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## Insurance--Statutes--Admissibility of Evidence of Conviction of Non Felonious Killing of Insured by Beneficiary

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*Star Milling Co.*,<sup>9</sup> the court held that the trade mark would be protected only in the market where it was actually used and a more recent decision<sup>10</sup> applied the same theory to a mark registered under the federal statute.

The court in the principal case thought it proper to enforce the covenant as to the territory where plaintiff actually did business without considering whether the full territorial restriction was excessive. The authorities permit that procedure, however, only where the covenant is by its very terms divisible, which was not the case here so far as the facts appear in the opinion.<sup>11</sup> To enforce an illegal indivisible covenant within the outer bounds of reasonableness not only makes the contract of the parties over but also leaves the covenantee free to impose as extensive restrictions as he pleases since he could expect a court to grant him all the protection the law allows in any event.<sup>12</sup>

—RUDOLPH E. HAGBERG.

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INSURANCE — STATUTES — ADMISSIBILITY OF EVIDENCE OF CONVICTION OF NON-FELONIOUS KILLING OF INSURED BY BENEFICIARY. — A wife, sole distributee, and beneficiary of a life insurance policy killed her husband, the insured, and was convicted of involuntary manslaughter. Insurer sued as stakeholder to dispose of the proceeds of the policy. Since the wife's conviction was for less than a felony, she sought to introduce the criminal judgment in the civil suit to establish her claim to the proceeds on the theory

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<sup>9</sup> 240 U. S. 403, 36 S. Ct. 357 (1916) (Common law result). Mr. Justice Holmes, in a separate concurring opinion, said that the protection should be state wide in every state where the trade mark was used unless the common law of the state were found to require a different result.

<sup>10</sup> U. S. Printing Co. v. Griggs Cooper & Co., 278 U. S. 592, 49 S. Ct. 267 (1928); discussed in Note (1929) 24 ILL. L. REV. 474, in which it is suggested that where the mark is so registered, it should be protected over the entire United States. A trade mark registered in West Virginia is given state wide protection. W. VA. REV. CODE (1931) c. 47, art. 1, § 2 *et seq.*

<sup>11</sup> This distinction is recognized in the cases relied upon by the court in *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 622 (1883), in rendering the dictum relied upon in the present case. So it was in the leading case of *Price v. Green*, 16 M. & W. 346, 153 Eng. Repr. 1222 (1847), and *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315 (1874).

<sup>12</sup> See *Mason v. Provident Clothing and Supply Co., Ltd.*, (1913) A. C. 724, 745. If divisible, but part of the covenant is unenforceable for uncertainty, relief should be given as to the valid portion. See *Standard Fashion Co. v. Magrane Houston Co.*, 251, Fed. 559 (C. C. A. 1st, 1918). But see *Fee-naughty v. Beall*, 91 Ore. 654, 178 Pac. 600 (1919).

that it was admissible by implication under a statute<sup>1</sup> rendering the conviction of a felonious killing conclusive evidence in bar. *Held*, the statute bars the right and makes conviction conclusive in the civil suit only where the beneficiary is convicted of feloniously killing the insured, but does not otherwise change the common law rule, and no reference to the criminal judgment can be made in the civil suit. *Metropolitan Life Insurance Co. v. Hill*.<sup>2</sup>

The rule, apart from statute, is that a beneficiary who has feloniously<sup>3</sup> killed the insured cannot take; some courts add that the killing must be intentional and wrongful<sup>4</sup> to operate as a bar. If the killing must be intentional to operate as a bar, it follows that involuntary manslaughter<sup>5</sup> will not preclude the beneficiary from obtaining the proceeds.<sup>6</sup>

Statutes have been passed regulating the subject. These statutes expressly prevent the beneficiary from obtaining the proceeds where he has unlawfully<sup>7</sup> or feloniously<sup>8</sup> killed the insured. Statutes like that of West Virginia render it unnecessary to prove the homicide by independent evidence where there has been a conviction.<sup>9</sup>

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<sup>1</sup> W. VA. REV. CODE (1931) c. 42, art. 4, § 2. " . . . No person who has been convicted of feloniously killing another . . . shall take or acquire any money . . . from the one killed, . . . either by descent and distribution, . . . or by any policy or certificate of insurance, or otherwise; but the money . . . to which the person so convicted would otherwise have been entitled shall go to the person or persons who would have taken the same if the person so convicted had been dead at the date of the death of the one killed or conspired against, unless by some rule of law or equity the money or the property would pass to some other person or persons."

