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LEGAL EXECUTION OF THE INSURED AS A DEFENSE TO AN ACTION ON A LIFE INSURANCE POLICY.

By W. L. Summers*

Whether the legal execution of an insured, for a crime committed by him, in absence of a condition in the policy excepting death by such cause from the risk, should be allowed as a defense in an action on a policy of life insurance contracted for by such insured on his own life, whether made payable to his estate or a named beneficiary, is a question upon which the courts of this country are in apparent hopeless conflict. The question as thus stated is divisible into two parts because two forms of policies are concerned, that is, in the one kind of policy the proceeds of the insurance are made payable to the insured's estate or personal representative, while in the other kind of policy the proceeds are made payable to a designated beneficiary. Many courts,1 in considering suicide or other criminal acts of the insured resulting in his death as a defense to an action on a policy of the latter class, have held that the beneficiary has a vested property interest therein which is not defeated by the act of the insured. Other

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courts have denied this distinction. Before taking up this distinction and its connection with the present subject under consideration it is deemed advisable to review briefly the English and American cases on legal execution.

The first case in which the legal execution of the insured was urged as a defense on a policy of life insurance arose in England and was decided by the House of Lords in 1830. The Lord Chancellor in stating the opinion of the court said:

"The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life in the Amicable Society. In the month of May in the same year he committed a forgery on the Bank of England. He continued to pay the premiums on this insurance for a considerable period of time. In the year 1824, he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced to death, and in the month of November following was executed.

"The question under these circumstances is this: whether the assignees can recover against the Insurance Company the amount of this insurance; that is to say, whether a party, effecting with an insurance company, an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether, under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in this policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void on the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? Namely, the interest we have in the welfare and prosperity of our connexions. Now if a policy of that description, with such a form of condition inserted in it in

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3 The Amicable Society v. Bolland, 4 Bligh (U. S. 194, 211.)
express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?

"Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by the counsel at the bar, in the discussion of this case, I think that this policy cannot be sustained, and that the respondents are not entitled to recover." 

The principles of public policy which furnished the basis of the decision in the Bolland Case, supra, were adopted by the Supreme Court of the United States in Mutual Life Insurance v. Ritter as one of its reasons for deciding that suicide of an insured avoided a policy of life insurance even tho there was no clause in the policy excepting suicide of the insured from the risk. The court said:

"In support of the general proposition that the law will not enforce contracts and agreements that are against public good, and are therefore forbidden by public policy, reference is often made to the case of the Amicable Society v. Bolland, 4 Bligh (N. S.) 194, 211."

The court then reviewed the facts of that case and quoted from in the opinion as set out supra.

The question of legal execution of the insured as a defense to a suit on policy of life insurance was squarely before the courts of this country for the first time in Burt v. Union Central Life Insurance Company, decided by the Supreme Court of the United States, in 1902. In that case the insured took out a policy on his own life payable to his wife, if living, otherwise to his executors, administrators or assigns. He was tried, convicted and executed for the murder of his wife. The plaintiffs, as the assigns of the insured, brought action to recover the proceeds of the policy. The defense of legal execution was made but the plaintiffs claimed recovery on the ground that the insured was not guilty of the crime for which he was executed. The lower court refused evidence as to the innocence of the insured and

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*Among the defenses urged by counsel were fraud and attainder*


*187 U. S. 362, 47 L. Ed. 216, 23 Sup. Ct. 139.*
was sustained in its ruling by the Supreme Court on the ground that if such proof were allowed, the contract, as insurance against the miscarriage of justice, would be contrary to public policy. As to legal execution as a defense, apart from the question of the innocence of the insured, the court said:

"The question therefore is whether an ordinary life policy, containing no applicable special provisions, is a binding contract to insure against a legal execution for crime. The petitioners would distinguish between cases in which the insured is justly convicted and executed and those in which he is unjustly convicted.

"Accepting the division made by counsel as one facilitating a just conclusion concerning the rights of the parties hereto we inquire, first, whether a policy of life insurance is a contract, binding the insurer to pay to the beneficiary the amount of the policy in case the insured is legally and justly executed for crime. In other words, do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?

"The researches of counsel have found but one case directly in point, the Amicable Society v. Bolland, decided by the House of Lords in 1830, and reported in 4 Bligh (N. S.) 194, 211. The Lord Chancellor, delivering the opinion, after stating the question, answered it in the following brief but cogent words:

"The plaintiffs therefore in each of the cases claimed directly under the insured and sought to recover on a policy obtained by him, the maturity of which was accelerated by his execution for crime; in neither was there any express stipulation in respect to such a contingency, so that the reasoning of the Lord Chancellor is pertinent to this case and it is reasoning the force of which it is impossible to avoid. It cannot be that one of the risks covered by the contract of insurance is the crime of the insured. *There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a

* Italicized used are the writer's.
Legal Execution as Defense to Action on Life Insurance Policy

stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for."

