

TICKTIN v. FIDELITY & CASUALTY CO. OF NEW YORK.¹

(Circuit Court, W. D. Missouri, W. D. May 20, 1898.)

No. 2,222.

ACCIDENT INSURANCE—SUICIDE.

Rev. St. Mo. 1889, § 5855, which provides that in suits "upon policies of life insurance," suicide shall be no defense, although the policy may contain stipulation to the contrary, does not apply to accident policies, although Rev. St. Mo. 1889, § 5811, authorizes life insurance companies to engage in the business of accident insurance, declaring, however, that "such accident insurance shall be made a separate department of the business of a life insurance company undertaking it."

This was an action by Liebbe Ticktin against the Fidelity & Casualty Company of New York on an accident insurance policy. Defendant demurred to the petition.

I. Ringolsky, for plaintiff.

Warner, Dean, Gibson & McLeod, for defendant.

PHILIPS, District Judge. The defendant, the Fidelity & Casualty Company of New York, is what is known as an "accident insurance company," engaged in the business of insuring persons against injuries resulting from accident. The petition avers that the accident to the plaintiff resulted in death from suicide while insane, by taking oil of mustard. By the fourth clause of the policy it is expressly stipulated that "in case of injuries, fatal or otherwise, intentionally inflicted upon himself by the insured, or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy." As the petition does not count upon a claim for recovery only of the premium paid, but for the full amount of the policy as in case of death by accident, the demurrer raises the question that, by the express provision of the policy, the liability sued for has not arisen. To obviate this objection, the plaintiff invokes the provision of section 5855, Rev. St. Mo. 1889, which is as follows:

"Sec. 5855. In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

The question of controlling importance to be decided is: Does this statute apply to an accident policy? The time at my command will not permit more than to briefly state the conclusions I have reached on this question. By the express terms of said section it is limited to "policies of insurance on life." Clearly, therefore, there is no escape from the proposition that, unless an accident policy can be held to be a policy of insurance on life, this statute affords no shelter to the defendant. It being a statute in contravention of the common-law

¹ Motion for rehearing pending.

rule, affirmative legislation changing the rule at common law is indispensable. From the very inception of any legislation in this state respecting the subject of policies on life insurance, such policies have been distinctively recognized as *sui generis*. Provisions peculiarly and exclusively applicable thereto have, in lines broad and distinctive, run through the different statutes. When accident insurance policies were provided for in acts of the legislature, provisions and requirements peculiar to them were as distinctively present and observed. This was confessedly so until the statute of 1889, when life insurance companies were for the first time authorized to engage in the business of issuing accident policies. Section 5811, Rev. St. Mo. 1889, amending section 5938, Rev. St. Mo. 1879. Prior to this amendment, no lawyer ever contended that these two business associations were not erected as separate departments, as distinct as any other two business concerns erected under the statutes of the state providing for the creation of business corporations. And, as up to the enactment of the last-named statute, no life insurance company created under the laws of the state of Missouri, or doing business therein, was permitted to enter into the business of issuing accident insurance policies in the state, when the legislature declared that, in suits upon policies of insurance for life, it should be no defense that the insured had died by suicide, the rule "*Expressio unius est exclusio alterius*," precluded carrying this special enactment over to any other claim of insurance than that of insurance on life proper. Reduced to its last analysis, therefore, the advocates for the application of the provision of section 5855 to an accident policy must base their contention upon the naked proposition that as, in 1889, the legislature authorized life insurance companies organized under the laws of the state to engage also in the business of issuing policies of accident insurance *ex vi termini*, it rendered the provision of section 5855 applicable to accident policies. This enabling act of 1889 in no wise altered or affected the other provisions of the antecedent statute in *pari materia*, for conducting the business operations of, and imposing separate obligations and conferring distinct privileges upon, two distinct branches of the insurance business. The act of 1889, after authorizing associations organized "for the purpose of making assurance upon the lives of individuals" to issue policies providing for "an indemnity against death, and for weekly or other periodic indemnity for disability occasioned by accident to the person of the insured," expressly declared that "such accident insurance shall be made a separate department of the business of a life insurance company undertaking it." To no extent did it obliterate the lines of distinction between the two classes of business. And as throughout the antecedent statutes providing for and regulating the operation and fixing the duties and obligations of the two branches of insurance companies the provision of section 5855 was restricted to life insurance companies, and the same provision in the same language was carried forward to and incorporated in the statute of 1889, denying the defense of suicide in "suits upon policies of insurance for life," by the well-known rule for the construction of statutes, the provision must receive the same application and be subjected to the same limitation given to it in the older statutes, un-

