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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

ATTORNEY AND CLIENT—THE OFFICE OF ATTORNEY—WHETHER CONCEALMENT AT TIME OF SEEKING ADMISSION TO THE BAR OF A PRIOR CONVICTION FOR CRIME JUSTIFIES DISBARMENT OF THE ATTORNEY—The Supreme Court of New Jersey, in the recent case of In re Hyra,1 was faced with the problem of determining the proper punishment to be imposed on an at-

torney who, at the time of seeking admission to a bar examination and to the bar, had failed to reveal to a character and fitness committee the fact that he previously had been convicted on five charges of burglary and larceny, the sentences for which had been suspended. He also, apparently, had failed to disclose the existence of these past convictions to those who wrote character references for him. When the fact of the respondent's prior criminal record was brought to the attention of the court, disbarment proceedings were instituted and the local character and fitness committee held a hearing. At this time the respondent, interrogated as to his reason for answering negatively under oath to a direct question as to whether or not he had ever been concerned as a party in any legal proceeding, stated that, at the time he answered, he was then fearful that a truthful disclosure would have prevented him from taking the necessary examination. The matter then came before the court, which held, under a four-to-three decision, that certain mitigating circumstances justified a judgment that the respondent should be no more than suspended from practice for a period of two years but the majority did serve warning that future applicants who transgressed in a like manner could expect nothing short of disbarment.

Good moral character being regarded as a universal requirement for all who would aspire to become members of the legal profession, it is common to expect applicants to establish the presence thereof before being admitted as well as to sustain the same in order to retain membership in the bar. Not only is the requirement a universal one but it is regarded as being paramount in importance, whereby even learning and diligence become matters of secondary consideration. This has long been true in New Jersey, where a court rule specifies that "no person [shall] be admitted to such examination [to practice as an attorney at law] unless he shall be of good moral character," and is also the case in other jurisdictions. To the end that only persons of unimpeachable character are admitted, most jurisdictions have established committees charged with the duty to investigate the background of all applicants, or have provided

2 In addition to a period of military service prior to engaging in the study of law, respondent had, after admission to practice, been appointed as municipal court clerk in his community. In each of these instances, he had made disclosure of his prior record. The court did note that, so far as was known, the respondent's professional relations with clients had been "without blemish."


4 This rule, adopted in revised form in 1805, appears in 1 N. J. L., vi, Rule 3.

5 See, for example, Rule 58 of the Illinois Supreme Court, Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.58(1), where the general qualification of "a good moral character" is included with other more specific requirements.

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other machinery for the purpose, and the applicant is usually required, under oath, to answer questions propounded to him bearing on the point.

As it would also be accepted that a primary requisite for a good moral character would be a reverence for the truth, the strong weight of authority in those jurisdictions which have been faced with the instant problem has been to the effect that a concealment on the part of an applicant for admission to the bar of facts showing a prior conviction for crime would be a fraud on the admitting court, justifying the subsequent revocation of any license obtained by means thereof. So deep-seated is this view that it has been said that an applicant's concealment of the fact that he had merely been charged or indicted for crime, even though never convicted, would be sufficient ground for the revocation of the license. Since the majority opinion in the instant case stresses the point that there generally is no place in the law for an individual who will not tell the truth, even when his own interests are involved, the decision rendered appears to be lacking in support as well as in reason.

While a lapse from grace on the part of one regularly admitted may not require the imposition of the severest penalty known to the profession, the same thing could hardly be said to be true of one whose entrance into

7 A judicial certificate on the point from a court of record was, at one time, required in Illinois: Smith-Hurd Ill. Rev. Stat. 1931, Ch. 13, § 2.

8 The court concerned with the instant case suggested, parenthetically, that a direct question as to whether or not the applicant had ever been convicted of crime could well be asked hereafter. The Illinois questionnaire requires the applicant not only to state whether he has been a "party or otherwise involved in any action or legal proceeding, either civil or criminal or quasi-criminal" but also requires a positive answer to the question as to whether or not the applicant has ever been "charged with crime, or arrested." A positive answer to either question requires the applicant to give "names of cases, courts where heard, and dates of all court proceedings" with the results thereof. A pending proposal to require the filing of a set of fingerprints by each applicant, already operative in certain states, represents an extension of this idea.


10 In Spears v. State Bar of California, 211 Cal. 183, 294 P. 697 (1930), the court said a duty rests on the applicant to make a full disclosure to the investigating committee as to criminal charges preferred against him, regardless of their outcome, which duty is absolute and breach of which would not be excused by advice to the contrary.

11 The dissenting opinion in the instant case noted that, in the matter entitled On Application for Attorney's License, 21 N. J. L. 345 (1848), Chief Justice Green said: "If it appear by the record of conviction that an applicant had been convicted of larceny, the court would not admit him . . . They would immediately upon proof of such fact strike his name from the roll after his admission . . . The act charged involves fraud and moral turpitude. It is precisely such a charge, and rests upon such evidence as would, if committed in the course of practice, warrant the court in calling upon an attorney to show cause why his name should not be stricken from the roll."
the bar had been obtained by fraud for disbarment would then be the only adequate remedy by which to revoke the license thus improperly obtained. This distinction was made in the New York case of *In re Klein*, has been followed in later cases arising in that state, and was invoked in the California case of *In re Holland* where the respondent had actually received a pardon for his earlier criminal offenses but had failed to reveal the facts at the time of applying for admission to the state bar. The only known exception, other than the one provided by the instant case, appears to have been developed in the case entitled *Re Jung* where the court did not favor disbarment because it felt that the respondent had not been guilty of wilfully and knowingly concealing any material fact in his application.

It is strange, therefore, to find a court decreeing no more than a temporary suspension of the license to a person who had fraudulently obtained admission to the bar. By so doing, the court is, in effect, palliating the fraud so practiced for, after a short period of suspension, the licensee will be entitled to regain full status in the profession on a par with those who rightfully gained the privilege of serving the public as ministers of justice. The high moral code which the legal profession has espoused would have been better served had the court decided, unanimously, for disbarment.