The court referred to the Ritter Case, supra, and its approval of the Bolland Case and the dicta of some American cases wherein this doctrine of public policy has met approval.

In 1907 the question under discussion was before the Supreme Court of Illinois in Collins v. Metropolitan Life Insurance Company. In that case one Kilpatrick had insured his life making the policy payable to his personal representatives. He was legally executed for crime and this was urged as a defense to a suit on the policy. The Illinois court took the view that a policy of insurance is a species of property; that the principle of public policy upon which the Bolland Case was decided was based on the doctrine of attainder; that since forfeiture of estate and corruption of blood for crime are prohibited by the Constitution of Illinois there could be no such rule of public policy in that state and consequently legal execution of the insured was not a valid defense to the action. The court said in part:

"An insurance policy payable to the estate or personal representatives of the assured is a species of property. It is in the nature of a chose in action, which, subject to certain conditions, varying according to the terms of the contract, is payable on the contingency of death or at a stated time. Life insurance has become an important factor in the commercial and social life of our people. To protect their credit, save their estates from embarrassment, and provide for dependent ones, the people of this state pay annually over $30,000,000 in premiums for life insurance. . . . The amount of insurance carried is approximately $1,000,000,000. Why should this enormous property interest be subject to any different conditions than those applying to any other property owned by the people? If a man who is executed for crime has at his death $1,000 in real estate, $1,000 in chattels, and $1,000 life insurance payable to his estate, his real estate descends to his heir, and his personal chattels to his administrator, but the $1,000 life insurance must be left in the hands of the company who has re-

ceived the premiums because it is said to be contrary to public policy to require the company to pay, lest by so doing it lend encouragement to other policyholders to seek murder, and execution therefor, in order that their estates or heirs might profit thereby. This is defendant in error's position. This contention seems to border closely upon the absurder. We know of no rule of public policy in this state that will enforce this species of forfeiture, but there is a rule of law which has often been applied when two parties make a valid contract and the same has been completely performed by one party and nothing remains except the performance by the other, which will compel performance or award damages for default against the delinquent party."

The question was before the Supreme Court of the United States a second time in the well known case of Northwestern Life Insurance Company v. McCue. In that case McCue insured his own life making the policy payable to his executors, administrators or assigns. He was executed for the murder of his wife. An action on the policy was instituted by the infant heirs of McCue, but later, by agreement of parties, his executors were also considered parties plaintiff. Mr. Justice McKenna wrote the opinion of the court. After stating the facts he said:

"The main question in the case is, as we said, the liability of the company under the circumstances. Or, to put it more abstractly for the present purposes of our discussion, whether a policy of life insurance insures against death by legal execution for crime."

The court then quoted from the opinions of that court in the Burt and Ritter Cases, supra, and continued:

"These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications."

After discussing other questions the court concluded:

"One other contention of the respondents remains to be noticed. It is contended that if the McCue estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above, the policy is the measure of

the rights of everybody under it, and as it does not cover death by the law, there cannot be recovery either by McCue's estate or by his children."

The rule of the English and Federal decisions was followed in a case before the Supreme Court of North Carolina in 1916. In that case the insured took out a policy on his own life naming a beneficiary but reserving the right to name another instead. The policy, like that of cases above, contained no clause stipulating for or against liability of the company in event of death of the insured by legal execution. The insured was electrocuted for the crime of murder. The beneficiary brought suit to recover the proceeds of the policy and the defense of legal execution was made. The court said:

"Upon the facts stated the only question presented on appeal is: Does an ordinary life insurance policy, in the absence of any provision in regard thereto, insure against death by act of law administered as a punishment for the commission of a capital felony? We do not think that the parties to the contract contemplated such an extraordinary risk, or that the terms of the policy include it. If such stipulation had been inserted in the policy, it would be insurance against the commission of crime, and void as against sound principles of public policy."

The court then cites the Bolland, Ritter, Burt, and McCue Cases, supra. Of the Collins Case, supra, it was said:

"The only case that militates against our conclusion is, Collins v. Insurance Company (citing it); but that decision seems to be based upon a provision of the state Constitution declaring that no conviction shall work a corruption of blood or forfeiture of estate. It is not necessary that we should discuss that case, except to say that we do not regard it as a precedent to be followed."

11 The Illinois Constitution, Art. II, Sec. 11, provides: "All penalties shall be proportioned to the nature of the offense; and no conviction shall work corruption of blood or forfeiture of estate."

Article XI, Sec. 1 of the North Carolina Constitution, provides: "The following punishments only shall be known to the laws of this state, viz., death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under this state."