less the legislature, by express provision or unavoidable implication, gave to it a broader application; so as to embrace accident policies. I am unable to find anything in the antecedent or subsequent provisions of the statute of 1889 which can justify the court in holding that the provision which had for a number of years expressly and exclusively applied to policies of insurance on life, carried forward into the later statute under the same terms of limitation, can be applied to policies of insurance against accidents declared by the statute to be a separate department. If it had been the purpose or thought of the legislature to wipe out all distinction in the provision of section 5855 in its application to the two distinct classes of policies, it would have said so. But the legislature has gone no further than to say that a company engaged in the business of issuing policies of insurance on life may also engage in the business of issuing insurance policies against accidents as a separate department. Throughout the statute, separate, distinct provisions, regulations, and obligations are made and imposed upon the companies transacting such dual business, as much so as if existing and operating under separate franchises. It does therefore seem to me that to apply to this case the defense provided for in said section 5855 would justly expose the court to the criticism of judicial legislation.

The defense of death resulting from an act of suicide being good at common law (*Bigelow v. Insurance Co.*, 93 U. S. 284; *Salentine v. Insurance Co.*, 24 Fed. 159; *Billings v. Insurance Co.* [Vt.] 24 Atl. 656; *Scarth v. Society* [Iowa] 39 N. W. 658), and this rule not having been changed by statute, the demurrer to the petition on this ground is well taken. It is therefore unnecessary to consider the other question raised by the demurrer.

LUSK'S ADM'RS v. KIMBALL et al.

(Circuit Court, W. D. Virginia. May 11, 1898.)

1. FOREIGN ADMINISTRATORS—ACTIONS.

An action commenced in Virginia by a foreign administrator without first taking out letters of administration in that state is a mere nullity, and no life can be imparted to it by subsequently procuring such letters, and then setting up the fact by amendment of the pleadings.

2. PLEADING—AMENDMENT.

Rev. St. § 954, authorizes amendments only in cases properly instituted, and then only in matters of form. It does not go to the extent of allowing the court, where an action was originally brought without authority or sanction in law, to so amend the original writ and declaration as to make new parties plaintiff, and thereby sustain an action that was originally brought without authority to institute the same.

Isaac Harr and Burrow Bros., for plaintiffs.
Fulkerson, Page & Hunt, for defendants.

PAUL, District Judge. This is an action at law brought by W. H. Hodges and E. B. McKeehan, styling themselves administrators of Samuel L. Lusk, deceased. The record shows that Samuel L. Lusk was an employé on the Norfolk & Western Railroad, and was,

on the 30th day of March, 1895, while in the service of the said railroad company, on the Kenova Division thereof, killed, by being crushed between two cars; that this action was instituted in this court at Abingdon, in the month of August, 1895, by the plaintiffs, who, prior to the institution of the suit, had obtained, in the state of Tennessee, letters of administration on the estate of said Lusk, but had not taken letters of administration in the state of Virginia. After the institution of this action, one J. W. Mort, a citizen of Virginia, qualified in the corporation court of the city of Bristol, Va., as administrator of the estate of said Lusk. In the month of June, 1897, said Mort tendered his resignation as administrator of said estate, and his resignation was accepted by the corporation court of the city of Bristol, and the plaintiffs, E. B. McKeehan and W. H. Hodges, were then and there appointed by the said corporation court of the city of Bristol and qualified as administrators of said estate in the room and stead of said Mort. The defendants at the October term, 1897, of this court filed a plea in bar to the action, alleging that at the time the same was instituted the plaintiffs had obtained letters of administration upon the estate of Samuel L. Lusk, deceased, in the state of Tennessee; that they were not administrators of said estate in the state of Virginia, but that one J. W. Mort had qualified in the corporation court of the city of Bristol, Va., and was then administrator of said estate. To this plea the plaintiffs filed a replication, as follows:

