EISEMAN v. JUDAH et al.

Case No. 4,321.

{1 Flip. 627;[1] 4 Cent. Law J. 345.}

Circuit Court, W. D. Tennessee. Feb. 23, 1877.

LIFE INSURANCE—CHANGE OF BENEFICIARIES—ALLOWANCE OF TIME FOR SUCH PURPOSE—WILL—POWER OF APPOINTMENT.

1. If a policy be payable to the wife of the assured at his death, she being then living, but, if not, to her children, and a proviso be inserted "that in case of the decease of the wife during the lifetime of the assured, the said assured may, at his option, substitute any other beneficiary under this policy"—such substitution must be made upon the decease of the wife, or within a reasonable time thereafter. After the date fixed for the next ensuing payment of premium it cannot be made.

2. The power thus conferred on the assured of substitution is not executed by a bequest in his last will, made a year after the death of the wife, in which the attempt is made to give and bequeath the policy in question, with three others, none of which were a part of his personal estate.

J. O. Pierce and H. F. Dix, for A. Judah. et al.

L. & E. Lehman, for guardians.

TRIGG, District Judge. This is a controversy over a portion of the proceeds of a policy of insurance on the fife of one Emanuel Ackerman, issued by the Globe Mutual Life Insurance Company of New York, October 19, 1870, for the sum of $5,000, premiums on which were payable semi-annually on the 12th days of October and April in each year during the life of the insured. The policy was payable at the death of Ackerman to his wife Ellen, if then living, or, if not living, then to her children; with the proviso, "that in case of the decease of the wife during the lifetime of the assured, the said assured may, at his option, substitute any other beneficiary under this policy." Ellen Ackerman died in the year 1872, leaving five children, to-wit: Delia and Carrie, the issue of a previous marriage, and Emma, Rosa and Jacob, the issue of her marriage with the insured. The three-latter are minors, and their regular guardians, B. Eiseman and G. H. Judah, are the complainants in the original bill. Delia, now the wife of Abram Judah, and Carrie, now the wife of Leo Judah, are, with their husbands, complainants in the cross-bill. Emanuel Ackerman died October 15, 1873. His last will, executed October 11, 1873, contains this clause: "My life being assured as follows: Globe Mutual Life, of New York, $5,000; Newark, of New Jersey, $5,000; New York Life, $5,000; Northwestern, paid up the above amount of $15,000 and over, I wish divided among my three children, as follows: $5,000—Emma Ackerman,

five thousand; $5,000—Rosa Ackerman, five thousand; $5,000—Jacob Ackerman, five thousand; the remainder. I will and bequeath to my brother, Jacob Ackerman, in Germany, the sum of $300—three hundred dollars." No other act of Ackerman, except this provision of the will, is set up as an attempt to execute the reserved power of substitution of a new beneficiary under the Globe policy. The policy in the New York Life Insurance Company was payable "to Ellen, wife of Emanuel Ackerman, and children, share and share alike, or their legal representatives." The policy in the Mutual Benefit Life Insurance Company of Newark was payable to the said Ellen, if living; but, if dead, then to "their children." The policy in the Northwestern Mutual was payable to "Ellen Ackerman, his wife, and his children by her, share and share alike." The defendants, Delia and Carrie Judah, have received their two-fifths share of the New York Life policy, without question made by the guardians of the minors. The first semi-annual premium, which fell due after the death of Ellen Ackerman, to-wit, on April 12, 1873, was paid by Emanuel Ackerman. The next premium, which fell due October 12,1873, was paid by Abram Judah, on behalf of himself and his wife, Ackerman being then ill, and upon his dying bed. It is contended by the guardians of the minor children, that the clause of the will above referred to operated as a sufficient appointment of a new beneficiary, and a valid execution of the power of appointment; and this is the question now to be considered.

1. Was the supposed execution of the power of appointment, by will, interposed in time to affect the rights of the defendants, if otherwise sufficient? Although the cause has, in the argument of counsel, been treated as a case of an ordinary power of appointment, I am unable to determine this question with reference to any of the authorities cited, in behalf of the construction contended for by complainants. In this case, Ackerman had not the slightest personal interest of a pecuniary character in the policy, although it insured his own life. The rights of the children of Ellen Ackerman, as beneficiaries under the policy, vested immediately upon her death. It cannot be considered that there was even a moment of time, after her decease, during which the beneficial interest in the insurance was in want of an object on which to rest. We cannot suppose it floating about in nubibus, waiting for a person or an object upon which it might rest, to be supplied by the act of Emanuel Ackerman, or otherwise. All the authorities upon life insurance agree that the rights of the children of the wife, in such cases, become, upon the death of their mother, vested rights in the fullest sense of the term. This is not, then, a case in which, like most cases of appointment under a power, no reason can be assigned for an immediate execution of the power, so that the whole life-time of the do nee of the power is allowed for its execution. Here there are reasons for a prompt execution; for, if the power be executed, the rights under the policy already existing are to betaken away. Within what time, then, will the law allow the act of Ackerman to take away the rights thus already vested, by the death of his wife, in her elder children? This period cannot be indefinite. Justice and