Article I, Sec. 21 of the Texas Constitution provides: "No conviction shall work corruption of blood, or forfeiture of estate; and the estates of those who destroy their own lives shall descend or vest as in case of natural death."
The last case decided on this subject was before the Court of Civil Appeals of Texas in 1918. The facts in that case were almost identical with those in the North Carolina case, supra, the defendant in both suits being the same company. The court said:

"The question, therefore, for our determination is this: does an ordinary life insurance policy, in the absence of any provision in regard thereto, insure against death by act of the law of the land administered as a punishment for crime? We have reached the conclusion that the question must receive a negative answer."

After citing with approval the Burt and McCue Cases, supra, the court continued:

"It is unnecessary for this court to discuss the reasoning of the Supreme Court of the United States in reaching its conclusion in the above mentioned cases as such reason speaks for itself, and in the opinion of this court, the same is not only legally sound, but comports with the highest public policy and common sense."

In referring to the Collins case, supra, the court said:

"We have read carefully Collins v. Insurance Company, and as said by the Supreme Court of North Carolina, we do not regard this case as a precedent to be followed in Texas, but prefer to follow the Supreme Court of the United States, and that of North Carolina, as well as others holding contrary to the views expressed by the Illinois court."

The facts and opinions of the foregoing cases have been set forth for the purpose of showing as clearly as possible the reasons and principles upon which the courts have based their opinions. At this point in the discussion it is sufficient to call attention to the fact that in the cases where the defense of legal execution has been allowed, the judges have assumed that the rights of the plaintiff, whether beneficiary or personal representative of the insured, were based on contract, and have accordingly applied thereto rules of public policy governing contracts. On the other hand, in the case where the defense was denied, the court assumed that the right of the

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plaintiff, who there was the personal representative of the insured, was one of property, and finding no rule of public policy in that state preventing the descent of property of a murderer to his heirs or personal representatives, very naturally held, that the legal execution of the insured was no defense to an action by the personal representative to recover the property. With assumptions of the courts as to the nature of rights created by a policy of insurance so different, it is not surprising that opposite conclusions were reached. Had any of the courts taken the pains to analyze the life insurance contract and determine the nature of the rights of a named beneficiary and the personal representative of the insured, under the forms of policies above mentioned, it is believed that the present conflict on this subject would not exist. It is proposed, therefore, to determine, if possible, the nature of the rights created by a life insurance policy.

It is well settled that the ordinary life insurance policy is an executory,\textsuperscript{13} conditional\textsuperscript{14} contract of investment,\textsuperscript{15} based on a contingency,\textsuperscript{16} whereby the insured agrees to pay to the insurer an annuity until the happening of the contingency. in consideration of the insurer agreeing to pay the insured's personal representative or named beneficiary a certain larger sum upon the happening of the contingency. The contingency in the ordinary life policy is the death of the insured. The amount of the annuities agreed to be paid are determined according to the life expectancy of the insured so as to be of such number and amount as will provide a fund for the payment of the amount due the beneficiary or representative of the insured at the end of the period of life expectancy.\textsuperscript{17}

It was pointed out above that the ordinary life insurance policy by which a man insures his own life may assume either of two forms. In one the proceeds of the policy are made payable to the estate, or personal representatives of the insured, and in the other they are...
made payable to a designated beneficiary. Because of the distinction, contended for by some of the courts, between the nature of the interest created in the respective parties to be benefited by the two kinds of policies, and the effect of a crime of the insured resulting in his death upon such interests, it becomes necessary to discuss them separately.

It must be admitted that the courts are prone to say that an insurance policy is a chose in action, and as such, property. But it is necessary to bear in mind that the contract is *executory* during the lifetime of the insured; that there is no present right to the proceeds of the policy, in the nature of contract or property in anyone until the contract becomes executed; that the contract cannot become executed until the happening of the contingency upon which it is based, and then only in the event that all of the conditions thereof, express or implied, have been fulfilled. If they mean anything definite, to what then do the courts refer when they say that a policy of insurance is a chose in action in the nature of property? It is not denied that a policy payable to the estate or personal representative of an insured, is, after his death, an asset for the payment of his debts, but in that case the contract is executed, the conditions are fulfilled, and the contingency has happened. An unmatured policy, on the other hand, is an asset available to creditors of the insured only when, according to the terms of the contract, the policy has an absolute money value, but in all other cases where the liability of the insurer is contingent, the policy is not to be regarded as available assets. Such surrender value is the only property which passes to the assignee in bankruptcy of the insured under the bankruptcy law. This doctrine that an insurance policy