R. A. Von Kaenel

**FALSE PRETENSES—PERSONS LIABLE—WHETHER A PARTNER CAN BE GUILTY OF THE CRIME OF OBTAINING MONEY BY FALSE PRETENSE WHEN THE MONEY OBTAINED IS THE PROPERTY OF THE PARTNERSHIP—** In the recent case of *State v. Quinn*, the Supreme Court of Iowa was faced with the problem of determining whether a partner, indicted for allegedly ob-

14 96 Cal. App. 655, 274 P. 559 (1929). See also *State Bar of California v. Hull*, 103 Cal. App. 302, 284 P. 492 (1930), where the same principle was applied to one seeking admission on the basis of a foreign license.
15 13 Cal. (2d) 199, 88 P. (2d) 679 (1939).
16 Not only is the judge expected to criticize and correct unprofessional attitudes on the part of members of the bar, pursuant to Canon 11 of the Canons of Judicial Ethics, but the lawyers themselves are admonished, by Canon 29 of the Canons of Professional Ethics of the American Bar Association, to "expose without fear or favor . . . corrupt or dishonest conduct" by lawyers and to "aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education."

1 — Iowa —, 64 N. W. (2d) 323 (1954). Oliver, J., and Smith, J., each wrote a concurring opinion. Thompson, J., wrote a dissenting opinion concurred in by Bliss, Ch. J., and Garfield, J.
taining money under false pretenses, could be held guilty of such a crime where the money involved was part of the partnership funds.\textsuperscript{2} The case arose on an indictment which charged that the defendant and his then partner were engaged in the used-car business, operated by the partnership; that the defendant had purchased a car, for resale by the partnership, with his own funds; but, with intent to defraud his partner, had falsely represented that he had paid more for the same than was the fact; that he thereby induced his partner to draw a check, in favor of the defendant, on partnership funds for the amount falsely represented as the purchase price, and, in this fashion, obtained a sum of money by false pretenses. The trial court directed a verdict of acquittal and the prosecution appealed. The state supreme court affirmed the trial court holding when a majority of the justices thereof agreed that a partner could not be guilty of the named offense if the money obtained already belonged to the partnership.

It being well-settled law that the crime of obtaining money by false pretenses requires the transfer of title as well as possession,\textsuperscript{3} the prosecution contended that a transfer of funds from the partnership to the defendant as an individual was sufficient to complete this requirement. Lacking direct local precedent on the point, the majority drew an analogy from the Iowa case of \textit{Gary v. Northwestern Masonic Aid Association},\textsuperscript{4} growing out of an alleged embezzlement of partnership funds by a partner, to reach the conclusion that this could not be so since, in law, partners "are treated, in a qualified sense, as joint tenants of the partnership property, having an interest therein \textit{per my et per tout}.\textsuperscript{5} It further refused to accept an argument that, there being a difference in the statutory language defining the offense of obtaining money by false pretense from that which defines the crimes of larceny and embezzlement,\textsuperscript{6} it was not necessary that the defendant obtain the "property of another" but merely obtain the money "from another."\textsuperscript{7} As the three offenses were said to differ only in the means by which the taking and conversion was to be accomplished,

\textsuperscript{2}The prosecution was based on Iowa Code 1950, § 713.1.
\textsuperscript{3}State v. Reysa, 198 Iowa 496, 199 N. W. 1000 (1924); People v. Cory, 124 Misc. 532, 208 N. Y. S. 788 (1925). See also 35 C. J. S., False Pretenses, § 24.
\textsuperscript{4}87 Iowa 25, 53 N. W. 1086 (1893).
\textsuperscript{5}87 Iowa 25 at 32, 53 N. W. 1086 at 1088.
\textsuperscript{6}Contrast Iowa Code 1950, § 713.1, with § 709.1, dealing with larceny, and § 710, dealing with embezzlement. A similar distinction might be noted in Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 253, concerning false pretenses, and Ch. 38, § 387, dealing with larceny.
\textsuperscript{7}In State v. Clark, 141 Iowa 297, 119 N. W. 719 (1909), the court said the difference in language was not material since the offense charged could only be committed by obtaining "money, goods, or property belonging to another."
the majority concluded that a partner could neither steal, embezzle, nor criminally cheat in partnership matters, although he might do so with respect to third persons, including those who contemplated the formation of a partnership but who had not yet actually entered into one.

The case is the more remarkable not so much for the fact that it represents one of the few holding on the point of law concerned as for the outspoken, even denunciatory, criticism voiced by the dissenting judges. Aside from expressing the belief that the final outcome of the case represented a "manifest failure of justice" and a "reproach to the law and to the courts which administer it," because too much emphasis was placed on form rather than substance, the dissenting opinion took the position that the theory of joint ownership of partnership funds, admitted to have a place in civil matters, was no more than a "legal fiction" which should not be pursued to the point of making it a cloak for gross cheats and frauds. Noting the fact that, in Iowa, a partnership is now considered as a separate entity, distinct from the partners who compose it, the minority deduced the principle that a taking of funds from a partnership by a partner should be no different than a taking of funds belonging to a corporation by one of its servants or employees. In this respect, the dissent does no more than elevate one fiction over another with little to choose between them except for the fact that the legal entity fiction is the more recent of the two views as to the nature of a partnership.