equity require that the power thus conferred shall be exercised at some precise time, in order that the fact of its exercise may be duly made known to all persons interested; and no further latitude can be allowed to the donee of the power, than to give him a reasonable time within which he shall act under it, if at all. This reasonable time may well be the period ending with the next ensuing payment of premium. At that date the policy mil lapse by its own terms, unless a new premium is paid. Such payment will continue the policy in force, and will thus be, in some sense, the making of a new contract. The beneficiaries may well wish to know whether the policy is to continue in force for their benefit, or whether their interest is to cease. If the divestiture of their rights by the appointment of a new beneficiary could be accomplished a year after those rights accrued, it might equally well be postponed for twenty years, during which time the beneficiaries might pay forty semi-annual premiums, instead of one, as in this case. I am constrained to hold the provision for such an appointment, "in case of the decease of the wife," to mean "upon the decease," indicating that event as the proper time; and to treat the time of the next succeeding payment of premium as the latest hour which can equitably be allowed for a divestiture of rights theretofore existing. The time of the execution of Ackerman's will was too late for the appointment, conceding that the provisions of the will were otherwise sufficient.

2. But I do not construe the will as an execution of the power. The testator treated as his own property four policies of life insurance, all which belonged to the children of his wife. Two of them were in law the property of his own three children, and in the two others the defendants were also beneficiaries. None of these were subject to his bequest, yet he attempted to bequeath them all. No reference is made to the power of appointment reserved in the Globe policy. It is true that policy is referred to by name; and, under some of the authorities, a plain and unambiguous reference to the subject of the power has been held sufficient to treat the devise or bequest of the property as an execution of a power of appointment. But in all cases to which the attention of the court has been called, the intention of the testator has been the objective point of inquiry and construction. It is impossible to impute to this testator an intention to execute this power. His intention, on the contrary, clearly was to bequeath this particular policy,

with others, as a part of his personal estate. This controlling intent is inconsistent with any idea of an execution of the power. Without giving any other construction to any part of the will, the construction contended for by complainants must be refused.

These considerations render unnecessary any reference to the other legal and equitable questions raised by the defendants. It follows that the defendants, Abram, Delia, Leo and Carrie Judah are entitled to two-fifths of the proceeds of the Globe policy, which will be paid to them by the guardians of the minors, who collected the same under decrees made in this cause. The last semiannual premium paid on the policy by the defendants, and the costs of the cause, will in like manner be equitably apportioned between the parties.

NOTE. The editor of the Central Law Journal, June 30, 1876, is to be credited with the subjoined note, which throws additional light on this intricate subject:

1. This case presents some elements of an estoppel, and possibly the judgment of the court might have been well based on the doctrine of equitable estoppel. Irrespective of the question of the time to be allowed the insured for the execution of the power of substitution, he seems, by the payment of a semi-annual premium after the death of his wife, without attempting to execute the power, to have evinced his election not to execute it. If it was in reliance upon this act of the insured, and in acceptance of the benefits thus continued to them, that the beneficiaries made the payment of the last premium, they might clearly have relied on the doctrine of estoppel, as laid down by Lord Denman in Pickard v. Sears, 6 Adol. & E. 469. and applied in this country in, among other eases, notably, Dezell v. Odell, 3 Hill, 215, and Decherd v. Blanton, 3 Sneed, 373. The principle laid down in Brant v. Virginia Coal & Iron Co. [93 U. S. 326], and the accompanying note, demands constructive fraud; "either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up," as a necessary feature of equitable estoppel. Such constructive fraud will be found in the attempt here made to claim for the children of the testator an interest in the policy greater than that which the defendants were led to believe existed when they paid the last premium.

2. The doctrine of vested rights in the privileges secured by the policy is well settled in favor of the children of an insured wife. Mr. May, at section 392, treats of their rights as vesting immediately on the delivery of the policy, and says: "Where the policy is issued to the wife, payable to her, or, in case of her death before her husband, to her children, the husband cannot, after her death, surrender the policy and take out a new one for his own benefit. All the cases proceed on the ground that when the policy is issued the rights are vested, and cannot be divested without the consent of those to whom they are secured." The rights of children so vested have been protected by the courts in Gould v. Emerson, 99 Mass. 154; Fraternal Ins. Co. v. Applegate, 7 Ohio St. 292; Chapin v. Fellowes, 36 Conn. 132; and Continental Life Ins. Co. v. Palmer (Conn.) 5 Ins. Law J. 307.

