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THE EFFECT OF PUBLIC POLICY ON THE LIABILITY OF
AN INSURER WHERE THE INSURED HAS BEEN
EXECUTED FOR THE COMMISSION OF A CRIME

MOSE E. BOIARSKY*

Despite variant pronouncements by courts as to the propriety of basing decisions on their interpretation of public policy,¹ that so-called "unruly horse"² has been a juridical guide in determining whether the legal execution of an insured for the commission of a crime is a valid defense in an action on a policy of life insurance, wherein there is no express condition excepting from the coverage thereof the risk of death by such cause. Whether the result reached has been favorable to the insurer or to those whom the insured designated as recipients of the benefits, public policy has been a factor in the conclusion or judgment.

I

Probably the earliest case to deal with the question of whether a recovery could be effected on a life insurance policy where the insured had been executed for the commission of a crime is *Amicable Society v. Boland*,³ frequently referred to as Fauntleroy's case. The insured had been convicted of the crime of forgery, then a capital offense, and was sentenced to be and was hanged. His assignees in bankruptcy sought to recover on the policy, which contained no exception to payment upon death at the hands of justice, and it was the opinion of the Master of the Rolls⁴ that recovery should be had, but upon appeal, the House of Lords reversed that ruling and held that death at the hands of the law was not an insurable hazard. Because courts have, and still do, quote with approbation the language of the Lord Chancellor, it merits consideration:

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¹ Winfield, *Public Policy in the English Common Law* (1928) 42 HARV. L. REV. 76.

² *Richardson v. Mellish*, 2 Bing. 229, 242-3, 252 (1824).

³ 3 Russ. Ch. 351, 4 Bligh N. S. 194, 5 Eng. Rep. R. 70 (1830).

⁴ "When the policy does not provide that the obligation to pay shall determine, if the event insured against shall happen in a certain specified manner, then, if the event do happen in that manner, the obligation to pay shall not determine merely because the conduct of the party insured produced the event, even though such conduct was an offense against the criminal law of the country. To avoid the obligation to pay, the act of the party insured, which produced the event, must be done fraudulently, for the very purpose of producing the event."

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“ . . . Suppose that in the 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 upon 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 crime, namely, the interest we have in the welfare and prosperity of our connexions? Can we, considering the 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?”

When the question first reached the Supreme Court of the United States,⁵ the doctrine of the *Boland* case had already received that court's approval.⁶ The same considerations and reasoning which supported the *Boland* case led the court to the conclusion that voluntary self-destruction—a felony at common law⁷—was not within the risks contemplated by the parties, although an English decision had previously reached a contrary result and had permitted a recovery in favor of a beneficiary wife where the insured, while sane, had intentionally killed himself.⁸ From these cases⁹ there arose a new postulate of public policy, namely, that there is an “implied obligation on the part of every insured to do nothing to accelerate wrongfully the maturity of his policy.” Upon such factors of public policy have other courts since avoided payment.¹⁰

At this point it is to be observed that state courts did not sanction the doctrine of the *Ritter*¹¹ case where a beneficiary of a suicide

⁵ *Burt v. Union Cent. L. Ins. Co.*, 187 U. S. 362, 23 S. Ct. 139 (1902).

⁶ *Ritter v. Mutual Ins. Co.*, 169 U. S. 139, 18 S. Ct. 300 (1898).

⁷ 1 HALE, P. C. (1736) c. 27.

⁸ *Moore v. Woolsey*, 24 Eng. L. and Eq. R. 248 (1854) wherein there is stated: “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 the 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.”

⁹ *Burt v. Union Cent. Life Ins. Co.*, *supra* n. 5; *Ritter v. Mut. Ins. Co.*, *supra* n. 6.

