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LIFE INSURANCE; "DEATH FROM POISON;" ACCIDENTAL SELF-POISONING OF INSURED. The case of *M'Glother* v. *Provident Mutual Accident Co.*, 89 Fed. 685 (Circuit Court of Appeals, Eighth Circuit, October, 1898), may prove of much importance in the law of accident insurance and it is a striking illustration of the divergence that so often exists between the rulings of the Federal and State courts.

The policy was against accident, but it expressly excepted death "from poison." The insured drank poison, thinking it a harmless medicine, and died from its effects.

The efforts made by the courts to relieve against the operation of such exceptions as this may be observed in Biddle on Insurance, Sec. 805, *et seq.*, or in the authorities cited in the opinions in the

present case. *Paul* v. *Ins. Co.*, 112 N. Y. 472 (1889), is the leading case in the State courts and it has been followed in many jurisdictions as establishing a distinction between "death from poison" and "death from taking poison" or "death by gas" and "death by inhaling gas." The word "taking" or "inhaling" is held to imply a conscious and intentional act; in the language of the opinion in *Paul* v. *Ins. Co.*, "If the exception is to cover all cases where death is caused by the presence of gas, there would be no reason for using the word 'inhale.'" Again, in a very recent case, *Fidelity and Casualty Co.* v. *Waterman*, 161 Ill. 635 (1896), the court speaks of "a voluntary or intelligent act, as distinguished from an involuntary and unconscious act."

The possibilities of this construction of accident policies are illustrated in *Menneiley* v. *Assurance Corp.*, 148 N. Y. 600 (1896), where it was held that a death from accidently inhaling gas while sleeping is not a death "resulting from poison, or anything accidently or otherwise taken, administered, absorbed or inhaled." Sanborn, Cir. J., comments on this very severely in the present case and asks pertinently: "If gas is unintentionally and unconsciously taken or inhaled, why is it not 'accidently' taken or inhaled? If it is not, then why is it not 'otherwise' taken or inhaled? And how can gas get into the system in any other way than by being 'accidently or otherwise taken, administered, absorbed, or inhaled?'" The construction given this clause, he declares, "appears to be cunning and astute to evade, rather than quick to perceive and diligent to apply, the meaning of the words it contains in their plain, ordinary and popular sense," and the path followed by these decisions "is so narrow, tortuous and indistinct that we should hesitate long to follow it." He had already shown that the rule "*Noscitur a sociis*" was inapplicable. The exception in this policy covered also death resulting from fits of vertigo and somnambulism; it could not be that this meant only cases where the deceased intentionally had the fits or purposely, voluntarily and consciously walked in his sleep.

While these last considerations tend to distinguish this case from *Paul* v. *Ins. Co.* and others of that class, the decision is based on broader grounds:

"There is no just reason why parties or courts should be ingenious or eager to add to, subtract from, or to search out curious and hidden meanings in the plain terms of their compact. Contracts of insurance are not made by or for casuists or sophists, and the obvious meaning of their plain terms to the business and professional men who make and use them must not be discarded for some curious and hidden interpretation that is to be reached only by a long train of acute and ingenious reasoning."

"Death by poison" is held to be an unambiguous phrase which raises no question or doubt of its meaning; the insurer is therefore exempt from liability for death attributable to poison.

From this conclusion Thayer, Cir. J., dissents. He invokes the

doctrine of *stare decisis* and cites many cases from the courts of New York, Pennsylvania and Illinois to show how well established is the rule of *Paul* v. *Ins. Co.* To the attempted distinction between "death from poison" and "death by taking poison" he attaches no weight; instead, he assimilates these exceptions in a policy to an exception from liability should the insured "die by his own hand." In such a case, he points out, the intelligence to understand the moral character and the effect of the act of self-destruction has been made the criterion: *Ins. Co.* v. *Terry*, 15 Wall. 580 (1872). Finally, he relies upon the rule requiring a policy to be construed most strongly against the insurer.

