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Insurance--Vacancy Clause--Effect of Uninhabitability Due to Fire

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is no other distributee to take. That should satisfy the escheat statute. The present statute, in effect, renders the murderer not a distributee.

—TRIXY M. PETERS.

INSURANCE — VACANCY CLAUSE — EFFECT OF UNINHABITABILITY DUE TO PRIOR FIRE. — A, the insurer, gave notice to M, the insured, to protect his partially burned house from further damage by fire. Pending the exercise of the option to repair or pay the loss, a second fire destroyed that part of the house not previously burned. This occurred after the forty day vacancy clause had expired. A denied liability for the second fire, but the case was submitted to the jury on the theory that notwithstanding the vacancy of the building, the jury might consider the damages caused by the second fire and whether or not, under the facts of this case, A had not waived the provisions of the policy as to occupancy. *Held*: The decision for M was based on the ground that the vacancy clause was not intended to cover an unoccupiable house. *American Central Ins. Co. v. McHose*.¹

There seems to be a paucity of authority. All three of the known cases, in point, were cited in the opinion. In support of the principal case, are two Nebraska decisions² based on occupancy of a dwelling uninhabited because of partial destruction by fire, could not have been within the contemplation of the parties. The opposing view is represented by a New Jersey case³ grounded on the fact that the insured agreed to ask the company for a permit in case he desired to vacate the insured property for any cause longer than the time permitted by the vacancy clause in the policy.

The dissenting opinion, in the principal case effectually disposes of the waiver argument by reference to the federal rule excluding oral evidence of waiver of written stipulations.⁴ But it fails to give full weight to another provision of the policy which was operative in this case, the option of the insurance company to pay the loss or rebuild the property. The result may be

¹ 66 F. (2d) 749 (C. C. A. 3d, 1933).

² *Schmidt v. Williamsburgh City Fire Ins. Co.*, 98 Neb. 61, 151 N. W. 920 (1915); *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313 (1900).

³ *Kupfersmith v. Delaware Ins. Co.*, 84 N. J. L. 271, 86 Atl. 399, 45 L. R. A. (N. S.) 847 (1913).

⁴ *American Central Ins. Co. v. McHose*, *supra* n. 1, at 752.

sustained, on a narrow ground, by reading this option clause as in *pari materia* with the vacancy clause, and thereby limiting the latter. The insured could not repair the building without trenching on the right of the insurer until its option was exercised. The vacancy clause would thus not be operative before action on the option clause. Since the insurer had notice of the first fire, and perhaps did not wish to continue the insurance he could, when the forty day period expired, have canceled the policy. Not having done so, the policy should remain in effect.⁵

The court, however, goes on a broader ground: namely, that the parties contracted on the basis of the house being inhabitable. This reasoning would apply, no matter for what reason the house was vacated, if it, in fact, were uninhabitable.⁶ This probably exceeds the bounds of construction but the burden of risk is not a reasonable one. It should be noticed that such a rule increases the burden on the court and defense counsel since inhabitability is a variable matter of proof.

—FREDERICK W. FORD.

SPECIFIC PERFORMANCE — MUST PLAINTIFF PLEAD ADEQUACY OF CONSIDERATION? — The plaintiff, C, instituted an action against W, administrator of the estate of S, for the specific performance of an oral agreement between C and S, whereby the latter promised to devise property to the former if the plaintiff would come and live with her and assist her in domestic affairs and bring J, the plaintiff's husband, to assist her in her business affairs. C performed in full but S died without having made the proposed will. The petition alleged in detail extensive services claimed to be as valuable as the property decedent had agreed to devise petitioner. *Held*: The failure to allege the value of the services rendered by the plaintiff to the deceased, or the value of the land

⁵If the company did not have notice of the damage it is suggested that they should be given a reasonable length of time to cancel the policy. Where the second fire destroys the house after the vacancy clause expires, but before notice, probably the insured should bear the loss.

⁶*Gash v. Home Ins. Co. of N. Y.*, 153 Ill. App. 31 (1910). In this case, a flood damaged the property and the day before the insured moved back to the house, which was after the vacancy clause elapsed, the house was destroyed by fire. The insured recovered even though there had been no notice of the vacancy.