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Taxation

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result in a reversal: "We do not think the evidence preponderates against the findings, and they will not be disturbed."[2]

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Conditional Sales Contracts—Election of Remedies by Vendor. In *Washington Cooperative Chick Ass'n v. Jacobs,* 42 Wn.2d 460, 256 P.2d 294 (1953), a conditional vendor brought an action against third parties who, with knowledge of the conditional sales contract, purchased the conditionally sold property from the conditional vendor. The plaintiff had commenced a previous action against the conditional vendee to recover the purchase price, but the action had been dismissed, without prejudice, before final judgment. *Held,* the mere commencement of the action constituted an irrevocable election by the conditional vendor.

Conditional Sales Contracts—Continued Use by Vendee—Waiver of Rescission. *Holland Furnace Co. v. Korth,* 143 Wash. Dec. 570, 262 P.2d 772 (1953), was an action to recover the amount due on a contract for converting the defendant's heating plant from gas to oil. The defendant had given notice of rescission on the grounds of fraud, but continued to use the heating equipment. The court held that the continued use did not constitute a waiver or abandonment of the rescission. An attempted rescission will not be defeated if the property was used merely in compliance with the purchaser's duty as bailee of the seller, and not for the purchaser's personal benefit. The expense of dismantling, removal, and storage of the heating system "would have more than offset deterioration resulting from continued use of the installation until such time as the seller performed his duty of removing it."

Defective Performance—Discharge of Seller by Voluntary Acceptance. *Angeles Gravel & Supply Co. v. Clallam County Hospital,* 42 Wn.2d 827, 259 P.2d 366 (1953) was an action for the balance due for concrete sold by the plaintiffs. The defendants claimed that there were shortages in the deliveries, though it appeared that no very positive complaints were made while the pouring of the concrete was in progress nor until some time thereafter. *Held,* the defendants were estopped to raise the issue of shortage. The court was satisfied that the facts justified an application of the theory of a discharge by voluntary acceptance of a defective performance. The application of the rule was "motivated by considerations of fair dealing between the parties and the necessity of the party claiming a shortage to establish it in time so that defective performance can be remedied."

TAXATION

Inheritance Taxes-Insurance Proceeds. The insured was the owner of life insurance policies the proceeds of which were payable to designated beneficaries, the wife and son of the insured. Prior to his death, the insured assigned the policies with the consent of the beneficiaries

[2] Madden v. Herzog, *supra* note 1. The other cases listed contain similar statements. And see Judge Weaver's strong comment on this point in Peterson v. Schoonover, 42 Wn.2d 621, 257 P.2d 209 (1953). Similar is Eder v. Nelson, 143 Wash. Dec. 495, 262 P.2d 180 (1953). These latter two are the only cases handed down in 1953 concerning Negotiable Instruments. Their value as precedent is considered to warrant no more than footnote mention here.

to a creditor as security for a debt. After his death the proceeds were used to discharge the obligation of the insured. In In re *Gufler's Estate*,[1] it was held that the proceeds were within the exemption allowed by the statute and thus not taxable.[2] The court declared that "'Beneficiary' as that word is used in the insurance statute, means the person or corporation to whom, according to the terms of the policy, the proceeds are payable on the death of the insured."[3] The use to which the proceeds are put does not determine their taxability.[4]

The legislative intent would seem to indicate that the general policy of the state is to include life insurance proceeds as part of the estate of the deceased insured. Prior to 1935, the statute provided that life insurance proceeds paid to beneficiaries except the estate of the deceased insured were exempt.[5] Immediately after the decision in the *Killien* case,[6] the statute was amended to provide that "Insurance payable upon the death of any person shall be deemed a part of the estate for the purpose of computing the inheritance tax . . . *Provided*, however, that there is exempt from the total amount of insurance, regardless of the number of policies, the sum of forty thousand dollars

[1] 143 Wash. Dec. 405, 261 P.2d 434 (1953).

[2] RCW 83.04.010: "All property . . . which shall pass by . . . contract . . . made or intended to take effect in possession or in enjoyment after death of the grantor, or donor, to any person in trust or otherwise, . . . shall . . . be subject to a tax measured by the full value of the entire property, after the payment of all debts owing by the decedent at the time of his death. . . ."

RCW 83.16.080: "Insurance payable upon the death of any person shall be deemed a part of the estate for the purpose of computing the inheritance tax . . . *Provided, however,* That there is exempt from the total amount of insurance receivable by all beneficiaries other than the executor, administrator or representative of the estate, regardless of the number of policies, the sum of forty thousand dollars and no more. . . ."

