

### **Insurance--Contracts--Right of Beneficiary to Sue After Period of Limitation in Policy (Selden v. Metropolitan Life Ins. Co., 47 A.2d 687 (Pa. 1946))**

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that the damage suffered by respondents is merely incidental and that recovery should consequently be denied.<sup>10</sup> This position is not tenable, for if the government had taken an easement of flight over the land of the respondents, and this easement were permanent, then it follows as a natural consequence that the easement would be the equivalent of a fee interest. It would be construed as constituting complete dominion and control over the land.

In the instant case, as in *Portsmouth Co. v. United States*,<sup>11</sup> the damages were not merely consequential in nature. They resulted from a direct invasion of the respondents' domain. As pointed out in *United States v. Cress*,<sup>12</sup> ". . . it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." Although the meaning of "property" as this term is used in the Fifth Amendment is a federal question, ". . . it will normally obtain its content by reference to local law."<sup>13</sup> According to North Carolina law, sovereignty in the air space rests in the state "except where granted to and assumed by the United States."<sup>14</sup> The flight of aircraft over land is considered lawful unless deemed to be an interference with the beneficial use thereof. Here there was such interference and the Courts' view was that the specific facts would seem to warrant the conclusion that there had been a servitude imposed upon the respondents' land.

The question herein presented has novel aspects and has not heretofore been directly passed upon. Mr. Justice Douglas in delivering the opinion of the Court refers to the case as one of "first impression." The decision will probably lead to additional legislation by Congress on the subject of air travel in view of its ever increasing importance and complexity.

I. L.

INSURANCE — CONTRACTS — RIGHT OF BENEFICIARY TO SUE AFTER PERIOD OF LIMITATION IN POLICY.—The defendant company issued to Jules B. Selden two policies of accident insurance; in one of them the beneficiary was Selden's mother, in the other his estate. He died on December 31, 1941, from a gunshot wound. The policies provided that affirmative proof of loss must be furnished to the company within ninety days after the date of such loss. Proof

<sup>10</sup> *Richards v. Washington Terminal Co.*, 233 U. S. 546, 58 L. ed. 1088 (1914).

<sup>11</sup> 260 U. S. 327, 67 L. ed. 287 (1922).

<sup>12</sup> 243 U. S. 316, 328, 61 L. ed. 746, 753 (1916).

<sup>13</sup> *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 279, 87 L. ed. 1390, 1400 (1942).

<sup>14</sup> GEN. STATS. 1943, § 63-11.

was furnished within the prescribed time in the case of the policy in which the estate was beneficiary. The mother, however, had no knowledge of the existence of the policy in her favor until it was found on February 22, 1943. The day following her discovery of the policy, the plaintiff beneficiary requested the defendant company to furnish her with proof of loss forms, which was refused. On March 19, she filed proof of loss under the policy, and on September 8, 1944 she brought suit. This was more than two years and ninety days from the date of the insured's death. The defense set up is, a provision in the policy which stipulated that no action shall be brought to recover on the policy unless commenced within two years from the expiration of the time within which proof of loss is required by the policy, and the complaint was dismissed. *Held*, affirmed. Ignorance as to the existence of a policy of insurance will not excuse the beneficiary's failure to comply with its provisions. *Selden v. Metropolitan Life Ins. Co.*, — Pa. —, 47 A. (2d) 687 (1946).

A provision in the policy for some reasonable time within which an action must be brought is valid and enforceable.<sup>1</sup> The beneficiary is subject to all the provisions and limitations of the policy.<sup>2</sup> The plaintiff contends that her failure to bring suit in time should be excused because of her ignorance as to the existence of the policy, and therefore because of an alleged impossibility of performance. But a person is not relieved from compliance with the express provisions of a contract whether because of ignorance of his rights, or even of the very existence of the contract; if the other party has not been guilty of any fraud which has caused such ignorance, the loss must be borne by the party in default, however innocent he may be. The court may not add, to the unambiguous terms of the policy, an exemption clause which the parties themselves omitted.

