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Insurance--Escheat--Murder of Insured by Beneficiary Who is Sole Distributee

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Only a few cases have involved a higher court's determination of the duties due to an aeroplane passenger. But, assuming, in the light of these cases, that certain aircraft should be placed in the class of "common carriers", the denial of a right to stipulate against damages for negligent injuries would seem proper,[12] and would be consistent with the rule prevailing in the United States, which prevents the ordinary common carrier for hire from limiting its legal liability for the negligent injury of passengers.[13]

—ROBERT W. BURK.

INSURANCE — ESCHEAT — MURDER OF INSURED BY BENEFICIARY WHO IS SOLE DISTRIBUTEE. — A wife, beneficiary under her husband's insurance policy, feloniously killed him and then committed suicide. Recovery of the proceeds of the policy by husband's administrator was denied.[1] The state then brought suit against the insurance company for the proceeds, on the ground that, insured having left no blood relatives, his wife being his sole distributee, and there being no unpaid creditors of the estate, the insurance proceeds were derelict and without a rightful owner and therefore escheated to the state. Upon demurrers of the insurance company the circuit sustained the bills and certified their sufficiency to the Supreme Court of Appeals. *Held*: Reversed; no

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absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of aircraft, ... whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured."

[12] See, Anderson v. Fidelity & Casualty Co., 228 N. Y. 475, 481, 127 N. E. 584, 585 (1920). " . . . . if there are those in the business of carrying passengers in the air to-day . . . . who are sufficiently unmindful of their humanitarian duty as to neglect to employ the utmost care in the selection and operation of their craft, the industry and the public both will benefit by the application of a rule of liability which will either require such care or ultimately eliminate them from this field of service." Smith v. O'Donnell, *supra* n. 4. Note (1933) 83 A. L. R. 357, cites Law v. Transcontinental Air Transport (1931) U. S. Av. R. 205, as holding that the aeroplane carrier cannot limit its liability by a stipulation in passenger's ticket. See also 4 AIR LAW JOURNAL 272 (1933), citing a like New Zealand decision.

[13] HUTCHISON, LAW OF CARRIERS, *op. cit. supra* n. 2, § 1072. "The obligation of a carrier to a passenger for his safe carriage is usually dealt with as an obligation imposed by the law of torts rather than as one assumed by contract: and properly, for the obligation is wider than any that could be based on mutual assent." 2 WILLISTON ON CONTRACTS (1920 ed.) § 1113.

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[1] Wickline Adm'r v. Ins. Co., 106 W. Va. 424, 145 S. E. 743 (1928).

escheat accrued to the state. *State v. Phoenix Mutual Life Insurance Co.*[2]

The rule seems to have become well settled in this country that where a beneficiary under a life insurance policy intentionally and wrongfully kills the insured, neither he nor anyone claiming under or through him can receive any benefit under the contract of insurance.[3] This legal conclusion is not necessarily dependent for its validity upon a bald declaration of "public policy"; it has often been predicated upon the maxim of the common law that no one may profit by his own wrong,[4] and it is also in accord with the well-settled principle applying to all contracts of insurance that no person insured shall under his contract receive indemnity for a loss that he has himself intentionally brought about.[5] The mere fact that the felonious act of the beneficiary defeats his rights under the policy does not, however, ordinarily extinguish the obligation of the insurer.[6] This would be the result in the case where the beneficiary procured the taking out of the policy with the express intention of thereafter killing the insured in order to get the proceeds, of course, as in such a case the policy is considered void *ab initio,* being fraudulent in its inception.[7] And sometimes the insurance company is allowed to retain the proceeds on the theory that the slaying of the insured by the

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[2] State v. Phoenix Mutual Life Ins. Co., 170 S. E. 909 (W. Va. 1933).

[3] Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 S. Ct. 877 (1886); Hewitt v. Equitable Life Assurance Society, 8 F. (2d) 706 (C. C. A. 9th, 1925); Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S. E. 865, 7 A. L. R. 823 (1919). See also Note (1931) 70 A. L. R. 1539.

[4] Smith v. Todd, 155 S. C. 323, 152 S. E. 506, 70 A. L. R. 1529 (1930); Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458 (1903).

[5] Karow v. Insurance Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17 (1883). "It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired." Field, J., in Mutual Life Ins. Co. v. Armstrong, *supra* n. 3, 600.

