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Insurance--Prohibited Articles Warranty--Forfeiture of Policy

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INSURANCE — PROHIBITED ARTICLES WARRANTY — FORFEITURE OF FIRE POLICY. — A policy of insurance contained a "prohibited articles warranty",[1] providing that the insurer should not be liable for loss while gasoline was kept on the premises, but a rider attached to the policy permitted the use of gasoline for the purpose of bottling automobile oils and other purposes not more hazardous. At the time of a fire the premises were occupied by a tenant who was using gasoline while engaged in the illegal manufacture of intoxicating liquors. The Supreme Court of the United States held that the insured could not recover on the policy if the warranty was violated by his tenant, notwithstanding the fact that the insured had no knowledge of such violation. *St. Paul Fire and Marine Insurance Co. v. Bachmann.*[2]

The theory of the cases is that a violation of a prohibited articles warranty by a tenant, or by one on the premises with the consent of the insured, is a violation of the insured himself.[3] The lessor engages that a certain thing shall not be done and it is his business to see that his tenants do not violate the conditions of the policy.[4] It may be stated as a general rule that the fact that the presence of the prohibited article on the premises is unknown to the insured does not excuse the breach.[5] Two jurisdictions, however, Massachusetts and Texas, follow a view contrary to the doctrine of the *Bachmann* case. It is there held that a landlord who uses reasonable care in the selection of his tenants will not have his insurance forfeited by their acts.[6]

It is necessary to distinguish prohibited articles warranties from so-called increase of hazard warranties. In the latter it is generally implied that the increased hazard must be one within the knowledge of the insured,[7] and even then, the policy is sus-

[1] The typical wording of such a warranty is that a stated article "shall not be kept, used, or allowed on the premises."

[2] 52 S. Ct. 270 (1932). The Court remanded the case for another trial after reversing a judgment for the plaintiff in order that a jury might find whether the operation of a moonshine still was more hazardous than the business of bottling automobile oils. If such was the case, the presence of the gasoline constituted a violation of the warranty.

[3] Liverpool and London Ins. Co. v. Gunther, 116 U. S. 113, 128, 129, 6 S. Ct. 306 (1885); German Fire Insurance Co. v. Board of Commissioners of Shawnee County, 54 Kan. 732, 39 Pac. 697 (1895); Gunther v. Liverpool and London and Globe Ins. Co., 134 U. S. 110, 116, 10 S. Ct. 448 (1890).

[4] Kelley v. Worcester Mutual Fire Ins. Co., 97 Mass. 284, 287 (1867); Fire Association v. Williamson, 26 Pa. St. 196, 198 (1856).

[5] Duncan v. Sun Fire Ins. Co., 6 Wend 487 (N. Y. 1831); See 2 COOLEY, BRIEFS ON THE LAW OF INSURANCE (1905) 1710.

[6] White v. Mutual Fire Assur. Co., 8 Gray 566 (Mass. 1857); East Texas Fire Ins. Co. v. Kempner, 12 Tex. Civ. App. 533, 34 S. W. 393 (1890).

pended only while the increase of hazard lasts,[8] whereas in the former class of warranties the policy is *ipso facto* forfeited by a single breach.[9]

Prohibited articles warranties are construed to prohibit the *habitual use* of such articles, and not their exceptional use as upon some emergency. The prohibited article must be kept on the premises with some degree of permanency.[10] Consequently, under this qualification of the doctrine it was held in *Farmers' Bank v. Tri-State Mutual Grain Dealers' Fire Ins. Co.*[11] that the insured did not violate a clause prohibiting "keeping, using, or allowing gasoline on the premises" by applying gasoline to the rusted parts of machinery in the building. Nor will the use of gasoline in burning off old paint breach such a warranty.[12] Another case goes so far as to permit a small amount of gasoline to be kept on the premises to be used in connection with the business conducted thereon if the gasoline has not caused the fire.[13] But where the insured for several months kept his Ford car with its gasoline tank one-third full in the building, the policy was forfeited, though the car was not in the building at the time of the fire.[14] In summary, it may be said that a prohibited articles warranty, whenever possible, will be construed to require a condition of some duration before there will be a breach. A case apparently out of line with the above decisions is one holding that where the Grand Army of the Republic held a reunion on the plaintiff's premises and gasoline was used by members, the plaintiff could not recover on the policy.[15] Though he never consented to the use of his premises by the Army, the Court considered knowledge of occupancy and acquiescence on the part of the plaintiff as sufficient to bind him.