The importance of this case is manifest. Apparently it was of first impression in a Circuit Court of Appeals; no Federal authorities are cited in either opinion except to support the construction put upon "die by his own hand." How wide a departure this decision marks from the course of reasoning pursued in the cases following *Paul* v. *Ins. Co.* may be seen, for instance, in *Pickett* v. *Ins. Co.*, 144 Pa. 79 (1891), a case relied upon by Judge Thayer. The Supreme Court of Pennsylvania, in *Pollock* v. *Accident Association*, 102 Pa. 230 (1883), upon a state of facts substantially the same as in the *M' Glother* case, had enforced a clause in a policy exempting the company from liability for death by the *taking of poison.* Notwithstanding this, in *Pickett* v. *Ins. Co.*, the court, after a re-argument before the full Bench, adopted the rule of *Paul* v. *Ins. Co.* (then recently decided) and permitted a recovery for a death from asphyxiation by carbonic acid in a well. The policy read "death from inhalation of gas." The distinction is drawn that the poison in the Pollock case was voluntarily and intentionally taken by the deceased, while here the gas worked a *violent death.* We may point out, however, that although the liquid was swallowed intentionally its nature was unknown and it was not taken *as a poison;* the facts of the earlier case come, therefore, within the rule of *Paul* v. *Ins. Co.* and the attempted distinction cannot readily be understood.

It is true, as Judge Sanborn shows, that these authorities in the State courts do not cover this precise point, but the distinction between "death by poison" and "death from taking poison," upon which they proceed, is disregarded both in the opinion of the court and in the dissenting opinion. The question at issue is resolved solely into this: Is a death resulting from purely accidental poisoning covered by such exceptions or does the policy refer only to cases where the insured's own volition contributed to the poisoning? In other words, should the rule be like that in cases of suicide?

In effect the evidence of the parties' intention relied upon by the State courts is excluded, and the underlying question of substantive law is decided upon a principle broad enough to cover the cases decided by the State courts in favor of the insured.

This same principle had already been applied in *Richardson* v.

Travelers' Ins. Co., 46 Fed. 843 (Circuit Court, M. D. Illinois, 1891), where Blodgett, J., held that asphyxiation in one's room by escaping gas was covered by an exception of "death resulting from *inhaling* gas;" *i. e.*, the decision was similar to that in *Pollock* v. *Accident Association.* The plaintiff relied upon *Paul* v. *Ins. Co.*, but the court thought the reasoning of that case unsatisfactory and the terms of the policy too clear to require construction. Moreover, the argument that the exception related only to poisoning which involved the insured's volition, was disapproved because of the difficulty in procuring evidence to show accident or suicidal intent.

On the other hand, the Circuit Courts have followed *Paul* v. *Ins. Co.* in several cases, such as *Westmoreland* v. *Preferred Accident Ins. Co.*, 75 Fed. 244 (1896), and *Lowenstein* v. *Fidelity and Casualty Co.*, 88 Fed. 474 (1898), where the word "inhaled" or "taken" was found in the policy. The latter case, in the Western District of Missouri, is particularly interesting since it had already been decided, but was not yet reported, when the decision was rendered in *M' Glother* v. *Accident Co.* The opinion is by Philips, D. J. He refers to *Paul* v. *Ins. Co.*, and to *Richardson* v. *Ins. Co.*, and then comments on the recent case of *Early* v. *Ins. Co.*, 71 N.W. (Mich.) 500 (1898). This decision he thinks "hardly germane" to the facts before him, as the policy read "death by poison"—a difference of language upon which the Michigan court had dwelt to distinguish the case from *Paul* v. *Ins. Co.* Judge Philips approves of this distinction and says, "it was properly held that 'death by poison' included any and every manner of poison, whether intentionally or unintentionally, consciously or unconsciously, taken." That is to say, he would have decided *M' Glother* v. *Ins. Co.*, as did Judge Sanborn, though on narrower grounds.

Judge Philips then reviews the futile efforts in New York to have the rule of *Paul* v. *Ins. Co.* reconsidered and cites cases following it in other States. In one of the latter (*Casualty Co.* v. *Waterman*, 161 Illinois, 632, 1896), he points out a very reasonable ground suggested for following this rule; the Casualty Company was the defendant in several of the later cases and after the question had been adjudicated in the courts of its own State, the company must be presumed to have had this construction in mind when it continued to issue policies in this form. A similar result, Judge Philips shows in conclusion, had been reached in *Manufacturing Co.* v. *Jones*, 66 Fed. 124, construing a contract to subscribe for stock, and by Judge Taft in *Indemnity Co.* v. *Dorgan*, 58 Fed. 956.