[6] Supreme Lodge v. Menkhausen, 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508 (1904); Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N. E. 816, 27 A. L. R. 1517 (1923); Anderson v. Life Ins. Co., 152 N. C. 1, 67 S. E. 53 (1910); New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305 (1899); Johnston v. Metropolitan Life Ins. Co., *supra* n. 3. "The rule of public policy is invoked to prevent the murderer from profiting — not to relieve the insurer from paying." Dibell, C., in Sharpless v. Grand Lodge, 135 Minn. 35, 159 N. W. 1086, L. R. A. 1917 B, 670 (1916).

[7] Goldstein v. New York Life Ins. Co., 225 App. Div. 642, 234 N. Y. Supp. 250 (1929); Jack v. Mutual Reserve Fund Life Ass'n, 113 Fed. 49 (C. C. A. 5th, 1902). See discussion of policies void *ab initio* 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 BOSTON U. L. REV. 281, 307.

beneficiary is an impliedly excepted risk.[8] In all other cases, however, the insurer is considered still obligated to pay the proceeds of the policy to some one, as otherwise it is allowed to benefit by the murder notwithstanding that the event insured against has plainly taken place.[9]

The personal representative of the insured is now almost universally allowed to recover the proceeds from the insurance company on a constructive trust theory,[10] except in the case where the beneficiary is the sole distributee and hence would indirectly receive the benefit for which he has been denied the direct recovery.[11] It was in order to prevent the insurer from keeping the proceeds in such a situation that the attempt was made in the principal case[12] to make the state the beneficiary and raise the constructive trust in its favor. The court was clearly right in refusing to allow this, however, simply on the ground that the state was a stranger to the transaction and the insurance company was not enriched at its expense. Nor could the state get the fund by escheat. The code[13] permits the personal estate of a decedent to "accrue" to the state only where "there may be no other distributee", and there was another distributee in this case — the wife of the insured.[14] It has been suggested, however, that the state

[8] Metropolitan Life Ins. Co. v. Shane, 98 Ark. 132, 135 S. W. 836 (1911); Schreiner v. High Court of I. C. O. of F., 35 Ill. App. 576 (1890).

The life insurance Presidents' Association has now under consideration the proposal that a special clause be inserted in all life insurance policies making the murder of the insured by the beneficiary an expressly excepted risk.

[9] See cases cited *supra* n. 6. See also Note (1933) 28 ILL. L. REV. 127, discussing DeZotell v. Mutual Life Ins. Co. of N. Y., 245 N. W. 58 (S. D. 1932).

[10] Schmidt v. Northern Life Ass'n, 112 Iowa 41, 83 N. W. 800, 51 L. R. A. 141 (1900); Johnston v. Metropolitan Life Ins. Co., *supra* n. 3; POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1053.

[11] Johnston v. Metropolitan Life Ins. Co., *supra* n. 3; Wickline v. Ins. Co., *supra* n. 1; McDonald v. Mutual Life Ins. Co., 178 Iowa 863, 160 N. W. 289 (1916).

Some courts refuse to make the exception, however. See, for example, Murchinson v. Murchinson, 203 S. W. 423 (Tex. Civ. App. 1918), allowing the recovery by the administrator even though it resulted in the murderous beneficiary getting the proceeds indirectly as sole distributee. See, however, the language in VANCE, INSURANCE (2d ed. 1930) § 601, n. 31. "Possibly the more pleasing doctrine that bars the murderer, whether claiming under the policy or the statute, can be justified on the ground that the claim of the representative is, in its nature, but of a resulting trust; and even a court of law, recognizing the equitable character of the claim, may refuse to grant it when by so doing it would confirm to the murderer the fruits of his crime."

[12] State v. Phoenix Mutual Life Ins. Co., *supra* n. 2.

[13] W. VA. REV. CODE (1931) c. 42, art. 2, § 25.

[14] Query: could the statute be construed to mean, "where there may be

be allowed to maintain an action for the amount of premiums paid on the policy or its surrender value.[15] This notion is open to the technical objection that by carrying the risk during the period when premiums were paid the insurer gave value for them. But as a practical matter, now that the event insured against has occurred, restoring the amount of premiums or surrender value would still leave the insurer in a relatively favored position.

