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Note and Comment

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NOTE AND COMMENT

THE EXECUTION OF THE INSURED FOR CRIME AS A DEFENSE TO THE INSURER, THE POLICY BEING SILENT AS TO THIS CONTINGENCY.—The case of *McCue* v. *Northwestern Mut. Life Ins. Co.*, 167 Fed. 435, recently decided by the United States Circuit Court of Appeals, Fourth Circuit, is, as far as has been found, the fifth case to directly decide the question involved in the subject of this note and the second to hold the insurer liable. The previous cases are, *Amicable Society* v. *Bolland*, 4 Bligh (N. R.) 194; *Burt* v. *Union Cent. Life Ins. Co.*, 187 U. S. 362; and *Collins* v. *Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct. 353, all holding that there could be no recovery; and *Collins* v. *Metropolitan Life Ins. Co.*, 232 Ill. 37, where the plaintiff recovered. This last case is reviewed and commented on in 6 MICH. L. REV. 489.

It is to be noted that the court in the principal case does not follow the decision in the *Burt* case. The charter of the company provided that the heirs, executors, administrators, and assigns of those insured should be members so long as they remained insured; the policy was executed and was payable in Wisconsin, and the company was a Wisconsin corporation. From these facts the court finds that the contract is strictly a Wisconsin contract and is to be construed according to Wisconsin law. We do not attempt to

discuss this feature of the case further than to remark that the construction put on this charter provision by the court below seems reasonable. The holding there was that this provision applied to heirs, etc., only in case of annuities or where insurance was taken out on the life of a third person and the one taking out such insurance should die leaving the insurance subsisting. It is with evident satisfaction that the court rejects the rule laid down by the Supreme Court in the *Burt* case.

The facts are these:—The insured took out a policy payable to his estate, which he left by will to his children. The policy, while it contained many exceptions, was silent as to death at the hands of justice. By an arrangement with the agents who solicited the insurance he paid the premiums for the first 18 months by giving his note due in six months. This note with the agent's note as collateral was sent to the state agent who remitted the amount of the premium in cash to the company. Eight days before the note became due the insured was arrested charged with the murder of his wife, and while in jail awaiting trial he paid the note to the state agent. He was subsequently tried, convicted and hanged.

The defense rested on two points:—(1) that death by the gallows was not one of the risks insured against, (2) that even if it had been expressly undertaken, still public policy would not allow the enforcement of the contract.

If the first point is completely separated from the second, there can be no doubt that the court very properly held that it was of no avail. The policy contained many exceptions, so many in fact that it is reasonable to suppose that the company expressly excepted such risks as they did not care to undertake. To strengthen this idea the court makes use of the fact that the premium note was paid while insured was in custody. The court below held that the payment in cash by the agent was payment of the premium and completed the contract. In any event it is hard to see any ground for estoppel. The insured was to be presumed innocent. And if he had been acquitted he would certainly have had an action against the company for a breach of the contract if they had attempted to cancel it.

The perplexing question is whether public policy is concerned. No court would or should enforce a contract, unless compelled by express legislative mandate, where such enforcement will tend to increase the crime of murder. The court in the principal case contends that the charter provision authorizing defendant to "make all and every insurance * * * connected with life risks," coupled with the fact that, in the absence of express stipulation, suicide while sane does not defeat a recovery in Wisconsin, is such an expression as precludes a general inquiry into the merits of the situation. It is to be remembered that in the case of *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139, the Supreme Court decides that suicide while sane is a defense to the insurer though not expressly excepted, and it follows that as far as the *Burt* case is based on the *Ritter* case, it necessarily conflicts with the Wisconsin cases. The *Ritter* case is based on the propositions, (1) that there is an implied condition in every contract of insurance that the insured

shall not voluntarily and intentionally increase the risk and (2) that such a risk if expressly assumed would be contrary to public policy as insuring a person against his wrongful act of self-destruction. The *Burt* case is based on the first above named ground and on a modification of the second, viz, that public policy will not allow the insertion of a condition which would tend to induce crime. Thus on the first proposition the court follows the *Ritter* case so we can assume that on this ground the Wisconsin court would not concur. But the second ground taken is broader than that in the *Ritter* case and it does not follow that a Wisconsin court would oppose this point. While the policy of the law opposes suicide, it is even more zealous in its opposition to murder. So we consider the question an open one in Wisconsin.