<sup>2</sup> 177 S. E. 188 (W. Va. 1934).

<sup>3</sup> *N. Y. Mutual v. Armstrong*, 117 U. S. 591, 6 S. Ct. 877 (1886); *Anderson v. Life Ins. Co. of Va.*, 152 N. C. 1, 67 S. E. 53 (1910); *Schmidt v. Northern Life Ass'n*, 112 Iowa 41, 83 N. W. 800 (1900); *Slocum v. Metropolitan Life*, 245 Mass. 565, 139 N. E. 816 (1923).

<sup>4</sup> See discussion of requirements that the killing be intentional and wrongful in Grossman, *Liability and Rights of the Insurer When the Death of the Insured is Caused by the Beneficiary or by an Assignee* (1930) 10 B. U. L. REV. 281, 287.

<sup>5</sup> "The absence of intention to kill or to commit any unlawful act which might reasonably produce death or great bodily harm is the distinguishing feature between voluntary and involuntary homicide." *State v. Weisengoff*, 85 W. Va. 271, 284, 101 S. E. 450 (1919).

<sup>6</sup> See *Schreiner v. High Court*, 35 Ill. App. 576 (1890). "No homicide which is the result of carelessness, or which is not an intentional killing should bar plaintiff's rights to the money on her certificate."

<sup>7</sup> D. C. CODE (1924) c. 11, § 961; NEB. COMP. STAT. (1922) § 1239; OKLA. REV. LAWS (1921) § 11319; S. C. LAWS 1924, no. 726, § 1, ("Unlawfully killing" — "except in cases of involuntary manslaughter").

<sup>8</sup> IOWA CODE (1927) § 12033; MINN. STAT. (Mason, 1927) § 8734; WYO. COMP. STAT. ANN. (1920) § 7010; ORE. LAWS (Olson, 1920) § 10140; TEX. COMP. STAT. (1928) art. 5047 (wilfully bringing about death of insured).

<sup>9</sup> D. C. CODE (1924) c. 11, § 961; NEB. COMP. STAT. (1922) § 1239; OKLA. REV. LAWS (1921) § 11319; W. VA. REV. CODE (1931) c. 42, art. 4, § 2.

The statute in the principal case is subject to more than one construction. The view taken by the court is that the statute is primarily concerned with the distribution of the proceeds of the policy and only as a secondary matter makes a felonious conviction conclusive in the civil trial, but does not otherwise alter the existing common law on the subject.<sup>10</sup> Analogous statutes in the field of administrative law<sup>11</sup> and torts<sup>12</sup> have been construed to be all-embracing and thus to supplant completely the common law on the subject.<sup>13</sup> Such a construction is not unknown in this jurisdiction,<sup>14</sup> but it is hardly appropriate to the statute under inquiry since its major emphasis is upon the fact of conviction of felonious killing as a bar to succeeding to the property or receiving the insurance of the decedent.

Were the common law otherwise repealed a beneficiary who had feloniously killed an insured, but had not been convicted of the crime, would be allowed to take,<sup>15</sup> — an absurd result not required by the language of the statute. It is not perceived, in any event, that to interpret the enactment as all-embracing would lead to a different conclusion in the principal case because its effect would be to admit evidence of conviction of felonious slaying and not of any lesser crime to bar the claimant. Thus it would leave unaffected as to lesser crimes the West Virginia rule excluding

<sup>10</sup> In *Smith v. Todd*, 155 S. C. 322, 156 S. E. 506 (1930), the court held the statute merely extended the common law on the subject.