One other point is made by the dissent, and it does merit attention. While, as between partners, no law action can be maintained with respect to partnership transactions until there has been an accounting and a settlement of the partnership affairs, there is no doubt that each partner

13 See also Reg. v. Evans, 9 Cox Crim. Cas. 239 (1862). Pollock, C. B., there noted that the effect of a partner's misrepresentation, whereby he had been able to obtain funds from the partnership, would be "overhauled when the accounts were gone into," but could not be made the basis of a criminal prosecution.
15 There is dicta to that effect in State v. Pierson, 204 Iowa 837, 216 N. W. 43 (1927).
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has at least an equitable right in the partnership assets and a right to secure equitable aid for the protection thereof against the unauthorized or unwarranted acts of his fellow partner without the need to seek dissolution of the partnership or a winding up of its affairs.\textsuperscript{17} Granted that the partner's actual distributive share in the partnership assets may be dependent on the existence of a residue after the discharge of all partnership liabilities,\textsuperscript{18} it would still be possible to trace the ultimate interest of the partner in these assets. It is this interest which the one partner, as in the instant case, would acquire from the other by fraud, so, except for its equitable character,\textsuperscript{19} it could well be considered as the "property of another" within the meaning of statutes relating to the obtaining of property by false pretense. If this is too strained a view to take with regard to the interpretation of a criminal statute, which statutes are notoriously open to no more than a strict construction,\textsuperscript{20} there would seem to be adequate reason for legislative reconsideration on the point to the end that the law may continue to command the respect of all as an instrument for justice.

H. L. BACCUS

INSURANCE—RIGHT TO PROCEEDS—WHETHER A SUBSEQUENT SUPPLEMENTARY CONTRACT TO A MATURED LIFE INSURANCE POLICY PROVIDING CONDITIONALLY FOR DISTRIBUTION OF PROCEEDS AFTER DEATH IS TESTAMENTARY IN CHARACTER—A decision of more than passing interest, both to insurance companies and the insuring public, appears to have been achieved by the final outcome of the New York case of Hall v. Mutual Life Insurance Company of New York.\textsuperscript{1} According to that case, an insured had obtained an ordinary life policy and had designated his daughter as beneficiary thereof. Upon the death of the insured, the daughter, with some slight modification,\textsuperscript{2} exercised one of the settlement options provided for in

\textsuperscript{17} Morrison v. Austin State Bank, 213 Ill. 472, 72 N. E. 1109, 104 Am. St. Rep. 225 (1904).

\textsuperscript{18} Richardson v. Adler, 46 Ark. 43 (1885).

\textsuperscript{19} It has, for example, been held sufficient to support a prosecution for obtaining property by false pretense to show that the defendant obtained the release of a mortgage which, because not properly recorded, amounted to no more than an equitable lien: Judkins v. State, 123 Ark. 28, 184 S. W. 407 (1916).

\textsuperscript{20} People v. Lund, 382 Ill. 213, 46 N. E. (2d) 929 (1943).

\textsuperscript{1} 1306 N. Y. 909, 119 N. E. (2d) 598 (1954), affirming 282 App. Div. 203, 122 N. Y. S. (2d) 239 (1953), which reversed 201 Misc. 203, 109 N. Y. S. (2d) 646 (1952). The New York Court of Appeals handed down only a brief unanimous \textit{per curiam} memorandum. Cohn, J., wrote a dissenting opinion to the holding of the Appellate Division.

\textsuperscript{2} The supplementary contract called for quarter-annual, rather than annual, payment of interest on the policy proceeds left on deposit, and also contained a reservation of the right to make partial or total withdrawal of the funds by the policy beneficiary at any time.
the policy, electing to leave the proceeds with the company subject to her call but irrevocably designating the person who was her then husband to receive any unpaid balance upon the death of the daughter-beneficiary, with a contingent provision for payment to the daughter's legal representatives in case her then husband did not survive her. This exercise of the optional features of the life insurance policy was evidenced by a separate writing designated as a supplementary contract which, while it took the form of a life insurance policy, was actually not one. Thereafter, the daughter-beneficiary secured a divorce from her then husband, married another, and died a few months later without having withdrawn any of the insurance fund or making any change in the existing arrangement. The first husband, as plaintiff, claimed payment under the supplementary contract and the company, when sued, impleaded the legal representatives of the daughter-beneficiary. The latter asserted the arrangement was void as an attempted testamentary disposition which failed to comply with local provisions regarding wills. On that contention, the trial judge, acting on a motion for summary judgment, awarded the fund to the daughter's estate. The Appellate Division, dividing two to one, reversed this holding and directed that summary judgment should be entered in favor of the plaintiff. The New York Court of Appeals, following further appeal to it, reached the same result when it appears to have considered the supplementary arrangement for payment under the original policy to have been one of contractual, rather than one of testamentary, character.

The decision so achieved is one of profound importance when consideration is given to the fact that literally millions of life insurance and similar contracts are presently in force in the United States most of which, certainly those issued since 1906 when the first New York statute authorizing optional forms of settlement was enacted, contain varied forms of optional provisions for payment of the policy proceeds at the election of the beneficiaries named therein. It is clear, then, that a contrary decision could well have had a catastrophic effect, not only as to existing settlement arrangements under which millions of dollars are being paid out annually to beneficiaries who have preferred not to take lump sum payments but also with respect to potential arrangements formulated by policy holders who frequently value these optional provisions almost as highly as they value the protection afforded by insurance itself. The unanimous

3 It is clear that the daughter did not take payment under the original policy and then use the money to buy a single-premium policy on her own life. She merely, in effect, gave direction as to the handling of money which was then due and payable to her.

4 See Thompson, Cons. Laws N.Y., Decedent Estate Law, § 21, which sets forth the formalities to be observed in the making of a will.

5 N.Y. Laws 1906, Ch. 326, § 101.
the character of the holding by the highest court in one of the nation's larger insurance centers should go a long way toward settling those doubts which have, heretofore, been expressed. A true appreciation of the holding, however, can best be obtained after consideration of the several factors urged, both pro and con, on this momentous issue.

