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Article 17

Life Insurance--Rights of Beneficiary--Surrender of Policy for Cash Value by Incompetent Insured (Wodell v. John Hancock Mut. Life Ins. Co., 67 N.E.2d 469 (Mass. 1946))

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premises.[7] The underlying reason for this rule has been explained as being that the landlord's denial of the use and enjoyment of a part of the premises is a wrongful act and, since the law will not permit a wrongdoer to apportion his own wrong, the tenant will not be held liable even for that portion of the premises retained and occupied.[8] The judgment here does violence to that principle by determining the value of that portion of the premises which were denied to the tenant, subtracting it from the total rent, and awarding the remainder to the landlord. In effect the judgment permits the landlord to recover on a *quantum meruit* basis even though, because of his wrongful act, the law precludes a recovery on the agreement itself.

It is submitted that the law of this state as interpreted by the higher tribunals is *contra* to the rule of decision herein. No criticism is offered as to the actual result reached by the court. The judgment is no doubt a fair adjustment of the differences between the parties and may be classified under the heading of practical justice. The query is directed rather at the means employed to serve that end. The *Pike*[9] case clearly settles the rule of decision applicable to a case wherein the tenant has been constructively evicted from a portion of the premises by a wrongful act of the landlord. It establishes that, in such a case, the tenant must pay the rent reserved, and seek damages for that portion of the premises, the use and enjoyment of which was denied to him by the landlord's wrongful act or omission by interposition of a counterclaim based upon a breach of either express or implied covenants of quiet enjoyment contained in the lease.

P. S. C., JR.

LIFE INSURANCE—RIGHTS OF BENEFICIARY—SURRENDER OF POLICY FOR CASH VALUE BY INCOMPETENT INSURED.—On May 13, 1944, the insured changed the beneficiary in accordance with the right reserved in each policy and substituted his own estate for the plaintiff, his widow, as beneficiary. On May 15, 1944, he surrendered the policies in accordance with the provisions thereof, and received a full cash surrender value. On May 13, and May 15, 1944 and thereafter until his death, the insured was insane and lacked mental capacity to perform any legal act. Defendant had no notice of in-

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[7] City of New York v. Pike Realty Corp., 247 N. Y. 245, 160 N. E. 359 (1928).

[8] Two Rector Street Corporation v. Bien, 226 App. Div. 73, 234 N. Y. Supp. 409 (1st Dep't 1929); Fifth Avenue Building Co. v. Kernochan, 221 N. Y. 370, 117 N. E. 579 (1917).

[9] City of New York v. Pike Realty Corp., 247 N. Y. 245, 248, 160 N. E. 359, 361 (1928).

sured's insanity and lack of capacity until after insured's death. Defendant acted on the change of beneficiary and paid the surrender value of the policies in good faith and in the regular course of its business. Insured was at no time under guardianship. *Held,* for plaintiff. The beneficiary of a life insurance policy has a qualified property interest in the contract which ripens into an absolute right if the insured dies without having effected a valid change of beneficiary. The plaintiff is therefore entitled to recover the difference between the cash surrender value and the face value of the policy. *Wodell v. John Hancock Mut. Life Ins. Co.,* — Mass. —, 67 N. E. (2d) 469 (1946).

It is clearly the general, if not the universal, rule that if at the time the insured attempted to change the beneficiary under an insurance policy the insured was incompetent, such change is ineffective, and the original beneficiary has such an interest in the proceeds as will entitle him to avoid the change and recover under the policy.[1] It has been held that, while the beneficiary had no vested interest at the time of the alleged transfer, he had a right after the death of the insured to raise the question, (as to whether the insured was incompetent when he executed the transfer), the same as an heir at law has a right to intervene after the death of his ancestor to set aside a grant made while he was incompetent.[2]

The defendant relies on the rule laid down in *Reed v. Mattapan Deposit & Trust Co.*[3] and *Leighton v. Haverhill Savings Bank*[4] wherein it was held that a bank which in good faith, in the ordinary course of business and without knowledge of his condition, had cashed the check of a depositor who had become insane, could not be compelled to pay the money again. The defendant therefore contends that an analogy should be drawn from those cases so as to prevent it from paying twice. The plaintiff relies on those cases holding that the original beneficiary is permitted to recover the balance over the surrender value paid to an insane insured.[5]

The court in the instant case pointed out that the doctrine in the *Reed* and *Leighton* cases was equitable in its nature and applies only to cases where the insurance company had paid the full value of the policy either to a changed beneficiary, or to an assignee. The doctrine asserted by the defendant, being equitable in its nature,

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[1] *See* Note (1936) 105 A. L. R. 950, 951.