It is important, then, to determine whether or not public policy should oppose a recovery in this case. It must be remembered that at the time of the decision of *Amicable Society* v. *Bolland,* supra, known as the *Fauntleroy* case, forfeitures and attainder still existed in England. It is said by the court in the principal case that this fact might have controlled the decision of that case. This is also contended by the Illinois court in the *Collins* case.

The reasoning in the *Fauntleroy* case is as follows:—An express contract to pay if insured met his death at the hands of the law would be void. "Would not such a contract (if available) take away one of the restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connections." If such an express contract would be void, no contract to that effect can be implied.

If the court meant by its reason why an express contract would be void that by this means the deterrent effects of the law of forfeitures would be avoided, then, of course, the reasoning would no longer apply. But it cannot be doubted that an express contract would be void for other reasons. So revolting to a court of justice is the crime of murder that no contract based on the contemplation of its possible commission by one of the parties would be tolerated. Consequently, if it follows as the court contended, that an implied contract would be equally vicious, the decision of the English court is unimpeachable. The fact, however, that the contract was express would tend to show that murder was contemplated. While the allowance of a recovery in the absence of express stipulation might not be an incentive to crime if such recovery was denied whenever it appeared that the policy was taken out in contemplation of such a crime. But it is possible that if a man knew his family would be well provided for by his insurance money in case he died at the hands of the law, this fact might tend to make him more reckless in the commission of murder and possibly this is the plain meaning of the reasoning in the *Fauntleroy* case. And it appears that a love of relatives and a desire for their well being is sometimes a characteristic of an otherwise vicious man. In *Lord* v. *Dall,* 12 Mass. 118, one Jabez Lord, though engaged in the "immoral traffic" of slave trading had been thoughtful enough to provide his sister with insurance, which, by the way, she was

allowed to collect though Jabez met his death while engaged in his unlawful occupation.

It might here be said that the *Burt* case on this point practically follows the reasoning of the *Fauntleroy* case. And this reasoning is potent. But there is much to be said in favor of the view of the Missouri court that "in life policies the insurer has a guaranty against increasing the risk insured, by that love of life which nature has implanted in every creature." *Harpers Adm'r* v. *Phoenix Ins. Co.*, 19 Mo. 506. In other words, few men will play the game they have to die to win. Certainly a person desiring to mature a policy of insurance would not often commit murder and seek execution therefor to accomplish his purpose. It was contended by counsel for insurer in the *Fauntleroy* case that by committing the capital crime Fauntleroy must have intended the legal consequences of his act, but the opposing counsel argued with force that this was just what he did not look forward to and in reply to the argument that the felonious act itself annulled the contract of insurance pointed to the fact that there might have been an escape, pardon, or commutation of sentence.

This line of argument does not, however, touch the contention that one who is insured, while he does not seek death, yet does not dread it—one of its terrors, a family left unprovided for, being taken away. And it is possible that some might be restrained from committing murder if their insurance would fail.

What seems a more potent reason for denying a recovery is the first ground taken in the *Burt* case, that there is an implied obligation on the part of the insured not to tamper with the risk. As said by the court in *Sup. Com. Knights Golden Rule* v. *Ainsworth*, 71 Ala. 436, "it cannot be in the contemplation of the parties that the insured by his own criminal act, shall deprive the contract of its material element"—the time when death occurs. Regardless of considerations of the security of human life, the insured, a party to the contract of insurance, by the commission of a capital crime, deliberately destroys the integrity of the contract in its very essence. He makes that certain, the uncertainty of which was the foundation of the contract. Such is the ground taken in the *Ritter* case and in the *Burt* case and it seems unassailable in principle.

