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Insurance—Death by Accidental Means; Insurance—Proximate Cause; Senior Citizens Grant—Constitutionality—Application; Wills—Mistake, Dependent Relative Revocation—Lost Will's Statute

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RECENT CASES

INSURANCE—DEATH BY ACCIDENTAL MEANS. The plaintiffs were beneficiaries under an insurance policy issued to the deceased by the defendant. The insuring clause of the policy provided: "Mutual Benefit Health and Accident Ass'n. . . . hereby insures . . . against loss of life, limb, sight, or time, sustained or commencing while this policy is in force, resulting directly and independently of all other causes, from bodily injuries . . . through purely accidental means." On the evening of his death the insured was an active participant at a dance, and was suddenly overcome by a heart attack. *Held:* Judgment for defendant. The insured's death was not caused by an unexpected event which happened by chance. He was engaged in an ordinary activity, and no unexpected event interposed itself to cause injury. *Hodges v. Mutual Benefit Health and Acc. Ass'n. of Omaha,* 115 Wash. Dec. 591, 131 P. (2d) 937 (1942).

In this case the court has placed a strict construction on the clause covering death by accidental means. There has long been a division of authority as to the interpretation of this term, 1 WORDS AND PHRASES 348.. One of the early Washington cases was *Horsfall v. Pac. Mut. Life Ins. Co.,* 32 Wash. 132, 72 Pac. 1028 (1903), which involved a policy requiring death by accidental means. The insured died as a result of a heart attack caused by the lifting of a heavy object; it was held to be accidental means. A like result was reached under the same type of policy in *Carpenter v. Pac. Mut. Life Ins. Co.,* 45 Wash. 679, 261 Pac. 792 (1927), where the insured skinned a sheep, nicked himself and in consequence thereof, received a fatal infection. A later case held that where the deceased drank wood alcohol believing it to be an ordinary cocktail, it was death by accidental means. *McNally v. Maryland Cas. Co.,* 162 Wash. 32, 298 Pac. 721 (1931). The Washington court recognized the problem and faced it squarely in *Zinn v. Equit. Life Ins. Co.,* 6 Wn. (2d) 379 107 P. (2d) 921 (1940); here the insured had gone to a physician for blood letting to relieve high blood pressure; the infection of the wound which resulted caused his death. The court recognized the existence of two lines of authority as follows: (1) Death is not by accident where an unexpected result occurs by reason of the doing of an intentional act by the insured. It must appear that the means were accidental, and it is not sufficient to show that the final result was unforeseen. *Mitchell v. N. Y. Life Ins. Co.,* 136 Ohio 551, 27 N. E. (2d) 243 (1940); *Brown v. Cont. Gas. Co.,* 161 La. 229, 108 So. 464 (1926); *Gohlke v. Hawkeye Comm. Men's Ass'n.,* 198 Iowa 144, 197 N. W. 1004 (1924). (2) Where death is the unforeseen, unusual result of an intentional act, it is by accidental means, even though there is no proof of unusual circumstances in the act or event which causes death. In holding for the plaintiff the court accepted the latter view and said: "We hold that death is accidental within the meaning of insurance policies . . . where death occurs as a result of an unusual, unexpected, or unforeseen event following an intentional act, provided that those events are not normally effected." This problem again arose in *Graham v. Police & Fireman's Ass'n.,* 10 Wn. (2d) 288, 116 P. (2d) 352 (1941); the insured intended to run downstairs during an emergency but lost his footing and fell. As a result thereof he had a fatal heart attack. Death was held to be by accidental means.

The usual view is expressed in Vance, *Insurance* (2 ed. 1930) § 258 p. 872; it is thus stated: "Therefore, when the policy covers only injury or death due to accidental means, it has been often held that the insurer is not liable when the acts which led up to the injury were designed or expected and took place in a manner intended and expected, though the resulting injury may have been wholly undesigned and unexpected." Among cases which affirmatively illustrate this rule are the following; in *Rock v. Trav. Ins. Co.*, 172 Cal. 462, 156 Pac. 1029 (1916), the insured undertook to act as a pallbearer, and performed his duties in a reasonable manner; however, he sustained a heart attack as a result of strain—judgment for defendant. To the same effect was a case in which the deceased swam against a swift current, and overexertion caused a fatal hemorrhage. *Brunswick v. Stand. Acc. Ins. Co.*, 278 Mo. 154, 213 S. W. 45 (1919). But death may result from accidental means, even where the act was intentional, provided it was done in a manner not intended; Vance, *Insurance* (2 ed. 1930) § 258 p. 873. This was the holding where the insured leaped from a platform and wrenched his ankles in landing; the court declared that though he intended to jump, he did not intend to land in such a position as to injure himself. *United States Mut. Acc. Ass'n. v. Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60 (1889).

