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# Insurance--Cash-Surrender Value--Mutual Mistake

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from the impairment consequent upon the public suspicion that purchased answers were being submitted.

Unprivileged interference with negotiations reasonably calculated to result in contracts beneficial to others,<sup>11</sup> or inducing third persons to refrain from the formation of contracts, when accompanied by legal malice<sup>12</sup> is tortious. Damages being inadequate and uncertain, equity might well feel moved to exercise its discretion to issue an injunction to prevent loss potentially consequent upon disappointment of reasonable anticipations.

Is there also present tortious fraud and deceit whose commission equity might enjoin? The *Restatement*<sup>13</sup> recognizes liability in damages for substantially assisting another in committing a tort upon a third person. Defendant's conduct in the instant case may conceivably be deemed a participation in deceit<sup>14</sup> by aiding contestants to submit prepared solutions on an implied false representation of their originality. If that is a tort, the difficulty of identifying the contestants joining in it argues for allowance of an injunction to stop the wrong at its root, which damages cannot do.

While the reasoning in the instant case is questionable, the result seems fair. Instinctively feeling that defendant's conduct inequitably prejudiced plaintiff's rights, the court apparently tried to accommodate it to existing concepts without critical analysis of alternative grounds or creative development of new ones.

M. S. K.

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INSURANCE — CASH-SURRENDER VALUE — MUTUAL MISTAKE. — *P* formerly held a policy of war risk insurance, which he later converted into a \$10,000 twenty-payment life policy. The latter policy provided for payment to the insured of \$57.50 per month upon due proof that he had become totally and permanently disabled while the policy was in force. The policy also contained a provision to the effect that upon written request therefor by the insured made

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<sup>11</sup> HARPER, TORTS (1933) § 231; *Lewis v. Bloede*, 202 Fed. 7 (C. C. A. 4th, 1912); *Union Car Advertising Co., Inc. v. Collier*, 232 App. Div. 591, 251 N. Y. Supp. 153 (1931); *Tarleton v. M'Gawley, Peake* 205 (N. P. 1804).

<sup>12</sup> 62 C. J. 1137, § 53.

<sup>13</sup> "For harm resulting to a third person from the tortious conduct of another, a person is liable if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance . . . to the other so to conduct himself . . ." RESTATEMENT, TORTS (1939) § 876, comment b.

<sup>14</sup> Deceit is a false representation, fraudulently made, under circumstances on which the plaintiff is entitled to rely if the plaintiff relies thereon to his damage. HARPER, TORTS § 217.

while this policy was in force, and upon complete surrender of this policy with all claims thereunder, the United States would pay to the insured the cash-surrender value thereof. *P* paid premiums on this policy through February, 1933, when though ill, he demanded its cash-surrender value. The government had received no notice that *P* was under any disability. Almost three years later, *P* filed a claim that he was permanently disabled prior to February, 1933, and demanded disability benefits under the surrendered policy. *Held*, that the exercise of an option by an insured for cash-surrender value is a termination of the insurance and a mistake as to disability does not go to the "essence" of the cash-surrender agreement so as to make it voidable. *United States v. Garland*.<sup>1</sup>

The insured had the unqualified right to elect which of several options he would accept, and the insurer had no right or authority to modify or in any way interfere with or deny him this right.<sup>2</sup> When the insured made this election in proper form, it was as irrevocable a contract as could be made.<sup>3</sup> Most authorities agree that a surrender may be avoided if tainted by mutual mistake<sup>4</sup> or insanity.<sup>5</sup> In the event of mutual mistake, however, the error must go to the essence of the agreement.<sup>6</sup> "Essence" means that the minds of the parties thereto must meet on the same thing, and the intent or understanding of parties thereto is necessarily an essential element.<sup>7</sup> In determining whether there has been a mutual mistake of fact, one must examine facts as they existed at the time of agreement for cash-surrender of the policy. A mutual mistake in prophecy or opinion may not be taken as grounds for rescission

<sup>1</sup> 122 F. (2) 118 (C. C. A. 4th, 1941).

<sup>2</sup> *State Life Ins. Co. v. Finney*, 215 Ala. 562, 114 So. 132 (1927); *Northwestern Mut. L. Ins. Co. v. Joseph*, 31 Ky. L. Rep. 714, 103 S. W. 317 (1907).