The executors concerned had urged, in the trial court, that the supplementary contract was analogous to a situation wherein one who had deposited money in a bank to draw interest had further directed that the fund should be paid to another upon the death of the depositor, other than by way of a joint tenancy arrangement, thereby attempting to make a testamentary disposition of the proceeds. The trial court, impressed with this argument, based more upon principles of property law rather than those of contract, refused to treat with the question as being one simply of insurance or, for that matter, as a valid social, economic and established institutional arrangement, but rather viewed the trivial variations made in the original policy as an indication that the original contract had been fully executed by both the parties and a new arrangement had been formulated between them, which new arrangement fell into the class of invalid testamentary dispositions of property despite the statute providing for optional modes of settlement on life insurance policies. The Appellate Division, holding that the policy beneficiary might properly stipulate for a gift over on her death, relied to some extent on the fact that the New York legislature, in 1952 and while the case was pending on appeal, had made it clear that a supplementary contract, even one containing a gift over in the event of death, would require no protection from the statute regulating the execution of testamentary dispositions, so it might be said


7 Specific statutory regulation usually exists with respect to joint bank deposits. See, for example, Ill. Rev. Stat. 1953, Vol. 1, Ch. 76, § 2 et seq.

8 As to the validity of an arrangement whereby the depositor declares himself to be trustee for another and the latter seeks payment of the account after the death of the depositor, see Thompson, Cons. Laws N. Y., Banking Law, § 134(2).

9 The trial court said the action of the beneficiary was "not an acceptance . . . of the express terms of the option and for this reason also, the so-called supplementary contract cannot be regarded as a supplementary contract of insurance, since a supplemental contract of insurance can result only from acceptance of the express terms of a particular option." 109 N. Y. S. (2d) 646 at 651.

10 See the former New York Insurance Law, § 46(1) and § 145(2). See also New York Personal Property Law, § 15(1), and McKinney, N. Y. Sess. Laws 1952, Ch. 820, adding Section 24-a to the Personal Property Law, which, among other things, declares: "The enactment of this act shall not create any implication of invalidity as to any contract or designation, of the nature herein described, made by any person who dies before the effective date of this act." This language, together with
that, as the result of the subsequent affirmance, the problem has been settled, without question, in New York.

Nevertheless, since other states lack statutory provisions of the kind relied on in the instant case, there is room for the production of contrary holdings, particularly since the amount of case law on the point is so miniscule that no established view could, as yet, be said to exist. In that connection, it might first be noted that, as in the New York case of *Gram v. Mutual Life Insurance Company of New York*,11 no problem can arise where one of the optional modes of settlement has been selected by the insured or the policy beneficiary in conformity with the terms offered in the original contract for then no attempt is being made to dispose of property rights but merely to assert contractual rights, i.e., rights which came into existence when the policy was originally issued.12 It follows therefrom that if, as in the Gram case, the beneficiary should seek to vary the terms of the initial arrangement, the company would not be obliged to concur in the proposed variation for its duties were also fixed by the same instrument and it could not be compelled to enter into a new contract against its wishes.13

When the company consents to a modification of the original contract, as it did in the instant case, the conflict between contract rights and property rights becomes sharpened by virtue of the existence of principles relating to third party beneficiaries. Ever since the leading case of *Lawrence v. Fox*14 was decided almost a century ago the principle has become imbedded in American jurisprudence15 that a third person for whose benefit a contract has been made may maintain an action for its breach16 and, in many states, this doctrine extends even to those who may be classed as donee beneficiaries, as would generally be the case with respect to persons, other than the insured, claiming under insurance contracts.

Recognition of the existence of contractual rights favoring such persons, in other than insurance cases, has been accorded, even though the

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13 The court there said that, under a supplemental contract, "the rights and duties of the parties flow from the original contract, whereas under a new contract they flow from the new agreement." 300 N. Y. 375 at 384, 91 N. E. (2d) 307 at 312.
14 20 N. Y. 268 (1859).
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donee beneficiary has not been precisely named in the contract, provided he can show that the agreement was made with intent that he should be benefited thereby, particularly so if he can show that the promise was exacted by the promisee with the beneficiary in mind. Such a beneficiary has been held to possess vested rights against the promisor where nothing remains for the promisor to do except to carry out his promise in favor of the third party beneficiary, although such would not be the case where only incidental benefits are involved as it is essential that there be a clear liability on the part of the promisor directly to the third person if the latter is to succeed.

These principles have been utilized and have been applied in the only insurance cases which, to date, have dealt with problems in any way analogous to the one found in the instant case. In the case of Mutual Benefit Life Insurance Company v. Ellis, for example, a federal court, applying what it believed was the law of Colorado on the point, sustained a subsequent agreement stemming from a life insurance situation wherein the arrangement differed substantially from any of the policy options. The Missouri Supreme Court, in the case of Kansas City Life Insurance Company v. Rainey, reached a similar result on certain annuity contracts under which the annuitant had reserved the right to change the beneficiary at will and also enjoyed a privilege to surrender the contracts for payment in his, the annuitant's, favor. The most recent decision prior to the instant case, that achieved by the Supreme Court of Washington in Toulouse v. New York Life Insurance Company, turned on the effect to be given to an agreement entered into between the insured and the insurance company, subsequent to the maturity of a twenty-year endowment policy,


18 In re Conay's Estate, 121 N. Y. S. (2d) 481 (1933).


22 The policy permitted either of three optional modes of settlement, but the beneficiary elected to leave the proceeds on deposit, evidenced by certain "Interest Income" certificates, calling for the payment of interest in Colorado, which named contingent payees in the event the original beneficiary did not apply for payment during her lifetime. The court held that the policy beneficiary had not selected either of the policy options and had, therefore, made a new arrangement with the insurance company but that the arrangement was a valid one in favor of the contingent donee beneficiaries.


24 40 Wash. (2d) 538, 245 P. (2d) 293 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 161. Donworth, J., wrote a dissenting opinion concurred in by Schwellenbach, Ch. J., and Weaver, J. Judge Mallery also wrote a dissenting opinion.
calling for the payment of the proceeds to certain beneficiaries therein irrevocably designated to receive the same but subject to the insured's right to call for total or partial payment to himself in his lifetime. This arrangement was also upheld as a valid third-party donee-beneficiary provision.