¹⁰ *Collins v. Met. Life Ins. Co.*, 27 Pa. Sup. Ct. 353 (1905); *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234, 32 S. Ct. 220 (1912); *Scarborough v. Amer., etc., Co.*, 171 N. C. 353, 88 S. E. 482 (1916); *Amer. Nat. Ins. Co. v. Munson*, 202 S. W. 987 (Tex. Civ. App. 1918); *Smith v. Met. Life Ins. Co.*, 211 N. Y. Supp. 755, 125 Misc. Rep. 670 (1925).

¹¹ *Supra* n. 6.

sought recovery.¹² In Georgia, despite a statute¹³ which released an insurer from the obligation of contract in the event of suicidal death, it was held that no public policy was involved which would preclude the insurer from waiving the benefit of the statute and expressly contracting to pay in the event of the insured's death by self-destruction.¹⁴ In Missouri, a statute¹⁵ excluded suicide as a defense. The policy, issued after passage of the statute, restricted the liability of the insurance company to one-tenth of the principal sum insured in the event of suicide not contemplated by the insured at the time the application was made. Justice Harlan who delivered the opinion in the *Ritter* case again expressed the views of the Supreme Court of the United States¹⁶ and adjudged that, under the statute, the beneficiary could recover the full sum.¹⁷

The Illinois court was the first to repudiate the reasoning of the *Boland* case when the question of the effect of the insured's death by execution for crime on recovery of an insurance policy was presented to it. It found the public policy enunciated in the *Boland* case to have been influenced by the law of forfeitures existent in England at the time the Lord Chancellor rendered his decision.¹⁸ To the Illinois court, the right of the insured's personal representative to the proceeds of the policy was one of property. The policy of insurance, it found, was a chose in action, which should devolve as did all real property and any other personal property, according to the rules pertaining to the descent and distribution of property. In constitutional and statutory provisions which provided that no conviction should work a forfeiture of estate, the court discovered a manifestation of the public policy of that jurisdiction.

Prior to the Illinois decision, courts had dealt with the ques-

¹² *Lange v. Royal Highlanders*, 75 Neb. 188, 110 N. W. 1110 (1907); *Patterson v. Nat. P. Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980 (1898); see *Smith v. Met. Life Ins. Co.*, *supra* n. 10, which holds that beneficiary's right must be vested.

¹³ Ga. Ann. Code, 1926, § 2500.

¹⁴ *Mut. Life Ins. Co. v. Durden*, 9 Ga. App. 792, 72 S. E. 295 (1911).

¹⁵ Mo. Rev. St. (1919) § 6945.

¹⁶ *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 27 S. Ct. 578 (1906).

¹⁷ Statutes with respect to suicide as a defense to actions on insurance policies have generally been regarded as valid. Among statutes which preclude suicide as a defense are: VA. CODE ANN. (1930) § 4228; MO. REV. STAT. (1919) § 6150; COLO. COMP. LAWS, ANN. (1921) § 2532; COMP. TEX. STAT. (1928) art. 4733.

¹⁸ *Collins v. Met. Life Ins. Co.*, 232 Ill. 37, 83 N. E. 542 (1907). Forfeitures for crime were abolished in England by 33 and 34 Vict. c. 23, (1870).

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tion solely from a contractual standpoint, but the Illinois court stated:

“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 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 absurd.”

This theory that the policy is a species of property, to be governed by the rules of public policy relating to the devolution of property, has been both disapproved¹⁹ and sanctioned²⁰ by other courts. In a critique of the doctrine²¹ the conclusion reached was that regardless of whether the plaintiff who sought recovery was the personal representative of the insured or a nominated beneficiary whose rights in the policy were or were not vested, the right of such person was based upon contract and the validity of such right must, therefore, be determined by rules of public policy governing contracts and not rules of public policy governing the descent of property, on the theory that during the lifetime of the insured the contract was executory, that there was no present right to the proceeds of the policy until the contract became fully executed by the happening of the contingency upon which it was based, and only then if all conditions had been fulfilled. In the latest case dealing with the question, the West Virginia court²² made no comment on the theory of the Illinois court; but in a constitutional provision, similar to that of Illinois which prohibited the forfeiture of estates as a result of felony, and in the statutes of descent and distribution, the court found elements of a public

¹⁹ Scarborough v. Ins. Co., *supra* n. 10, disposes of the Illinois case in this manner: “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.”