The learned judge's treatment of the phrase "or otherwise" calls for notice. The language in the policy is: ". . . injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." "Or otherwise," he holds, cannot qualify the *act of inhaling*, but is to be read in connection with "accidental;" "it means an injury of

a kindred character, and would cover an intentional taking as well as an accidental taking." Again, he says, if the purpose of adding this phrase was to escape the effect of the ruling in the *Paul* case, "it was a concealed purpose, not apparent to the ordinary mind, and not at all calculated to carry to the insured even a suggestion that it was intended to say by this policy that the company would not answer for liability resulting from inhaling gas or other poisonous substances, whether taken voluntarily and consciously or involuntarily and unconsciously." Yet we may well ask ourselves whether the insertion of these additional words might not indicate an intention to effect another result. "Accidentally" would, of course, be specified, for the policy was against accident and "or otherwise," in ordinary English is simply "by other means." The two would, therefore, include all possible means, the one which would first suggest itself being mentioned to show expressly that it was included. The Century Dictionary, quoted by Judge Philips, says only that in law, "'or otherwise,' when used as a general phrase following an enumeration of particulars, is *commonly* interpreted in a restricted sense as referring to such other matters as are kindred to the classes before mentioned." But the parties had just used "or otherwise" in another than this restricted sense, for they spoke of "injuries, fatal or otherwise." Injuries are necessarily fatal or non-fatal, *i. e.*, they are in two classes mutually exclusive. Why would not the more familiar sense of the phrase be quite as proper in this place as the artificial one adopted by the court?

The Circuit Court of Appeals have not as yet passed upon a policy reading "inhaled or taken" but as we have seen no effect was given these words in *M'Glother* v. *Provident Co.* The operations of accident insurance companies are generally wide-reaching and often it must happen, if this case be followed, that the insurers can bring their more important claims before a Federal court and escape a liability which would be inevitable in the courts of the State where the policy-holders resided. Be this as it may, it is a satisfaction to have the law expounded with such lucidity and vigor as Judge Sanborn has displayed in his opinion and to see the plain words of a business contract given their natural meaning.

Erskine Hazard Dickson.

CREATION OF TRUST; ASSIGNMENT OF CHOSE IN ACTION. A woman had on deposit in a savings bank a considerable sum of money. She expressed to the teller of the bank a desire to put the deposit in the name of her two sisters and herself, her object being to enable her sisters to obtain the deposit on her death without probate proceedings. The teller informed her that if she did as she proposed, the money could be drawn out by her sisters during her life. She replied that she had confidence in them. Her request was then granted, the names of the two sisters were added to the

account in the ledger of the bank, and also posted in the deposit book. The depositor informed the sisters of what she had done, stating her desire to provide for them on her death. She subsequently drew out part of the deposit, but deposited other sums so that the total amount of the deposit at the time of her death was more than at the time the account was in the three names. The executor under her will and the two sisters claimed the deposit. The court upheld the right of the sisters, on the ground that while the transaction did not amount to a gift *inter vivos* or *mortis causa*, it did amount to a creation of trust by the depositor in the bank, and the acceptance of the trust by the bank: *Booth* v. *Oakland Bank*, 54 Pac. 320.

For this theory of the result of the transaction there is some authority. Schouler, in his work on Personal Property, Vol. II, Sec. 78, regards a deposit of money in another's name as a declaration of trust, while in this case the court can point to several authorities sustaining such a proposition, as, *Bosdel* v. *Locke*, 52 N. H. 238 (1872): *Institution* v. *Hathorn*, 88 Me. 122 (1895); *Martin* v. *Flunk*, 75 N. Y. 134 (1878); *Mabie* v. *Bailey*, 95 N. Y. 206 (1884); *Cunningham* v. *Davenport*, 147 N. Y. 43 (1898); *Gerrish* v. *Institution*, 128 Mass. 159 (1880). Where, however, is the declaration of trust? Deposit money in a bank. The bank is a debtor to the amount of the deposit, not a trustee of the money. The mere agreement of the bank to pay this money to some one else does not make the bank any more or less a debtor for the sum than it was before the agreement was made. Neither the original depositor nor the persons to whom he or she has directed the money to be paid could, on the failure of the bank, claim priority for the deposit as a trust fund as against the general creditors. The bank, therefore, in such cases, never becomes a trustee. Neither, in the particular case under discussion, did the depositor declare herself a trustee for the bank's obligation to her in favor of her sisters. She intended to make a gift of some kind, the sisters being volunteers. If the intended gift was not completely executed, it is now an elementary principle that the courts will not give effect to the incompleted gift by holding the donor or her representative trustee for the volunteer.