From this analysis it may be seen that the decision in the principal case is not inconsistent with that handed down in the *Zinn* case; but it also seems that although the latter is correctly decided, it was not properly brought within the usual view. In the principal case the insured completed his act exactly in the manner intended, only the result being fortuitous. And therefore, the decision was entirely consistent with the usual rule.

J. D. M., JR.

INSURANCE—PROXIMATE CAUSE. Deceased, a member of the National Guard, while crossing an intersection in the city of Olympia approximately one half hour before drill, sustained a severe head injury which later resulted in his death. The defendant company insured the Guardsman under a policy which reads:

"This policy insures against loss or disability resulting directly and exclusively of all other causes, from accidental bodily injury sustained during the term of this policy and *caused by* service classed as incurred in the line of duty as a National Guardsman, including guard duty, participation in drills, parades, practice or instruction in an armory or in the field when with his organization under the command of officers, including the annual encampment or while travelling to and from encampment, hereinafter referred to as 'Such injury'."

The court held in as much as Doke, the deceased, was presumed to be on his way to drill, the injury sustained was within the protection of the provisions of the policy. *Doke v. United Pacific Insurance Company*, 115 Wash. Dec. 460 (1942).

The general rule of accident insurance cases is that when the words "caused by" or ones connoting the same meaning are used, an injury must be the proximate and not the remote cause of the loss. *Lavender v. Continental Life Insurance Co.*, 143 Wash. 201, 253 Pac. 595 (1927); *Kelly v. Fidelity Mutual Life Insurance Company*, 169 Wis. 274, 172 N. W. 152, 4 A. L. R. 845 (1919). In the *Lavendar* case the deceased, covered by an

accident insurance policy specifying definite types of risks, was injured by a motor falling from a truck. The Washington court in denying recovery stated that the act named in the policy must be the efficient cause of the death. The judge further stated, in quoting from *White v. Standard Life & Accident Insurance Co.*, 95 Minn. 77, 103 N. W. 735 (1905) that "if the injury is the proximate cause of the death the company is liable." In the *Kelly* case where the policy was issued to Kelly as a civilian, a provision limited liability when death occurred as a result of engaging in military service. It was held that the death of the insured from the skidding of his motorcycle while riding from one sawmill to another, as a part of his military duty did not prevent full recovery. The death was not met under circumstances peculiar to the military service. Hundreds of civilians are killed in this manner almost daily. Likewise, in policies worded similarly, the insurer is liable when death to a soldier results from influenza unless it was in consequence of his military service. *Starr v. Great American Life Insurance Co.*, 114 Kan. 315, 219 Pac. 514 (1923); or where the insured in the line of duty was killed by an accidental gunshot wound at the hands of a fellow soldier. *Malone et al v. State Life Insurance Co.*, 202 Mo. App. 499, 213 S. W. 877 (1919).

A closely analogous situation is one involving windstorm insurance. Such a policy does not cover damage occasioned by a combination hail and wind storm. Even though the loss was largely due to the hail, the damage would not have occurred had it not been for the high wind which prevailed at the time. *Hartford Fire Insurance Co. v. Nelson*, 64 Kan. 115, 67 Pac. 440 (1902).

Where proximate cause is once established, the insurer will not escape liability although the insured should meet his death while violating the law. "An exception, in the policy, of death because of violation of law, includes only those cases in which death ensues as the proximate result of the criminal act of the insured." Vance on *Insurance*, p. 812; *Accident Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685 (1891).

Certainly the policy in the *Doke* decision would not cover injury resulting from an earthquake during guard drill. There would be a definite lack of a causal connection between the reason for the injury and the risk insured. Even conceding the deceased was on his way to the armory, it seems there should not be a recovery without a proximate causal relationship. Such accidents are not peculiar to National Guard duties and have no relation thereto, but are associated with every day civilian life. Even though courts construe in favor of the insured they should be consistent and permit recovery only when there is an existing relation of cause and effect. M. R. B.