It must be said, however, that the majority of the state courts including Wisconsin have repudiated this doctrine as far as suicide is concerned. *Patterson* v. *Nat. Premium Mut. Life Ins. Co.*, 100 Wis. 118. Their theory is well expressed in the Missouri case above referred to, that "in such policies, unless it is otherwise stipulated, the insurer takes the subject insured with his flesh, blood, and passions." *Harper's Adm'r* v. *Phoenix Ins. Co.*, 19 Mo. 506. F. D. S.

THE POWER OF A CORPORATION TO HOLD AND VOTE STOCK OF ANOTHER CORPORATION.—An interesting question arose a year ago when the United States District Court for the Western District of Michigan granted a temporary injunction to A. S. Bigelow, complainant, in the case of *Bigelow* v.

Calumet & Hecla Mining Company et al., 155 Fed. 869, restraining the defendants from voting the stock which they held in the Osceola Company and also the proxies which they had acquired from other Osceola stockholders. (See, 6 MICH L. REV. p. 480). Recently the complainant's bill was dismissed on final hearing (167 Fed. 704), and on appeal the decree dismissing the bill was affirmed. *Bigelow* v. *Calumet & Hecla Min. Co.* et al., (1909), — C. C. A. 6th Cir. —, 167 Fed. 721.

The questions involved were whether or not the acts complained of would be in violation of either the Michigan anti-trust law or the Sherman Anti-Trust Act, and the essential facts are these: Both companies are Michigan corporations engaged in mining and refining copper. The Calumet & Hecla Company has bought outright 22,671 shares of the Osceola Company's stock, and has obtained, in the names of its directors, proxies for enough additional stock of the Osceola Company to make a majority of the 100,000 shares of capital stock of the Osceola Company. In circular letters soliciting proxies, the Calumet & Hecla Company openly avows the intention to elect a majority of the Osceola directors from its own directors. Also it is clear that the Osceola Company is to be continued as an independent company.

Amendment to the Michigan mining law (Pub. Acts. Mich. 1905, p. 153, No. 105) provides that corporations organized under the Michigan mining law or any other laws for refining, smelting, or manufacturing ores, metals, or minerals may "subscribe for, purchase, own or dispose of stock in any company organized under this act, or under any other laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or minerals." The power to pass the amendment was reserved § 1, art. 15, of the Constitution of Michigan and the amendment is binding on stockholders. *Att'y. General* v. *Looker*, 111 Mich. 498, 69 N. W. 929, affirmed, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; *Polk* v. *Mutual Reserve Fund Life Ass'n.*, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222. The right to vote the stock and to acquire and hold stock proxies is expressly given by the Michigan mining act (2 Comp. Laws Mich. § 7002), and the right to vote is also incidental to the ownership of the stock. *Rogers* v. *Nashville, Chattanooga & St. Louis R'y. Co.*, 33 C. C. A. 517, 91 Fed. 299, 312; *Taylor* v. *Southern Pacific R'y. Co.*, 122 Fed. 147.

Since the 1905 amendment of the Michigan mining act was passed subsequent to the Michigan anti-trust law, action thereunder must be considered as legal unless an intention to create a monopoly or restrain trade is present, and the court in the principal case expressly found that no such intention existed.

The power of Congress to pass anti-trust legislation is derived from the constitutional power to regulate commerce among the states and with foreign nations. Therefore in considering the application of the Sherman Anti-Trust Act it must be borne in mind that it applies only to those restraints or monopolies, which directly and immediately, or necessarily, affect commerce among the states or with foreign nations. *Hopkins* v. *United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290.