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18 See cases cited in note 1.
is a chose in action is by no means consistently applied. Assuming
by this doctrine that the courts mean to say that the insured or his
personal representative has a property (chose) in the proceeds of the
policy which may be recovered by an action. Such action cannot be
brought by the insured, for during his lifetime there is no obligation
on part of the insurer to pay. The only right the insured has is to re-
cover a surrender value and discontinue the policy, or the alternative
right to continue the policy in force according to the terms and con-
ditions provided for in the contract. Suppose the insured dies, the
representative has a right to sue and recover the proceeds of the
policy, provided all conditions of the policy have been complied with.
How did the personal representative get this right to sue, which the
insured did not have? He undoubtedly acquired it by *virtue of the
contract*, yet the Supreme Court of Illinois would have us believe
that the insured, from the inception of the policy, had a property in-
terest in the proceeds thereof which passed by descent to his personal
representative. It is submitted that this theory of the Illinois Court
is wholly unsound on reason and principle. To repeat the error then
of the Illinois Court in the Collins case is in *assuming* that the con-
tract of insurance gives to the insured a property right in the proceeds
of the policy, which property right goes to the personal representative
by descent unhampered by any rule of public policy governing con-
tracts which might affect the policy or the ultimate right to the pro-
ceeds thereof. By this theory the insured is given power to pass by
descent a property which he did not have during life. Conceding,
for the sake of argument, that the insured did have a property in the
proceeds of the policy during his lifetime and a right to sue for the
recovery of such property and that such property and right of action
passed to the personal representative by descent, an action by the
personal representative to recover the proceeds of the policy would
still be based on contract and a defense that the contract was contrary
to public policy would still be good.

The right of action, therefore, which the personal representative
of an insured has to sue for recovery of the proceeds of an insurance
policy contracted for by the insured and made payable to his estate
or personal representatives, is a right based on contract, dependent for
its validity upon the proper performance of the express or implied
conditions of the contract, and upon the rules of public policy govern-
ing contracts, and is not, as the Supreme Court of Illinois assumes, a
property right in the insured passing by descent to his personal repre-
sentative and governed solely by rules of public policy affecting the
devolution of property. For this conclusion there is ample author-
ity,22 altho it is to be regretted that the courts in passing upon the
validity of the defenses of legal execution and suicide in suits for
recovery of proceeds of an insurance policy have not more fully de-
dined their position in this respect.

When an insured contracts for insurance upon his own life and
the policy provides that the proceeds thereof shall be payable uncondi-
tionally to a designated individual, practically all of the courts
agree that such beneficiary takes a vested interest in the policy in-
defeasible by an act of the insured without the beneficiary’s consent,
and that such right is one of property capable of being seized for the
beneficiary’s debts, of passing by descent to his personal representa-
tive, or by his will or assignment.23 Where the right of the designated
beneficiary to take may be defeated by a condition subsequent it is
said to be conditionally vested, and if the right is dependent upon a
condition precedent the interest acquired is contingent, capable of
becoming vested, but if insured reserves the privilege of changing the
beneficiary at will then the named beneficiary has nothing more than a
mere expectancy of benefit.24 Many courts have held that suicide, or
other wrongful act of the insured resulting in his death, is not a de-
fense to an action by a beneficiary to recover the proceeds of a policy,
on the ground that the vested right acquired cannot be defeated by
the insured’s wrongful act, and thus make the distinction referred to
above between policies payable to a beneficiary and those payable to

303, 42 L. Ed. 633; Amicable Society v. Bolland, 4 Bligh (N. R.) 114; Northwestern
239, 47 L. Ed. 216; Scarborough v. Am. Nat. Ins. Co, 171 N. C. 533, 58 S. E. 421;
on Insurance, pages 390 to 395; Bacon on Life and Accident Insurance, Fourth Edi-
tion, sec. 377; Bliss on Life Insurance, sec. 318; 14 R. C. L. 1375, and cases cited;
24 Vance on Insurance, pages 390 to 400, and cases cited; Joyce on Insurance,
Second Edition, sec. 730 to 734; Bacon on Life and Accident Insurance, Fourth Edi-
tion, sec. 373, 381; 14 R. C. L. 1397-1399.
personal representatives.\footnote{\textsuperscript{26}} In some cases the distinction is made even tho the beneficiary has no vested interest.\footnote{\textsuperscript{28}} But other courts hold that where the right is reserved to change the beneficiary, as is usually the case in mutual benefit insurance, the same principles should apply as to policies payable to insured's estate or personal representatives.\footnote{\textsuperscript{27}}

In none of the decided cases wherein legal execution of the insured was urged as a defense to a recovery on the policy was the distinction made between policies payable to the legal representative and to a beneficiary, for the simple reason the plaintiffs in none of those cases had a vested interest. It becomes necessary, therefore, to determine, if possible, the nature of this vested right acquired by the beneficiary, and the effect, if any, of such an interest upon the defense of legal execution set up by the insurer in a suit by a beneficiary to recover the proceeds of a life policy.

