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RIGHT OF DEVISEE TO PROCEEDS OF FIRE
INSURANCE POLICY—LOSS OCCURRING
AFTER DEVISE

Where real estate is insured against loss by fire and, after a contract for sale of the property is made, but before the time fixed for performance, a loss by fire occurs, there is a lack of uniformity in the decisions as to who is entitled ultimately to the insurance money.¹

The English view permits the vendor to collect the proceeds of the policy, but subrogates the insurance company to the rights of the vendor against the vendee.² This conclusion places the entire burden on the vendee and is objectionable because the risk which the insurance company contracted to assume and for which it has received sufficient consideration is not borne by the insurance company but cast upon the vendee.

The Pennsylvania view, on the contrary, permits the vendor to collect the insurance money, but designates him as a trustee for the vendee.³ The theory is, that the vendor who holds the legal title as trustee for the vendee until the day of performance in order to secure performance, holds the policy and the proceeds therefrom in the same way.

Is it the law of Pennsylvania, when property is insured and later devised but after the devise a loss occurs, that the personal representative who collects the proceeds holds it as a trustee for the devisee?

When a contract for the sale of real estate is made it may be argued that it is inequitable to compel the vendee to pay the full contract price and in return receive insured property which has been damaged or destroyed by fire. However, this argument is unavailable when there is a devise of land because the devisee is a mere volunteer.

Under the standard policy of fire insurance, which runs

¹A. J. White Hutton, *Some Fire Insurance Problems*, 25 *Dickinson Law Review* 255.

²*Castellain v. Preston*, L. R. 11 Q. B. D. 380 (1883).

³*Reed v. Lukens*, 44 Pa. 200 (1863); *Insurance Co. v. Updegraff*, 21 Pa. 513 (1853).

to the insured and his "legal representatives,"⁴ it is well settled that the personal representative is the proper party to maintain an action to recover for a loss occurring after the death of the insured.⁵ This result is sound because policies of insurance against fire are personal contracts and consequently the right of action arises in the personal representative after the death of the insured. The fact that the personal representative is specifically named in the contract considerably strengthens the conclusion that he has the right to maintain the action⁶. Furthermore, it would be illogical to say that a fire insurance policy is a personal contract and then permit the heirs or devisees to sue on a personal contract to which they were not parties.

Even the English courts which deprive a vendee of the benefits of a fire insurance policy admit that a devisee is a cestui que trust of such proceeds. In *Parry v. Ashley*,⁷ the testator charged certain real estate with an annuity and subject to that, devised it to the defendant who was the sole residuary devisee and also the executrix. After his death the executrix renewed the insurance policy on the building which afterward burned. The Court held, "the proceeds of the policy cannot be considered as part of the testator's personal estate but that they are affected with a trust for the benefit of the parties interested in the real estate."

The same rule has been enunciated in the United States.⁸ *Culbertson v. Cox*⁹ is typical. The facts were as

⁴Act of 1921 P. L. 682, sec. 523, 40 P. S. 658.

⁵*Wyman v. Wyman*, 26 N. Y. 253 (1863); *German Insurance Co. v. Curran*, 8 Kan. 9 (1871); *Georgia Home Insurance Co. v. Kinners Adm'x*, 28 Grat. (Va.) 88; *Forest City Insurance Co. v. Hardesty*, 182 Ill. 39 (1889); *German Insurance Co. v. Wright*, 49 Pac. (Kan.) 704 (1897); *Oldham's Trustee v. Boston Ins. Co.*, 189 Ky. 844 (1920).

⁶*Wyman v. Wyman*, 26 N. Y. 253 (1863).

⁷3 Sim. 97, 57 Eng. Rep. 936 (1829).

⁸*Culbertson v. Cox*, 13 N. W. (Minn.) 177 (1882); *Wyman v. Wyman*, 26 N. Y. 253 (1863); *Clyburn v. Reynolds*, 31 S. C. 91 (1889); *Graham v. Roberts*, 43 N. C. 99 (1851); *Dix v. German Ins. Co.*, 65 Mo. App. 34 (1896); *Millard v. Beaumont*, 185 S. W. (Mo.) 547 (1916); *Haxall Executors v. Shippen*, 10 Leigh (Va.) 536 (1839);

follows: The testator insured certain property and died leaving a widow who took a life estate with remainder over. Subsequently the premises were burned and the administrator collected the insurance money. The Court said, "the proceeds of the policy partook of the character of real estate and was affected with a trust for the benefit of the parties interested in such real estate, and the plaintiff, as widow of the deceased, was entitled to the use of the money during her life—the same interest she was entitled to in the property destroyed"—and gave her judgment for a sum in gross equal to the present worth of the life interest.