Negligence—Liability of an Abutting Owner. The defendant operated a parking lot which he had surfaced with fine gravel. Trucks passing in and out of the lot kicked small amounts of rock onto the sidewalk. The plaintiff was walking in front of the lot when she turned her ankle on one of the stones and fell. *Held:* Judgment for the plaintiff affirmed. The abutting owner may use the sidewalk, but the use carries with it the duty to exercise reasonable care that the use does not create conditions rendering it unsafe for pedestrians. *James v. Burchett*, 115 Wash. Dec. 105, 129 P. (2d) 790 (1942).

The defendant operated a filling station with driveways over the sidewalk. Snow fell, and cars coming into the station disturbed the snow, thus rendering it rough and icy and more hazardous to pedestrians. Plaintiff slipped and fell upon the corrugated surface and sued for injuries sustained. *Held:* Judgment for plaintiff reversed. The abutting owner has the right to construct driveways and to allow his customers to use them in a natural and reasonable manner. *Bennett v. McGoldrick-Sanderson Co., Inc.*, 115 Wash. Dec. 114, 129 P. (2d) 795 (1942).

The holding in the *James* case is based mainly upon the decision in *Cobb v. Salt River Valley Water Users' Assn.*, 57 Ariz. 451, 114 P. (2d) 904 (1941). Here it was held that the defendant had no right to run waste irrigation water across a sidewalk; also that there would have been no liability had the impairment been by natural causes. The court states: "This seems to be the rule everywhere. Whatever it is that causes the harm to the pedestrian, *if it is the affirmative act of the abutting owner* (italics supplied), whether it be from the freezing of melting snow or rain cast on the sidewalk by such owner, or escaping oil . . . he is liable for the resulting harm." In agreement are the following: *Collais v. Buck & Bowers Oil Co.*, 175 Wash. 263, 27 P. (2d) 118 (1933); *Nadeau v. Roeder*, 139 Wash. 648, 247 Pac. 951 (1926); *Mitchell v. Thomas*, 91 Mont. 370, 8 P. (2d) 639 (1932); *Hanlon v. Waterbury*, 108 Conn. 197, 142 Atl. 681 (1928); *Markham v. Fred P. Bell Stores Co.*, 285 Pa. 378, 132 Atl. 178 (1926).

The *Bennett* opinion follows the principle announced in *Dan Braven v. Public Service El. & Gas. Co.*, 115 N. J. L. 543, 181 Atl. 46 (1935). In this case where the facts are pratically identical, the court says: "The case falls within a well defined class of cases which absolves the user from liability for conditions imposed by nature where no other and further interference with the course of nature than that exercised by the defendant exists." This view is strengthened by the holding in *Abar v. Ramsey*, 195 Minn. 597, 263 N. W. 917 (1935). The court here stated that the abutting owner was under no greater duty to keep clear a part of the sidewalk crossed by his driveway than any other part of the walk adjacent to his property. The case of *Massey v. Worth*, 39 Del. 211, 197 Atl. 673 (1938) is seemingly not in accord with the *Bennett* decision. It was held in the Massey case that the abutting owner would be liable for the wrongful act of *accumulating* snow on the sidewalk. A careful analysis reveals that these cases may be distinguished on a single point, which factor will also serve to classify the principal cases. The test should be whether or not affirmative negligence can be found. In the *James* case the court was dealing with a suit in which the defendant was guilty of negligence by an affirmative act (surfacing the lot); whereas, in the *Bennett* case, if the defendant is charged with negligence at all, it is merely from failure to act.

J. D. M. JR.

SENIOR CITIZENS GRANT—CONSTITUTIONALITY—APPLICATION. In three recent decisions the Washington Supreme Court has interpreted and upheld as constitutional Initiative 141, the old-age assistance initiative which liberally amended the existing old-age system. Since its origin the constitutionality of the initiative has been a subject of much speculation and citicism. These decisions seem to definitely give judicial sanction

to the initiative and the old-age assistance system as it is now in operation, and to put a practical end to the severe criticism which the initiative has received. In each of the three decisions, the initiative was upheld by a divided court, two of the judges on each occasion giving very strong dissenting opinions. *Morgan v. Department of Social Security*, 114 Wash. Dec. 93, 127 P. (2d) 686 (1942); *Burgdorf v. Department of Social Security*, 114 Wash. Dec. 140, 127 P. (2d) 709 (1942); and *Halsell v. Department of Social Security*, 114 Wash. Dec. 114, 127 P. (2d) 711 (1942).

