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Joseph C. Lyons

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VESTED INTEREST OF BENEFICIARY IN INSURANCE POLICY—DEATH IN COMMON DISASTER.

It is no doubt true, that the beneficiary in a contract of insurance takes a vested interest when that beneficiary has an insurable interest and is unconditionally named—that is, death is the one condition that makes it payable to the beneficiary absolutely. The authorities well established this rule.¹ But when there is some condition added to the right of the beneficiary to take, beside the major condition of death, the right of the beneficiary to take a vested interest often times becomes one of difficulty. As where both parties were killed in a common disaster and there is no evidence that either survived the other, when survivorship was the condition which was to determine the rights of the parties.

The case that presents exactly such a state of facts was decided in Missouri in 1902.² That case has been widely cited as supporting the rule that a beneficiary takes the vested interest in contracts of insurance when the usual relations exist between the parties. On examination of authorities one learns that there have been but few cases both in England and the United States, that present exactly the same point for decision, and of the ones that do so present the points for decision, the majority have decided against the point on which the Kacer case was determined.³ This case does reaffirm the doctrine that a beneficiary takes a vested interest at the inception of the contract relation and cannot be deprived of that interest without consent when such beneficiary has an insurable interest. But it goes a little further than this settled principle, and holds that where the beneficiary is to

1. 25 Cyc. 889.

2. 169 Mo. 301.

3. 141 App. Div. (N. Y.) 478.

take only on condition that she survive the insured—and they both die in a common disaster—no evidence that either survived the other—such beneficiary takes a vested interest, and the indemnity is to be paid to the legal representatives of the beneficiary and not the representatives of the insured. And it is on this holding that the conflict of authority has grown up.

The facts of the Kacer case⁴ are shortly these: A bill of interpleader in equity to determine the right to eight thousand dollars, the proceeds of two insurance policies on the life of Harry C. Yocum, and paid into court by the U. S. Casualty Co. The interpleaders are, respectively, by the legal representatives of Harry C. Yocum, the assured, and his daughter, the beneficiary.

Harry C. Yocum, with his daughter, Miss Florence Yocum, and other friends left New Orleans in a private yacht to make a trip over the Gulf of Mexico. They were never heard of again until bodies of the parties were later found on a small island in the Gulf. There was no evidence as to how the accident occurred.

The accident policies provided that the proceeds should be paid to Miss Florence Yocum, *if surviving, if not, to the legal representatives of the assured*, Harry C. Yocum.

The insured, Harry C. Yocum, and the beneficiary, Florence Yocum, both perished in this calamity and there is no evidence that either survived the other. The established English and American Doctrine⁵ is, that in such cases there is no presumption that either survived the other (as in the Roman Civil Law⁶) but that both perished at the same instant. Therefore the rights to the indemnity of the policy depends on the interpretation of the contract at the time of its making; that is, what was the intention of the parties,

4. 169 Mo. 301.

5. 1 Greenleaf, Evidence Sec. 30.

6. 6 St. Louis Law Review, page 1.

and in whom does the law vest the interest at the inception of the contract? And this in turn depends upon the interpretation given to the stipulation, "if surviving, if not, to the legal representatives of the insured," which must be either a condition precedent or a condition subsequent. For it is obvious, that if this stipulation is to be regarded as a condition subsequent, the interest vested in the beneficiary at the inception of the contract, subject to be divested if she did not survive her father. But regarding the stipulation as a condition precedent, the interest of the beneficiary did not vest immediately when the contract relation came into existence, but could only vest when the condition occurred. And it seems that in the absence of proof that the beneficiary did survive the insured, the interest would be in the legal representatives of the insured; "for survivorship is clearly a condition precedent."⁷

The Kacer case might be distinguished from a great body of the cases that involve life insurance policies as different in fact, from accident insurance policies. That case did involve an accident insurance contract. While courts generally have made no distinction between life and accident policies, there is, in fact, this difference: A life policy depends upon a condition that is sure to happen according to the natural efflux of time; the contract is to last until death occurs and determines it. And it is reasonable to say, that the interest of the beneficiary, in such a contract should vest, in the absence of conditions precedent. But in the case of accident policies, a very different and limited contract exists between the parties. Accident insurance policies cover a certain period only and determine absolutely at the end of that period. They are also dependent upon the contingency of accident; that is to say, on a condition which in its very nature is liable not to take effect at all; it will not, in the course of time, surely happen. The policy in the

7. 53 Cen. Law Journal 45.