There was a dissenting opinion which held that the plaintiff should have had a reasonable time within which to file proofs of loss after she found the policy, if such failure to discover the policy was through no fault or negligence on her part.<sup>3</sup> The limitation on her ability to commence an action, then, would not begin to run until the expiration of the "reasonable time" after she found the policy.

The view taken by the majority of the states disagrees with the decision in this case. The general rule prevailing in this country seems to be that where one is ignorant as to the existence of a policy of life or accident insurance in his favor, strict compliance with its provisions as to proofs of loss, notice, or the bringing of an action may be excused, if those provisions are complied with within a reasonable time following the discovery of the policy.<sup>4</sup> A qualification

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<sup>1</sup> *Ercole v. Metropolitan Life Ins. Co.*, 155 Pa. Super. 549, 39 A. (2d) 293 (1944); *National Fire Ins. Co. v. Brown*, 128 Pa. 386, 18 Atl. 389 (1889).

<sup>2</sup> *Miller v. Travelers Ins. Co.*, 143 Pa. Super. 270, 17 A. (2d) 907 (1941).

<sup>3</sup> 7 COUCH, *CYCLOPEDIA OF INSURANCE LAW* (1929) § 1538k.

<sup>4</sup> *Konrad v. Union Casualty and Surety Co.*, 49 La. Ann. 636, 21 So. 721

to this rule requires that the lack of knowledge must be without negligence or fault of the party seeking to be excused.<sup>5</sup> Applying the general rule to this case, it would appear that the case should have gone to the jury, in order to determine whether the plaintiff was negligent in failing to discover the policy.

Section 164, subdivision 3(n)14, of the New York Insurance Law provides that no action shall be maintained on a policy unless brought within two years from the expiration of the time within which proof of loss is required by the policy. Whether ignorance as to the existence of the policy will excuse the beneficiary from filing proofs of loss within ninety days after the date of the loss, as required by Section 164, subdivision 3(g)7, of the New York Insurance Law, is a question that has not as yet been squarely met in the New York courts. It has been held that although the ten- or twenty-day period after the accident, within which notice must be given,<sup>6</sup> may be extended by necessity (the notice may be given as soon as reasonably possible)<sup>7</sup> the period within which proof of loss must be filed may not be extended. The filing of the proof of loss within that period is an absolute condition precedent to the plaintiff's right to recover on the policy, unless the policy expressly states that such failure to comply will be excused if shown to be not reasonably possible.<sup>8</sup>

In the case at hand, since the insurance contract did not adopt this language which would overcome the strictness of the rule, the period within which proof of loss should have been filed was not extended. It terminated ninety days after the loss, at which time the two-year period of limitation commenced to run, and having run out, the plaintiff is barred from bringing an action.

W. C. B.

LANDLORD AND TENANT — CONSTRUCTIVE EVICTION. — The premises involved, an apartment in a multiple dwelling unit, were extensively damaged by a fire. The landlord in this action seeks to

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(1897); *McElroy v. John Hancock Mut. Life Ins. Co.*, 88 Md. 137, 41 Atl. 112 (1898); *Munz v. Standard Life and Accident Ins. Co.*, 26 Utah 69, 72 Pac. 182 (1903).

<sup>5</sup> *Schanzenback v. American Life Ins. Co.*, 58 S. D. 528, 237 N. W. 737 (1931).

<sup>6</sup> N. Y. INSURANCE LAW § 164, subds. 3(d), 4.

<sup>7</sup> *Walterman v. Mutual Benefit Health and Accident Assn.*, 260 App. Div. 478, 23 N. Y. S. (2d) 158 (1st Dep't 1940); *MacKay v. Metropolitan Life Ins. Co.*, 281 N. Y. 42, 46, 22 N. E. (2d) 154, 156 (1939).

<sup>8</sup> *Trieger v. Commercial Travelers Mut. Accident Assn.*, 122 Misc. 159, 202 N. Y. Supp. 410 (Sup. Ct. 1923); see *Titus v. Travelers Ins. Co.*, 268 App. Div. 802, 49 N. Y. S. (2d) 203 (2d Dep't 1944); *Trippe v. P. F. Society*, 140 N. Y. 23, 35 N. E. 316 (1893).