The purpose of Initiative 141, discussed in a comment in 16 WASH. LAW REVIEW 95 (1941), was to liberalize the existing old-age assistance program by increasing the amount of the grants to the qualified recipients. Under the plan any person is eligible for the grant who has attained the age of sixty-five, is without resources, and has a yearly income which is less than $480 and a monthly income which is less than $40. The grant awarded is in the sum of not less than $40 per month on a uniform state-wide basis, minus the income of applicants from other sources. The initiative liberalized the plan by excluding in the definition of "income" and "resources" such things as the residence of the applicant, foodstuffs, livestock, fuel, light and water which he may produce or receive from his family. Under these definitions, an applicant could have more of these forms of wealth and still qualify under the maximum yearly income. The above would also not be deducted from the monthly grant as income from other sources.

These are the major changes in the old-age system. The stated purpose of the initiative was to provide assistance for aged, needy people and to comply with the Federal Social Security Act so as to take full advantage of the Federal government's offer to match state funds, up to $20, in an old-age assistance program.

The definitions of "income" and "resources" in the initiative differed from those of the Federal Act. It was necessary that the Washington definitions be the same as those of the Federal Act, as this was a requisite to receiving Federal aid. To comply with the requirement, the state board wrote a memorandum accepting the definitions of the Federal Act. The Federal Board then gave its approval of the state plan. The Federal definitions do not exclude from the annual income "resources" and "income" as defined in the Washington act. The Federal definition also makes those things included in the terms subject to deduction from the monthly grant. The effect of this is to substantially lower the net total monthly income which the majority of the recipients would receive.

Since the initiative became law it has been the Federal definition which has been used by the state board in its consideration of Senior Citizen Grants, and not the one as stated in the initiative.

The criticisms of Initiative 141 as it has been applied by the department and as it was upheld by the court are well expressed by the minority. It was their opinion that the act as passed gave to senior citizens a minimum of $40 monthly, regardless of the action of the National Social Security Board, and that any other application or construction would render the act unconstitutional. They contend the citizens had clearly manifested their intent in the expressly stated language of the initiative. The act as interpreted by the majority and as applied by the department is obviously contrary to the express words of the statute and, it would seem contrary to the will of the people.

The objections to the constitutionality of Initiative 141 are well stated in Justice Simpson's dissenting opinion in the *Morgan* case, *supra*, pg. 132.

> "First, the department, an agency of the executive branch, through nullifying Section (g) and (h), by adopting diametrically opposed rules and regulations, in effect usurped the power of repeal heretofore delegated to the legislative branch. Secondly, the department by promulgating rules and regulations as a substitute for Section Three (g) and (h), in effect redrafted the statute, thereby usurping the power of the legislative branch to legislate; and finally, the majority's approval of the department's actions constitutes a transfer of the power vested in the judicial branch in that it allows a Federal administrative agency to construe a law of this state. It is apparent then that the rights of the legislative branch have been encroached upon by both the executive and judicial branches."

It was also vigorously argued that Section 9 was a substitution of judical discretion for that of the executive department of the government, to which administration of the law has been allocated by the legislature, in as much as it provided for judicial review even in the absence of a showing of arbitrary and capricious action by the department.

These objections were answered by the majority in the following manner: First, that Section Three (g) and (h) were not in accord with the provisions of the Federal Social Security Act, and that the Federal Board correctly held that these subparagraphs "are in violation" of that act. Secondly, it held that legislative authority may by statute provide that the executive branch of the government shall determine some fact or status, upon the existence of which the application of a law depends It held that the department was working within its delegated and right fully authorized powers. Third, that the Federal agency in its definition of terms had not usurped the power vested by the Constitution in the judicial branch of the government. Fourth, that arbitrary or capricious action on the part of the department is often not essential to a judicial review of such action. An order of the department may be illegal, though not arbitrary or capricious.

Though the logic and authority for the three decisions on Initiative 141 may still be open to criticism, it appears that the issues have definitely been decided by the court. Its decision has twice been upheld. And while Initiative 141 specifically gives $40 monthly, subject to no deductions for "income" or resources" as defined, to aged, needy persons who can meet the qualifications of the act, the interpretation of the court and the one followed by the department is that Senior Citizen Grants shall be made in compliance with the Federal Act, though at least verbatim it is contrary to the one of Washington.

Washington has had an old-age assistance system under which it was entitled to receive aid from the government since the enacting of the Federal Plan. In complying with the Federal Act through its interpretation of Initiative 141, the Washington plan continues to meet Federal requirements, and consequently this state is still receiving assistance under the Federal Act. The other 47 states, the District of Columbia, Alaska, and Hawaii have also put into effect plans which comply with the requirements of the Federal Social Security Act.

