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Insurance—Endowment Policy Disbursement—Testamentary or Contractual

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case, *D*'s motion to suppress could have been granted on the basis of ownership of the chattels seized in accordance with the ruling in the *Pielow* case. The court seemingly granted it on a broader basis. The government argued that the search did not violate *D*'s privacy. The court answered that the two events, the search and the seizure, ". . . are not capable of being viewed separately. . . ." and that the whole venture is a violation of the constitution and therefore the evidence is to be suppressed.

It is submitted that the opinion in the instant case leaves doubt on the question as to what persons have standing to invoke the exclusionary rule. The facts of the case permit the interpretation that the defendant must at least have ownership of the chattels seized before the rule can be invoked. The opinion, however, tends to indicate that the protective benefits of the rule will be granted because the constitution has been violated regardless of whether any rights of the particular defendant have been violated. If this is true, the exclusionary rule will have a broader application because one of the limitations upon its use has been destroyed.

JACK J. LOBDELL

Insurance—Endowment Policy Disbursement—Testamentary or Contractual. *S*, owner of a fully paid endowment life policy, elected Option 1 as a method of settlement. This gave him a lifetime access to the principal sum and interest, the right to name distributees for the residue, if any, at his death, but withheld the right to change the distributees once named. *P*, executor of *S*'s estate, claims the residue from *D*, the insurer, contending the Option 1 agreement to be in violation of the Statute of Wills. The trial court found for *D*. On appeal, *Held*: Affirmed. *Toulouse v. New York Life Insurance Co.*, 40 Wn. 2d 538, 245 P. 2d 205 (1952).

In contemplating the agreement embodied in the Option 1 settlement the court found the distributees to be donee beneficiaries of a third party contract. The court also infers that an exemption from the Statute of Wills is created by the section of the insurance code permitting companies to enter this kind of agreement. RCW 48.23.300 [REM. SUPP. 1947 § 45.23.30]. Further support is found in the decision of *Mutual Ben. Life Insurance Co. v. Ellis*, 125 F. 2d 127 (1942) wherein a seemingly testamentary disposition was held outside the Statute of Wills purely on a third-party-contract theory. A concurring justice in the *Toulouse* case asserted that the decision should rest solely on the conclusion that the contract is a valid third party donee-beneficiary contract.

So much would be a clear-cut addition to the law of third party contracts, but the case is confused by the efforts of the majority to take the transaction out of the testamentary category on the additional theory of the passage of a present right. It finds the passage of a present right in the vesting in the beneficiary of the mere right to have the contract performed by the promisor (albeit that the value to the beneficiaries might be nullified by subsequent lawful acts of the promisee). Analogy is drawn by the court to insurance policy cases, citing *Massachusetts Mut. Life Insurance Co. v. Bank of California*, 187 Wash. 565, 60 P. 2d 675 (1936), which holds that vesting is an incident of the renunciation of the right to change the beneficiary.

In the principal case the insured could have extinguished the distributee's expectancy by withdrawing the whole fund; the only right he has relinquished to them is that of cutting them off by changing the named beneficiary while keeping the contract extant. If such a nebulous right, presently passed, is adequate to make a disposition non-testamentary in Washington, does this indicate a modification of the criteria for presently passed rights necessary for testamentary dispositions? In *In re Murphy's Estate*, 193 Wash. 400, 75 P. 2d 916 (1938) the court, in finding a disposition to be void because testamentary, ignored an agreement not to sell or mortgage certain

property leased to the beneficiary. By this agreement rights passed which were much more substantial than that relied on in the instant case.

A fact situation similar to the principal case was encountered in *Hall v. Mutual Life Ins. Co. of N.Y.*, 201 Misc. 203, 109 N.Y.S. 2d 646 (1952). The court recognized a contract for the benefit of the distributee but held it invalid because testamentary without required form, saying "The plaintiff's right, at best, arose only on her (the donee's) death; he had no present interest; nothing was transferred to him."

The reasoning in the *Hall* case is sound, but the decision, if undisturbed, would have outlawed an institutional arrangement widely established and socially desirable. Statutory enactment has since validated this arrangement in New York State in Laws of New York 1952 c.820 § 24-a whereby "If a person entitled to receive payment of (a) . . . (b) money payable by an insurance company . . . designates . . . a payee or beneficiary to receive payment thereof upon death of the person making designation . . . , the right of the person so designated . . . [is] not defeated by any statute or rule of law governing transfer of property by will or gift or intestacy."

The *Toulouse* case is antithetical to the *Hall* case. It uses reasoning dyadic and tenuous but reaches a result at once desirable and in accord with contemporary custom. Legislative clarification is therefore improbable. It will remain for the Washington Supreme Court to say on another occasion which of the theories was the operative one, and which one was dictum. Are all, or perhaps some, types of third party beneficiary contracts to be considered immune from attack under the Statute of Wills or, on the other hand, is the transfer of a mere defeasible right adequate to make a donation non-testamentary?

Perhaps this decision is best considered as a recognition of a widely used insurance practice and should not be strained beyond its own particular fact structure.

IVOR LUSRY

Corporations—Merger—Lawful Business Purpose. *P*, a minority stockholder in *Z* Corp., voted against a proposed agreement between *Z* and *X* Corp., whereby the shareholders of *Z*, in consideration of payment of \$100, were to grant an option for over eighteen months, to purchase all shares of *Z*. *D*, a principal stockholder and director in *Z*, organized *Y* Corp., in which *D* was principal stockholder and director. *Y* had an authorized capitalization including both common and redeemable preferred stock. The directors of *Z* and *Y* approved a merger agreement between the two corporations, wherein shareholders of *Z* received one share of redeemable preferred stock in *Y* for each of their shares of *Z* common. *D* gave all principal minority stockholders except *P* an option to purchase the same number of shares of common stock in *Y* as they had held in *Z*. The merger was approved by holders of two-thirds of the voting shares of *Z*, *P* only dissenting. *Y* and *X* then entered an option agreement similar to the original proposal. *P* seeks to set aside the merger agreement. Judgment for *D* affirmed, *Matteson v. Ziebarth*, 40 Wn. 2d 286, 242 P. 2d 1025 (1952).

The court held: (a) the use of the merger device for recapitalization was not illegal; (b) the appraisal and sale statute prescribes the exclusive remedy available to a dissenting stockholder in merger or change in corporate structure, absent either unfairness or breach of fiduciary duty unknown to the dissenter at the time of the merger or change, or actual fraud.

Discussing (a), the court sought to determine whether *Y* was a corporation of the kind which may emerge. The power to merge is granted in RCW 23.40.010 [RRS § 3803-42] if the corporations are formed for purposes recognized under RCW, Title 23 [RRS, Title 25], which provides that a corporation must be formed for "lawful