[3] *In re* Killien's Estate, 178 Wash. 335, 35 P.2d 11 (1934). In this case the policies of life insurance were made payable to a trustee who was also designated as the executor of the estate of the insured under his will. The trust agreement provided that the trustee was to collect, invest, and pay the proceeds to the insured's children. The supervisor contended that the proceeds were not within the exemption allowed by the law then in effect. L. 1929, c. 135, § 1 provided that ". . . the proceeds of all life insurance policies, hereafter or heretofore paid to beneficiaries, except where the estate of the deceased insured, is the beneficiary, shall be exempt from inheritance tax. . . ." The court after defining the term 'beneficiary' as referred to in the text, went on to say "the term 'beneficiary' has no other meaning, *so far as the question here involved,* than the word 'payee' applied to other kinds of contracts." (emphasis supplied).

[4] The present federal statute, I.R.C. § 811 (g) contains no exemption. Interpretations of a former federal statute, Internal Revenue Act of 1926, § 302 (g), as amended, similar to the present Washington statute, appear to be contrary to the holding in the Gufler case. Insurance proceeds, which are required to be used and are used to satisfy debts of the decedent or his estate although payable to a beneficiary other than the estate, are to be treated for the purposes of the Federal estate tax as receivable by the executor, and are includible in the value of the decedent's gross estate. U.S. Treas. Reg. 80.26 (1941); Estate of Silas B. Mason v. C.I.R., 40 B.T.A. 128 (1939); Morton v. C.I.R., 23 B.T.A. 236 (1931).

[5] L. 1929, c. 135, § 1.

[6] Note 3, *supra.*

and no more. . . ."[7] In 1939, the legislature limited the exemption to apply *only when the proceeds were received by beneficiaries other than the executor, administrator or representative of the estate.*[8]

It is a general rule of statutory construction that exemptions are to be construed strictly.[9] The policy of the state has been to allow an exemption to encourage the development of insurance for the protection of dependents.[10] Does the transaction in the instant case fall within the purview of that policy? The court stated that the evident intent of the legislature was to exempt life insurance proceeds, when received by the beneficiaries other than the executor, administrator or representative of the estate, regardless of the ultimate use or destination of the funds. But was it the legislative intent to exempt life insurance proceeds which were used to pay off the debts of the decedent *even though such proceeds were not "received" by the designated beneficiaries?* What was the nature of the beneficiaries' interest in the policies upon the death of the insured as a result of the assignment? These questions would seem to embody the controlling factors, but they were given no consideration by the court.

Literally construed the words of the statute may support the conclusion reached in the *Gufler* case. Assume however, that the decedent takes out a life insurance policy, and subsequently names the creditor as the beneficiary at the time he borrows the money. The insured dies and the insurance proceeds are used to discharge the debt. Does the *Gufler* case mean that the proceeds are excluded, and that the debt is deductible? Logically that is what the conclusion should be. As a practical matter, however, there is no difference between naming the creditor directly as a beneficiary, and naming another but by an assignment which is joined in by the insured and the named beneficiaries to pledge the policy to the creditor.[11] In either case a debt is being dis-

[7] L. 1935, c. 180, § 115.
[8] L. 1939, c. 202, § 5.
[9] Miethke v. Pierce County, 173 Wash. 381, 23 P.2d 405 (1933); *In Re* Ferrel's Estate, 112 Wash. 231, 192 Pac. 10 (1920).
[10] *In re* Killien's Estate, note 3, *supra.*
[11] Estate of Mathews v. C.I.R., 3 T.C. 525 (1944), involved an assignment similar in terms to the one in the Gufler case (see copy of assignment attached to brief of Supervisor). The beneficiary contended that a right of subrogation existed. The Tax Court declared that "on the evidence in this case we think that the assignment to the creditor bank amounted to a conveyance of a property right in the policies to the extent of the indebtedness to the bank at the time of his death. To that extent the transfer was as effective as if the decedent in the exercise of his reserved power to change the beneficiary at any time had named the creditor bank beneficiary of the policies. . . . But even if it should be conceded that the beneficiary had a valid claim against decedent's estate by right of subrogation or otherwise for the amount of the proceeds of the policies it would not follow that the portion of the proceeds was not

charged on behalf of the estate. Upon the death of the insured, the executor takes the place of the decedent. The executor has the duty of taking charge of the assets and discharging all the debts before he distributes the residue. When the insured with the consent of the beneficiaries assigned the proceeds, he took complete control of the property interest in the policy and directed the discharge of his obligations. The fact that no change was made in the beneficiaries designated on the policies would not detract from this. For all practical purposes it was exactly as though he had named his executor as beneficiary and assigned the policy to the creditor as security. It seems that unless one adheres to the literal wording of the statute and disregards the substance and effect of the actions of the insured and the designated beneficiaries, the assignment made the proceeds payable to "the executor, administrator, or representative of the estate," within the meaning and intent of the Washington inheritance tax statute.