Kacer case with the uncertain condition of accident, and the superimposed condition, "if surviving, if not, to the legal representatives," presents a double condition, both of which are in their very nature never liable to happen. The question naturally arises in a reasonable mind, how can it be said that a contract based on two wholly contingent conditions, vest an interest in a beneficiary who is to take only on the happening of both? Such decision would seem to destroy the fundamentals on which the law was developed; that is, to base conclusions of law on premises that are not ambiguous, and to make things reasonably certain the basis of legal interest. In the law of real property in a leading case,⁸ Justice Bigelow said: "Gifts or grants of estates in fee with limitations upon a condition or event of an uncertain or indefinite nature, the limitation over being executory and depending on a condition or event which may never happen, passes no vested interest or estate." The law deals with such conditions in one way only, by calling them conditions precedent.

As suggested in *Hoffman v. Indemnity Co.*,⁹ the Court held that the beneficiary in an accident policy, until the death of the insured, has, at most an inchoate and contingent interest and the insurer cannot recognize her as a party to the contract having a present interest therein. In the case just referred to, a condition in an accident policy required the beneficiary to give notice of death of the insured within ten days of the happening of the accident causing the injury. Such a condition was held to be impossible on the ground that the beneficiary acquired no definite interest in a policy until death occurred. That is, the Court held that under an accident insurance policy the beneficiary took no interest that would make such party one to the contract, and consequently would not hold that condition good. The party was

8. 3 Gray 142.

9. 56 Mo. App. 30.

unaffected by the condition because the beneficiary was not considered as having an interest in the policy. It is also said: "Where the policy provides that the beneficiary shall take if surviving, no difficulty should arise in any view of the case as survivorship is clearly a condition precedent."¹⁰

In the case of *Fuller v. Linzee*,¹¹ the policy provided that "in case the insured should die before the decease of her husband, the amount of the policy should be payable to their children." The husband, the wife and their children were lost at sea, and there was no direct evidence as to which survived the other. The Court held that the interest of the wife in the policy was contingent on her surviving her husband, and that the burden of proof was on her next of kin to show that she survived. The Court said: "He (the insured) was providing for the disposition of a fund, which was not to exist until after his death, and he made the provision by designating the persons to whom it was to be paid, and his obvious intention was that it should be paid to his wife, if she should survive to take it, and to their children if she should not survive. * * * We think upon the view of the contract already taken, that the wife had no interest transmissible to her next of kin unless she survived her husband and they cannot maintain their claim."

The stipulation in an insurance policy payable to the beneficiary if surviving, if not, to the legal representatives of the insured, is, for a further reason manifestly a condition precedent and not a condition subsequent; the beneficiary is not to take at all events, as said in *Dunn v. New Amsterdam Casualty Co.*,¹² but only in case he survives the insured. Therefore, the principle is precisely like the case of fraternal or mutual benefit insurance in which it has been uniformly held, in this and other jurisdictions, that those claiming un-

10. 53 Cent. Law Journal 45.

11. 135 Mass. 468.

12. 141 App. Div. N. Y. 478.

der the beneficiary named must prove survivorship of the beneficiary." That is to say, the stipulation in an accident insurance policy, "if surviving, if not, to the legal representatives of the insured," is equivalent to the reservation of the right to change the beneficiary, and in those cases it has always been held that the beneficiary takes no vested interest, because of the contingency.

In the case of *Supreme Council v. Kacer*,¹³ arising from the same state of facts and decided in the Missouri Court of Appeals, the policy contained the right to change the beneficiary, or it was interpreted to be equivalent to that right. The by-laws of the organization provided, that in case the beneficiary died before the insured, the indemnity should be paid to certain other persons dependent or related. Judge Goode gives a very lucid and comprehensive opinion in which he decides in favor of the legal representatives of the insured, contra to the *U. S. Casualty Co. v. Kacer, supra*. If this is to be construed as the reservation of the right to change the beneficiary, it would seem clearly and logically to follow, that the stipulation "if surviving, if not, to the legal representatives of the insured," is likewise equivalent to the right to change the beneficiary. For the conditions in each of these policies are not within the discretion of the insured as to whom should ultimately take, but will determine by the course of events.

In the case of *Dunn v. New Amsterdam Casualty Co., supra*, Julia Dunn procured a policy of accident insurance from the New Amsterdam Casualty Co., and one of the provisions of the policy was, "the indemnity for loss of life shall be payable to the beneficiary named in the stub attached hereto, or in the event of the prior death of such beneficiary, or in the event that no beneficiary is named in the said stub as herein provided, then to the legal representatives of the assured." The sister of the insured was named in the stub

13. 96 Mo. App. 93.