²⁰ Fields v. Met. Life Ins. Co., 147 Tenn. 464, 249 S. W. 798 (1923); Weeks v. N. Y. Life Ins. Co., 128 S. C. 223, 122 S. E. 591 (1924).

²¹ Summers, *Legal Execution as a Defense to an Action on a Life Insurance Policy* (1919) 7 Ky. L. J. 1.

²² Corey v. Mass. Mut. Life Ins. Co., 178 S. E. 525 (W. Va. 1935), wherein the court pointed out that in West Virginia public policy was reflected by judicial decisions to the effect that civil death as a consequence of a felony no longer obtained.

policy which was "to do away with the consequences of crime, except in so far as the direct punishment to the guilty person is concerned."

II

With courts thus attempting to evade the postulates of the public policy announced in the earlier cases, it is not surprising to find the incontestable clause urged to preclude the defense that the insured had met his death at the hands of justice.²³ It was argued, however, and with success, that in such case, the insurance company does not contest its liability under the policy but simply asserts that death so caused was not a risk which it assumed. It distinguishes between non-coverage and a breach of some condition subsequent.²⁴ To the South Carolina court, however, "the real question, therefore, in this aspect of the subject, is whether it is against sound public policy for the insurer to assume this particular risk of being defrauded," and it could "see no reason why it may not lawfully contract to assume the risk or waive the defense of the insured's fraud in wrongfully maturing the contract."²⁵

As support for the conclusion of the *Ritter* case, the court cited *Supreme Commandery v. Ainsworth*²⁶ which had, in turn, approved the *Boland* case, but which did not involve an incontestable clause. There is factual pertinency therein, since the Alabama court in a later case,²⁷ which involved the usual incontestable clause, declared it to be a material and valuable portion of the contract and that thereby the company waived its defense of suicide. The effect of the clause was expressed thus:

"It was not an agreement to pay him, his estate, or the beneficiary that amount if he committed suicide or was executed by virtue of the criminal law, or in any other manner contributed to his own death. The company merely agreed

²³ There is no mention of an incontestable clause in any of the following cases: *Amicable Soc. v. Boland*, *supra* n. 3; *Burt v. Union Cent. Life Ins. Co.*, *supra* n. 5; *Northwestern Mut. Life Ins. Co. v. McCue and Smith v. Met. Life Ins. Co.*, *supra* n. 10.

²⁴ *Scarborough v. Ins. Co.*; *Collins v. Met. Life Ins. Co.*, both *supra* n. 10. The theory of non-coverage is that when public policy speaks, it does so from the beginning.

²⁵ *Weeks v. N. Y. Life Ins. Co.*, *supra* n. 20. See the decision of *Henderson v. Life Ins. Co. of Va.*, 179 S. E. 680 (1935), where the South Carolina court declared that the incontestable clause did not preclude the defense that the beneficiary had no insurable interest.

²⁶ 71 Ala. 436 (1882).

²⁷ *Mutual Life Ins. Co. v. Lovejoy*, 201 Ala. 337, 78 S. E. 299 (1917), decided by a divided court on rehearing.

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and bound itself that it would not litigate any of these questions, though without the incontestable clause they would be a defense."²⁸

An interesting comparison with the language just quoted is the view taken by the Supreme Court of the United States, when, in 1920, the Circuit Court of Appeals for the Eighth Circuit certified to the appellate court two cases which presented the question of insurers' liability in suicide cases.²⁹

In the first of these cases, the policy had been issued on the life of one Johnson; it was payable to his wife and contained a provision that "if within two years from the date hereof the said insured shall . . . die by his own hand . . . the policy shall be void." The second case had been brought by the insured's personal representative on a policy which contained no expression as to suicide but contained an incontestable clause effective one year from the date of the policy. Johnson died a suicide, while sane, after the limitations of time expressed in each of the policies. Of the incontestable clause, the court, speaking through Mr. Justice Holmes, said:

"The object of the clause is plain and laudable—to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as free as it reasonably can be done."

