

a statute of the state may authorize such a proceeding in the courts of the state. *Hollins v. Iron Co.*, 150 U. S. 371, 378, 14 Sup. Ct. 127; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. It follows that the demurrer was properly sustained in the circuit court.

The decree dismissing the bill was absolute, and, although the appellants have not objected on that account, it should be modified. *Lacassagne v. Chapuis*, 144 U. S. 119, 126, 12 Sup. Ct. 659. The decree of the court below dismissing the bill is so modified as to declare that it is without prejudice to an action at law, or to the assertion by the appellants in the suit by the *Farmers' Loan & Trust Company v. The Greenville Water & Electric Light Company* of any equity they may have under the statutes of the state of Texas providing for the appointment of receivers against corporations; and as so modified the decree is affirmed.

HOPKINS v. NORTHWESTERN LIFE ASSUR. CO.

(Circuit Court, E. D. Pennsylvania. June 7, 1899.)

No. 87.

1. LIFE INSURANCE—SCOPE OF CONTRACT—SUICIDE.

It is a term of every policy of life insurance, implied if not expressed, that the insured will not die by his own willful and deliberate act, and therefore, if he does die by such act, his life is terminated by a risk against which the company has not insured; and the fact that the beneficiary is a person other than the insured himself cannot enlarge the scope of the contract, nor authorize a recovery thereon.

2. SAME—PRESUMPTION OF SANITY.

Where it is shown that an insured person committed suicide, in the absence of evidence that he was insane at the time, his sanity will be presumed.

On Motion by Defendant for Judgment Notwithstanding the Verdict.

Bernard Gilpin, for plaintiff.

Ira J. Williams and Simpson & Brown, for defendant.

McPHERSON, District Judge. In April, 1892, John S. Hopkins made a contract with the defendant,—then called the Northwestern Masonic Aid Association,—which for present purposes we shall assume to have been a contract of life insurance. By this policy his life was insured for \$10,000 upon the assessment plan, the beneficiaries named therein being his wife, the plaintiff, if living, and, in case of her death, his children, or his heirs at law. The policy provided that a "change of beneficiaries can be made at any time, without charge, upon complying with the by-laws." It contained no express condition against suicide. In December, 1897, Mr. Hopkins decided to abandon the assessment plan, and accordingly applied to the company for a new policy of \$10,000, similarly payable to his wife or children, but providing for the payment of a defined annual premium during a period of 20 years. The substitution

was made, the first policy was surrendered and canceled, and the second policy was delivered to Mr. Hopkins in the month just named. Mrs. Hopkins neither knew of nor consented to the change. The second policy contained the following condition: "If the insured shall die by his own hand or act, whether sane or insane, within two years from the date of this policy, * * * then this policy shall be void, and cease to be binding upon said company, except for the amount which the insurer has paid in premiums on account hereof." In March, 1898, Mr. Hopkins killed himself, the death occurring within two years from the date of the policy. The company tendered before suit, and has paid into court, the premiums paid by the insured.

The present suit is brought by Mrs. Hopkins upon the first contract, her position being that, because she did not consent to the substitution, she is not bound by the second policy, but may treat the first as still in force. To this the company objects, and devotes much of its argument upon this motion to the support of its objections. We do not think it necessary, however, to consider the argument upon this branch of the case. For the purposes of the motion now before the court, we shall adopt the plaintiff's position, and shall regard the first contract as still in force. We shall also regard it as a policy of insurance, and not a mere certificate issued by a mutual benefit association. The defendant avers that when the first contract was made it was a mutual benefit association, and not a life insurance company, and that the contract in suit is merely a certificate of membership, expressly providing for a change of beneficiaries at any time, in which Mrs. Hopkins could therefore have no vested interest to be prejudiced by the subsequent substitution of another policy upon a different plan. As already stated, however, we shall not consider this objection, but shall assume the contract to be a policy of life insurance, properly so called. Treated as a policy, it is silent concerning suicide, and the single question to be determined is whether, in the absence of such a condition, the contract covers the risk of deliberately self-inflicted death. There is no averment or proof that the insured was insane, and the presumption of sanity must, therefore, prevail.

Since the decision in *Ritter v. Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, we do not think the question is open for discussion in the federal courts. In that case the application contained a warranty that the insured would not die by his own act, whether sane or insane, during a period of two years from the date of the policy; but the application was excluded by the trial judge, and the case was heard and considered by the supreme court upon the policy alone, which contained no such provision. Without quoting from the opinion, it is enough to say briefly that the decision is put upon the ground that, although the policy contained no condition against suicide, nevertheless such a condition is an implied term of the contract; and therefore, if the insured does commit suicide, there can be no recovery. It is true that in *Ritter's Case* the policy was made payable to the assured himself, or to his ex-

ecutors or administrators, while in the case before us the policy was made payable to the wife of the assured; but, in our opinion, this difference is not important. In either event, the terms, whether express or implied, of the contract, must control the right to recover; and, if these terms exclude the risk by which death is caused, no person whatever can have an enforceable right based upon such a death. We think it may be misleading to speak of the contract as being "avoided" in case of suicide. Such language is often used in policies, and finds its way thence into the decisions of the courts; but it seems to be more accurate to say that the contract does not insure at all against death by suicide. It is a term of the policy, express or implied, that the assured will not die by his own willful and deliberate act; and therefore, if he does die by such act, his life is terminated by a risk against which the company has not insured. Suicide does not "avoid" the policy; against this event, the policy does not exist.

