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Insurance--Alteration of Material Fact by Applicant Between Date of Application and Issuance of Policy

INSURANCE — ALTERATION OF MATERIAL FACT BY APPLICANT BETWEEN DATE OF APPLICATION AND ISSUANCE OF POLICY. — *S* applied for fire insurance, stating that there were no encumbrances upon his property.[1] Between the date of application and issuance of the policy *S* encumbered the property.[2] *Held,* that the provisions of the policy against encumbrances were not violated. *Sypolt v. Pomona Mutual Fire Ins. Co. of Preston & Monongalia Counties.*[3]

The present case clearly involves conflicting doctrines of insurance law. On the one hand the law proposes to protect the insured from the tendency of the insurer to forfeit the contract by unfair use of technical conditions.[4] Conversely, the strong social interest in the equalization and distribution of individual losses demands reasonable protection for the insurer.[5] In consequence, in view of public interest in the solvency of insurance companies, the courts have sanctioned such defenses as misrepresentations and concealment to aid in the estimation and control of the risk.[6] These defenses are grounded in the concept that in preliminary negotiations the parties are dealing on the basis of mutual confidence and good faith.[7]

Since the statement negativing encumbrances was true when made, it is obvious that the defense of misrepresentation will not aid the insurer. Some cases hold that a representation made by the insured will be regarded as speaking at the time the contract is completed,[8] *i. e.,* a continuing representation which becomes a

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[1] The statement in the prinicpal case was true when made and did not amount to an actual misrepresentation which would avoid the contract. See Nicholl v. Am. Ins. Co., 18 Fed. 231 (D. C. Pa. 1829); Armour v. Transatlantic Ins. Co., 90 N. Y. 450, 47 N. Y. Super. 352 (1882); Evans v. Columbia Fire Ins. Co., 40 N. Y. Misc. 316, 81 N. Y. Supp. 933 (1903).

[2] Had the provisions of the policy been effective at the date of application the policy would clearly have been voidable. See Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497 (C. C. A. 8th, 1905); Sulphur Mines v. Phoenix Ins. Co., 94 Va. 355, 26 S. E. 826 (1897); Nassauer v. Susquehanna Ins. Co., 109 Pa. 507 (1885).

[3] 180 S. E. 274 (W. Va. 1935).

[4] Continental Fire Ins. Co. v. Whitaker, 112 Tenn. 157, 79 S. W. 119 (1903). See VANCE, INSURANCE (2d ed. 1930) 395, citing the following statutes which were passed to prevent unfair use of conditions by the insurer: OHIO GEN. CODE (Page, 1926) § 9391; IOWA CODE (1927) §§ 8980, 8981; KY. STAT. (Carroll, 1922) § 639; GA. CIVIL CODE (1926) §§ 2480, 2481.

[5] VANCE, INSURANCE 334-335.

[6] *Ibid.*

[7] Contracts of insurance are generally described as being *uberrimae fidei* (utmost good faith). See M'Lanahan v. Universal Ins. Co., 1 Pet. 170 (U. S. 1828).

[8] Cable v. W. S. Life Ins. Co., 111 Fed. 19 (C. C. A. 8th, 1901); Blumer v. Phoenix Ins. Co., 45 Wis. 622 (1878); Frederick Connty Mut. Fire Ins.

misrepresentation when conditions change.[9] It is believed that this solution flagrantly ignores the true facts and is justifiable only as to result.

It is suggested, however, that a proper application of the defense of concealment in the present case would justify a contrary result. In marine insurance the subject matter being usually far removed and consequently incapable of inspection,[10] the law imposes upon the insured a duty to disclose all material changes in conditions prior to the issuance of the policy.[11] In the absence of fraud, the preponderance of American authority has refused to extend this rule to life and fire insurance[12] mainly because in these latter fields the company may generally estimate the risk by expert inspection.[13] The strict rule has been relaxed in life insurance cases, however, when the subsequently occurring conditions were the subject of specific inquiry in the application.[14] Particularly is this true when knowledge of the change is peculiar to the applicant.[15] The fire insurance cases are in confusion on this point.[16] By analogy to marine and life insurance, however, it would seem that where, as in the principal case, there has been specific inquiry as to conditions which are not discoverable by an examination of the premises,[17] the law should require disclosure by the insured. *A fortiori,* should such duty arise where the alteration of circumstances is *voluntary* rather than fortuitous.

Co. v. DeFord, 38 Md. 404 (1873); Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co., 109 Me. 79, 82 Atl. 649 (1912); MAY, INSURANCE (4th ed. 1900) § 190.

[9] *Supra* n. 8.

[10] M'Lanahan v. Universal Ins. Co., *supra* n. 7, at 170; Watson v. Delafield, 2 Caines (N. Y.) 224, 2 Johns. (N. Y.) 526 (1804); Hart v. British F. M. Ins. Co., 80 Cal. 404, 22 Pac. 302 (1889).

[11] *Supra* n. 10.

[12] Clark v. Ins. Co., 8 How. 235 (U. S. 1850); Penn. Mut. Life Ins. Co. v. Mechanics' Bank, 71 Fed. 413 (C. C. A. 6th, 1896); Browning v. Ins. Co., 71 N. Y. 508 (1897); Mallory v. Ins. Co., 47 N. Y. 52 (1871).

[13] Hartford Protection Ins. Co. v. Horner, 2 Ohio St. 452 (1853).

[14] Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311, 48 S. Ct. 512 (1928); Cable v. U. S. Life Ins. Co., 111 Fed. 19 (C. C. A. 8th, 1901); N. Y. Life Ins. Co. v. Gay, 36 Fed. (2d) 634 (C. C. A. 6th, 1901).

[15] *Supra* n. 14.

[16] Springfield F. & M. Ins. Co. v. National F. Ins. Co., 51 Fed. (2d) 714 (C. C. A. 8th, 1931); Schraeder v. Trade Ins. Co., 109 Ill. 157 (1883); Day v. Hawkeye Ins. Co., 72 Iowa 597 (1887); Mutual Asso. v. Mahon, 5 Call 517 (Va. 1804); Blumer v. Phoenix Ins. Co., 45 Wis. 622 (1878).

[17] Even the fact of recording of the deed of trust would appear to give no notice since this is not a purpose of the Recording Act. The English doctrine is that there must be actual notice to the insurer before the insured is excused from making a disclosure of a change in conditions. See VANCE, INSURANCE 354.