There is no question but that the beneficiary named in a life policy takes such an interest therein that he may, upon the maturity of the policy, sue and recover the proceeds thereof. The courts have proposed various theories, none of which are altogether satisfactory, by which the beneficiary in the insurance contract is given this peculiar vested and indefeasible property right so different to that ordinarily given a third person by a contract made for his benefit.\footnote{\textsuperscript{28}} It is believed, however, that the manner in which the right is secured is not necessary of determination in this discussion. The question here is, does the beneficiary have, from the inception of the policy, a vested property right in the proceeds of the policy? If it is again recalled that the liability of the insurer to pay the proceeds of the policy is dependent upon the proper performance of all express and implied conditions of the contract and upon the happening of the contingency upon which it is based, it is then evident that when the courts speak of the vested interest of the beneficiary they do not and cannot properly mean that he has a vested interest in the pro-

\footnote{\textsuperscript{26}} See cases cited in note\textsuperscript{1} supra.
\footnote{\textsuperscript{28}} See Vance on Insurance, page 303 for discussion of the principles involved.
ceeds of the policy.\textsuperscript{29} It is meant only that the beneficiary has a vested right to receive the money that shall become due and payable upon a proper performance of the contract. In those cases, pointed out \textit{supra},\textsuperscript{30} where it is held that the right of the beneficiary cannot be defeated by the wrongful act of the insured, the courts have in effect held that altho the vested right of the beneficiary may be defeated by breach of an express condition of the contract but not by breach of an implied condition thereof or because the contract is contrary to public policy. To illustrate: Suppose A insures his life for the benefit of B and that in the policy there is an express condition that if A goes to Mexico the policy will be void, and an implied condition that if A commits suicide while sane the policy will likewise be void, and still further that there is a rule of public policy which prevents a recovery on the policy if A commits suicide while sane. Now this group of cases hold that if A goes to Mexico B’s vested interest is gone and he cannot bring action to recover the proceeds. But, on the other hand, they hold, without denying the existence of the implied condition or the rule of public policy, that a breach of either does not destroy B’s vested interest. By holding that the breach of the express condition destroys the beneficiary’s interest they admit that his right is based upon contract. Yet by holding that the breach of the implied condition does not have the same effect they make a distinction between the effect of the breach of express and implied condition of contract for which there is no sound reason. And by holding in effect that the rights of the beneficiary are not defeated by the breach of the rule of public policy, they deny the principle that the beneficiary’s rights are dependent upon the validity and proper performance of the contract of insurance, which they admitted in holding his rights defeated by breach of the express condition.

For the foregoing reason it is believed that this distinction made between policies wherein the beneficiary has a vested interest, on the one hand, and those wherein his right is not vested or where the proceeds are made payable to the insured’s estate or personal representative, on the other hand, as to the right of the respective parties to re-


\textsuperscript{30} See cases cited in note 1.
cover on the policy where suicide of the insured is a defense, is wholly unsound. It is believed that the doctrine of vested interest of the beneficiary was made use of by these courts in an attempt to avoid the conclusions of the Ritter Case. There would be much less confusion in the law upon this subject if these courts had openly repudiated the doctrine of the Ritter case instead of attempting, as they did, to get around it by constructing the above mentioned erroneous distinction. This distinction has been repudiated by courts and writers on other grounds.\textsuperscript{31}

It is submitted therefore that the right of a beneficiary named in a contract of insurance, to sue for the recovery of the proceeds of the policy, is a right dependent upon the proper performance of both the express and implied conditions of that contract, as well as upon the validity of the contract as determined by the rules of public policy. And that there is no sound distinction between the nature of the right of such beneficiary and the right of the personal representative to sue for the proceeds of a policy made payable to the insured's estate or personal representative. Therefore where suit is brought on a life policy and the defense is the legal execution of the insured the validity of such defense should in no way be dependent upon whether the plaintiff sues as the personal representative or the beneficiary of the insured.

The conclusions of this discussion to this point may be summarized as follows:

(1) Where a suit is brought by the personal representative of the insured to recover the proceeds of an ordinary life insurance policy made payable to the estate or personal representatives of the insured, and the legal execution of the insured is interposed as a defense, the right of such plaintiff is based upon contract and the validity of such right must be determined by rules of public policy governing contracts and not rules of public policy governing the descent of property. To this extent the decisions of the House of Lords and the Supreme

Court of the United States are correct and the decision of the Supreme Court of Illinois is wrong.

(2) That the rights of one named as a beneficiary in a policy of life insurance are also based on contract, whether his rights may be said to be vested or not vested; and that there is no such difference in the interest of a beneficiary who has vested rights and the interest of the beneficiary whose rights are not vested, that would defeat the defense of legal execution of the insured, whether based on ground of public policy or breach of an implied condition, in the one instance, and allow it in the other.

Having arrived at the foregoing conclusions, it now remains to determine if there really is such a doctrine of public policy governing the contract of insurance or an implied condition in every life insurance policy that will have the effect of preventing a recovery by the beneficiary or personal representative where the insured has been legally executed for crime. It becomes necessary to investigate the reason and theory upon which these principles are based.

In the Bolland Case one reason only was given why legal execution should constitute a defense.

"Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crime—namely, the interest we have in the welfare and prosperity of our connexions."