It seems to be well settled that a contract of fire insurance is strictly personal and does not pass as an incident to a transfer of title to the property.¹⁰ While this rule might be applicable as against a grantee, mortgagee or other creditor who claimed an interest in the proceeds by virtue of a conveyance or lien upon the property which was insured, it is apparently unavailable against a devisee. As was said in *Culbertson v. Cox*,¹¹ per Mitchell J., "We do not think that the widow, heir or devisee, upon whom the property devolves upon the death of the insured are strangers to the contract of insurance. Neither are they and the personal representative strangers to each other; for both acquire their rights from the deceased by a devolution or transfer, which is not forbidden by the policy. Both represent the insured; the title to the property, and the beneficial interest in the policy, passing to the widow, heir or devisee; while the right of action to recover on the policy is by its terms vested in the administrator or executor, while the interest in the property which was requisite to sustain the action, belongs to others."

It has been pointed out in this note, that in Pennsylvania the vendor who recovers the proceeds of a fire insur-

Kane's Estate, 77 N. Y. Supp. 874 (1902); Reynold's Estate, 109 Atl. (Vt.) 60. See also 16 A.L.R. 312 and cases cited.

⁹13 N. W. (Minn.) 177 (1882).

¹⁰*Culbertson v. Cox*, 13 N. W. (Minn.) 177 (1882); Richards on Insurance, page 76 and cases cited.

¹¹13 N. W. (Minn.) 177 (1882).

ance policy holds it as a trustee for the vendee.¹² Consequently, our courts in Pennsylvania have every reason to hold that such proceeds when recovered by the personal representative remain in his hands as a trustee for those beneficially interested in the property.

Although this precise question has never been presented to an appellate court in Pennsylvania, there is a lower court decision, *Callahan's Estate*,¹³ in which it is said, "Insurance money received by an executor for a loss of property by fire has a double character. It belongs on the one hand to the devisees of the property and on the other is assets for the payment of debts, and it must be used so far as needed for that purpose; but both of these qualities are to be kept in mind in disposing of such fund. The executor has the right to resort to it to make up the deficiency cast upon him by the settlement of his administration account but after that has been satisfied the balance must be devoted to the same trusts as the real estate out of which it grew."

While unquestionably the insurance money is an asset for the payment of the testator's debts, it is not to be assumed that there has been such a conversion of the property as to change the nature of the fund and make it distributable as a fund derived from a sale of personalty. On the contrary, the proceeds of the insurance policy are merely a substitute for the property destroyed and are subject to the payment of debts only to the extent and in the order that the property would have been were it not destroyed.¹⁴

The New York Court of Appeals in the leading case of *Wyman v. Wyman*¹⁵ said, "An insurance policy provides that upon destruction or injury of the property the insurers, if they choose, might repair or restore it in specie. If they

¹²See note 3.

¹³5 Lack. Leg. N. (Pa.) 105.

¹⁴*O'Brein's Estate*, 19 C. C. (Pa.) 467 (1897); *Nichol's Appeal*, 128 Pa. 428 (1889); *Parry v. Ashley*, 3 Sim. 97, 57 Eng. Rep. 936 (1829); *Culbertson v. Cox* 13 N. W. (Minn.) 177 (1882); 26 C. J. 593 and cases cited.

¹⁵26 N. Y. 253 (1863).

had elected to that course the expenditure which would have been made would of course have been entirely for the benefit of the heirs. The building repaired or replaced would have been theirs because standing upon their lands. The theory of the payment of money in lieu of such reparation is that the party is thus enabled to replace what has been destroyed by himself instead of it being done by the insurers. * * * * It would be a singular result if the election of the insurers could determine whether the heirs or administrator should take the benefits of their contract; whether they would make compensation in money to the latter or in kind to the former. And it is a strong implication from the existence of such a feature in the contract that its benefits must in any event and in either performance enure to those who would, in case of literal performance reap its fruits. My opinion is that in such a case the administrator or executor is trustee for the heirs who alone have been damnified, who has sustained the loss and entitled to indemnity."

To epitomize:

1. Under the standard policy of fire insurance which runs to the insured and "his legal representatives" it is proper for the personal representative to maintain an action to recover for a loss occurring after the death of the insured.

2. However, the fiduciary holds the proceeds in a double capacity. They belong on the one hand to the devisee of the property but if the personal estate is not sufficient to pay the debts of the deceased, resort may be had to the proceeds of the policy to the same extent as the property would have been liable were it not destroyed by fire.

3. But aside from this claim of creditors to which the right of the devisee is subordinate, the proceeds should be distributed among those entitled to the real estate.

Milton J. Goodman.