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Note Re Incapacity as an Excuse for Failure to Notify Insurer Regarding Total Disability

under any and all circumstances, until final decree. (2) They have abolished the necessity for entry of the former rule to answer as a condition precedent to entry of a decree, and thus have prevented the possibility of reversal of a decree because of oversight in failure to enter a rule to answer. Beyond these two things, a great deal has not been accomplished in the way of fixing even a more definite time within which the answer must be filed. Approximately what the present situation amounts to is that a tentative statutory rule to answer, subject to modification within the court's discretion by way of substituting a judicial rule to answer, has been substituted for the former judicial rule to answer. The final results must await the test of judicial construction.

—LEO CARLIN.

NOTE *Re* INCAPACITY AS AN EXCUSE FOR FAILURE TO NOTIFY INSURER REGARDING TOTAL DISABILITY. — In the previous discussion[1] of the requirement of notification to the insurer of the total disability of the insured, — as a condition precedent to waiver of payment of premiums under a life policy, — it was suggested that the requisite notice might be excused where the proven physical or mental incapacity of the insured made performance of the condition impossible. Hence, forfeiture of the policy would be averted, and a result achieved more in accord with social interests in the individual life and conservation of social resources.[2] Such an approach had already been followed in Virginia,[3] when the problem later arose in West Virginia and was disposed of by the Supreme Court of Appeals simply by resort to ordinary principles of strict contract law.[4]

The issue has now been decided in a recent decision[5] by the Circuit Court of Appeals, for the Fourth Circuit, holding that such supervening impossibility may excuse performance of the con-

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[1] Note (1934) 40 W. VA. L. Q. 276.

[2] POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (4th ed., 1928) XIII., A., 3., iv and vi., pp. 66, 69.

[3] Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192, 168 S. E. 423 (1931, 1933).

[4] Iannerelli v. Kansas City Life Ins. Co., 171 S. E. 748 (W. Va. 1933); Da Corte v. New York Life Ins. Co., 171 S. E. 248 (W. Va. 1933).

[5] Johnson v. Mutual Life Ins. Co. of New York, 70 F. (2d) 41 (C. C. A. 4th, 1934, (W. D. Va.), per Soper, Circ. J.

dition precedent of notification to the insurer regarding insured's disability. Thus, the "federal" rule in West Virginia, under the theory of *Swift v. Tyson*,[6] denies forfeiture in these circumstances, contrary to the settled doctrine of the state court. It is not improbable, therefore, that litigation of the sort will tend to shift over to the federal district courts of West Virginia, so long as the precedents of the *Iannerelli* and *Da Corte* cases continue unmodified.

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[6] 16 Pet. 3, 10 L. Ed. 865 (1842).