It seems to follow that the quality and extent of the beneficiary's interest in the contract is of no importance. The question is, does the policy forbid suicide? If so, death by that act is a risk that is not insured against, and can therefore furnish no ground for recovery. The fact that the beneficiary is some other person than the insured himself cannot enlarge the scope of the contract. This, we think, is the answer to the reasoning of the supreme court of Pennsylvania in *Morris v. Assurance Co.*, 183 Pa. 563, 39 Atl. 52, in which a different conclusion was reached upon the point now before us. With much respect for the opinion of that court, we are constrained to believe that this view of the contract was not sufficiently considered, for it is not discussed, and the decision appears to rest mainly upon the ground that the insured cannot defeat the gift to the beneficiary by his own fraudulent conduct afterwards. It seems to us that this begs the question. The beneficiary does not receive a gift of a policy against suicide, for the contract does not cover death by such an act, and therefore the insured does not take away what he did not and could not give. But, whatever weight should be allowed to this case in the courts of the state, we are bound to follow the decision in *Ritter v. Insurance Co.*, and this is founded upon the principle that recovery cannot be had because the company has not insured against this particular risk. The principle is formally stated in the following sentence at the close of the opinion on page 160, 169 U. S. and page 307, 18 Sup. Ct.: "For the reasons we have stated, it must be held that the death of the assured * * * was not a risk intended to be covered, or which could legally have been covered, by the policies in suit." As it seems to us, it must follow inevitably that the beneficiary can have no more extensive right of recovery than the personal representative of the assured; for in either case the suit must be upon the contract, and must be restricted to the subject-matter of the contract.

We direct judgment to be entered for the defendant upon the reserved point, notwithstanding the verdict. Exception to the plaintiff.

MONONGAHELA COAL CO. v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Fifth Circuit. May 23, 1899.)

No. 817J

INDEMNITY—BREACH OF SURETYSHIP BOND—EVIDENCE.

Under a bond for indemnity given on behalf of an employé appointed as agent for the sale of merchandise on commission, which by its terms declares that its true intent and meaning are that the surety "shall be responsible for moneys, securities, or property diverted from the employer through fraud or dishonesty on the part of the employé," proof that on a settlement of accounts between them there was an indebtedness from the employé to the employer is not of itself sufficient to authorize a recovery by the employer against the surety, as such indebtedness may have been authorized by agreement between the employer and employé, or by their course of dealing, and may have been incurred without any fraud or dishonesty on the part of the employé.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This is an action brought by the plaintiff in error against the J. B. Donnally Company, Limited, and the defendant in error, on a bond of insurance or indemnity. The said plaintiff in error had judgment against the J. B. Donnally Company, Limited, for \$6,634.15; but the circuit court directed a verdict for the defendant in error, and judgment was rendered in its favor. Whether or not the court erred in directing a verdict for the Fidelity & Deposit Company of Maryland is the question for consideration here.

The petition, leaving out formal parts, is as follows:

"First. That on the 10th day of March, 1896, It entered into a contract of agency with said defendant [the J. B. Donnally Company, Limited] to sell Pittsburg coal of plaintiff in the state of Louisiana upon the terms, under the conditions, and for the commissions set forth in the agreement thereof, made part hereof; same expiring on the 31st of December, 1896. Second. That said contract was in writing, renewed for one year to the 31st day of December, 1897, as per renewal thereof annexed hereto as part hereof. Third. That, during the course of the business relations so existing between petitioner and said defendant, certain lots of coal were sold by said defendant, the proceeds thereof collected for account of petitioner by said defendant, and not paid over, and same amount to the sum of six thousand six hundred thirty-four and $\frac{15}{100}$ dollars, with six per cent. per annum interest from the 1st October, 1897, as will more fully appear by the statements annexed as part hereof. Petitioner further represents that demand has been made upon said defendant for the payment of said sum aforesaid, without avail. Your petitioner further represents that the Fidelity & Deposit Company of Maryland, a corporation created under and by virtue of the laws of the state of Maryland, and a citizen of said state, domiciled at Baltimore, Maryland, and having a legal representative and doing business in this district, did, by its bond No. 30,901, in consideration of the premium therein expressed and paid, bind and obligate itself unto your petitioner, in the sum of ten thousand dollars, that it would save, defend, and keep harmless your petitioner from and against all loss and damage whatsoever, of any nature or kind, and from all other legal costs and expenses, direct or indirect, incidental thereto, which petitioner shall or may at any time sustain or be put to in the premises, and against all and any pecuniary loss sustained by petitioner of moneys belonging to petitioner, in the possession or custody of the said J. B. Donnally Company, Limited, of New Orleans, or for the possession of which it is responsible, under their contract of agency and renewal hereinbefore set forth, which said bond is signed on the 20th of March, 1896, for a period of time of one year expiring the 20th March, 1897, and which bond was continued in full force and effect thereafter, for due