Inheritance Taxes—Property Previously Exempted. In In re *Gagan's Estate*,[12] the first decedent owned insurance policies the proceeds of which were payable to his wife, the present decedent. The proceeds were not included in the estate of the first decedent in computing the inheritance tax because they were within the statutory exemption.[13] The present decedent bequeathed the proceeds to her two children who now claim that such proceeds are exempt from taxation as property previously taxed.[14]

'receivable by or for the benefit of the estate' within the meaning of the commissioner's regulations." See also Estate of Hofferbert v. C.I.R., 46 B.T.A. 1101 (1942).

In Estate of Max Reinhold v. C.I.R., 1944 P-H BTA-TC Mem. Dec. 44,093, it appeared that the beneficiary had recovered by right of subrogation the amount of the proceeds paid from the policies assigned. The court in referring to the proceeds applied on the debt declared that "they are as much a part of the gross estate as the debt is a deduction from the gross estate. One counterbalances the other. Fannie Reinhold did not receive from the insurance company the $6,237.08, which was applied to satisfy the indebtedness of Max Reinhold to the Grace National Bank. What her estate recovered from the estate of her husband was not the proceeds from insurance policies. Therefore they are not excludible from the gross estate of Max Reinhold."

[12] 42 Wn. 2d 520, 256 P 2d 836 (1953).

[13] RCW 83.16.080: "Insurance payable upon the death of any person shall be deemed a part of the estate for the purpose of computing the inheritance tax and shall be taxable to the person entitled therto. . . Provided, That there is exempt from the total amount of insurance receivable by all the beneficiaries other than the estate, regardless of the number of policies, the sum of forty thousand dollars and no more. ."

[14] L. 1939, c. 202, § 2: "There shall be exempt an amount equal to the value of any property forming a part of the estate of any husband, wife, lineal descendant, . who died within five years prior to the death of the decedent where such property now passes from the decedent to any member of the same class: *Provided,* That this exemption only applies to transfers upon which an inheritance tax was paid in the estate of the first decedent. . . " Amended, L. 1953, c. 137, § 1. (with the exception of a change in the members of the class, this particular provision remains substantially the same). RCW 83.16.070.

The probate court, on the authority of In re *Johanson's Estate*,[15] concluded that the proceeds passing to the present decedent had been taxed in the estate of the husband and were exempt from being taxed as passing to the children. The supreme court set aside a portion of the order approving the final report and decree of distribution with the instruction to recompute the tax, and declared that the reasoning for the holding in the *Johanson* case, *supra*, did not apply to exempt insurance proceeds.

In the *Johanson* case, the state claimed that the amount listed as an exemption in the estate of the second decedent should have been reduced by the amount of the exemption allowed to Class A beneficiaries in the estate of the first decedent. The court, however, held that the entire amount of the estate, including the exemptions was considered in determining the amount of the tax for each bracket in Class A and thus no portion of the estate had escaped taxation.

The effect of the decision in the *Johanson* case would seem to have been abrogated by the recent statutory enactment[16] which provides that "the proportion of deduction chargeable against and any exemption allowed against the property previously taxed in the estate of the prior decedent" must be excluded from that portion of the property previously taxed. In the *Gagan* case the court declared that the exemption allowed to the estate of the first decedent had no part in determining the amount of inheritance tax. The court thus reached a result intended by the subsequent 1953 amendment.[17]

GUST A. LEDAKIS

TORTS

Wanton Misconduct—Contributory Negligence not a Defense. Contributory negligence is not a defense to wanton misconduct. The first clear statement of this rule in Washington was pronounced recently in *Adkinson v. Seattle*.[1] The defendant, in the course of sewer and water main construction, left, on a highway, a pile of dirt three to six feet high which entirely covered one side of the heavily traveled arterial, with no barriers and no more than three flare pots, on a dark and rainy night. The plantiff's decedent was speeding when he struck it.

Wanton misconduct is a middle ground between wilful misconduct and negligence. A wanton act is one performed with a reckless in-

[15] 38 Wn. 2d 492, 230 P. 2d 614 (1951).
[16] L. 1953, c. 137, § 1. See Harsch, *Taxation*, 28 WASH. L. REV. 197 (1953).
[17] *Supra*, note 16.
[1] 42 Wn.2d 676, 258 P.2d 461 (1953).