The similarity between the situation presented in the last mentioned case and the one involved in the case at hand is strong because, in both instances, summary action by the principal party concerned could have readily extinguished the interests of the donee beneficiaries, yet the arrangements so made were upheld as being no more than valid contractual provisions which the parties were competent to adopt if they so wished. These holdings do, however, push third party beneficiary doctrines to extreme limits. It is true that an agreement to pay money at a specified time after the death of the promisor would be considered contractual and not testamentary in nature\(^{25}\) and, if a contract is made upon a valid consideration, it would be considered enforceable even though it provided, as one of its terms, that title to property should pass to another upon the death of one of the parties.\(^{26}\) For that matter, a contract does not take on a testamentary character merely because the time for performance is postponed until the death of one of the parties, such delay being regarded not as a testamentary disposition so much as a post-mortem performance.\(^{27}\) But, in these instances, the legal rights of the beneficiaries are considered as having arisen under the original contract, are usually vested in character, and are measured by the terms of that contract.\(^{28}\)

In the light of these principles, it can be seen that no problem would arise with respect to the ordinary insurance situation where the claim and suit, if any, rests on the original contract and the beneficiary relies on the precise terms thereof. Thus it has been held that the interest of a designated beneficiary in a life policy is a vested property right, even though the right to change the beneficiary has been reserved by the insured, which can only be divested if there is a change of beneficiary accomplished as prescribed by the contract,\(^{29}\) for which purpose an unexecuted intention of the insured to change the beneficiary would be considered ineffective.\(^{30}\) It is also clear that, where no power of divestiture

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has been reserved in a life policy, the issuance of such a policy confers vested rights upon the person named therein as beneficiary which cannot be transferred or destroyed without the consent of the beneficiary for the designation then initiates an inchoate gift of the policy proceeds which, upon the death of the insured, becomes fully vested and enforcible by action.

There would also seem to be little difficulty involved in applying these principles to common forms of life insurance trusts under which the policy proceeds are payable to a designated beneficiary, either revocably or irrevocably appointed, to hold in trust for purposes designated in the accompanying trust instrument. The recent Oregon case of Gordon v. Portland Trust Bank will serve to illustrate this fact. In that case, the insured had caused the bank to be designated as the revocable beneficiary under certain life insurance policies. The bank had collected the proceeds of these policies on the death of the insured which it claimed the right to hold and administer in accordance with the provisions of the trust agreement. The plaintiff there contended that the trust agreement was in the nature of a testamentary disposition which had been revoked by the act of the testator-insured in making a later will but the court held to the contrary. Although the case was one of first impression in Oregon, the question has been litigated extensively elsewhere, has been the subject of much discussion by textwriters and commentators, and has usually resulted in a determination to uphold the arrangement on the basis that the insurance trust will generate no more than trust problems which will have no bearing on testamentary aspects of the situation.

It is, however, a little difficult to correlate the contract and trust principles which have been noted herein to situations like the one involved in the instant case when the terms of the original contract have, to a large degree, been satisfied or discharged and the designated beneficiary, entitled to receive payment under the policy, has thereafter devised a dif-

35 Scott, Trusts, § 57.3; Bogert, Trusts and Trustees, §§ 238-9; Grahame, "The Insurance Trust as a Non-testamentary Disposition," 18 Minn. L. Rev. 391 (1934); Hanna, "Some Legal Aspects of Life Insurance Trusts," 78 U. of Pa. L. Rev. 346 (1930).
36 In Bose v. Meury, 112 N. J. Eq. 62, 163 A. 276 (1932), for example, it was held that a gift in trust of the proceeds of a life insurance policy would be made complete by the designation of the trustee as beneficiary in the policy. Possession of the policy by the trustee was said not to be essential. See also Gurnett v. Mutual Life Ins. Co., 356 Ill. 612, 191 N. E. 250 (1934), and Ill. Rev. Stat. 1953, Vol. 1, Ch. 73, § 853.
different manner of treatment for what is clearly then the beneficiary's property. Insurance company executives appear to be conscious of the confusion and potential danger which could follow from a holding that these supplemental arrangements are of testamentary character\(^\text{37}\) but it is questionable whether the members of state legislatures are also alert to these possibilities.\(^\text{38}\) While the decision in the instant case may serve to lead other courts to similar holdings, there is good reason to believe that legislation akin to the present New York statute should be adopted in other American jurisdictions for existing principles do not clearly dictate an obligation to achieve an identical result. If justification should be needed for the development of statutory rules on the point which could be said to call for different treatment in insurance cases from that which would be given to other contract or property rights, this justification ought to be found in the fact that, on insurance questions, the social consequence of a particular determination would possess so widespread a public effect as to bring the matter within the realm of public, as opposed to mere private, interest.\(^\text{39}\)

C. E. R. STRAND

LIBEL AND SLANDER—WORDS AND ACTS ACTIONABLE AND LIABILITY THEREFOR—WHETHER AN ACTION MAY BE MAINTAINED AGAINST THE ESTATE OF A TESTATOR FOR LIBELOUS MATTER APPEARING IN A WILL PUBLISHED SUBSEQUENT TO TESTATOR'S DEATH—The Supreme Court of Oregon, by means of the case of Kleinschmidt v. Matthieu,\(^1\) a case of first impression for that jurisdiction, was recently confronted with the question as to whether or not an action for libel would lie against the estate of a testator whose will contained defamatory statements pertaining to one of the beneficiaries named therein. The defamatory matter first became public when the will was duly admitted to probate, whereupon the plain-

\(^{37}\) See, for example, the affidavit of the vice-president and chief actuary of the company involved in the instant case offered in the trial court and reproduced in part in 109 N. Y. S. (2d) 646 at 653.

\(^{38}\) Except for statutory regulation with respect to standard provisions which must be included in life insurance policies, and as to provisions which are prohibited, the only Illinois provision is one which permits the issuance of policies containing more favorable terms than the standard ones. See Ill. Rev. Stat. 1953, Vol. 1, Ch. 73, §§ 836-7 and § 844(2).