While it is not necessary to a violation of the act to show affirmatively a specific intent to restrain commerce or create a monopoly, provided such restraint or monopoly be the direct, immediate and necessary result of the combination (*United States* v. *Trans-Missouri Freight Ass'n.*, 166 U. S. 290, 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States* v. *Joint Traffic Ass'n.*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Chesapeake & Ohio Fuel Co.* v. *United States*, 53 C. C. A. 256, 115 Fed. 610), yet an intent is necessary to be shown when the acts are not sufficient in themselves to produce a result which the law seeks to prevent. *Swift & Co.* v. *United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279, 49 L. Ed. 518; *Commonwealth* v. *Peaslee*, 177 Mass. 267. Further a combination or agreement is not to be assumed to contemplate unlawful results unless a fair construction requires it upon established facts (*Cincinnati, P. B. S. & P. Packet Co.* v. *Bay*, 200 U. S. 179, 184, 26 Sup. Ct. 208, 209, 50 L. Ed. 428), and the court in the principal case found that no such facts were established.

The business of the defendants in the principal case is the mining and refining of copper and this has no direct or immediate connection with interstate commerce, even though the product ultimately enters the so-called "stream of interstate commerce," and the main purpose and chief effect of the action of the Calumet & Hecla Company's acts, as appears from the facts, was to extend its industrial life and keep up its production and net earnings. The case therefore falls within the principle that if a combination only incidentally or indirectly restricts competition, it is not denounced or voided by the federal act. *United States* v. *E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins* v. *United States*, supra; *Anderson* v. *United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Davis* v. *A. Booth Co.*, 65 C. C. A. 269, 131 Fed. 31.

The principle of the *Knight* case controls the principal case, for in that case it was held that the acquiring, by the American Sugar Refining Company, of control of 98 per cent of all the sugar refining of the United States was a monopoly only of manufacturing and therefore not in violation of the federal act, whereas in the principal case the action of the Calumet & Hecla Company will affect only about one-ninth of the copper production of the United States, so that here even a monopoly feature is absent.

Many cases have held the agreements and combinations involved therein to be in violation of the federal act. *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States* v. *Swift*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Montague* v. *Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

However, none of these latter cases have expressly or impliedly overruled the *Knight* case, supra, and all are distinguishable from that case by the fact that in each one the effect of the combination on interstate commerce was direct and immediate, or the agreement was such that the result was directly and necessarily a monopoly and restraint of competition.

Therefore the principle seems clear that when a corporation is lawfully the owner of the stock of another corporation, it has the power to vote that stock, even to the extent of electing its own directors as directors of the other company, provided the resulting combination is not engaged directly and immediately in interstate commerce, and that the main purpose and necessary result does not effect a restraint of competition. D. B. S.

EFFECT OF AN AGREEMENT NOT TO COMPROMISE WITHOUT CONSENT OF ATTORNEY UPON CONTRACT FOR CONTINGENT FEES.—Cases involving questions of the rights of attorneys in respect of fees are of considerable interest to the profession generally, and because of the large number of cases which attorneys take upon a contingent fee basis the decisions involving this particular phase of the question are peculiarly so. The common law view of champertous contracts has undergone many modifications, so many and in such varying particulars in the various states that it is practically impossible, at the present time, to state any general rule. In a great many jurisdictions contracts for contingent fees are upheld if they appear to be fair and reasonable. See WEEKS, ATTORNEYS AT LAW, § 350 et seq.