as beneficiary. Both the insured and her sister, who was the beneficiary, perished in the accidental burning of the steamboat General Slocum, and it could not be ascertained which died first. The Court held that the burden of proof was on the legal representatives of the beneficiary or those claiming under her to establish the survivorship of the beneficiary; and that in the absence of such proof the proceeds of the policy should be paid to the legal representatives of the insured. This is directly contra to *U. S. Casualty Co. v. Kacer, supra*. The New York Court said in the course of the opinion: "Phraseology is important only to determine the intention, which in this case was, that the indemnity should be paid to the sister if living, otherwise to the legal representatives of the assured. And that purpose could not have been made more manifest if that language had been employed. The survivorship of the sister, then was a condition of her taking, and it begs the question to say that she took a vested interest subject to be divested by her prior death. No doubt the law is that in the absence of the reservation of the right to change a beneficiary that may not be done by the assured. But the cases on that head have no application whatever to the question now being considered. Here the beneficiary named was not to take at all events, but only in case she survived the assured. And the case is therefore, in principle precisely like the cases of fraternal or mutual benefit insurance, in which the right to change the beneficiary is expressly reserved, and in which it has been uniformly held, (as is conceded by the respondent), in this and other jurisdictions, that those claiming under the beneficiary named must prove survivorship. * * * By the terms of the policy the beneficiary was to take only in case she survived the insured. We construe the policy in question to mean the same thing. In such a case the burden to prove survivorship of the beneficiary would rest upon those claiming under her, and the fact being unascertainable, the in-

demnity should go as the parties obviously intended, to the representatives of the assured, who take under the policy, not under survivorship."

The decision in the case of *Hildebrand v. Ames*.¹⁴ is to the same effect. In that case Frank Doll took out a policy of life insurance, naming his wife as the beneficiary. The provision of the policy was that it should be payable to Minnie Doll, wife of the insured, if living, if not living, then to the insured's executors, administrators, or assigns. Both the insured and the beneficiary were killed in a flood under such circumstances that it was impossible to determine which died first. The Court held that the interest of Mrs. Doll was a contingent interest, and that the burden of proof was upon the representatives of her estate to prove her survivorship. The following is the language of the Court: "Under the terms of the policy in question, we are of the opinion that Mrs. Doll's interest in the proceeds of the policy was a contingent interest, not transmissible to her heirs, and that it devolved upon her representatives to show that the contingency had happened which would entitle her to receive the proceeds of the policy."

In cases of this nature where the insured adds the condition of survivorship in a policy, it might be said that the intention was to provide for the support of the beneficiary so named, after the death of the insured; and he certainly did not intend that the proceeds should go to the legal representatives of the beneficiary.¹⁵ His intention was to provide for the support of such beneficiary if living at the time of his death. But if not living, such provision being unnecessary, the proceeds of the policy should go to his estate. As said in *Dunn v. New Amsterdam Casualty Co.*,¹⁶ "It is obvious that the policy in question was not taken out for the

14. 27 Tex. Civ. App. 377.

15. 187 U. S. 401; 8 H. L. 183.

16. 141 App. Div. N. Y. 478.

benefit of the personal representatives of the beneficiary named. They were not in the mind, either of the insured or the insurer. Upon its face the policy was procured for the benefit, first, of the assured's sister, second, of the assured's estate or next of kin."

It is a fundamental rule of the law of contracts, that a contract is to be construed so as to give effect to the intention of the parties. In the light of the foregoing decisions, it might be said, that to follow the decision of *U. S. Casualty Co. v. Kacer*, would be to defeat the expressed intention and purpose of the insured when he has added the stipulation, if surviving, if not, to legal representatives. For in many cases it would lead to the distribution of the proceeds of the insurance to the very persons to whom the insured did not want to give it. If the insured, in such a policy desired the indemnity to go to the legal representatives of the beneficiary, he would not have provided against it, but made the contract payable to the beneficiary absolutely. It is obvious that survivorship is a condition precedent, and the criticism of the Missouri case made by the New York Court,¹⁷ is justified on fundamental principles of law.

The marvelous expansion of the insurance business, and the numerous financial aids to which these contracts are made to extend, should impel courts to construe them strictly according to the settled principles of law, and when there is any ambiguity, always against the insurer. This also has the tendency to make the insurer more cautious about stipulations for the benefit of the beneficiary. For such contracts can be more readily used for the great number of purposes to which they are becoming adapted, if they are unconditional and have this definite quasi-negotiability.

Then the rule, that the beneficiary under an insurance contract takes a vested interest, is in strict accord with the

17. See Note 3.

basis on which life and accident policies are growing. The beneficiary should take some interest good in law, so when it becomes necessary to use such interest, it can be dealt with in a legal way; that is, have weight enough to alter substantive rights. But to hold that the beneficiary takes a vested interest under an ambiguous contract would tend to defeat rather than accomplish this end.

JOSEPH C. LYONS, '24.