\(^{39}\) The idea that the insurance structure of the nation is a matter of public concern, transcending the importance of a decision to the particular litigants, has been expressed in Palmer v. Central Life Assur. Soc. of U. S., 193 Minn. 306, 258 N. W. 732 (1935); George v. Guarantee Mut. Life Ins. Co., 144 Neb. 285, 13 N. W. (2d) 176 (1944); Smith v. New York Life Co., 86 N. E. (2d) 340 (Ohio, 1948), not reported officially; and Kuhnle v. Mutual Life Ins. Co. of New York, 20 Wash. (2d) 255, 147 P. (2d) 281 (1944).

\(^1\) — Ore. —, 266 P. (2d) 686 (1954).
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Tiff, a grandson of the testator, considering himself defamed by the language of the will, brought his action for damages against the testator’s estate. On demurrer to the complaint for failure to state a cause of action, the trial court held for the defendant. On appeal to it, the Oregon Supreme Court reversed this holding on the ground that an action would lie against a testator’s estate whenever libelous matter appeared in a will even though no publication occurred until after the testator’s death.

The opinion in the case reveals a determined effort on the part of the court to plug a loophole in the law through which an occasional testator, protected by the safety of the grave, has been able to commit a tort through the medium of a libelous will without being subject to legal recourse. Fortunately, few such cases have arisen but in those cases the major problem has been one centering around technical difficulties with respect to establishing the necessary element of publication and the confusion produced by common law rules concerning the abatement of actions as modified by various survival statutes enacted by the states. The task of the court in the instant case was, therefore, one to find a satisfactory legal basis upon which to predicate its decision without doing too much violence to established doctrines or ignoring the views expressed by courts in other jurisdictions.

In that connection, the leading case favoring a denial of liability is the Georgia case of Citizens’ & Southern National Bank v. Hendricks wherein the court reasoned that the tort was completed upon the writing of the will but, the tort being a personal one, the common law rule of abatement became operative immediately upon the death of the testator so as to bar a suit. In advancing this theory, however, the Georgia court appears to have overlooked the elementary rule that libel is actionable only when there has been a publication of the defamatory matter to

2 The particular beneficiary was charged in the will with deserting his mother, with taking sides against the testator in a lawsuit, and with having been a “slacker” by reason of shirking his duty in World War II.

3 The court relied, in part, on Ore. Const. 1857, Art. I, § 10, which gives every man a remedy for injury done to his reputation.

4 It is fundamental law that a libelous injury does not occur at the time of the writing but rather upon the publication of the defamatory matter to others: Restatement, Torts, Vol. 3, §§ 558 and 577. In Yousling v. Dare, 122 Iowa 539, 98 N. W. 371 (1904), the court decided that, as the testator was never subject to any liability during his lifetime, since the libelous matter had not been published prior to his death, the common law maxim could not apply because it referred to the destruction of causes of action which had existed during lifetime.

5 Reference, of course, is made to the maxim *actio personalis mortuit cum persona*, i.e., personal actions die with the person. An interesting discussion of this maxim may be found in Holdsworth, Hist. Eng. Law, Vol. 3, p. 576.

others, and it appears to have completely failed to give consideration to the fact that a publication would ordinarily occur subsequent to the testator's death and in connection with the probate proceedings. In contrast, in the earlier Tennessee case of *Harris v. Nashville Trust Company*, representative of the other view although involving the same type of facts, it was reasoned that, as the death of the testator was the cause of the publication of the libel, it could not, at the same instant, be also operative to produce an abatement of the action. To obviate and untangle the problems thus illustrated, appreciable efforts have since been made by other courts to find suitable theories by means of which it would be possible to preserve an action for testamentary libel.

Recognizing that a defamation arising from the indiscretion or malevolence evidenced by a testator at the time of preparing his will should be a wrong for which a remedy ought to be provided, two of the cases allowing a recovery, although treating the point in an unsatisfactory manner which has only compounded the confusion, have reached the conclusion that the executor of the estate was to be deemed the agent of the deceased testator for the purpose of making the necessary publication. Realizing that this line of reasoning overlooks established principles of law with respect to the agency relationship, the Oregon court concerned with the instant case was careful to point out that an executor could not be an agent of the testator after the latter's death, since any agency which might have existed would be terminated by the death of the testator-principal, it not being coupled with an interest. Furthermore, while an executor derives his position from the nomination in the will, his authority comes from his official appointment by the court, in which respect the executor is considered more nearly to be an officer of the court, following probate of the will, than an agent of the testator.

The argument has been advanced that a recovery for a testamentary libel should be permitted by holding the executor himself personally

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7 Prosser, *Handbook of the Law of Torts* (West Pub. Co., St. Paul, 1941), p. 810 et seq. The holding might apply, all other things being equal, in the event the testator published the defamatory matter at the time of writing, as, for example, by reading the provisions of the will to the attesting witnesses.

8 128 Tenn. 573, 162 S. W. 584, 49 L. R. A. (N. S.) 897 (1914). It does not appear that this case was brought to the attention of the Georgia court involved with the Hendricks case.

9 A note in 97 U. of Pa. L. Rev. 289 criticizes the Harris case as being no more than a mere indulgence in dialectics.

10 *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584 (1914); In re *Gallagher's Estate*, 10 Pa. Dist. 733 (1900).

11 *Farmers’ Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784 (1893); Restatement, *Agency*, § 120.

12 In re *Workman’s Estate*, 151 Ore. 475, 49 P. (2d) 1136 (1935).
liable on the theory that the repetition of the defamation is a publication in itself, chargeable to the one who republishes. This theory has received little judicial support since it runs contrary to the tort rule that one may not be liable for the doing of an act which he has a legal duty to perform. Inasmuch as it would be the first duty of the executor to produce the will for probate, if it is in his custody, irrespective of whether it be libelous or not, the presence of defamatory matter therein would not excuse him from performing this duty nor affect the admissibility of the will to probate.

The extreme opposite of this position was taken by a Pennsylvania court, in the case of Nagle v. Nagle, where a recovery for defamation resulting from a libelous will was denied on the ground the will was the foundation of a judicial proceeding and was, therefore, absolutely privileged. This view, which would save both the estate and the executor from liability, also goes too far. In contrast thereto, the court in the instant case, accepting an argument which had been made in the New York case of Brown v. Mack, pointed out that a will is not made in the judicial proceeding but is, rather, the subject of it. For this reason, a claim that a will is privileged would be no more valid than if the same privilege was asserted with respect to a deed of land or to a contract which might be offered in evidence.