The suicide clause, it stated, was but "an inverted expression of the same general intent" as that of the incontestable clause and "both equally mean that suicide" after the specified time is not a defense.

The language of the court that the question presented involved *express undertakings* rather than *implied exceptions* has induced the argument that the court did not, expressly or tacitly, overrule the *Ritter* case.³⁰ There is, however, no escape from the facts that the insured had by his own act matured payment of the policy and that what the court had expressly held in the *Ritter* case to be against public policy became permissive under its later pronounce-

²⁸ See also *Murphy v. Metrop. Life Ins. Co.*, 152 Ga. 393, 110 S. E. 178 (1921); *Afro-American Life Ins. Co. v. Jones*, 113 Fla. 158, 151 So. 405 (1933).

²⁹ *Northwestern Mut. Life Ins. Co. v. Johnson and Natl. Life Ins. Co. of Montpelier, Vt. v. Miller, Adm'r*, 254 U. S. 96, 41 S. Ct. 47 (1920).

³⁰ See *Met. Life Ins. Co. v. Conway*, 252 N. Y. 449, 169 N. E. 642 (1930), where Cardozo, Ch. J., in commenting on *Northwestern Mut. Life Ins. Co. v. Johnson*, says: "The clause there in question was not a limitation as to coverage. It was a provision for a forfeiture." *But cf.* (1932) 6 *TULANE L. REV.* 634, criticizing the result in the *Conway* case.

ments.³¹ The court had previously given judicial sanction to states' rights in the matter of establishing their own public policy,³² but it is submitted that had the court been inclined to its former conclusion, it would have required a showing that the policy of the state concerned would not be violated by a finding favorable to the beneficiary or the personal representative. Nor was the language that the question presented involved *express* undertakings amiss, for the question of implied exception arises only where public policy is invoked: without it, the only consideration can be that of an express undertaking.

Another view of the effect of an incontestable clause is presented by the West Virginia court.³³ In its opinion public policy will not yield to the incontestable clause, but "that is not to say that the incontestable clause, which is an express covenant of the policy, could not be successfully invoked to overcome the contended provisions of an implied covenant of the policy."

III

How imperative are the postulates of public policy relied upon to avoid a contract, valid from its inception to the very moment the state exacts the life of the insured as a punishment? Does sound public policy require that legal execution as an excepted risk be written into a contract by judicial decision where the contracting parties have omitted it?

One argument used for reading into the policy of the implied obligation on the insured's part "to do nothing to accelerate wrongfully the maturity of the policy" is based strongly upon a supposed analogy to fire insurance. The New Jersey court early stamped such reasoning as specious,³⁴ citing authority that a contract of life insurance is not one of indemnity.³⁵ The lack of a determinable method of ascertaining the financial worth of a human life is not the sole difference between life and fire insurance. In life insurance the only uncertainties are the time and manner

³¹ "The basis for this rule has been cut from under it by the decision of the *Northwestern Life Insurance Company v. Johnson*." RICHARDS, *LAW OF INSURANCE* (4th ed. 1932) 654. See also Note (1921) 30 *YALE L. J.* 401, to the effect that the *Ritter* case was "tacitly repudiated by that process of casual reference which Mr. Justice Holmes used so gracefully."

³² *Whitfield v. Aetna Life Ins. Co.*, *supra* n. 16.

³³ *Corey v. Mass. Mut. Life Ins. Co.*, *supra* n. 22.