Undoubtedly the weight of authority supports the view that a contingent fee contract which contains a clause forbidding the client from making a settlement or compromise of the matter in litigation is void as being opposed to public policy, it being stated as the policy of the law that amicable settlements or compromises of law suits are always to be encouraged, and that any restriction upon the right of a litigant to do so is void, especially when found in connection with a contract for a contingent fee. *Davis* v. *Webber*, 66 Ark. 190, 45 L. R. A. 196, 74 Am. St. Rep. 81; *North Chicago St. R. R. Co.* v. *Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177, reversing the Appellate Court in the same case, 58 Ill. App. 522; *Davis* v. *Chase*, 159 Ind. 242, 64 N. E. 88, 95 Am. St. Rep. 294; *Boardman* v. *Thompson*, 25 Ia. 487; *Davis* v. *Insurance Co.*, 78 Oh. St. 256, 85 N. E. 504; *Matter of Snyder*, 190 N. Y. 66, 82 N. E. 742. And such provision makes the entire contract void. Cases supra. Some courts, however, have regarded them as valid, or at least as not fatal to the whole contract. *Hoffman* v. *Vallejo*, 45 Cal. 564; *Lipscomb* v. *Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500; *Potter* v. *Ajax Mining Co.*, 22 Utah, 273, 291, 61 Pac. 999.

In a recent decision by the St. Louis Court of Appeals, the rule in Missouri is said to be based upon the peculiar provisions of their statute relative to attorneys' fees and liens. *Beagles* v. *Robertson*, 115 S. W. 1042. The question arose under a somewhat complicated state of facts. It will suffice for this purpose to observe that it was a suit by a client to recover from his attorney a certain sum of money paid to the attorney by the defendant in the original cause of action in part payment of a settlement of the litigation. The attorney claimed the money as his fee, and set up a contract containing the terms of the contract between him and his client. The client replied that the contract was void because of a provision in it forbidding any compromise of the litigation without consent of the attorney.

The court held that the provision did not make the contract as to fees void, basing its conclusion upon the statute, Laws 1901, p. 46 (Ann. St. 1906, § 4937-2) and *Lipscomb* v. *Adams*, supra, in which the court used the following language: "We do not lay it down as a general rule that a contract by which a client agrees not to compromise a suit without the consent of his attorney is not contrary to public policy, for circumstances may well be supposed in which such a contract would be held to be illegal for that reason, etc."

§ 4937-1 of Missouri Ann. St. 1906, provides that "The compensation of an attorney * * * is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action * * * the attorney * * * has a lien upon his client's cause of action * * *; and cannot be affected by any settlements between the parties before or after judgment." This section is taken from the New York Code of Civ. Pro., § 66, which was in force when *Matter of Snyder* (supra) was decided. *Taylor* v. *Transit Co.*, 198 Mo. 715, 725, 97 S. W. 155. But § 4937-2, referred to above, is not found in the New York Code. 4937-2 provides in substance the following: that in all actions it shall be lawful for an attorney-at-law to contract with his client for legal services for a certain portion or percentage of the proceeds, and upon notice in writing by the attorney, served upon the defendant, that he has such an agreement, stating therein the interest he has in such claim or cause of action, then the agreement shall operate as a lien upon the claim or cause of action and upon the proceeds of any settlement thereof, and cannot be affected by any settlement between the parties; and any defendant who shall, after notice served as provided, in any manner settle the cause of action or claim with the attorney's client without first procuring the written assent of such attorney, shall be liable to such attorney for such attorney's lien upon the proceeds, as per the contract existing between the attorney and client. While this statute does not expressly state that contracts of the nature herein considered shall be valid, there is a clear declaration of policy, and it seems that the court could not very well hold otherwise than it did. So far as the writer is aware the provisions of § 4937-2 are peculiar to Missouri.

R. W. A.

THE PENNSYLVANIA SUPREME COURT AND THE PENNSYLVANIA RAILROAD COMPANY.—A widespread impression has got abroad among the members of the profession in other states that the decisions of the Pennsylvania Supreme Court are not so unprejudiced as they might be where one of the parties to the cause is the Pennsylvania Railroad Company. The extreme doctrine which that court has maintained in cases of proximate causation, particularly in actions where contributory negligence of the plaintiff is pleaded, and where, in this jurisdiction, the Pennsylvania Railroad Company is so frequently the party defendant, if it has not furnished the origin of, at least has served to lend credence to, this unfortunate impression. See the very recent case of *Schlemmer* v. *Buffalo, R. & P. R'y Co.* (1909), — Pa.

