
REVIEW OF RECENT DECISIONS

ACCIDENT INSURANCE—DEATH RESULTING FROM INSURED VOLUNTARY ACT—MEANS MUST BE ACCIDENTAL.

In *Ramsey v. Fidelity and Casualty Co.*, 223 S. W. 841, (Tenn.) 13 A. L. R. 651 (note p. 660), recovery was sought on a policy of accident insurance and the claim based on the death due to blood poisoning following the extraction of a tooth. The court denied recovery, declaring that the bill of plaintiff did not allege the means causing the injury were accidental nor that the tooth was pulled accidentally nor that the accident happened while the tooth was being pulled. According to the weight of authority it is held that death or injury does not result from accident or accidental means within the terms of an accident policy where it is the natural result of the insured's voluntary act, unaccompanied by anything unforeseen, except the death or injury. *Maryland Casualty Co. v. Spitz*, 246 Fed. 817; *Young v. Railway Mail Ass'n.* 126 Mo. App. 325, 103 S. W. 557; *Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. 79. It is not shown in the Tennessee case that the means by which the gums were injured, were intentionally and purposely applied, but on the other hand it appears that the insured knew that the inevitable result of the pulling of the tooth would be to break down and lacerate the gum tissue. The means not being accidental nor the result following the pulling of the tooth and laceration of the gum tissue expected or foreseen there can be no recovery on the policy. 224 N. Y. 18, 120, N. E. 56.

CONTRACT—CERTAINTY IN CONTRACT—SUBSEQUENT PAROL AGREEMENT NOT BINDING—WHEN.

The case of *Fuller v. Presnell*, 233 S. W., 502, was an action for damages for breach of contract for sale of lumber. The plaintiff obtained judgment for \$1,710, and the defendant appealed. The contract is evidenced by the following writing signed by the defendant: "Received of Oscar Fuller two hundred fifty dollars (\$250) being part payment for one hundred to one hundred fifty thousand feet of oak lumber to be delivered at Laffin, Mo., by Jan. 1, 1920, at \$30.00 per thousand for 8 foot, and \$35.00 per thousand for standard lengths. Same to grade No. 2 common and better and to be inspected at Laffin." (Sgd) "Chas. E. Presnell". Defendant in his answer set up fraud upon the part of plaintiff's agent in representing that lumber to "grade No. 2 common and better" meant the same as "mill run," whereas it meant a certain grade of lumber and that, therefore, he could not deliver under this contract the entire output of his mill. Subsequently defendant and plaintiff's agent

orally modified the contract by mutual consent so that defendant could only be required to deliver such quantity as he might be reasonably able to cut and deliver. Defendant alleges that he complied with the contract as modified but that the plaintiff refused to inspect and to accept the lumber. Shortly following, defendant sold the lumber to another party and gave notice to plaintiff that he would not furnish him any more. As a result of this, plaintiff brought action for breach of contract as stated above. Two of the principal points stated by defendant as grounds for appeal were (1) Failure of the lower court to sustain a demurrer to plaintiff's testimony because the contract was void for uncertainty as to the kinds and quantity of lumber contracted for, and (2) That defendant's testimony as to modification of contract was not denied.