Here are two principles of public policy united. One is, that no one should be permitted to make a contract that might incite him to commit crime. The other, that no man should be allowed to benefit himself or kin by his own wrong. It is necessary to make use of both principles to formulate a rule relative to insurance contracts, because the contract could not be said to violate the first rule, that is, inciting crime, unless there also existed the temptation or desire to benefit by the crime. The use of implied condition as mentioned in this opinion is merely for the purpose of giving effect to the rule of public policy which is the basis of the decision.

In the Burt Case the court gives two reasons why the plaintiff there could not recover:

(1) "There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy." (2) "Public policy
forbids the insertion in a contract of a condition which would tend to induce crime."

The Supreme Court in the McCue Case adopted the above reasons. The North Carolina and Texas courts did likewise. This additional doctrine of implied obligation was apparently taken from the opinion of Justice Harlan in the Ritter Case. Justice Harlan may have taken it from the argument of counsel in the Bolland Case for it was strongly urged there. It seems to be plain that the courts in this country, which have allowed legal execution as a defense in an action on an insurance policy, have based their decisions upon the two reasons set out in the Burt Case. These two reasons are also the basis of the decision of the Supreme Court of the United States in the Ritter Case, where suicide of the insured was the defense. Furthermore the courts in the legal execution cases have expressly stated the reasons set out in the Ritter Case are applicable where legal execution of the insured is a defense. It would seem to be conclusive then that one desiring to question the soundness of these principles must turn the opinion of Justice Harlan in the Ritter Case where these principles and the reasons supporting them are ably set forth.

In the Ritter Case it was held that the suicide while sane of an insured is a defense to an action on a life policy, even if the policy does not expressly declare that it shall be void in such a case. For this decision two main reasons are given, first, that there is an implied obligation in every contract of life insurance that the insured will do nothing wrongfully to accelerate the maturity of the policy, and second, that public policy forbids the insertion in a contract, expressly or by implication, a condition which might incite or induce the insured to commit crime.

To support this first main principle three arguments are made which are more or less dependent upon each other. The first of these is, that the life tables upon which the contract of insurance is based do not include in their estimates death by crime or suicide. Since such

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Northwestern Life Ins. Co. v.,McCue, supra; Ritter v. Mutual Life Insurance Company, supra.
a risk was not in the contemplation of the parties, the court reasons that it should be excepted from the policy by an implied condition, even tho the parties failed to do so by express stipulation. Justice Harlan cites no authority to show the basis upon which the life tables are computed. It appears that most of such tables are based on death records or certain groups of persons covering a period of years. The causes of death of individuals of the groups selected do not appear to have entered in any way into the calculation of the averages.34

This statement of Justice Harlan has also been denied by other courts.35 The Supreme Court of Nebraska in speaking of the Ritter Case said:

"We find on examination of that opinion that the reasoning of the learned judge who wrote it was to some extent based on the assumption that the experience tables used as a basis for fixing the consideration to be paid for such insurance exclude suicide as a cause of mortality, but we find it to be a fact as shown by the authorities, and one which we have never heard questioned, that all of the mortality or experience tables used as a basis for computing premiums on life insurance, and assessments for carrying benefit certificates in fraternal benefit associations, include all forms of death, of which suicide is considered one."

The first argument then to support the principle of implied condition seems to be based on an erroneous assumption of fact.

The second argument to support the existence of an implied condition is that the insurer does not contemplate incurring the risk of death by suicide, for, if he knew that the insured would take his own life the contract would never be made, and to allow a recovery on such a policy would be fraud on the insurer. The authorities all agree that if an insurer contracts for life insurance in contemplation of suicide that to allow recovery on such a policy would be fraud on the insurer, on the simple ground of concealment of a fact material to the risk.36 But here fraud is claimed regardless of any intention on part of the insured at the time of making the contract to take his own

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life. The fact the insurer did not contemplate the risk of suicide seems to be the basis of the fraud. This fact of the insurer's state of mind is in turn based on the assumption that the mortality tables do not include suicide, as a cause of death. This latter proposition has been shown to be erroneous, therefore this argument of fraud based on it must fail. For if the contract does, in absence of express exception, insure against death by suicide, there can be no fraud on the insurer.

As a third ground of support of the doctrine of implied condition it is said that insurance against death by suicide could not have been within the contemplation of the parties at the inception of the contract, for if it was, the happening of the contingency upon which the liability of one party is to arise would thereby be wholly left at the option of the other. This, it is asserted, "is against the very essence of the contract." To prove the soundness of this statement Justice Harlan makes use of that ancient and false analogy between property and life insurance which was urged by counsel in the Boland Case, and first uttered by Lord Campbell, *obiter*, in *Moore v. Woolsey*:

"If a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover on a policy if within the-year he causes her to sink."

To prove that such analogy is false and inapplicable it is only necessary to recall that life insurance is not a contract of indemnity but an agreement to pay a fixed sum on the happening of an inevitable event, and without regard to the value of the life or the loss sustained.