"(1) It is true that before the institution of this action plaintiffs had obtained letters of administration upon the estate of Samuel L. Lusk, deceased, in the state of Tennessee. (2) It is true that at the time this action was instituted plaintiffs had not been appointed administrators of said estate in the state of Virginia. (3) It is not true that at and before the institution of this action one J. W. Mort had been appointed and qualified as administrator of said estate in the corporation court of Bristol, Virginia. (4) It is true that after the institution of this action said J. W. Mort was appointed and qualified as administrator of said estate in said corporation court of Bristol, Virginia, but on the ——— day of June, 1897, said Mort, having fully administered and made settlement of all the assets of said estate coming into his hands, tendered his resignation as administrator of the said estate, and said resignation was accepted by said corporation court of Bristol, and plaintiffs, E. B. McKeehan and W. H. Hodges, were then and there appointed and qualified as administrators of said estate in the room and stead of said Mort, and they are now the only administrators of the estate of Samuel L. Lusk, deceased."

The question presented by the pleadings for decision is, can this action, on this state of facts, be maintained? The plaintiffs insist that, although they had not taken out letters of administration at the time of the institution of the action, yet, having subsequently done so, they have a right to amend the declaration so as to make them parties plaintiff, and claim that the amendment so made will have relation to the time of instituting the action, and invests them with the right to maintain the action.

This is an action under section 2902 of the Code of Virginia of 1887, which provides for the recovery of damages where the death of any person is caused by the wrongful act of any person or corporation. Section 2903 of the Code of Virginia of 1887 provides:

"Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his death. * * *"

Section 2640 provides for the qualification of an administrator, as follows:

"Before any grant of administration, as of the estate of an intestate, the person to whom it is granted shall, in the court granting it, give bond and take an oath that the deceased has left no will, so far as he knows, and that he will faithfully perform the duties of his office to the best of his judgment. * * *"

Thus, it will be seen that, before an administrator is authorized to do any act under the laws of Virginia, he must comply with the requirements of the statute in the important particulars of taking an oath in open court and executing a bond with security. Until he complies with these requirements of the statute, he stands in the same relation to the estate of the decedent as any other individual, even though he has taken out letters of administration in another state. These can confer no authority upon him to exercise so important a power as instituting an action at law. This question has been so frequently decided by the courts, state and federal, that the doctrine is firmly established that letters of administration confer no authority outside of the territorial jurisdiction of the state granting the same, in the absence of a statute conferring such authority. A leading case on this subject is that of *Noonan v. Bradley*, 9 Wall. 394. This decision has been cited as a controlling authority in numerous cases subsequently arising in the federal courts. In that case the supreme court, Mr. Justice Field delivering the opinion of the court, said:

"All the cases on the subject are in one way. In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the foreign appointment outside of the territorial jurisdiction of the state within which it was granted. All hold that, in the absence of such a statute, no suit can be maintained by an administrator in his official capacity, except within the limits of the state from which he derives his authority. If he desires to prosecute a suit in another state, he must first obtain a grant of administration therein in accordance with its laws. So far has this doctrine been extended that in *Fenwick v. Sear's Adm'rs*, 1 Cranch, 259, where the plaintiff had obtained letters of administration in Maryland, before the separation of the District of Columbia from the original states, it was held by this court that he could not, after the separation, maintain an action in that part of the District ceded by Maryland, by virtue of these letters, but that he must take out new letters within the District."

In *Dickinson v. McCraw*, 4 Rand. (Va.) 158, it was held that an administrator appointed in the state of North Carolina cannot be joined as a party plaintiff with an administrator appointed in Virginia in an action brought in the latter state. 8 Enc. Pl. & Prac. 700, 701; *Vaughn v. Northup*, 15 Pet. 1; *Kerr v. Moon*, 9 Wheat. 565; *Dixon v. Ramsay*, 3 Cranch, 319; *Eells v. Holder*, 12 Fed. 668.

The statutes of Virginia have no provision authorizing an administrator to whom letters of administration have been granted in another state to bring an action in the former state. The doctrine of the common law, as recognized in England and in the United States, is unchanged, and an administrator cannot maintain a suit in this

state without first taking out letters of administration in some court in this state.