[2] Grand Lodge A. O. U. W. v. Frank, 133 Mich. 232, 94 N. W. 731 (1903); *see* Knights of the Modern MacCabees v. Sharp, 163 Mich. 449, 128 N. W. 786 (1910); Wells v. Covenant Mut. Ben. Ass'n, 126 Mo. 630, 29 S. W. 607 (1895).

[3] 198 Mass. 306, 84 N. E. 469 (1908).

[4] 227 Mass. 67, 116 N. E. 414 (1917).

[5] Nutter v. Des Moines Life Ins. Co., 156 Iowa 539, 136 N. W. 891 (1912); Hicks v. Northwestern Mut. Life Ins. Co., 166 Iowa 532, 147 N. W. 883 (1914); Sluder v. National Americans, 101 Kan. 320, 166 Pac. 482 (1917); *cf.* Wells v. Covenant Mut. Ben. Ass'n, 126 Mo. 630, 29 S. W. 607 (1895).

should be moulded to accomplish equitable results. The court therefore held that an equitable result would be brought about if the policy were regarded as reinstated, any necessary adjustments being made with respect to premiums and dividends, and if the surrender value were credited to the company as of the date the company paid it to the insured. Plaintiff then would recover the balance of the total value of the insurance.

B. H. A.

NEGLIGENCE—CHILDREN UNDER DISABILITY—INFANT THREE YEARS AND TWO MONTHS OLD CONCLUSIVELY PRESUMED INCAPABLE OF NEGLIGENCE.—Defendant, approaching an intersection while driving along in his automobile, struck the plaintiff's son who darted out from between two parked cars into the path of defendant's automobile. The child died that same day. At the trial, evidence was introduced showing the deceased to have been brighter and more mentally alert than the normal child of his age. The court submitted to the jury the question of defendant's negligence while driving the automobile which struck the child, and also an issue as to the contributory negligence of the deceased, who was an infant of three years and two months at the time of the accident. Plaintiff's counsel requested a charge that "a child of the age of three years and two months is *non sui juris* and incapable of being guilty of negligence." The request was refused and the jury brought in a verdict for the defendant. The Appellate Division affirmed the lower court's verdict [1] and plaintiff appeals by permission to the Court of Appeals. *Held,* reversed and a new trial granted. A child of the age of three years and two months is *non sui juris* and incapable of being guilty of negligence. *Verni v. Johnson,* 295 N. Y. 436, 68 N. E. (2d) 431 (1946).

At what age a child is presumed to be incapable of contributory negligence has long divided the courts.[2] In the United States, the weight of authority, as regards a child between three years and four years of age is in favor of a conclusive presumption of incapacity.[3] However, many courts hold that age alone does not determine whether a child is *sui juris* but that experience, maturity, and intelligence also enter into the picture and it is a question for the jury to decide.[4] It

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[1] 269 App. Div. 997, 58 N. Y. S. (2d) 382 (2d Dep't 1945).

[2] "The law does not disregard variations in capacity among children of the same age, and does not arbitrarily fix an age at which the duty to exercise some care begins or an age at which an infant must exercise the same care as an adult." Camardo v. New York State Ry., 247 N. Y. 111, 116, 159 N. E. 879, 880 (1928).

[3] Note (1937) 107 A. L. R. 4, 100.

[4] Leach v. St. Louis-San Francisco R. R., 48 F. (2d) 722 (C. C. A. 6th, 1931) (experience, mental capacity and particular circumstances of case);