<sup>11</sup> The state claimed as a preferred creditor in the liquidation of an insolvent trust company contending that the statute being silent on the subject, the common law was still in effect. (See *Marshall v. New York*, 254 U. S. 380, 41 S. Ct. 143 [1920], holding that the state had a prerogative preference at common law.) The court held: "It is a general principle that the enactment of administrative law, impliedly repeals the statutes and supersedes the common law theretofore governing the subject." *Com'r of Banks v. Highland Trust Co.*, 283 Mass. 71, 186 N. E. 229 (1933); *Knowlton v. Swampscott*, 280 Mass. 69, 181 N. E. 849 (1932).

<sup>12</sup> *Boston Ice Co. v. Boston Ry. Co.*, 76 N. H. 6, 86 Atl. 356 (1913); *Graves v. Ill. Cent. Ry. Co.*, 126 Tenn. 148, 148 S. W. 239 (1912).

<sup>13</sup> The doctrine of construing a statute as designed to cover an entire field and abrogate the common law on the subject is well defined in the case of *In re Lord & Polk Chemical Co.*, 7 Del. Ch. 248, 44 Atl. 775 (1895), the court saying: "Also, if the legislation undertakes to provide for the regulation of human conduct in respect to a specific matter or thing already covered by the common law, and parts of which are omitted from the statute, such omissions may be taken generally as evidences of the legislative intent to repeal or abrogate the same."

<sup>14</sup> The doctrine though not pertinent to the decision was recognized by the court, citing *In re Lord & Polk Chemical Co.*, *supra* n. 13. *Raleigh County Bank v. Potest*, 74 W. Va. 511, 515, 82 S. E. 332 (1914).

<sup>15</sup> See *Burns v. Cope*, 182 Ind. 289, 105 N. E. 471 (1914), where the court construed a statute, providing that a person could not take property by descent who had been convicted of unlawfully causing the death of another, to mean that he could take unless so convicted.

evidence of criminal convictions in civil cases.<sup>16</sup> However insupportable that rule may be, it is strongly entrenched judicially and we may expect it to be relaxed only through legislation<sup>17</sup> upon the very subject and not by remote implication.

Under the common law test of the instant decision an unlawful intentional non-felonious slayer would be barred from taking the proceeds. While an unlawful intentional homicide, not felonious in character, is not conceivable,<sup>18</sup> yet if such a result could be reached in the criminal trial, the statute as construed by the court would not govern the distribution of the proceeds. Were the killing unintentional the beneficiary should prevail both at law and in equity.

—HOUSTON A. SMITH.

OIL AND GAS — CONSTRUCTION OF DRILL OR PAY COVENANT FOR FURTHER DEVELOPMENT — EFFECT OF PAYMENT OF DELAY RENTALS.

— A covenant in an oil and gas lease required the lessee to drill a well within one year, and if that well was a paying and producing well which would deliver at least ninety thousand feet of gas daily into the line, the lessee was to drill a second well within twenty-four months or pay rentals quarterly thereon. The first well was drilled and produced gas. On being requested by the plaintiff lessor, a year later, to take action under the covenant as to further development, the lessee began paying rentals. The defendant who had come into possession of the lease by assignment ceased payment, whereupon the plaintiff brought this suit for rentals due and unpaid. *Held*, the covenant was operative if at any reasonable time after its completion, the first well was capable of delivering the required amount of gas into the line, but the payment of rentals by the lessee constituted an election which bars the defendant from raising non-occurrence of the contingency as a de-

<sup>16</sup> *Interstate Dry Goods Stores v. Williamson*, 91 W. Va. 156, 112 S. E. 301 (1922); *Shires v. Boggess*, 72 W. Va. 109, 77 S. E. 542 (1912). See Note (1924) 31 A. L. R. 262.

<sup>17</sup> The rule has not been frequently relaxed by judicial decision. In *Eagle S. & B. D. Ins. Co. v. Heller*, 149 Va. 82, 142 S. E. 314 (1927), the court held that the criminal judgment against the defendant is *res adjudicata* as to him in the civil trial. See admitting such judgment as *prima facie* evidence in the civil trial, but saying that further departures must be by legislation, *Schindler v. Royal Ins. Co.*, 258 N. Y. 310, 179 N. E. 711 (1932).

<sup>18</sup> An unintentional (*i. e.*, a negligent) killing might be wrongful though not necessarily felonious.