If we cannot support the decision on the theory advanced by the Supreme Court of California, can it be supported on any other theory? It is clear that the transaction amounted to a gift *inter vivos* or it did not amount to anything. If one makes a deposit in a bank in the name of another, though that other may not know of the deposit, the title to the bank's obligation is in the volunteer: *Howard* v. *Windrim Bank*, 40 Vt. 597 (1868). At least this is the general rule in this country. There would seem to be no objection to regarding the assignment of the obligation of the bank to a depositor as complete whether the depositor directs the bank to place the deposit in the name of a third person and the bank does as directed. If this last is correct, the only difficulty in the case in

California is that the intention of the women was to retain full power over the deposit. Her first intention was not to give her sisters any interest till her death. When told that the method proposed by her would result in giving her sisters power over the deposit during her life, she acquiesced. The fact that the reason for this acquiescence was her confidence that her sisters would not exercise the right during her life does not seem to be material. She consciously attempted to create a joint ownership during life, with a condition that should she die before her sisters, her rights should pass to them and the whole property be then vested in them absolutely. Such a settlement of personal property is perfectly legal, and while we do not know of a case where one has conveyed a joint right of property with himself to another, with a right of survivorship in that other, without the intervention in the conveyance of a trustee to whom the property is first conveyed, we know of no reason why it should not be done.

DIVORCE; CRUEL AND INHUMAN TREATMENT. In the case of *Walton* v. *Walton*, in the Supreme Court of Nebraska, 77 N. W. 392, (Dec. 8, 1898), an action by the wife for divorce, it was alleged that the husband had used vile and opprobrious epithets toward her; that he had called her a bad woman, and accused her of committing adultery. The court held that a false charge of adultery made by a husband against his wife, and calling her vile and opprobious names, was sufficient to constitute extreme cruelty according to the statute.

While it is admitted that the tendency has been, especially of late years, to extend the doctrine of cruelty as ground for divorce, both in this country and in England, by the weight of authority, the abuse and inhuman treatment must be such as renders cohabitation unsafe, or is likely to be attended with injury to the person or the health of the party. The test must be danger of life, limb or health. In *Evens* v. *Evens*, 1 Hagg Const. 35 (1790), it was said: "Mere austerity of temper, petulance of manners, rudeness of language, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty." In *Russell* v. *Russell*, [1897] A. C. 395, a wife had charged her husband with committing an unnatural crime, and insisted in the charge publicly, after admitting that she had not an honest belief in the charge. The court held that such ill-treatment was no ground for divorce, saying there must be personal ill-treatment, such as blows or bodily injury of any kind, or threats of such description as would reasonably excite, in a mind of ordinary firmness, a fear of personal violence. Words, however abusive, offensive, harsh, obscene or vulgar, will not amount to extreme cruelty unless they be accompanied by some act indicating personal injury to life or health of the party. This principle is established by many cases. In *Cheatham* v. *Cheatham*, 10 Mo. 296 (1848), charges of infidelity do not constitute such cruelty as to entitle a

person to divorce. In *Shaw* v. *Shaw*, 17 Conn. 189 (1845), the husband had charged the wife with adultery and used vulgar, obscene and harsh language, which would wound the feelings. It was held that these, unaccompanied with any act indicating personal violence, will not constitute extreme cruelty. To the same effect was *Detrick's Appeal*, 117 Pa. 452 (1888), where the court said: "There must have been actual personal violence, or reasonable apprehension of it, or such a course of treatment as endangered her life or health and rendered cohabitation unsafe." In *Blair* v. *Blair*, 76 N.W. (Iowa) 700 (1898), the husband had charged the wife with adultery, but the court held that this treatment was not such as to endanger life, hence not sufficient cruelty as would entitle the wife to divorce. But any ill-treatment, or the use of such language as produces mental suffering of sufficient degree as to injure the health, will be sufficient cruelty. In *Jefferson* v. *Jefferson*, 168 Mass. 456 (1897), the husband used vile and vulgar language to his wife when she was pregnant, and this was considered such extreme cruelty as to be injurious to health and sufficient ground for divorce.

The thought that pervades all the decisions is not to lay down any hard and fast rule as to legal cruelty, but to give protection to the complainant against actual or apprehended violence, physical ill-treatment or injury to health.