Equally undesirable would seem to be the method utilized in the New York case entitled Matter of Draske where an executor, to protect the estate against claims for injury from defamation, petitioned the court to delete the defamatory matter from the will and this request was allowed on the ground that only those directions which pertain to administration and to the disposition of property constitute the essential elements of a will. This view has not been shared by courts in other jurisdictions.

13 Prosser, op. cit., p. 813, and note in 27 Ill. L. Rev. 220.
15 Matter of Reimers, 261 N. Y. 377, 185 N. E. 403 (1933); In re Jolly, 3 Wash. (2d) 615, 101 P. (2d) 995 (1940). But see Garr v. Selden, 4 N. Y. 91 (1850). By statute, a person in possession of a will may be obliged to present the instrument for probate, or at least file the same, under civil or criminal penalties if he does not: Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, §§ 212-3; Thompson Consol. Laws N. Y., Penal Law, § 2052; S. C. Code 1942, §§ 8946-7; Williams Tenn. Code Ann. 1942, § 10.
18 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945).
21 This view was said to follow the English practice as stated in Re Wartnaby, 1 Robb. Eccl. Rep. 423, 163 Eng. Rep. 1088 (1846), and in In re Goods of Honeywood, L. R. 2 P. D. 251 (1871). See also Brown v. Mack, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945), and note in 32 Va. L. Rev. 189.
They have refused to follow this theory because, without express statutory authorization, a court would have no power to expunge any matter, defamatory or otherwise, appearing in a will.22 In addition, a court should be hesitant to alter any part of a will not only because it would, in effect, be undertaking to re-write the testator’s will but also because the libelous statements appearing in a will often manifest the motives of the testator in setting up the scheme of distribution which has been adopted.23

Accepting it to be the better view that the testator’s estate, rather than the executor, should suffer for the defamation which the testator has been able to perpetrate through the medium of his will and that it would be unfair to require the victim to go without a remedy, the problem still remains as to whether or not such an action would be affected by the common law maxim calling for the abatement of personal actions upon the death of the actor. As this maxim has normally been treated with judicial disfavor, a number of states have enacted survival statutes expressly abolishing the common law rule.24 Seventeen states, however, have measures which, while generally abolishing the doctrine, have expressly excepted from the survival statute those actions arising from defamation, as to which the common law rule of abatement still operates.25 Two states, by contrast, have codified the common law rule, except as to designated actions there declared to survive, so that all other actions abate at the death of either of the parties.26 Still other states have expressly provided for the survival of libel actions or other suits which sound in defamation.27

22 Woodrull v. Hundley, 127 Ala. 640, 29 So. 98 (1900) ; In re Pfarr’s Estate, 144 Cal. 121, 27 P. 825 (1904) ; In re Meyers’ Will, 72 Misc. 556, 131 N. Y. S. 27 (1911).


24 S. C. Code 1942, § 419, for example, states: “All causes of action for and in respect to . . . any and all injuries to the person shall survive both to and against the personal representative of the deceased person.” Statutes of this character have been said to apply only to causes of action accruing before the death of the party: United States Cas. Co. v. Rice, 18 S. W. (2d) 760 (Tex. Civ. App., 1929).


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Judicial interpretation of these survival statutes has produced some startling results, as is evidenced by the South Carolina case of Carver v. Morrow\textsuperscript{28} where, under analogous facts to those involved in the instant case, the court said that an injury to reputation was not an injury to the person, hence the survival statute did not apply. In much the same way, the Washington case of Dyer v. Missouri State Life Insurance Company\textsuperscript{29} has operated to nullify the effect of the Washington statute\textsuperscript{30} for the court there interpreted the statute to apply only in those cases where the action survived at common law. As the statutes of two other states declare that the rule of non-survival is not to apply where the injured party still lives,\textsuperscript{31} it may be concluded that the several statutes, as interpreted by the courts, if not practically irrelevant to the problem are so inadequate as to be of little use in clearing a path through the legal maze involved in the matter of granting relief to a party injured by a testamentary libel.\textsuperscript{32}

In holding that a cause of action arising from an injury produced by the publication of a libelous will should prevail over the claims of legatees, who are no more than privileged recipients of unearned wealth,\textsuperscript{33} the Oregon court has evolved a decision which results in no injustice or inequity. Decisions of this character should operate to discourage testators from utilizing permanent public records as a vehicle for injuring others, either maliciously or indiscreetly. The issues raised and determined in the case, however, suggest that there is manifest need for some legislative re-examination of the problem so as to specifically enable a libel action to survive the death of the testator.

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SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—WHETHER A PUBLIC SCHOOL DISTRICT, AS A QUASI-MUNICIPAL CORPORATION, IS IMMUNE FROM SUIT ON TORT LIABILITY WHEN EXISTENCE OF LIABILITY INSURANCE OR OTHER NON-EXEMPT FUNDS IS NOT ALLEGED IN THE COMPLAINT—The recent decision of the United States District Court for the Eastern District of Illinois in the case of Tracy v. Davis,\textsuperscript{1} wherein plaintiff brought an action against a trucking corporation and a public school district for

\textsuperscript{28} 213 S. C. 190, 48 S. E. (2d) 814 (1948).
\textsuperscript{29} 132 Wash. 378, 232 P. 346 (1925).
\textsuperscript{32} The Oregon court dealing with the instant case short-cut the whole problem by refusing to acknowledge the existence of any common law rule binding upon it.
\textsuperscript{33} See note in 32 Corn. L. Q. 297 (1946).
\textsuperscript{1} 123 F. Supp. 160 (1954).
personal injuries sustained in an automobile accident, serves to illustrate
an important issue relating to pleading in suits against certain types of
corporations who might be considered immune from liability for the
torts of their agents. The complaint therein, while generally alleging
the elements of a cause of action, made no mention of the fact that the
public school district carried liability insurance or was possessed of other
non-exempt funds. The defendant school district moved to dismiss the
complaint as to it, as well as a cross-complaint which had been filed in
the action, on the ground of its alleged immunity from tort liability. The
motion was denied when the District Court held that, despite the absence
of an allegation in the complaint that the school district had insurance or
other means by which to satisfy a judgment against it without impairing
public funds, the plaintiff would be entitled to bring an action and to
obtain a limited and conditional judgment against the school district,
although recovery thereunder might never be accomplished so long as the
assets of the school district were restricted to public funds.