—, 71 Atl. 1053, where, in a short per curiam opinion, the Pennsylvania law of contributory negligence is clearly stated. The comparatively recent decision in *Philadelphia County* v. *The Pennsylvania R. R. Co.* (1908), 220 Pa. 100, 68 Atl. 676, in which case the two cent rate law was declared unconstitutional in so far as it affected the defendant company (and it has not yet been declared unconstitutional in so far as it affects other railroad companies operating within the state) has been mentioned in some quarters as a further reason for the suspicion cast upon the impartiality of the Pennsylvania Supreme Bench.

The unexpected has come to pass, however,—the Pennsylvania Supreme Court has scored the corporation that it is sometimes said to favor. The recently decided case of *Catherine Burns* v. *The Pennsylvania R. R. Co.* (1909); — Pa. —, 71 Atl. 1054, furnished the opportunity for a rebuke to counsel that should, from an ethical viewpoint at least, be more frequently administered to corporation counsel by all self-respecting courts. This case was an action brought against the railroad company by the widow Burns, who sues to recover for the death of her husband who was run down on a foggy morning by one of the company's trains at a notoriously dangerous grade crossing. It has been one of the longest litigated death claim suits on the records of the Pennsylvania courts. It was heard in the Supreme Court four times: 210 Pa. 90, 59 Atl. 687; 213 Pa. 280, 62 Atl. 845; 219 Pa. 225, 68 Atl. 704; and 71 Atl. 1054. It had five jury trials in the Court of Common Pleas,—in addition to the four common pleas verdicts appealed from there was one mistrial, a juror being found asleep during the submission of evidence. The case was submitted to arbitrators once, and an unsuccessful effort was made upon another occasion to bring it before such a body but the case had attained such notoriety that no one could be found willing to serve in such a capacity. Some of these facts appear in the latest decision of the court, others the writer adds of his own knowledge. In reading the decision of the court, MESTREZAT, J., after referring to the former appeals, says: "We are now pleased to say that our judgment on this appeal will terminate the litigation which has been pending for nearly six years. Such delay frequently results in a denial of justice and contravenes the maxim: 'Interest reipublicæ ut sit finis litium.'"

"We have examined the twelve assignments of error, and we fail to find any merit in a single one of them. * * * (four assignments) are not only without merit but have no exceptions of record to support them. * * * The court was clearly right in dismissing the exceptions to the award of arbitrators. They were frivolous and without substance, and the only apparent excuse for filing them was to delay the final adjudication of the cause." Among other assignments of error brought to the Supreme Court was the refusal of the Common Pleas Court to grant a change of venue on the alleged grounds that the company could not have a fair and impartial trial in Cambria County because of the "unfair, improper, and in many instances, untruthful statements" of the Cambria County press. In reviewing this assignment, the Court said: * * * "it appears that, the second

day after the first comment on the case was made by the press, the counsel for the defendant replied in a lengthy article in defense of his company. If therefore the case was tried in the newspapers of the county, the defendant company, by its counsel, and not the plaintiff, was responsible in part for its submission to that tribunal for adjudication. He who invites war must accept the consequences."

The position taken by the court in this case must not be taken to mean, however, that the severity of the doctrine of contributory negligence is to be in anywise abated, for on the same day that Court read the opinion in the *Burns* case (January 4, 1909), the per curium opinion in *Schlemmer* v. *The Railroad,* supra, was handed down. In this latter case this unmistakable statement of the law is found: "It is the settled law of Pennsylvania that *any* negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence either greater or less than his own by the other party."

Justice MESTREZAT, who delivers the opinion in the principal case, is known as the Harlan of the Pennsylvania Supreme Bench, because of the great frequency of his dissenting opinions. J. E. O., Jr.