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INSURANCE–EFFECT OF CONTRACT TO REBUILD UPON GARNISHEES OF INSURED

After reserving a life estate to herself, Willie Lytton Johnson conveyed a 152 acre tract of land to her son, Ogden C. Johnson and Maggie H. Johnson, his wife, "for and during their natural lives, and the life of the survivor thereof, with remainder in fee" to their children. In addition to the consideration of $1 and the promise to pay all taxes on the land during the life of the grantor mentioned in the deed, Ogden and his wife also promised to pay his mother for the use of her life estate; to pay the insurance premiums then in effect on the property; and, in case of loss or damage by fire or other causes insured against, *to apply the insurance proceeds to the repair or restoration of the property damaged or destroyed.* Sometime later, the clause, "Ogden C. Johnson, as his interest may appear," was added to the beneficiary clause of the insurance policy which previously had read only "Willie Lytton Johnson, Administratrix of W. J. Johnson." This was upon advice of the insurance company concerned. The dwelling house on the tract, which was insured for $4,000, later burned. A judgment creditor of Ogden C. Johnson brought garnishment proceedings against the insurance company to subject the proceeds of the fire insurance to the payment of his judgment of $468. The trial court dismissed the case and the Supreme Court of Appeals granted a writ of error. Upon appeal, *held,* affirmed. "By virtue of this agreement, the insurance proceeds in this case stand in the place of the destroyed property, and neither Ogden C. Johnson, the judgment debtor, nor any of the other persons whose interest in the property was insured are individually entitled to these proceeds." *Lynch* v. *Johnson,* 196 Va. 516, 524, 84 S.E.2d 419, 424 (1954).

The Court also said that even if it be assumed Ogden C. Johnson was entitled to some part of the proceeds, the evidence did not establish what amount was due him, the Court recognizing the intricate problems involved in determining the interest of one having only a joint life estate with the right of survival subject to a prior life estate on which he holds a joint lease.

A contract of insurance is a personal contract, and, in the absence of words indicating a contrary intent, inures to the benefit of the party with whom it is made, and this is true even though the insured has only a qualified estate in the property covered by the policy.[1] It is not a contract *in rem*[2] and it does not run with the insured property.[3] The general rule with respect to the proceeds of property insurance is that contingent, uncertain, and speculative interests cannot be attached.[4] With respect to the insurance company having the option to rebuild, it is generally held that until the option to rebuild is either exercised or waived, a contingency exists which prevents the insurance company being garnisheed.[5] If the option to rebuild is exercised by the insurer, then no garnishment can lie as there is no indebtedness owed by the insurer to the insured subject to garnishment.[6]

By virtue of this decision by the Court, would it be advantageous to incorporate such a provision, i.e., the insurance proceeds to be used for the restoration of the destroyed premises, in all contracts involving not only life tenant-remainderman, but leasee-leasor, mortgagee-mortgagor, possibly landlord-tenant, and other similar type arrangements whereby two or more parties have insurable interests in common property? Certainly it would permit the entire proceeds to be used for the reconstruction of the destroyed property without the proceeds being diminished by garnishment as was attempted in the present case.

This method or plan would surely go a long way towards placing the concerned parties, as well as lien creditors whose liens upon the destroyed property would not follow to the proceeds,[7] in the same position they occupied before the loss occurred. This is, of course, based on the supposition that the proceeds will cover the cost of rebuilding or the involved parties can reach some agreement as to their shares of the contribution if the proceeds are not sufficient to cover the rebuilding costs.

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[1] Allemannia Fire Ins. Co. v. Winding Gulf Collieries, 60 F.Supp. 65 (S.D.W.Va. 1945); 10 Michie's Jurisprudence 302 (1950).
[2] St. Paul Fire & Marine Ins. Co. v. Culwell, 62 S.W.2d 100 (Tex.Com.App. 1933); see 44 C.J.S. 933 (1945) for further discussion.
[3] 44 C.J.S. 934 (1945); 5 Appleman, *Insurance Law and Practice*, Ch. 148 (1942); see Annot., 66 A.L.R. 864 (1930).
[4] West Florida Grocery Co. v. Teutonia Fire Ins. Co., 74 Fla. 220, 77 So. 209 (1917); see Annot., 38 A.L.R. 1072 (1925).
[5] 4 Am.Jur., Attachment and Garnishment §301 (1936).
[6] *Ibid.*
[7] 46 C.J.S. 32 (1946).