Though it is possible that the view of the court will change, it seems fairly certain that the interpretation laid down in these three decisions will continue to be the law in Washington. J. C. B.

WILLS—MISTAKE, DEPENDENT RELATIVE REVOCATION—LOST WILL'S STATUTE. About to undergo an operation, the decedent signed a will, witnessed by his fiancee and two nurses, in which he left $5,000.00 to his fiancee and the balance of his estate to his brother, Louis. After the operation had been successfully performed, decedent informed an attorney that he wished to make a gift of the $5,000.00 to his fiancee in lieu of the bequest in his will, and that he desired to have the remainder of his property pass to his brother, Louis. In answer to questions by the attorney, decedent said that he had no relatives other than his brother, Louis. After informing the decedent that his estate would pass to Louis, the lawyer, with the consent of the deceased, tore up the will. Death came a few days later and it was discovered that the deceased had a number of brothers and sisters residing in Belgium. *Held:* the will was properly denied probate, the court saying, (1) the doctrine of dependent relative revocation did not apply for there was no attempt to make a new will; (2) a will must be in physical existence at the time of death before it can be admitted to probate under the lost will's statute; and (3) there was no fraud which would permit probate of the will under the lost will's statute. *In re Kerckhof's Estate,* 113 Wn. (2d) 469, 125 P. (2d) 284 (1942).

In interpreting wills the intent of the testator must govern according to statutory mandate. REM. REV. STAT. sec. 1415 (P. C. sec. 10042). The rules concerning the construction of wills obviously are of no effect where the testator left no will unless a revoked will can be revived in some manner. Here, the intentions of the deceased are conflicting—he intended to leave all of his property to Louis and to die intestate. There appears to be no way to probate the destroyed will.

In deciding the issues presented to it, the court followed the normal rule when it said there must be a subsequent revoking instrument before the doctrine of dependent relative revocation can be considered. 23 KY. L. J. 559, 578. But assuming a revoking instrument had been made, is this not a case of mistake rather than of dependent relative revocation? There seems to have been no showing of a conditional intent on the part of the deceased or that any condition he might have intended was fulfilled. Certainly at the time of revocation he did not expect his relatives in Belgium to take an intestate share of his estate and condition his revocation upon such a happening. He was mistaken about the existence of relatives (a mistake of fact), and in his belief that his brother would take all his property by intestacy (a mistake of law). For very good discussions of the difference between dependent relative revocation and mistake see Joseph Warren, *"Dependent Relative Revocation,"* 33 HARV. L. REV. 337, and 1 Page, WILLS (3rd Ed.) 873-8, Sec. 378.

A mistake which induces the testator to make a will has no effect upon the validity of the will, and it would seem to follow that a mistake which induces the testator to revoke his will would have no effect upon the validity of such revocation. 33 HARV. L. REV. 337, 342, 348; 23 KY. L. J. 559, 582. However, counsel and court are not to be condemned for it is said that one reason dependent relative revocation and mistake are confused is because they lead to the same result. 1 Page, *Wills* (3rd Ed.) 875, Sec. 478.

The existence of relatives was peculiarly within the knowledge of the deceased at the time he revoked his will. Where a mistake of fact ap-

pears upon the face of an instrument revoking the will, the courts have found the revocation valid because the alleged fact rested in the personal knowledge of the testator. *Campbell v. French*, 3 Ve. Jr. 321 (1797); 68 C. J. 823, Sec. 525; 28 R. C. L. 177, Sec. 134; 33 HARV. L. REV. 337, 349. But for this rule to apply there must be a revoking instrument, and there was none in the present case.

The only method by which all of the property could have been given to Louis would have been for the probate court to disregard the mistake by virtue of its inherent equitable powers to set aside acts on the grounds of mistake when it appears that the deceased, had he known the true situation, would have preferred his old will to none. 39 HARV. L. REV. 405; Atkinson, *Wills*, p. 387-8. Such a solution is inconsistent with the practice of admitting a will induced by mistake to probate. Atkinson, *Wills*, p. 387-8. However, the lost will's statute would have thwarted any attempt to probate the deceased's revoked will. The Washington court took the better view when it decided that the term "existence" means physical rather than legal existence in a statute which contains an express exception for fraudulently destroyed wills. 2 Page, *Wills* (3rd ed.) 380, Sec. 711.

C. C. G.