With reference to point Number 1, the only thing not definitely provided in the contract was the amount of 8-foot lengths and the amount of standard lengths that were to be furnished. The Supreme Court held that a contract such as this gave the defendant the right to select the amount of each kind of the different lengths he would furnish, and with that right resting in him he had it in his power to comply with the terms of the contract so far as that provision was concerned and that the contract was a valid and binding contract. Evidently the rule of construction *id certum est quod certum reddi potest* was applied. This view is supported in *The American Hardwood Lumber Co. v. Dent*, 151 Mo. App. 614, in which the contract was for furnishing lumber to be sawed from standing trees. There was a suit for damages for breach of contract. The defense was made that the contract was so indefinite it could not be complied with since there was nothing to show the quantity of each variety to be shipped. The Court held, however, that since the minimum amount of lumber to be furnished was stated the defendant might select the amount and variety of each kind to be shipped, and that the contract could have been complied with had the defendant so desired. Considering point Number 2, the Court held that since this contract was for the purchase of personal property of greater value than \$30, to be binding it must be in writing under the Statute of Frauds. The statute was complied with in this respect with reference to the original contract. But the rule is also well settled in Missouri that a contract required to be in writing can only be changed or modified in writing. *Rucker v. Harrington*, 52 Mo. App. 481; *Arky v. Commission Co.*, 185 Mo. App. 281; *Warren v. Mayer Mfg. Co.* 161 Mo. 112. Since the modified contract in the main case under consideration was not in writing it could not be held binding. In the case of *Ark v. Brockman Co.*, 185 Mo. App. 241, the plaintiff declared not alone on a written contract, evidenced by a memorandum, but upon this as modified by, or taken together with a subsequent oral agreement. The Court held that, while a contract not required to be in writing by the Statute of Frauds may be subsequently modified or varied by an oral agreement, a contract required to be in writing under the Statute cannot be modified or varied by a subsequent oral agreement.

As above shown the contract in the case of *Fuller v. Presnell*, 233 S. W. 502, was held not to be void for uncertainty and the modified contract set forth by the defendant was held not binding. Therefore the judgment of the lower

court for plaintiff was affirmed, provided the plaintiff remit within ten days all of the judgment in excess of \$1,215, said remittance being based upon a point not considered in this discussion.

CORPORATIONS—LIABILITY FOR SLANDER

In the recent case of *Allen v. Edward Light Co.*, 223 S. W. 953 (Mo. App.), the plaintiff sued the defendant corporation of which he was an employee for slander, spoken by the president of the corporation in the hearing of another employee. Plaintiff was a salesman, with authority to make small donations to customers, and in the exercise of this authority he gave a purchaser goods valued at \$1.10. Lefkovits, the president of the corporation, hearing of this donation had detectives investigate, and discovered that the goods had actually been given to the customer. The plaintiff was called to the president's office, where he was faced by Lefkovits and two detectives, Milton and Valleau. Lefkovits and Milton both accused the plaintiff of being a thief, of having stolen the goods and intimated that they had papers to prove their statements. The defendant corporation insisted that the words, being spoken to the plaintiff and not of him, were not slanderous; that inasmuch as only Valleau, an employee had heard the accusation there was no publication; and further that the corporation and Lefkovits, standing in the relation of principal and agent, were severally liable for their slanders and could not be jointly sued.

Disposing of these defenses in their order the Court held that it was no defense to an action for slander that the words were spoken to and not of the plaintiff; that there was sufficient publication when Valleau heard the accusations made by Lefkovits and Milton, and the fact that he was an employee of the corporation was immaterial; finally that the president being the owner of the corporation was speaking both for himself and the corporation when he uttered the slander and was jointly liable with the corporation.

ESTATE IN ENTIRETY—SURVIVORSHIP, WHEN APPLICABLE.

In the recent case of *McGhee v. Henry*, 234 S. W. (Tenn.) 509, a husband and wife held certain tracts of land as tenants by the entirety. The estate in entirety is very similar to the joint estate, its important feature being the right of survivorship. Upon the death of one, the survivor takes the entire estate to the exclusion of the heirs of the deceased. In the case under discussion, both husband and wife perished simultaneously by being burned to death in a building in Lonsdale, West Virginia. It was held that their being no survivor, both having died at the same instant, the children and heirs of each inherited one-half of the estate. In the absence of statutes to the contrary or any fact to prove which one survived the other, there is no presumption as to survivorship. *United States Casualty Co. v. Kacer*, 169 Mo. 301; *Coye v. Leach*, 8 Metc. (Mass.) 371; *Walton v. Buschel*, 121 Tenn. 715. For a full discussion see 8 R. C. L. 716.