³⁴ *Campbell v. Sup. Conclave*, 66 N. J. L. 274, 49 *Atl.* 550 (1901).

³⁵ *Dalby v. India & L. L. Assur. Co.*, 15 C. B. 365, 139 *Eng. Rep. R.* 465 (1854).

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of death, while the event of loss by fire may or may not happen.³⁶ Another argument used 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 constitute a fraud on the insurer. Of course, if an insured contracts for life insurance in contemplation of suicide, recovery on such a policy would be concealment of a fact material to the risk;³⁷ but here the basis of the fraud appears to be the fact that the insurer did not contemplate the risk.³⁸

Reverting to the language in the *Boland* case, we find that the public policy therein expressed is based upon two elements: first, that a contract which induces the commission of crime is void, and second, that no benefit should flow from such a wrongful act. The theory that recovery on policies would be an inducement to crime has been ridiculed. To the Illinois court³⁹ it "bordered on the absurd." The Tennessee court⁴⁰ commented thus:

"It is fanciful to say that the cancellation of an insurance policy will restrain a man from crime. The law of the land, the machinery for its enforcement, and the restraints of conscience do this."

And, in the same tenor the South Carolina court speaks thus:⁴¹

"Certainly, to indulge the surmises that a forfeiture of life insurance would add any element of potency to the inhibition already imposed upon the criminal will by the electric chair and the hangman's noose, would seem clearly to trench upon the fanciful and speculative."

The theory of inducement to commit crime is ably attacked by the charge that it is not the crime of murder that prevents the recovery, but it is the punishment that sometimes follows that crime that does so. In other words, one might be convicted of murder in the first degree but not executed because of the jury's finding that he be punished by life imprisonment; or there might be a conviction of murder, in the first degree, a sentence to be hanged,

³⁶ HUEBNER, PRINCIPLES OF LIFE INSURANCE (1928) 152.

³⁷ *Supra* n. 21.

³⁸ Compare with the problem under consideration, the situation in *Henderson v. Life Ins. Co. of Va.*, *supra* n. 25, where one having no insurable interest in the life of the insured procures the issuance of a policy on the theory that such a contract is void as a wager contract against public policy.

³⁹ *Supra* n. 18.

⁴⁰ *Supra* n. 20.

⁴¹ *Weeks v. N. Y. Life Ins. Co.*, *supra* n. 20.

and a natural death before hanging; or, again, there might be a conviction of murder in the first degree, a sentence of hanging, and later a pardon: in either event his life insurance would remain enforceable.⁴²

If, as we have just shown that the theory of inducement is a fallacious one, and if we are to believe that the welfare of society is the supreme end of law,⁴³ why should a court, against innocent beneficiaries, impose a forfeiture which the contract does not demand? Under modern social and economic conditions, life insurance has become a business which in a very real sense is impressed with a public interest.⁴⁴ The business of life insurance has undergone considerable development since the day of the *Boland* case, and even since the *Burt* case has its importance grown as a factor in the economic life of our people.⁴⁵ Against the public good to be subserved by avoiding recovery, upon the tenuous theory that such forfeiture would tend to discourage the commission of crime, the South Carolina court balanced the public welfare which would be promoted by requiring payment of the insurance.⁴⁶ The state is vitally concerned in the protection of creditors, in the prevention of waste and sacrifice of estates, and in providing for dependent ones. Frequently, life insurance policies are kept in force through sacrifices of infants and spouses. "Why should the state consider the continuance of his life as a thing so valuable, and the welfare of his suffering family as a thing to be held so cheap?"⁴⁷ Again, policies of life insurance are frequently employed as a means for the procurement of loans. If the rights of an assignee for value are to be destroyed by the insured's commission of crime, the efficacy of the policy as a medium of credit is impaired.

⁴² *Corey v. Mass. Mut. Life Ins. Co.*, *supra* n. 22.

⁴³ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 66.

⁴⁴ *Weeks v. N. Y. Life Ins. Co.*, *supra* n. 19.

