the death was by accidental means. But "accidental means" was more strictly construed in *New Amsterdam Casualty Company v. Johnson*,¹² where the court held that since the voluntary act of taking a cold bath was carried out in the exact manner as intended by the insured, the unanticipated dilation of the heart would not be death by accidental means.

In the case at bar, both the Court of Appeals and the Supreme Court applied the strict test by looking at the act to see if it was accidental, and yet they arrived at different conclusions. The Court of Appeals stressed the fact that the act, which they considered to be the non-exercise of control by the insured, was unusual and unintended, and hence accidental. The Supreme Court said that the evidence did not show anything unexpected or unusual in the act, which they thought

⁷ In the case of sunstroke there is a marked split of opinion; cf. *Landress v. Phoenix Mutual Life Ins. Co.*, *supra*, note 4, with *O'Connell v. New York Life Insurance Co.*, 220 Wis. 61, 264 N.W. 253 (1936); and see 17 A.L.R. 1197.

⁸ *Nat. Life Ins. Co. v. Patrick*, 28 Ohio App. 267, 162 N.E. 680, 6 Ohio L. Abs. 168 (1927); *Commonwealth Casualty Co. v. Wheeler*, 13 Ohio App. 140, 30 Ohio C.C. (N.S.) 257, 17 Ohio L. Rep. 304 (1919).

⁹ *New Amsterdam Casualty Co. v. Johnson*, 91 Ohio St. 155, 110 N.E. 475, L.R.A. 1916B, 1018 (1914).

¹⁰ *Knickerbocker Casualty Ins. Co. v. Jordan*, 6 Ohio Dec. Rep. 1145, 10 Am. L. Rec. 625 (1882); *United States Mutual Accident Association v. Hubbell*, 56 Ohio St. 516, 47 N.E. 544, 40 L.R.A. 453 (1897).

¹¹ *Burns v. Employers' Liability Ass'n. Corp.*, 134 Ohio St. 222, 16 N.E. (2d) 316, 12 Ohio Op. 18, 117 A.L.R. 733, 26 Ohio L. Abs. 52 (1938).

¹² 91 Ohio St. 155, 110 N.E. 475, L.R.A. 1916B, 1018 (1914).

was the water pressure, but that the act was done in the manner intended, and consequently the unexpected result did not constitute "accidental means." The dissenting opinion emphasized the fact that in view of the disastrous result, the act must not have been done in the manner intended, and that the amount of the pressure was unforeseeable, unexpected and unusual, and hence was the "accidental means." When one looks to the distinction drawn by the Court of Appeals¹³ between the case at bar and the *New Amsterdam* case, he finds merit in the contentions made by the Court of Appeals and the dissent in the principal case. The Court of Appeals pointed out that in the *New Amsterdam* case the insured did nothing but that which he intended to do, while in the case at bar the act quite obviously was not done in the manner intended. Such an interpretation of the principal case seems to be in conformity with the holding in the key case of *United States Mutual Accident Association v. Barry*.

D. A. W.

LABOR LAW

THE NATURE OF A STRIKE

The term "strike" is as old as organized labor. The problem of defining it has often been before the courts. Many cases have turned upon the question of the existence or non-existence of a strike.

Strike clauses in contracts have given rise to some litigation in this area.¹ Surety bonds with saving clauses releasing the surety in the event the loss involved was caused by a strike have made such a determination essential.² And cases have arisen with respect to employee group insurance,³ strike clauses in insurance policies,⁴ demurrage costs during delay caused by strikes,⁵ and the payment of union strike benefits.⁶

Social legislation of quite recent enactment lends new importance to the problem of clearly analyzing the strike concept. Some states have statutes which provide that no employer shall advertise for help *while a strike is in progress* in his place of business without stating the fact in such

¹³ 62 Ohio App. 54, 28 Ohio L. Abs. 653, 15 Ohio Op. 406 (1939).

¹ *McLeod v. Genius*, 31 Neb. 1, 47 N.W. 473 (1890); *Consolidated Coal Co. v. Jones & A. Co.*, 232 Ill. 326, 83 N.E. 851 (1908); and see 11 A.L.R. 1004.

² *Uden v. Schaefer*, 110 Wash. 391, 188 Pac. 395, 11 A.L.R. 1001 (1920).

³ *Roehrig v. Mo. State Life Ins. Co.*, 251 Ill. App. 434 (1929).

⁴ *Brous v. Imperial Ins. Co.*, 224 N.Y. Supp. 136, 130 Misc. 540 (1927); *aff'd* 227 N.Y.S. 777, 223 App. Div. 713 (1927).

⁵ *United States v. Russian Volunteer Fleet*, 22 F. (2d) 187 (1927); *Riviera Realty Co. v. Ill. Surety Co.*, 165 App. Div. 114, 150 N.Y. Supp. 116 (1914); *General Commercial Co. v. Butterworth-Judson Corp.*, 198 App. Div. 799, 191 N. Y. Supp. 64 (1921).

⁶ MARTIN, *THE MODERN LAW OF LABOR UNIONS* (1910), sec. 282.