WILCOCKS, *N.O.*, v. VISSER AND NEW YORK LIFE INSURANCE CO.

1910. *November* 23. MAASDORP, C.J., and FAWKES and WARD JJ.

Husband and wife.—Notarial deed of separation.—Insurance.—Asset of joint estate.—Evidence to identify subject-matter of agreement.

Where H, deceased, had insured his life with the N Y Co., and had designated V, his wife, as beneficiary, and thereafter H and V had entered into a notarial deed of separation whereby *inter alia* all the assets of the joint estate were to become the property of H in consideration of a lump sum and an insurance policy on V's life, which was to become the property of V, *Held*, that the words "assets of the joint estate" included the policy on H's life, and that, as between H and V, H had cancelled the designation of V as beneficiary.

Held, further, that oral evidence was inadmissible to show that H and V had intended that the policy on H's life should, by the deed of separation, become H's property, and that the designation of V as beneficiary should be cancelled.

The pleadings in this case will be found on p. 91 (*supra*).

The second defendants agreed to pay into court the sum of £1754 admitted as the balance due on the policy, on condition that the costs incurred by them should form a first charge on that amount. It was further agreed between plaintiff and first and second defendants that the costs of the second defendants should be costs in the cause as between the plaintiff and first defendant. The policy in dispute had been effected on the life of the deceased on the 16th June, 1906, and the premium payable was £147, 13s. 2d. per annum. One of the conditions contained in the policy was to the effect that if any change was made in the designation of the beneficiary notification thereof was to be given to the second defendants. The first defendant was the beneficiary designated in the policy itself.

The Court pointed out that the declaration as it stood did not

sufficiently allege that the policy had become an asset of the joint estate, and leave was granted to add the following paragraph between pars. 5 and 6: "By reason of the premises the said policy became and was an asset of the joint estate."

Leave was granted to the first defendant to add the following special plea: "That on or about the date of the issue of the said policy effected on the life of the deceased, the said deceased verbally ceded and handed over the said policy to the said first defendant. Wherefore the first defendant prays that plaintiff's claim may be dismissed with costs."

Plaintiff was thereupon given leave to amend his replication by inserting a denial of the cession referred to in the special plea and, alternatively, that in or about November, 1909, the said cession was cancelled by mutual consent of deceased and first defendant, who agreed to surrender the benefits arising therefrom.

Blaine, K.C. (with him *Streeten*), for the plaintiff: I submit that I am entitled to adduce parol evidence to identify the subject-matter of the "assets of the joint estate" as used in the notarial deed of separation, and to show that the policy in dispute was included in such assets. See *Macdonald* v. *Longbottom* (1 El. & El. 977; 29 L.J. Q.B. 256).

[MAASDORP, C.J.: There is no ambiguity in the term.]

I submit that there is a latent ambiguity. The policy on the life of the first defendant is specifically mentioned as excluded from the assets. In accordance with the maxim *expressio unius est exclusio alterius*, the policy in dispute was intended to be included in the assets.

[FAWKES, J.: The first defendant has a contingent interest?]

The policy would remain in the estate until the contingency arose.

Dickson (with him *P. U. Fischer*), for the first defendant, was not called upon on this point.

MAASDORP, C.J.: There is no ambiguity in the words. If it were for a moment laid down that extrinsic evidence was admissible to explain words in which there is no ambiguity, the

whole of our law of inheritance would be upset. There is no ambiguity, and consequently no evidence can be admitted to explain what was meant by the parties. The question is, What does the document mean? The words "assets of the joint estate" have a legal meaning. That meaning we must discover from all the circumstances, but not from what the parties thought they meant. No further evidence can therefore be led to explain the words.

Dickson: The evidence given by the first defendant proves that there was a cession of the policy to her. See Law 12 of 1894, sec. 3, which allows a husband to cede a policy effected on his own life to his wife *stante matrimonio*. Even if there had been no cession, the policy cannot be considered as an asset of the joint estate. See Porter on *Insurance* (4th ed.), p. 47.

MAASDORP, C.J.: The plaintiff in this case, the executor of the estate of the late husband of the first defendant, asks for an order declaring that the first defendant is not entitled to claim the proceeds of a life insurance policy effected on the deceased's life on the 16th June, 1906, and an order declaring that the plaintiff is entitled to the proceeds for the benefit of the heirs under the deceased's will. The grounds of plaintiff's claim are that, though this policy was originally entered into by the late Mr. Visser for the benefit of his wife, there was an agreement entered into on the 24th January, 1910, whereby deceased and his wife agreed that they would separate and that all the assets of the joint estate should belong to deceased for a certain consideration in favour of his wife. The question is, What do the words "assets of the joint estate" signify? The term "assets" refers in law to the goods of any person as distinct from his liabilities. Therefore the question is, What goods were included? Now counsel for both sides have endeavoured to supplement the evidence contained in the deed of separation, presumably because they neither of them thought their case very strong. Both of them have tried to drag in some other agreement. Mr. *Dickson* has to-day pleaded the following special plea: "That on or about the date of the issue of the said policy effected on the

life of the deceased, the said deceased verbally ceded and handed over the said policy to the said first defendant. Wherefore the first defendant prays that plaintiff's claim may be dismissed with costs."

This is denied by Mr. *Blaine*, and in the alternative he pleads cancellation of the cession. All that we have before us to prove that there was such a cession is what passed between the deceased and his wife. She says she opened the envelope containing the policy, though it was addressed to the deceased, and that he handed it to her after she had explained it to him, with the words, "Take the policy, and when I am dead you can draw the money." We are asked to interpret this as amounting to an express cession by deceased to his wife. Two of the essentials of a valid cession are an intention to make over to another what belongs to oneself in order that it may in future belong to that other and not to oneself, and in addition delivery or some legal formality equivalent thereto. How can we from this wording derive any intention on the part of the deceased to make over this policy? How can we deduce such a conclusion from the words used? We hold that there was no such cession, and therefore that there was no necessity for plaintiff to prove cancellation of what never existed. The next question is, Is there anything in this policy which shows that it did not belong to the joint estate? It clearly did not belong to the beneficiary, for the very simple reason that the insured by the policy reserves the right of dealing with it himself. He could pledge it, which means that he could also sell it. He could change the beneficiary and take away the rights of the beneficiary at any moment. He had the full right to deal with this document. What was there left of the rights under the policy for the first defendant to have? If the deceased did not interfere with this document the proceeds would go to her. If anything were done in the meantime to take this right away nothing would remain for her to lose. To whom could the policy belong? It could only belong to the estate. The only parties to the contract contained in the policy were the insurance company and the joint estate of which the deceased had the administration, and it was the deceased who entered into the contract with the company. We

conclude that the policy must be regarded as belonging to the joint estate, and as falling under the deed of separation into the husband's estate. Judgment must therefore be for the plaintiff with costs in terms of prayers (*a*) and (*b*) of the declaration.

FAWKES and WARD, JJ., concurred.

Plaintiff's Attorneys: *Botha & Goodrick;* First Defendant's Attorney: *C. J. Reitz.*