The second main principle upon which the doctrine of the Ritter Case is based, public policy, is formulated by welding together well known postulates of public policy; first, that no contract should be enforced which by its terms incites one of the parties to commit crime, and second, no one should be allowed to benefit by his own wrong.

Moore v. Woolsey, 4 El. & Bl. 263.

The rule claimed to result is that no man should be allowed to insure against death by suicide, for thereby he would be incited to commit suicide, or commit a crime and have himself legally executed for the purpose of benefiting himself or his beneficiaries. The two original maxims of public policy are not questioned, but their jointure and the resultant principle as applicable to life insurance is questioned.

Under this rule there are only two inducements stated, which, it is claimed, might cause the insured to commit crime; first, to benefit himself, and second, to benefit his dependents or beneficiaries. The soundness of this whole doctrine then must depend upon the strength of these inducements upon the mind of the insured and the attendant injury to the welfare of the public in general. The force of these alleged inducements, it is submitted, upon the mind of the insurer, must be measured by the manner in which they effect the mind of the person of average power of mind and intellect and not in the manner which they might affect the person of weakened or inferior power of mind. The first question amounts to this is the average minded individual induced to commit suicide in hopes of gaining benefit from a contract which is matured by his death? To show there is an inducement it must first be shown that there is belief in the mind of the individual that he is to have benefit, which is to come to him at his death. Some things, even to the average individual, are dearer than life, but such things are not to be measured in terms of dollars and cents, particularly such amounts as an insurance policy may represent. Benefit as used in this maxim means material and not moral or spiritual benefit. It is impossible to see how any person may gain benefit by his own death where death is condition precedent to the benefit, nor do the supporters of the alleged principle show there is such a benefit to be gained, or such a hope of benefit in the mind of the average person who has a life insurance policy. If there is no hope or belief of benefit there is no inducement. If no inducement there is no breach of public policy, and to this extent the alleged rule fails. On this point one judge says:

“No one in this world can derive a benefit from his own death. By that final event all earthly profit ends for him to whom it comes. He is for this life equally beyond gain and loss, and as to him the rules
that govern mundane intercourse become no longer applicable. Those who derive the benefit have done no wrong."

The second question is, is the individual of average intellect and force of mind induced to commit suicide because he believes his estate or beneficiaries will be benefited? In this case, if the contract is allowed to be good, the benefit to the third person cannot be doubted. But when, in the mind of the insured, this knowledge of resultant benefit to a third person comes in contact with the inherent instinct of self preservation, the first and strongest instinct in man, will there be in that person's mind an inducement to commit suicide, or murder for the purpose of having himself executed, so that a third person may receive the proceeds of an insurance policy? Eliminating that class of persons who contemplate suicide or crime at the time of making the contract of insurance, it is believed that few if any average minded persons would be induced by such contract to commit crime or suicide. At least there would not be such number as would warrant this so called doctrine of public policy which defeats the clear and simple contract of parties concerned. There is much more reason for saying that an estate limited on a life is void for the same reason. But as Justice Holmes rightly says:

"The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon death. It shows no prejudice against remainders after life estates, even by the rule in Shelly's case."

For the foregoing reasons it is submitted that the two principles upon which Justice Harlan bases his decision in the Ritter Case are unsound. If they are unsound where suicide is the defense they are equally unsound where legal execution is the defense, for as shown above the Supreme Court restated these reasons as the basis for their decision of the Burt and McCue Cases and said they were applicable there.

One other proposition set out in the Burt and McCue Cases demands attention. In the Burt Case it is said:

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*Collins, Judge, in Campbell v. Supreme Conclave I. O. H., supra.
"In other words, do insurance policies insure against crime?  
"Is that a risk which enters into and becomes a part of the contract."

The doctrine of the aforementioned cases when thus put in broad sweeping statements seems hard to controvert, but in cases like those under discussion, where nothing is said in the contract for or against payment in case of death by crime or legal execution, this question, it is submitted, is beside the point. The life insurance contract is for the payment of a fixed sum on the happening of an inevitable event. Life insurance is not concerned primarily with the individual but with the group. The rates are based on the average expectancy of life as determined by the mortality tables, and it is that fictitious person, the average member of the group, with which the contract is concerned. It is not assumed by the insurer that any particular individual will live any certain number of years, for such individual may meet with misfortune, but the group is counted on dying regularly.