MEASURE OF DAMAGES; RIGHT TO RECOVER FOR BURIAL EXPENSES WHERE DEATH RESULTS FROM WRONGFUL ACT. *Trow* v. *Thomas*, 41 Atl. 652 (July 18, 1898). In this case the Supreme Court of Vermont decided that a parent could not recover expenses incurred in burying a minor child who had been killed through the defendant's negligence. The decision was based solely on the authority of a previous case, *Sherman* v. *Johnson*, 58 Vt. 40, 2 Atl. 707 (1886), but the court questioned the truth of the principle of law therein enunciated. In *Sherman* v. *Johnson* it was decided that where a minor son had been killed by the wrongful act of the defendant, the child's father could not recover damages for the loss of his services from the time of his death to his majority. In reaching this conclusion the court relied exclusively on the common law rule "*Actio personalis moritur cum persona*", and overlooked the Acts of Assembly, 1847, No. 2 and 1849, No. 8, Revised Laws of Vermont, 2134, 2135 and 2138, 2139. The cases of *Needham, Adm'nx* v. *Grand Trunk R. R.*, 38 Vt. 294 (1865), and *Legg, Adm'nx* v. *Britton*, 64 Vt. 652 (1890), interpreting these statutes to have abrogated the common law doctrine of non-survival of actions, and creating rights similar to those given by Lord Campbell's Act (1846), 9 and 10 Victoria, c. 93, also seemed to have escaped the notice of the court.

Before the case of *Trow* v. *Thomas*, the right to recover damages for burial expenses where death resulted from another's negligence

had never arisen in the courts of Vermont and it is fair to presume from the language of the opinion, that had the court not felt bound to follow the decision of *Sherman* v. *Johnson*, which was stated to be analagous to the question under consideration, a recovery for such expenses might have been allowed.

At common law the death of a human being afforded no ground for an action of damages, although where death was not instantaneous, the executor or administrator of the deceased might recover for the pain and suffering experienced and such expenses as nursing and medical attendance incurred prior to death: *Finlay* v. *Chairnay*, 20 Q. B. Div. 494, 502 (1888); *Osborn* v. *Gillett*, L. R. 8 Ex. 88 (1873). To remedy this hardship Lord Campbell's Act was passed, providing that in addition to the common law right in favor of the executor or administrator there might be a recovery for such damages as were occasioned to the members of the decedent's family by reason of the deprivation of his services. Only such damages can be recovered, however, as occur on account of the decedent not being alive to support his family, and, therefore, it has been uniformly held that damages which are purely incidental to death, such as mental pain and anguish, loss of society and affection are not recoverable: *Blake* v. *Midland Ry. Co.*, 18 A. B. 93 (1852); *Pym* v. *Great Northern Ry. Co.*, 4 B. & S. 396 (1863); *Read* v. *Great Eastern Ry. Co.*, L. R. 3 Q. B. 555 (1868); *Rowly* v. *London R. R. Co.*, L. R. 8 Ex. 221 (1873).

Nor can funeral expenses be recovered, for they are not incurred *qua* the decedent's family is deprived of his support: *Dalton* v. *S. E. R. R. Co.*, 4 C. B. N. S. 296 (1858); *Boulter* v. *Webster*, 73 Weekly Reporter, 289 (1865).

Lord Campbell's Act, being abrogative of the common law, has received a strict interpretation from the English courts and only such damages can be recovered in an action where death results from another's wrongful act as are explicitly granted by the Act. In the United States the decisions of the various state courts in reference to the right to recover damages for death occasioned by another's negligence are not in accord, but generally a more liberal view obtains than in England. Where statutes, similar to Lord Campbell's Act, have not been adopted, the common law rule prevails, and death affords no ground for an action of damages. In those states where by statutory right an action may be maintained for damages resulting from death, funeral expenses are recoverable when they have been incurred by those entitled to bring such action: *Penna. Co.* v. *Lily*, 73 Ind. 252 (1881); *Consolidated Traction Co.* v. *Hone*, 59 N. J. L. 275 (1896); *Cleveland R. R. Co.* v. *Rowan*, 66 Pa. 393 (1870); *Murphy* v. *New York, Etc., R. R. Co.*, 88 N. Y. 445 (1882); *Petrie* v. *Columbia, Etc., R. R. Co.* 39 S. Car. 303 (1888). In several states, however, the English doctrine is followed, and burial expenses are disallowed on the ground that only such damages are recoverable as result from the loss of the decedent as a wage earner: *Holland* v. *Brown*, 13