<sup>3</sup> *Tucker v. Equitable Life Assur. Soc.*, 174 La. 598, 141 So. 71 (1932); *Pequot Mfg. Corp. v. Equitable Life Assur. Soc.*, 253 N. Y. 116, 170 N. E. 514 (1930).

<sup>4</sup> *Marker v. United States*, 43 F. (2d) 457 (D. C. Idaho 1930). Evidence held to establish war veteran was permanently disabled at the time of issuance of converted war risk policy, constituting mutual mistake, and therefore entitling veteran to rescission of converted policy. Here mutual mistake actually existed. *Bowes Co. v. Milton*, 255 Mass. 228, 151 N. E. 116 (1926).

<sup>5</sup> *Marti v. Midwest Life Ins. Co.*, 108 Neb. 845, 189 N. W. 388 (1922); *Knoche v. Mutual Life Ins. Co.*, 317 Pa. 370, 176 Atl. 230 (1935) (insured's surrender of life policy to insurer while insane was invalid and ineffective).

<sup>6</sup> *King v. Ohio Valley Fire & M. Ins. Co.*, 212 Ky. 770, 280 S. W. 127 (1926); *Davenport v. Pennsylvania Fire Ins. Co.*, 207 N. C. 861, 177 S. E. 187 (1935). Contracts must result from concurrence of minds of two or more persons, it being not what either thinks but what both agree.

<sup>7</sup> *Flatow, Riley & Co. v. Roy Campbell Co.*, 280 S. W. 517 (Tex. Com. App. 1926).

where such mistake becomes evident only through passage of time.<sup>8</sup> Had the insured made a better election, such as paid up or extended insurance, he would, under the statute,<sup>9</sup> have been entitled to payments under the prior policy, upon surrender of subsequent contract; here this could not be done because the cash-surrender election was a complete termination of the policy.<sup>10</sup>

The instant case seems to present some difficulty because of the sympathy one feels for those who suffer from what has turned out to be a bad bargain. Hard cases are quicksands of law. There will be less difficulty in seeing the correctness of the decision if the principles involved are applied to a different situation. If the insured, hopelessly disabled and practically certain to die in the near future, desired a lump sum rather than comparatively small monthly payments for the short span of life that was left him, the insurer would have to abide by this election; any refusal to make such payment would be a plain breach of the insurance contract.<sup>11</sup>

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LABOR LAW — COMPUTATION OF WORKING TIME UNDER MAXIMUM HOUR LAWS — MINING INDUSTRIES. — The question of what constitutes hours worked in underground metal mines, within the meaning of section 7 of the Fair Labor Standards Act of 1938,<sup>1</sup> has been answered by two recent federal cases holding that the

<sup>8</sup> *Chicago & N. W. Ry. v. Wilcox*, 116 Fed. 913, 915 (C. C. A. 8th, 1902); *Pacific Mut. Life Ins. Co. v. Jacob*, 87 F. (2d) 870 (C. C. A. 8th, 1937).

<sup>9</sup> *World War Veterans' Relief*, 38 U. S. C. A. § 518.

<sup>10</sup> But see *Denny v. United States*, 103 F. (2d) 960 (C. C. A. 7th, 1939). The case states by way of dicta that a veteran's converted policy was satisfied by its surrender for cash, but this did not prevent him from recovering on his original war risk insurance contract, and having his case submitted to the jury for determination, provided there was substantial evidence presented showing the required disability. *Tucker v. Equitable Life Assur. Soc.*, 174 La. 598, 141 So. 71 (1932). Insured's mailing his letter expressing decision to take surrender value of life policy, was held an election for cancellation preventing recovery on the policy, although check for surrender value was not received until after insured's death.

<sup>11</sup> *United States v. Garland*, 122 F. (2d) 118 (C. C. A. 4th, 1941). This example was suggested by Judge Dobie in the instant case, by way of dictum.

<sup>1</sup> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce: . . . (3) for a workweek longer than forty hours after the expiration of the second year from such date [the effective date of the Act], unless such employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half the regular rate at which he is employed." Fair Labor Standards Act of 1938, 29 U. S. C. A. c. 8, § 207.