Michigan Law Review

Volume 38 | Issue 4

1940

# INSURANCE - LEGAL EXECUTION OF INSURED AS A DEFENSE

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INSURANCE — LEGAL EXECUTION OF INSURED AS A DEFENSE — Insured was convicted of murder and legally executed by the state. Plaintiff is the beneficiary of his life insurance policy. *Held*, no recovery on the ground that the risk of legal execution was impliedly excepted in the policy as a matter of law. *Southern Life & Health Ins. Co. v. Whitfield*, (Ala. 1939) 190 So. 276.

Many life insurance policies contain no express exception of death by legal execution. When the insured is executed and the policy silent on this point, the decisions are in conflict as to whether the insurance company may prevail on the defense of an impliedly excepted risk in a suit brought by the beneficiary on his life insurance policy. The tendency of modern decisions is to allow recovery.[1] This seems to be the better view.[2] However, a recent Massachusetts case [3] and the principal case have held to the contrary. The formal reasoning of the court in the principal case deserves particular scrutiny. The court first assumes that a policy specifically insuring a life against the risk of legal execution would be contrary to public policy. From this assumption it concludes that this risk cannot be impliedly included in a general coverage. Thus the court reasons that because the part alone is bad—i.e., that a policy of insurance insuring only against death by legal execution would be contrary to public policy—that such risk impliedly included in a larger coverage must likewise be held contrary to public policy. This reasoning may well be questioned. First, no instance has been found where a policy of the type first assumed by the courts has been issued. At this point the validity of the first assumption and its applicability to the decision in the instant case may be doubted as being unfounded in fact. Second, it is submitted that in its reasoning the court has fallen into the part-whole fallacy, in that different considerations of public policy are involved when the express risk of death by legal execution alone is insured against than when that risk is only one of many included in a policy of general coverage. In 1898 the Supreme Court of the United States applied the same type of reasoning used by the Alabama court in refusing recovery in the *Ritter* case,[4] involving suicide of the insured. In 1902 it again denied recovery in the *Burt* case,[5] where insured was

[1] For a collection of the latest cases, see a note in 35 MICH. L. REV. 836 (1936).

[2] VANCE, INSURANCE, § 229 (1930); RICHARDS, INSURANCE, 4th ed., § 370 (1932); 6 COOLEY, BRIEFS ON INSURANCE, 2d ed., 5222 (1928).

[3] Millen v. John Hancock Mutual Life Ins. Co., (Mass. 1938) 13 N. E. (2d) 950.

[4] Ritter v. Mutual Life Ins. Co. of New York, 169 U. S. 139, 18 S. Ct. 300 (1898).

[5] Burt v. Union Cent. Life Ins. Co., 187 U. S. 362, 23 S. Ct. 139 (1902). The Burt case was followed in Northwestern Mutual Life Ins. Co. v. McCue, 223

executed, upon the same type of reasoning, relying upon the analogy of the suicide cases and citing the *Ritter* case as well as the English case of *Amicable Society v. Bolland*,[6] which involved forfeiture of goods for conviction of a crime. In 1920 the Supreme Court avoided the fallacy in the reasoning applied in *Ritter* case and allowed recovery in two suicide cases,[7] thus rejecting the same type of reasoning employed by the Alabama court in the instant case. The Alabama court emphasized one type of public policy—that of preventing insurance against the risk of legal execution. It is submitted that countervailing policies should also be considered. That a man should not be indemnified for the results of his own criminal act is axiomatic in the common law. Thus an insured who burns his own building to collect the insurance should not recover from the insurer upon the theory of an implied exception. But if a third person should, without collusion with the insured, burn the same building, there could be no objection to the insured's recovering for his loss. It is apparent, then, that a policy may at times be unenforceable between two persons under one set of facts, but enforceable between them under a different set of facts. Also, policy considerations may make a contract unenforceable between *A* and *B*, but that does not necessarily mean that it cannot be enforced between *A* and *C* where the same reasons for unenforceability are not present.[8] In the life insurance cases, the insured profits nothing from the results of his own insurance after he has been executed. Further, there should be a public policy in seeing that dependents of the executed criminal are cared for, not penalized because of his misdeeds. As long as insurance rates are based upon deaths from all types of risks, and life insurance is not generally considered to be a contract of indemnity, no advantage is being taken of the insurer. Policy questions are always difficult of solution, but courts should face them instead of applying mechanical methods of reasoning in the decision of cases.

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U. S. 234, 32 S. Ct. 220 (1912), which is the latest Supreme Court decision on execution of the insured.

[6] 4 Bligh N. S. 194, 5 Eng. Rep. 70, 2 Dow. & Cl. 1, 6 Eng. Rep. 630 (1830).

[7] Northwestern Mutual Life Ins. Co. v. Johnson, 254 U. S. 96, 41 S. Ct. 47 (1920), discussed 30 YALE L. J. 401 (1921).

[8] Levin, "The Varying Meaning and Legal Effect of the Word 'Void,'" 32 MICH. L. REV. 1088 (1934).