It should be noted that West Virginia now, as do some other states,[16] has a statute[17] which apparently will settle most of the future cases. The legislature has approved the decisions in the *Johnston*[18] and *Wickline*[19] cases, in specifying that the money to which the murderer would have been entitled, either by descent or distribution, or by any policy of insurance, "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, unless by some rule of law or equity the money or property would pass to some other person or persons."[20] It is arguable that this language would warrant a different result in a situation like the principle case since it means that legally there

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no other distributee *who is qualified to take"?* If so, then the state could, without any more argument, get the proceeds under the escheat statute, the beneficiary, the sole distributee, having been admittedly disqualified by her crime.

[15] *Cf.* Note (1932) 6 U. OF CINN. L. REV. 469; also Note (1929) 15 CORN. L. Q. 116.

[16] IOWA CODE (1927) § 12034; MINN. STAT. (Mason, 1927) § 8734; WYO. COMP. STAT. ANN. (1920) § 7010; ORE. LAWS (Olson, 1920) § 10140; OKLA. COMP. STAT. ANN. (Bunn, 1921) § 11319. All these statutes render the proceeds "subject to distribution among the other heirs of such deceased person" according to the laws of descent and distribution. TEX. REV. CIV. STAT. (1925) art. 5047, provides that where the beneficiary forfeits his right by wilfully causing the death of the insured, the nearest relative of the insured shall receive the proceeds. S. C. Laws, 1924, No. 776, § 2, provides that the slayers interest shall vest in the estate of the deceased, subject to the proviso, however, that if the criminal has a child or children who, if the wrongdoer were dead, would inherit from the deceased, they shall take the interest in the estate of the deceased which the offending parent would have taken but for the provisions of the statute.

[17] W. VA. REV. CODE (1931) c. 42, art. 4, § 2.

[18] Johnston v. Metropolitan Life Insurance Co., *supra* n. 3.

[19] Wickline v. Ins. Co., *supra* n. 1.

[20] W. VA. REV. CODE, *supra* n. 17. The revisers' note points out that the section is a new one framed to meet a case like Johnston v. Metropolitan Life Ins. Co., *supra* n. 3. The rule where the beneficiary has died before the death of the insured and no other beneficiary has been designated is that the insured holds the money in trust for the estate of the insured. See Ryan v. Rothweiler, 50 Ohio St. 595, 35 N. E. 681 (1893), and Bancroft v. Russell, 157 Mass. 47, 31 N. E. 710 (1892), both cited and approved in Schmidt v. Northern Life Ass'n, *supra* n. 10, at 47.

is no other distributee to take. That should satisfy the escheat statute. The present statute, in effect, renders the murderer not a distributee.

—TRIXY M. PETERS.

INSURANCE — VACANCY CLAUSE — EFFECT OF UNINHABITABILITY DUE TO PRIOR FIRE. — A, the insurer, gave notice to M, the insured, to protect his partially burned house from further damage by fire. Pending the exercise of the option to repair or pay the loss, a second fire destroyed that part of the house not previously burned. This occurred after the forty day vacancy clause had expired. A denied liability for the second fire, but the case was submitted to the jury on the theory that notwithstanding the vacancy of the building, the jury might consider the damages caused by the second fire and whether or not, under the facts of this case, A had not waived the provisions of the policy as to occupancy. *Held*: The decision for M was based on the ground that the vacancy clause was not intended to cover an unoccupiable house. *American Central Ins. Co. v. McHose.*[1]

There seems to be a paucity of authority. All three of the known cases, in point, were cited in the opinion. In support of the principal case, are two Nebraska decisions[2] based on occupancy of a dwelling uninhabited because of partial destruction by fire, could not have been within the contemplation of the parties. The opposing view is represented by a New Jersey case[3] grounded on the fact that the insured agreed to ask the company for a permit in case he desired to vacate the insured property for any cause longer than the time permitted by the vacancy clause in the policy.

The dissenting opinion, in the principal case effectually disposes of the waiver argument by reference to the federal rule excluding oral evidence of waiver of written stipulations.[4] But it fails to give full weight to another provision of the policy which was operative in this case, the option of the insurance company to pay the loss or rebuild the property. The result may be

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[1] 66 F. (2d) 749 (C. C. A. 3d, 1933).
[2] Schmidt v. Williamsburgh City Fire Ins. Co., 98 Neb. 61, 151 N. W. 920 (1915); Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313 (1900).
[3] Kupfersmith v. Delaware Ins. Co., 84 N. J. L. 271, 86 Atl. 399, 45 L. R. A. (N. S.) 847 (1913).
[4] American Central Ins. Co. v. McHose, *supra* n. 1, at 752.