⁴⁵ "Every American insurance agent has an attractive life policy for you in case you think of dying, an endowment if you still want to live, and an annuity or disability policy if you are in fear of growing old or crippled. If you can afford none of these, he has a promising offer on much more modest 'industrial' terms, of a nice coffin and 'really decent' funeral. His bag is full of bargains . . . You can have them at retail or wholesale in the new 'package' insurance." Epstein, *THE INSURANCE RACKET* (Sept. 1930) 21 *Am. Mercury* 1.

⁴⁶ *Weeks v. N. Y. Life Ins. Co.*, *supra* n. 20.

⁴⁷ George Richards, *LIFE INSURANCE — SUICIDE AND EXECUTION FOR CRIME* (1913) 22 *Yale L. J.* 292, 297.

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IV

This surveys the hopeless conflict of authority. The public policy of the *Boland* case has been, in some jurisdictions, scrutinized and denied; and if, to obtain a socially desirable result, there has been error in some of the mental processes, the result obtained is indeed more justifiable than the persistency of a fallacious rule predicated on naught than the "blind imitation of the past." Elsewhere herein is shown the abandonment of the doctrine of the *Ritter* case. There is even less justification for adherence to the doctrine as applied to facts similar to those in the *Boland* and *Burt* cases, for tested by experience, it is not consonant with either a sense of justice or the social welfare. We may well be grateful to those jurists who have aimed a fatal blow at the magic of an echo of the past.

The fulfillment of contractual obligations is a cherished concern of the public policy of any jurisdiction. The assertion of a defense based upon public policy pleads an exception to that basic policy.⁴⁸ The policy contract is the creature of the insurer: it embodies not only the experience of the insurer itself but of every other insurance company in existence. To the insurer, the language may be esoteric; it may contain loopholes for technical defenses; but to the person whom such language is addressed it can mean only what clear language imports.⁴⁹ Insurers today provide for excepted risks in their policies. The assertion of other excepted risks by implication based on technicalities has been the occasion for legislation requiring the policy of insurance to contain the entire agreement between the parties.⁵⁰ To hold that there is an implied exception of death at the hands of justice when the insurance contract is silent thereon but contains other language contradictory to such an exception is tantamount to the commission of a fraud on those for whom the policy was procured and kept alive, by which the insurer seeks a benefit from the wrongful act of the insured, for by the express provisions of the contract was the insured in-

⁴⁸ *Corey v. Mass. Mut. Life Ins. Co.*, *supra* n. 22. The West Virginia court has declared in cases where the beneficiary has murdered the insured that such felonious conduct does not relieve the insurer from its contractual obligation if there is some one, other than the beneficiary, to take the proceeds. See *Johnston v. Ins. Co.*, 85 W. Va. 70, 100 S. E. 865 (1919), wherein the court stated that "the doctrine of public policy will not be carried by the courts any further than is necessary to prevent resort to them for the purpose of effecting a fraudulent intent."

⁴⁹ *Northwestern Mut. L. I. Co. v. Johnson*, *supra* n. 28.

⁵⁰ W. VA. REV. CODE (1931) c. 33, art. 5, § 9; TENN. ANN. CODE (1932) § 6179 (3); COMP. TEX. STATS. (1928) art. 5050.

duced to purchase the contract, the maturity of which was to be effective at his death, limited only by the risks expressly excepted.

The true measure of the right to the proceeds should be the language of the policy contract. The implied exception has been vitiated by legislative fiat in Virginia.⁵¹ For sometime at least, courts may be prone to answer the rationale of the public policy enunciated in the earlier cases, but it is submitted that the approach to the proper solution of the question will, by "casual reference" relegate the doctrine of the *Boland* case to "innocuous desuetude."⁵²

⁵¹ VA. CODE ANN. (1930) § 4228.

⁵² Note (1921) 30 YALE L. J. 401, 402.