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Insurance - Premiums, Dues and Assessments - Recovery of Premiums Paid Due to Lack of Consideration

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the validity of a parol gift,[7] must be absolute, irrevocable, and intended to take immediate effect.[8] When a gift of an insurance policy is made, the insured loses the right to change the beneficiary,[9] notwithstanding a reservation of that power in the policy.[10] The donee acquires a vested interest in the proceeds of the policy[11] which cannot be divested, changed, or impaired without his consent.[12]

The holding in the instant case is contrary to the express provisions of section 31 (9) of the New York Personal Property Law. The statute was designed to prevent the perpetration of fraud upon a deceased person's estate by terminating litigation based on unsupported oral agreements.[13] It provides that every contract to assign, *or assignment,* or promise to name a beneficiary of an insurance policy, is void unless in writing.[14] The court's reason for permitting proof of the parol assignment, in face of this statutory prohibition is not clear. Much emphasis is placed upon the fact of actual delivery of the insurance policy. This plus the plaintiff's payment of the premiums, the confidential relation between the husband and wife, and the surreptitious taking of the policy by the husband in his attempt to change beneficiaries, speak strongly in favor of the final result.

The assignment to the plaintiff resulted in the complete divestment of the insured's title to the policy, and made his attempted change of beneficiary ineffectual.[15] The power to change a beneficiary exists under the policy as a power of appointment, and when the insured transfers his interest in the policy this power is extinguished.[16]

While the court's decision may be equitable, its apparent effect is to render the New York statute ineffective.

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INSURANCE — PREMIUMS, DUES AND ASSESSMENTS — RECOVERY OF PREMIUMS PAID DUE TO LACK OF CONSIDERATION — Plaintiff had purchased a public liability insurance from defendant to insure plaintiff against loss from liabilities which might arise from the negligent operation of a county hospital. Under the terms of a statute authorizing recovery of premiums where an insurer has incurred no risk of loss, plaintiff sought a return of all premiums paid, con-

7. Ratsch v. Rengel, 180 Md. 196, 23 A.2d. 680 (1942); Guardian Life Ins. Co. v. Mareczko, 114 N.J.Eq. 369, 168 Atl. 642 (1933).
8. Guardian Life Ins. Co. v. Mareczko, 114 N.J.Eq. 369, 168 Atl. 642 (1933).
9. John Hancock Mut. Life Ins. Co. v. Sandrisser, 95 N.Y.S.2d 399 (1950).
10. Stepson v. Brand, 213 Miss. 826, 58 So.2d. 18 (1952).
11. Cooke v. Cooke, 65 Cal. App.2d 260, 150 P.2d 514 (1944).
12. Continental Life Ins. Co. v. Sailor, 47 F.2d 911 (S.D. Cal. 1930); Miller v. Gulf Line Ins. Co., 152 Fla. 221, 12 So.2d. 127 (1942); Shepard v. New York Life Ins. Co., 87 Conn. 500, 89 Atl. 186 (1913).
13. Katzman v. Aetna Life Ins. Co., 137 N.Y.S.2d 583, 128 N.E.2d 307, 309 (1955).
14. New York Personal Property Law §31 (1943): "Agreements required to be in writing. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; . . . is a contract to assign or an assignment, with or without consideration to the promisor, of a life or health or accident insurance policy, or a promise, with or without consideration to the promisor, to name a beneficiary of any such policy. This provision shall not apply to a policy of industrial life or health or accident insurance."
15. Stepson v. Brand, 213 Miss. 826, 58 So.2d. 18 (1952); John Hancock Mut. Life Ins. Co. v. Sandrisser, 95 N.Y.S.2d 399 (1950).
16. Mutual Ben. Life Ins. Co. v. Swett, 222 Fed. 200 (6th Cir. 1915); Ehlerman v. Bankers' Life Co., 199 Iowa 417, 200 N.W. 408 (1924) (Ineffectual attempt to change beneficiary held not to be an assignment).

tending that as there was no liability on the part of the county for the risks insured against, there was no consideration for the premiums paid. Defendant base its defense on the theory that the county hospital was a proprietary rather than a governmental function, and that as the policy protected employees of the hospital in their individual capacities, there was adequate consideration for the premiums paid. The court *held*, that recovery be allowed. The operation of the hospital was a governmental function and, in the absence of a statute specifically permitting the county to insure for the protection of its employees, there was no consideration for the premiums paid. *Jerauld County v. St. Paul – Mercury Indemnity Company*, 71 N.W.2d 571 (S.D. 1955).

Consideration is essential to the enforceability of an insurance conrtact.[1] To constitute a valid consideration on the part of the insurer for premiums paid by the insured there must be a risk of loss assumed by the company.[2] In the instant case no risk of loss had been borne by the insurer because the hospital as a governmental unit, was immune from tort liability.

The courts have quite generally refuted the contention that procurement of liability insurance by a county acts as a waiver of its sovereign immunity.[3] In *Boice v. Board of Education of Rock District*,[4] the court stated:

> "As the board is purely a statutory creature, it has no authority to change in any way the mold in which it was fashioned by the legislature. It cannot alter the fact that it is a governmental agency, neither can it 'step down from its pedestal of immunity,' for that immunity is incidental to a governmental agency . . ."[5]

It has frequently been argued that as the insurance protects the employees of a governmental unit as individuals this protection should constitute valid consideration for the premiums paid. But ordinarily before coverage for employees may be obtained it is necessary for the legislature to authorize procurement of such insurance.[6] In the instant case there was no such statute.[7] As a consequence, the county could not possibly insure its employees because any contract of insurance which it might attempt to make would be void.[8]

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1. Adkins v. Western and So. Indemnity Co., 117 W.Va. 541, 186 S.E. 302 (1935); Vance, Insurance §2 (3d Ed. 1951).

