

Comment on Recent Decisions

ACCIDENT INSURANCE—BENEFIT CERTIFICATE HELD TO EXEMPT INSURER FROM LIABILITY FOR ACCIDENTAL DEATH BY POISON.—The insured, believing that he was taking medicine, by mistake drank carbolic acid and died from the effects thereof. The benefit certificate issued by defendant contained a provision excepting the company from liability for "injury (fatal or otherwise) resulting from poison or infection or from anything accidentally or otherwise taken, administered or inhaled." Held, that the provision was drawn for the express purpose of avoiding liability in such accidents and the plaintiff could not recover on the policy. *Miller v. Ft. Wayne Mercantile Accident Association* (Ind. 1926) 153 N. E. 427.

There are two lines of decisions on such provision, one, the older, holding that such a provision covers an injury caused only by the deliberate act of the insured, and the other, of which the instant case is an example, excludes recovery entirely in the excepted cases. The leading case holding the insurer liable is *Paul v. Insurance Co.*, 112 N. Y. 472, where the insured died from inhaling illuminating gas in his sleep. It was held in this case that the clause excepting death from inhalation of gas meant a voluntary inhalation and not an accident. *Healy v. Accident Insurance Association*, 133 Ill. 556 followed this and explained that since the contract was signed by the insurer only it would be construed strictly against him and must be construed with reference to the subject matter of the contract, which was indemnity for accident. *Pickett v. Insurance Co.* 144 Pa. 79 followed the same reasoning but distinguished *Pollock v. Accident Assn.* 102 Pa. St. 230, the leading case in the other rule. *Casualty Co. v. Waterman*, 161 Ill. 632 held that the exception referred to a voluntary act and pointed out that since the contract was written by a New York company after the decision in the *Paul* case, the insurer must have understood its meaning in the light of that decision. In *Menneilly v. Asso. Co.* 148 N. Y. 596 the courts begin to turn away from the strictness of the rule by holding that the exception would apply to a voluntary altho accidental taking of poison but not to some unconscious act, as the inhalation of gas while asleep. *Insurance Co. v. Dunlap*, 160 Ill. 642 in a case similar to this in which carbolic acid had been taken by mistake for medicine that the phrase "taking poison" meant in ordinary parlance a voluntary intentional act and that such a provision to be effective should be free from doubt. This was followed by the statement in *Insurance Co. v. Ayres*, 217 Ill. 390 that ambiguous language should be construed against the company, but that it should not be difficult to make such a provision explicit.

Considering the rule of the instant case, it derives from *Pollock v. Insurance Co.* 102 Pa. St. 230, in which it was held that the exemption of liability for death "by taking of poison" included an accidental taking. This same construction was applied in *Early v. Insurance Co.* 113 Mich. 58, and in giving force to the exemption, *Casualty Co. v. Hudgins*, (Texas) 76 S. W. 745 holds that such a provision as the one in the principal case is plain and unambiguous and meant to exempt liability of insurer for such an accident and the court could not by construction write a new contract for the parties, reaching a different result through the same reasoning as the older cases. *Jones v. Assn.* 184 Iowa 129 holds that the phrase "accidentally or otherwise" includes involuntary and unconscious and that the court cannot write a new contract, while *Riley v. Accident Association* 184 Iowa 1124 says that in the phrase "voluntary or involuntary," the word involuntary has the same meaning as accidental.

Missouri has adopted the same rule in *Dezell v. Fidelity & Casualty Co.* 176 Mo. 253, in which the insured died from an overdose of morphine administered

by a physician in treatment. The court held that this was not within a similar exemption clause, and there seems to have been no disposition to challenge the rule.

The Federal rule does not seem to be well defined, some cases construing the exemption clause against the insured, *Bayless v. Ins. Co.* Fed. Cas. 1138; *Westmoreland v. Acc. Ins. Co.* 75 Fed. 244; *McGlother v. Acc. Co. of Phila.* 89 Fed. 685. Others following *Fidelity & Casualty Co. v. Lowenstein*, 97 Fed. 17 construe it against the company. It is interesting to note that in the *McGlother* case Judge Sanborn wrote the decision and Judge Thayer dissented, while in the *Lowenstein* case Judge Thayer wrote the decision and Judge Sanborn dissented. The latter case, however, went largely on the ground that by issuing a policy in New York containing the same clause, the company had adopted the decision in the Paul case.

A study of the case involved in the two rules will show, however, that there is not so great a difference as appears by a statement of the rule. The older cases are decided largely on the grounds that there was an ambiguity which would be construed against the insurer, and the later cases have merely advanced from that ground by holding that an exemption clause which is plain and unambiguous means just what it says.

W. M. T. '27.

ATTORNEY AND CLIENT—AUTHORITY TO PURCHASE PROPERTY AT MORTGAGE FORECLOSURE SALE.—An attorney, appearing in mortgage foreclosure proceedings for a bank which was insisting on security of mortgage, acting in good faith, purchased the property for his client, without express authority to do so. When the sale was called there was only one other bidder and unless the attorney had bid, the property would have been sold at a price insufficient to protect his client's interest. The bank afterwards refused to ratify the act of its attorney and to comply with the bid. Held, an attorney appearing in mortgage foreclosure proceedings has both actual and implied authority to do whatever is necessary for the protection of his client's interest, and is authorized to bid in the property at an amount sufficient to satisfy claims secured by the mortgage. *Foxworth v. Murchison National Bank*, (S. C. 1926) 134 S. E. 428.

This case cannot be sustained on authority. In every jurisdiction where this question has arisen it has been held that an attorney cannot bind his client to such a purchase without express authority to do so. In the case of *Savery v. Sypher*, 6 Wall. 157, 18 L. Ed. 822, the administratrix of the mortgagee brought foreclosure proceedings against the mortgagor. At the sale the attorney for the mortgagee bid off the property in the name of his client. The mortgagor insisted upon the mortgagee complying with the bid which her attorney had made. The court declined to confirm the sale, saying, "The burden of proof was imposed on . . . (the mortgagor) who seeks to confirm the sale, to show the authority of . . . (the attorney) for an attorney, *virtute officii*, has no authority to purchase property in the name of his client." In *Bauman v. Eschallier*, 107 C. C. A. 44, 184 F. 710, the facts were quite similar. Here the court said, "While an attorney has large discretionary powers in the conduct of a suit, he has no power, by virtue of his mere authority to conduct a suit and collect the judgment, to purchase property for his client, and thereby substitute such property for the money." In *Beardsley v. Root*, 11 Johns (N. Y.) 464, 6 Am. Dec. 386, the syllabus is as follows: "An attorney, by his general authority as such, cannot purchase land sold under execution in favor of his client, either in trust or for the benefit of such client." The case of *Washington v. Johnson*, 26 Tenn. 468, is in accord. Under but slightly changed circumstances, in *Fischer v. McInerney*, 137 Cal. 28, 69 P. 622, it is held that an attorney at law has no authority, as such, to purchase for his client the latter's property sold under execution in the proceedings in which the attorney is employed. The case of