Four years ago, following the decision of the Illinois Supreme Court
in the case of Moore v. Moyle, a forecast was made on the point as to
whether or not, in suits of the kind here under consideration, it would be
necessary for the plaintiff to allege in the complaint that non-public
funds, in a suit against a quasi-municipal corporation, or non-trust funds
in the case of a charitable institution, existed as a source from which
satisfaction could be obtained in order to state an actionable case. The
forecast, relying upon certain language used by the Illinois Supreme Court
in that case, was in the negative. The instant case now appears to have
confirmed that view although the court did say that, in reaching its de-
cision, the answer was not one entirely free from doubt.

The defendant trucking company had filed a counterclaim against the plain-
tiff and a cross-claim against the school district, based upon the same trans-
action as that disclosed in the original complaint.


The court said: "It is apparent that . . . the question of insurance in no way
affects the liability of the institution, but would only go to the question of the
manner of collecting any judgment which might be obtained, without interfering
with, or subjecting the trust funds or trust held property to, the judgment. The
question as to whether or not the institution is insured in no way affects its
liability any more than whether a charitable institution holding private nontrust
property or funds would affect its liability. These questions would only be of
importance at the proper time when the question arose as to the collection of any
judgment out of nontrust property or assets." 405 Ill. 555 at 564-5, 92 N. E. (2d)
81 at 86.
A careful analysis of the leading cases on the subject elsewhere would support the conclusion that, in those jurisdictions where the quasi-municipal or charitable corporation is not either absolutely liable or entirely free from liability, a suit should not be dismissed for a failure on the part of the plaintiff to allege and prove the existence of non-exempt funds or property although the existence or non-existence thereof may materially affect the enforceability of any judgment which might be secured. Accepting for the moment that, under the present Illinois view, the limited degree of immunity accorded to a school district is based upon a desire to protect its public funds and, in the case of a charitable institution, the protection of its trust funds, the point is far from settled as to whether or not such defendants must possess non-exempt property at the time the cause of action accrues or at the time the suit is brought although reference to those cases cited with approval by the Illinois Supreme Court in the opinion in the Moore case would indicate that it is not even essential that non-exempt funds exist even at the time the judgment is entered.

Turning aside from the major issue for an instant, it would appear to be pertinent to quote from the historical Indiana case of City of Connersville v. The Connersville Hydraulic Company. The court there said that while an ordinary action might be maintained against a municipal corporation upon its contracts as well as its torts, and while it was true that public property could not be seized upon execution, "this does not affect the right to sue and obtain judgment. It is one thing to obtain a judgment and another thing to enforce its collection . . . It would be a strange doctrine that would impose upon a creditor, holding his debtor's obligation, the duty of showing both a liability and an ability to pay." Not only is this proposition true as to ordinary suits but, in the only Illinois case prior to the Moore holding in which a judgment against a charit-
able corporation was upheld, that of Marabia v. Mary Thompson Hospital, stress was placed on the fact that a liability would exist unless the doctrine of immunity was invoked as a defense in order to protect trust funds against depletion.

Notwithstanding this fact, the Appellate Court for the Second District, in the case of Slenker v. Gordon, affirmed a judgment of a lower court in favor of a defendant, in a tort action against a charitable corporation for personal injuries sustained as a result of a collision involving an automobile driven by an agent of the corporate defendant, on the ground the record established the fact that all of the then funds of the corporation were trust funds and, being such, were entitled to protection. Considering this application of the principles mentioned to be unfounded in reason and logic, the judge writing the opinion in the instant case said: "Of course the judgment cannot and should not be collected from the trust funds or public funds, but if there are other assets such as insurance which are available to pay the judgment this court can see no reason why the judgment should not be obtained but be limited as to collection."14

It is true that, in the earlier Tennessee case of Gamble v. Vanderbilt University, the recovery was predicated on the fact that funds were then available which were not part of the trust assets, with the court noting that it would not permit a judgment to be rendered in the event it was made apparent that there was no property from which the judgment could be collected. The Supreme Court of Tennessee did, however, again consider the problem in the later case of McLeod v. St. Thomas Hospital, at which time it apparently repudiated this limitation for it there held that the fact the defendant had no property subject to execution was no defense to the tort suit, thereby adding emphasis to the point that it is not the charitable institution which is entitled to immunity from suit so much as it is the trust funds themselves which are to be protected.

It would appear to be on this basis, therefore, that the court concerned with the instant case came to the conclusion that the plaintiff would be entitled to maintain his action and to obtain a judgment, if proper, without the necessity of alleging, or proving, the existence of non-exempt assets in the hands of the defendant, although the judgment, if one was rendered, would be limited in its enforcement to funds other than public funds. The

12 309 Ill. 147, 140 N. E. 836 (1923).
13 344 Ill. App. 1, 100 N. E. (2d) 354 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 186.
15 138 Tenn. 616, 200 S. W. 510 (1918).
16 170 Tenn. 423, 95 S. W. (2d) 917 (1936).
holding would appear to be no more than a just and reasonably sound projection of principles already laid down, the basic premise for which rests in the fact that an individual who has been injured by the tortious conduct of an agent or employee of a quasi-municipal corporation or of a charitable institution should not be forced to suffer the loss where there is, or may come to be, a source of satisfaction, other than public funds or trust funds, from which a judgment could be paid.

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