The contention that the want of authority on the part of a foreign administrator to bring an action in this state is cured by his procuring letters of administration in this state after he has instituted his action cannot be sustained. His failure to do so before he commences his action is a fatal defect in his right to maintain it. In this case not only did the plaintiffs fail to procure letters of administration in this state before commencing their action, but after its institution letters of administration were granted to Mort, a citizen of the state of Virginia. For two years he was invested with all the rights and interests of an administrator, and during that period they could, under no principle, or even fiction, of the law, be vested in any other person. It was only by his resignation that he was divested of his authority as administrator, and it was only by the subsequent qualification of the plaintiffs as administrators that they were invested with the rights and the authority pertaining to that fiduciary office. Prior to that time, any action brought by them in their representative character was a nullity. There was no legal proceeding pending which could be kept alive and prosecuted by their subsequent qualification as administrators. The authority conferred could not have relation so as to give vitality to a null and void proceeding.

Counsel for the plaintiffs insist that, under the provisions of section 954 of the Revised Statutes of the United States, they have a right to amend their declaration so as to make the administrators who qualified in the state court of Virginia after the institution of the suit in this court the plaintiffs, in place of the administrators who qualified in the state court of Tennessee. The section referred to is as follows:

"Sec. 954. No summons, writ, declaration, return, process, judgment, or other proceeding in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion, and by its rules, prescribe."

While this statute is very broad and liberal in the allowance of amendments to the process or pleadings, the amendments which it permits can only be made in a case that is properly instituted, and only then in matters of form. It does not go to the extent of allowing the court, where an action was originally brought without authority or sanction in law, to so amend the original writ and declaration as to make new parties plaintiff, and thereby sustain an action that was originally brought without authority to institute the same.

There is no question that, where an action is brought by a party having authority to institute it, the pleadings may be amended in

matters of form so as to perfect the jurisdiction of the court upon the record. But, when the parties instituting a suit have no authority to bring the same, the amendments authorized by the statute cannot cure the defect in the proceedings. The action cannot be maintained. The special plea in bar must be sustained, and the action dismissed.

In re MURPHY.

(Circuit Court, D. Massachusetts. May 18, 1898.)

No. 1,833.

1. HABEAS CORPUS—ISSUANCE OF WRIT.

Where a petitioner, serving a sentence of a state court, has delayed nearly two years to apply for a writ, and his right of appeal in the state court is not yet barred, habeas corpus will not issue unless his case is clear.

2. FEDERAL QUESTION—WHEN PRESENTED.

The action of a judge of a state court in erroneously sentencing one convicted of crime under a statute not applicable to his case presents no question for the federal court.

3. SAME—EX POST FACTO LAWS.

When a statute providing for the sentence to prison of persons convicted of crime has been construed by the highest state court to apply to offenses committed prior to its enactment, the question whether it violates any provision of the federal constitution is directly in issue, on habeas corpus, to release one sentenced thereunder for a crime so committed.

4. EX POST FACTO LAWS—CONSTRUCTION OF STATUTES.

In order to render legislation unconstitutional as ex post facto, it is not necessary to show that it must be detrimental to all persons charged with offenses; it is sufficient that it materially alters their condition in a manner which may be detrimental to some.

5. SAME—INDETERMINATE SENTENCE LAW.

The Massachusetts indeterminate sentence statute (St. 1895, c. 504, §§ 1-3), declaring that the court "shall not fix the term of imprisonment," if taken literally, is unconstitutional, if applied to offenses committed prior to its enactment.

6. SAME.

Quære, whether the indeterminate sentence law of Massachusetts (St. 1895, c. 504, §§ 1-3), which is applicable to all sentences pronounced after its enactment, regardless of what the law was when the offense was committed, is invalid as an ex post facto law.

7. HABEAS CORPUS—PRACTICE ON APPEAL.

A writ of habeas corpus was denied, but, there being a constitutional question of great doubt involved in the application, the petitioner was given an opportunity to apply for an appeal to the supreme court, under rule 34, with an intimation that thereupon the order would be amended and a writ directed to issue, to be discharged upon its return, with leave to apply for admission to bail pending the appeal.

Brandeis, Dunbar & Nutter, Ezra R. Thayer, and Edward F. McClellan, for petitioner.

J. M. Hallowell, Asst. Atty. Gen., for respondent, Bridges.

PUTNAM, Circuit Judge. This is an application for a writ of habeas corpus, heard on the return of an order to show cause why a writ should not issue. The petitioner is in prison, under a criminal sentence of the superior court of the state of Massachusetts,