There is a line of authority decidedly favorable to the insured, which, though purporting to follow the doctrine that a prohibited articles warranty may be violated irrespective of the in-

[7] St. Paul Fire and Marine Ins. Co. v. Bachmann, *supra* n. 2.
[8] Insurance Co. of North America v. McDowell, 50 Ill. 120 (1869).
[9] Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. 379 (1894).
[10] Sandersville Oil Mill Co. v. Globe and Rutgers Fire Ins. Co., 32 Ga. App. 722, 124 S. E. 728 (1924).
[11] 41 S. D. 398, 170 N. W. 638 (1919).
[12] Lebanon County v. Franklin Fire Ins. Co. of Philadelphia, 237 Pa. 360, 85 Atl. 419, 44 L. R. A. (N. S.) 148 (1912).
[13] McLure v. Mutual Fire Ins. Co., 242 Pa. 59, 88 Atl. 921, 48 L. R. A. (N. S.) 1221 (1913).
[14] Morgan v. Germania Fire Ins. Co., 104 Kan. 383, 179 Pac. 330 (1919).
[15] Germania Fire Ins. Co. v. Board of Com'rs of Shawnee County, *supra* n. 3.

sured's knowledge of the breach, holds that the warranty is not violated by the act of the third person if such act is not under the control of the insured, and the insured has taken reasonable precautions to prevent the act.[16] Where a policy contained a strict prohibition against smoking in or about the building, and third parties by permission on the premises did smoke, the insurance company is nevertheless liable if the insured took reasonable precautions to prevent it.[17] An employee of the insured carried a can of gasoline on the premises with an avowed purpose to burn the house, and it was so used without the insured's knowledge or complicity. Such an act was held not a "keeping, using, or allowing gasoline on the premises" within the meaning of the policy.[18]

—AUGUST W. PETROPLUS.

TORTS — LIABILITY IN DAMAGES FOR OBTAINING ANNULMENT OF MARRIAGE BY FRAUD. — *H* had his marriage with *W* annulled because no decree of *W's* divorce from her first husband in Kentucky appeared on the records there. By fraud *H* prevented *W's* appearance in the annulment proceeding and a decree was granted *H* by default, but *H* continued to live with *W*, concealing the annulment from her until his remarriage with *G*. The Kentucky court thereafter entered a *nunc pro tunc* order, dissolving *W's* first marriage as of the date prior to her marriage with *H*. *W* sued *H* in chancery to vacate the annulment decree;[1] and though *W* was awarded costs, the court refused to vacate the decree because of the intervention of the rights of *G*, an innocent third party.[2] Now *W* sues *H* at law for damages caused by his fraud in securing the annulment and in actively concealing this fact until his remarriage, which barred her subsequent suit to vacate the decree. On demurrer the majority of the court decided the declaration set out an actionable wrong which arose after the cessation of coverture. *Cameron v. Cameron.*[3]

The weight of authority refuses to permit husband and wife

[16] Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213 (1870).
[17] *Ibid.*
[18] Queen Ins. Co. v. Van Giesen, 136 Ga. 741, 72 S. E. 41 (1911).

[1] 105 W. Va. 621, 143 S. E. 349 (1928).
[2] 107 W. Va. 655, 150 S. E. 225 (1929).
[3] 162 S. E. 173 (W. Va. 1932), Hatcher and Lively, JJ., dissenting.