2. Tyrie v. Fletcher, Cowp. 666, 98 Eng. Rep. 1297 (1777); Physicians' Defense Co. v. Cooper, 199 Fed. 576, 579 (9th Cir. 1917) (dictum); Vance, Insurance §2 (3d Ed. 1951).

3. Levy v. Superior Court of California, 74 Cal. App. 171, 239 Pac. 1100 (1925); McKay v. Morgan Memorial Co-op. Industries and Stores, Inc., 272 Mass. 121, 172 N.E. 68 (1930); Siidekum v. Animal Rescue League, 353 Pa. 408, 45 A.2d 59 (1946); Kesman v. School District of Fallowfield Twp., 345 Pa. 457, 29 A.2d 17 (1942); McLeod v. St. Thomas Hospital, 170 Tenn. 423, 95 S.W.2d 917 (1936).

4. 111 W.Va. 95, 160 S.E. 566 (1931).

5. *Ibid.*

6. Burns v. Am. Cas. Co., 127 Cal. App.2d 198, 273 P.2d 605 (1954) (This was a taxpayer's suit against an insurance company to recover premiums paid by the county for liability insurance covering a county hospital. The court held the county was acting within its scope of authority, as provided by statute, in procuring insurance covering all risks for which the county and its employees *were* liable. The court further stated, however, that as the policy coverage included risks for which the county and its employees *were not* liable, such as malpractice, mistake, and negligence, a pro rata refund could be had based on *partial* failure of consideration.)

7. S. D. Code §§27.19, 450202 (Supp. 1949) (later amended by S. D. Laws, 1955, c. 199) (Such insurance is now authorized).

8. State *ex rel.* State Highway Comm'n. v. Kansas City Power and Light Co., 232 Mo. App. 308, 105 S.W.2d 1085, 1087 (1937) (dictum); Adkins v. Western and So. Indemnity Company, 117 W.Va. 541, 186 S.E. 302 (1936); Board of Educ. v. Commercial Cas. Ins. Co., 116 W.Va. 503, 182 S.E. 87 (1935) (dictum) (It was contended that protection afforded employees was sufficient consideration but the court stated that while such protection may have been undertaken by the insurer, it was of a secondary nature and

Still a further basis relied upon by insurance companies for the retention of premiums paid is that an insurance policy protecting a governmental unit from tort liability constitutes a third-party beneficiary contract between the county and the insurer for the benefit of any injured party. Hence, the protection afforded third parties furnishes the necessary consideration for the premiums paid. In countering this argument, one authority on insurance law stated:

> "While the risk covered by liability policies may be to some extent regulated by statute, most public liability contracts are considered to be contracts taken out by the insured for his own benefit, rather than that of third persons, though they may be indirectly benefitted thereby."[9]

Finally, it has been asserted that the immunity which relieves a governmental unit from liability does not obtain where injury results from the maintenance of a nuisance.[10] In considering this assertion, the court in the principal case concluded that the distinction between nuisance and negligence is one of extreme nicety, and to change from the rule that immunity covers both, to the more liberal view that a county is liable for injury resulting from nuisance is for legislative rather than judicial determination.[11]

It is interesting to note that although the question resolved in the instant case has apparently never been raised in North Dakota our legislature has recently seen fit to authorize procurement by political subdivisions of liability insurance.[12] If the statute is not retroactive in effect,[13] the highly germane question of whether a statute of limitations operates against an action by a sovereign in a suit for recovery of money paid arises. The general rule is that statutes of limitations do not run against the sovereign with respect to public rights unless specifically so provided by statute.[14] The North Dakota Code provides that limitations of actions apply to the state in the same manner as to actions by private parties.[15] Therefore, suits for the recovery of funds by a North Dakota governmental subdivision would be barred by the statute of limitations after six years.[16] If, on the other hand, the statute is retroactive, this issue is moot.

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would not justify the substantial premium paid for the policy; the primary purpose of the policy was to indemnify the board against any legal liability and it would be only for this that the substantial premiums could be justified).

9. 7 Appleman, Insurance Law and Practice §4491 (1941).

10. Herman v. Buffalo, 214 N.Y. 316, 108 N.E. 451 (1915); Thompson v. City of Eau Claire, 239 Wis. 76, 69 N.W.2d 239 (1955); Lloyd v. Chippiwa County, 265 Wis. 293, 61 N.W.2d 479 (1953).

11. Bojko v. City of Minneapolis, 154 Minn. 167, 191 N.W. 399 (1923); Shaw v. Salt Lake County, 119 Utah 50, 224 P.2d 1037 (1950); Bingham v. Board of Educ. of Ogden City, 118 Utah 582, 223 P.2d 432 (1950).

12. N. D. Laws 1955, c. 261: "Any political subdivision of the state may insure claims of loss damage, or injury against such political subdivision or, and department agency, or function, or officer, agent or employee, of such subdivision. This act shall not claim governmental immunity but such immunity shall not be available to the insurance carrier furnishing such insurance and all policies providing for such insurance shall contain a waiver of such defense.".

13. The statute has received no judicial construction. But there is a general presumption that a statute operates prospectively unless the contrary is expressly provided. Standard Accident Ins. Co. v. Miller, 170 F.2d 495 (7th Cir. 1948); Taggart v. Mills, 180 Md. 302, 23 A.2d 832 (1942).

14. 6 Williston, Contracts §2003 (1938).

15. N. D. Rev. Code §28-0123 (1943).

16. Lakeville Township v. Northwestern Trust Co., 74 N.D. 396, 22 N.W.2d 591 (1946); Rosedale School Dist. v. Towner County, 56 N.D. 41, 216 N.W. 212 (1927).