"Whatever event may happen meanwhile is a matter of indifference to the company. They do not found their calculations on that but simply on the probabilities of human life, and get paid the full value of the calculation."41

Legal execution and suicide are causes of death and as such are included in the calculations of the mortality tables and these contingencies are a part of the contract of life insurance unless expressly excepted. Therefore, for the purpose of determining the validity of the defense of legal execution of the insured in a suit on the policy, whether the defense is claimed to be good on ground of public policy or on the ground of fraud on the insurer, the proper question is not as stated in the Burt Case, but where public policy is relied on the question should be, whether it is against public policy for the insurer to assume the risk of death by legal execution, and where fraud is relied on, whether the parties contemplated death of the insured by legal execution. As to the first question, for reasons shown above,

death caused by inducement to legal execution and suicide under this class of contracts, if it ever exists, is so slight as compared with the volume of insurance, that there is no such appreciable danger of injury to the public as to warrant the doctrine that such contracts are against public policy as being insurance against crime. As to the second question, it is submitted that with the proper conception of the nature of insurance in mind, it is clear that the insurer does contemplate that some of the group may meet death by legal execution, for that is a cause of death. There is no fraud then on the insurer if the contract is fairly entered into, even tho an insured died at the hands of justice, and no reason for the doctrine of implied condition to the contract of life insurance excepting from the risk such cause of death.

The foregoing criticisms of the doctrine of the Federal cases, it is believed, clearly show that the principles enunciated therein are unsound in reason. It is not necessary, however, to rely upon these criticisms. While there are but three cases decided by the courts of the states upon the question of legal execution, and in two of these the Federal rule was followed, and in the other, the properly deciding that the defense of legal execution was not good, but on an erroneous assumption of the nature of the question, yet the majority of the courts have in some form disapproved or evaded the broad doctrine laid down in the Ritter Case. One state has passed a statute which enacts that suicide is not a defense unless contemplated when the policy was secured. Since the public policy of the state where the contract is made, must determine its validity, it is hard to understand how the courts of such states, when


\(^{43}\) Missouri Revised Statutes 1889, sec. 5855.
they fully realize that the same doctrines of public policy are involved in the legal execution cases as are involved in the suicide cases, can consistently repudiate, evade and distinguish from the principles of the Ritter Case, in cases where suicide is the defense, and follow these same principles where legal execution is the defense. They have not done so and it is not believed that they will.

The foregoing decisions go to show that in recent years the courts are following the warning sounded by Lord Campbell in Moore v. Woolsey, where he said:

"The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide, is a very remote and improbable contingency; and it may frequently be very beneficial by rendering a life policy safe security in the hands of an assignee."4

This viewpoint is reflected by the Supreme Court of New Jersey in this language:

". . . . I cannot see that the public good is more concerned to prolong a life that may be worthless to the public than to secure creditors their just demands, or afford a maintenance to wife and children. Insurers may guard their interests in their contracts. I know of no rule of public policy more useful than that which holds contractors to their performance."5

And by the Supreme Court of Illinois it is said:

"If a man who is executed for a crime has at his death $1,000.00 in real estate, $1,000.00 in chattels, and $1,000.00 life insurance payable to his estate, his real estate descends to his heir, and his personal chattels to his administrator, but the $1,000.00 life insurance must be left in the hands of the company who received the premiums because

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4 El. & Bl. 243.
it is said to be contrary to public policy to require the company to pay, lest by so doing it lend encouragement to other policyholders to seek murder, and execution therefor, in order that their estates or heirs might profit thereby. This is defendant in error’s position. This condition seems to border closely upon the absurd. We know of no rule of public policy in this state that will enforce this species of forfeiture, but there is a rule of law which has often been applied when two parties make a valid contract and the same has been completely performed by one party and nothing remains except performance by the other, which will compel performance or award damages for default against the delinquent party."

If there ever was need for this doctrine of public policy as to insurance contracts, which was so skillfully created by the House of Lords in the Bolland Case, and carried to the extreme by the Supreme Court of the United States in the Ritter, Burt and McCue Cases, it is believed that such doctrine is fast disappearing, because it does "interfere with the innocent and useful transactions of mankind." Justice Holmes says:

"Life insurance has become in our days one of the best recognized forms of investment and self-compelled saving."

The state courts have used many methods to evade this postulate of public policy laid down by the two greatest courts in the world, and they have done so because of the ever increasing development and importance of life insurance as a necessary institution of society. Many of the courts, to evade this doctrine, have made use of the property theory of insurance, some declaring that it did not affect the vested right of the beneficiary, and one court (Illinois) has carried the property theory to the extreme to avoid it. It is believed, however, that the time will soon come when the courts will meet the question squarely and relegate this so-called rule of public policy to the past from whence it came.

Therefore we conclude that the right to recover in an action on a policy of insurance against the insurer for the proceeds thereof

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44 Lord Campbell in Moore v. Woolsey, supra.
where legal execution of the insured is made a defense, whether the
policy is made payable to the estate or personal representative, or to
a named beneficiary, with or without a vested interest, is to be de-
termined by the terms, conditions and validity of the contract of
insurance, and where death from such cause is not expressly excepted
from the risk, there is no sound reason or principle upon which such
provision can be made a term thereof by implication on the ground
that the parties did not contemplate death from such cause, or on the
ground that public policy prevents recovery on the contract if such
risk is contemplated, but the good faith intention of the parties ex-
pressed in the contract should control.