However, assuming the situation where neither party wishes to rebuild or an additional contribution is needed and the parties cannot arrive at their respective shares of this contribution, what then? It would appear logical to assume that their contract to use the proceeds to rebuild had been waived by mutual consent, and it would then be incumbent upon the parties to determine their respective interests in the proceeds. This could be done by mutual agreement, use of tables, or petitioning a court of equity if the parties are unable to arrive at a satisfactory settlement.

The question naturally arises now whether this idea would not allow the parties involved to play fast and loose with debtors such as the one involved in the present case. Actually it gives lien creditors more protection than they have now because the contract to rebuild will prevail unless both (or all, as the case may be) parties agree not to rebuild. It does not necessarily follow that a mere fortuitous event such as a fire loss should have the effect of providing a garnisheeable fund in the hands of the insurer to the detriment of lien creditors and the debtor, who is carrying insurance not only to protect his investment but also to provide a fund with which he can rebuild. It would seem the more equitable solution would be to allow the proceeds to stand in place of the destroyed property and be used to restore all parties concerned to their former position before the loss.

One further problem remains and that is the situation where there is a contract to rebuild, a judgment creditor, and after the insurance company settles the claim the parties decide not to rebuild. This situation would appear to give an unscrupulous debtor an excellent chance to defraud his judgment creditors. This could probably be remedied by saying that the persons covered by the "as their interests may appear" clause were trustees of the proceeds. Upon notification by the judgment creditor that except for the contract to rebuild the debtor's interest could be garnisheed in the hands of the insurer, the trustees are under a duty to notify the creditor in order that he might start proceedings to reach this fund, part of which belongs to his debtor.

It would appear that the use of this type of contract to use the insurance proceeds to rebuild would achieve for all intents

and purposes practically the same effect as the doctrine of equitable conversion or the idea that the proceeds should stand in place of the destroyed property which a few courts believe to be the better view as to insurance proceeds.[8]

The Court bolsters its opinion by further saying that no evidence was brought forth as to the amount due Ogden C. Johnson, the debtor, in the trial court, citing several Virginia cases[9] to the effect that under Virginia statutes[10] the claim of the debtor must be certain and absolute because it is not the duty of a court of law to determine the debtor's interest, that being the duty of a court of equity. This might have the effect of weakening the case to some extent as a precedent because it raises the problem that if the evidence does establish the debtor's interest definitely a future court could attempt to distinguish that case from the present one on the ground that this case went off mainly on the point of indefiniteness rather than on the point of the contract to rebuild.

In summary, there is much to be said for the use of this type contract in those situations where more than one person has an interest in the same property and it is thought desirable to have one person insure for all interested parties.

It is submitted that the result is undoubtedly the proper one, and it is further submitted that the contract to rebuild should be the basis of the decision. This not only permits the concerned parties to agree in advance as to the application of the proceeds, but it goes a long way towards maintaining the status quo of all parties before the fortuitous event.

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[8] See 19 Va.L.Rev. 282 (1933) for further discussion why proceeds of fire insurance policy should be treated as substitute for destroyed property, particularly in the life tenant-remainderman situation.

[9] Rollo v. Andes Ins. Co., 23 Gratt. 509, 64 Va. 509 (1873); Barnes v. American Fertilizer Co., 144 Va. 692, 130 S.E. 902 (1925); Ayres v. Harleysville Mut. Cas. Co., 172 Va. 383, 2 S.E.2d 303 (1939).

[10] See Va. Code §8-519 through §8-577 (1950, Supp. 1954), in particular §8-524, §8-525, and §8-550 through §8-553.