3. No case has heretofore been reported where the policy, as in this case, contained an express provision for a divestiture of vested rights by a change of beneficiaries. In respect of this question, the principal case is one of first impression. The insured husband was allowed, after the death of his wife, to change the beneficiary, in Gambs v. Covenant Mut. Life Ins. Co., 50 Mo. 44; but this was where no rights had, by the death of the wife, vested in children or others. So in Roberts v. Roberts, 64 N. C. 695, the court sustained a by law of the insurer, allowing the insured to appoint an executor to disburse the proceeds to the beneficiaries, a proceeding in aid rather than in avoidance of vested rights. And in England, where under the friendly societies' act it was the custom for the insured member to nominate a beneficiary, and he had power to revoke his nomination and make a new one, this was allowed because of the existing and continuing ownership of the member over his own policy during his life. See Buny. Assur. 151–153. The court, in the principal case, in suggesting that the insured might make such change at the time of paying an annual premium, has doubtless gone as far toward allowing an arbitrary divestiture of rights, once vested under the contract, as any court would feel authorized to go.

4. The court has followed the main current of the authorities in looking to the whole of the will, in order to discover the testator's intention, if any existed, of executing the power. The general rule is well known, that in construction of a will the intention of the testator is to govern, as gathered from all parts of the will. 1 Redf. Wills, 431–434; Allison v. Chaney. 4 Cent. Law J. 239. The same rule is applied when the question is, whether a power has been executed by the will. In Sugd. Powers, 369 et seq., many eases are collected, showing that Lord Alvanley, Sir William Grant, and other chancellors, have laid it down repeatedly and uniformly that "it was always a question of intention whether the party meant to exercise the power or not." Page 372. In 4 Kent, Comm. 335, the rule is announced that, if construction can be given to the will without taking it as an execution of the power, it will not be so taken in doubtful cases; and this is the rule approved by Mr. Perry in his work on Trusts (section 511c, 2d Ed.). The precise question is, can any other intention than that of executing the will-power be imputed to the testator? Bradish v. Gibbs, 3 Johns. Ch. 551; Blagge v. Miles [Case No. 1,479]. So it will be found that in all the leading cases on the subject, the courts have been astute to first discover, and then be guided by, the intention of the testator as to an execution of the power. For example, in Croft v. Slee, 4 Ves. 60, the master of the rolls found, on examination, no intention apparent from the will to execute the power of appointment, and so the power was held not to be executed. A similar conclusion was reached in Pomfret v. Perring, 5 De Gex, M. & G. 775. A late and leading American case is White v. Hicks. 33 N. Y. 383, where the rule is clearly stated, and is illustrated by reference to many cases. There, the court construed the whole will together in the light of extraneous circumstances, which were looked to as

evidence, not of what was the testator's intention in the will, but of what influences may have swayed the testator. Applying the rule above cited, the result is reached in this case that an intention existed to execute the power. But it is apparent in all the cases that the court always follows this rule as a polar star, let it lead in whichever direction it may.

5. A singular and important case, in which a slightly different aspect of the question of execution of a power is presented, is Cooper v. Martin, 3 App. Cas. 47. It is worthy of attention in connection with the principal case, inasmuch as, like it, it treats of the time within which a power should be executed, and uses a similar argument ab inconvenienti. A power of appointment was to be exercised within a certain period of time. The donee of the power within that period executed her deed-poll, making an appointment under the power, but reserving a power of revocation, and afterwards, and by her will, executed still within the prescribed period, she made another appointment

in distinct terms. But she died after the time had expired, and it was held that the will, not taking effect till her death, had no power to effect a revocation of the appointment by deed, or to make a new appointment Lord Cairns, L. J., said: "The power given to the widow was to be exercised by her before the youngest son attained twenty-five. The reason for this appears obvious on the face of the will. The residuary personal estate was to be distributed at that time; and, although the life estate of the widow in Pain's Hill might, as to it, postpone the sale and distribution to a later period, it was clearly in the highest degree desirable that at the period when the residuary estate should become divisible the children of the testator should know definitely what were their vested and transmissible rights in all his property. The time within which an appointment was to be made by the widow was, therefore, in my opinion, not a matter of form, but of the substance and essence of the power." And Sir John Rolt; L. J., said: "The will would not operate as any such execution of the power till the widow's death. It is nothing that the will bears date within the time. It was intended to be ambulatory, and the law must assume that the donee of the power did not intend that it should operate as an execution of the power till her death." This accords with the doctrine of Redf. Wills, 379, that a will takes effect only at the death of the testator, and speaks from thence. But a contrary opinion was advanced by Chancellor Cooper, of Tennessee, in Williams v. Corson, 2 Cent. Law J. 520, where it was held that the will of an insured, disposing at his own life policy, although "not practically operative until after death," yet had the effect, under the statutes of Tennessee, to so dispose of the policy prior to the death as to cut off the rights of his wife, which would otherwise have been called into existence by the force of the statute at the time of his death. This was upon the theory that, "it is the execution in life that gives effect to a will or deed, and the time when the donee goes into possession or reaps the actual benefit, is a mere incident."

[1] {Reported by William Searcy Flippin, Esq., and here reprinted by permission.}