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Insurance--Concealment--Duty of Insured to Reveal Material Facts Not Covered by Questions Asked

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road commission. W. Va. Code, c. 43, § 64. And when a county-district road is so taken over, it becomes designated as a "State Route" road. W. Va. Code, c. 43, § 4. The above considerations seem to show conclusively that after the state road commission has taken over a county-district road; by order entered of record, the county court is no longer liable for personal injuries caused by reason of such road's being out of repair. Two reasons lead to this conclusion: (1) the road is no longer under the control of the county court and the latter is no longer bound to maintain it; (2) the road is no longer a county-district road, and therefore does not come within the wording of the statute imposing the liability in question. W. Va. Code, c. 43, *supra.* If the county court is no longer liable, is the state road commission? Apparently the commission is in the same position as the county court, as a quasi-public corporation, being an agent of the state and created a corporation by it, with power to sue and be sued. W. Va. Code, c, 43, § 1. Therefore, as in the case of the county court, it would not be liable for personal injuries, in the absence of a specific provision imposing such liability. W. Va. Code, c. 43 *supra, Watkins* v. *County Court, supra.* For the above reasons. it is believed that the question left unanswered by the supreme court must be answered in the negative. The result is, that if one is injured by reason of the state road commission's failure to keep in repair a road which it has taken over from the county court, he is left without a remedy. Since the commission is charged with the duty of repair and has control of the road which it takes over, it should incur such liability. The writer believes that this weakness in the state road law should be a matter for consideration at the next session of the legislature in order to carry out the obvious purpose and intent of the law. —R. T. D.

INSURANCE — CONCEALMENT — DUTY OF INSURED TO REVEAL MATERIAL FACTS NOT COVERED BY QUESTIONS ASKED.—K on June 21, 1920 filed application for insurance with D Insurance Company. When examined by the D Company's doctor, K was not asked if she had cancer, and K, though knowing at the time that she had cancer failed to mention this fact. The insurance policy was issued. K. on January 20, 1921, seven months after the policy was issued, died of cancer. When policy was presented by P, the

administrator of K, the D Company refused payment on the ground of fraudulent concealment. *Held,* insurer cannot complain of decedent's failure to answer questions not asked. *Williams* v. *Metropolitan Life Insurance Co.,* 123 S. E. 509 (Va. 1924).

The court supported this decision by *Hall* v. *Insurance Co.,* 6 Gray (Mass.) 191, which holds that the company by consenting to issue the policy upon the application as it was, waived all claim to further answers, and that the company was liable under the policy contract.

The above Virginia case presents the questions; first, is there a duty upon the insured to reveal a material fact, when not questioned concerning the fact? Second, if there is such a duty, will the failure to reveal amount to a fraudulent concealment, and avoid the insurance contract?

Let it be supposed that A on the first day of January, accidently drank a slow but sure-acting poison. A knows his dangerous condition, and applies for a life insurance policy. He is asked customary questions, and is given the usual examination, but is not asked the direct question, "Do you have a slow but sure-acting poison in your system?" A dies January 20 from the poison, his death occurring after the policy was issued, and in force. Would a court be justified in holding that the knowledge possessed by A should be furnished the insurance company only in case A were questioned in regard to this particular condition? Even if the courts are inclined to construe a policy in the sense most favorable to the insured, could it be said that the insurance company cannot complain of decedent's failure to answer questions not asked?

Cancer is a disease characterized by a tumor which constantly grows, and is recognized by all as very dangerous to life. Medical science thus far, has admitted there is no satisfactory cure for cancer. It is certainly reasonable to presume that a person having cancer, like the one having poison in his system, would recognize the possibilities of his life being greatly shortened. It is clear that the applicant for insurance, under such conditions, should reasonably know that if the insurance company were in possession of these facts, the applicant would be refused the insurance.

In the principal case the critical condition of the insured is shown by her dying seven months after the policy was issued. Questions were asked her concerning ailments of slight significance compared to that of cancer. The importance of the unrevealed fact was known to the insured. Nevertheless, the insured allowed the

policy to be issued her, without telling the insurance company a fact that would have, as she well knew, justified the insurance company in refusing her insurance.

In marine insurance there is a strong duty on the part of the insured to reveal every fact pertaining to the risk. *Hart* v. *British Insurance Company,* 80 Cal. 440, 22 pac. 302. In case of negligence in revealing the facts, the policy is void. The reason for this is that quite often the opportunity for inspection is not conveniently available, the vessel in most cases being on the high seas when insured. The parties to a fire insurance contract stand on a more equal basis, as the subject to be insured can be more adequately inspected. There is also the practice of requiring the applicant to answer numerous questions. The same is true of life insurance. When such questions have been answered fully and truthfully, the applicant may have been said to have done his duty. This additional information convenient to the insurer distinguishes the fire and life insurance contracts from the marine insurance contracts. It is seen that the difference is one of degree; the duty of the applicant to reveal being decreased as the opportunity for information to the insurer increases. However, a balance is not in all cases reached. Such a case is not made the subject of inquiry, but the insured nevertheless, knows to be material to the risk. To have *uberrima fides* among the contracting parties, a duty arises to reveal this material fact to the insurance company. *Knights of Pythias* v. *Rosenfield,* 92 Tenn. 508, 22 S. W. 204; *Lefavour* v. *Ins. Co.,* 1 Phila. 558; *Penn Mutual Ins. Co.,* v. *Mechanic's Savings Bank,* 37 U. S. App. 692; *Security Life Ins. Co.,* v. *Booms,* 159 Pac. 1000 (Cal. Ap.); *Thompson v. Travelers' Ins. Co.,* 13 N. D. 444, 101 N. W. 900. That the unrevealed fact in the principal case was material, will be questioned by no one.

The next question is, admitting there was a duty to reveal this material fact, will the failure to reveal amount to a fraudulent concealment, and avoid the policy? WILLISTON ON CONTRACTS, Sec. 1499 says, "Failure to disclose a material fact is already recognized by the law as fraudulent, and the tendency of the law of sales, as well as in other contracts, is doubtless toward requiring a somewhat higher degree of good faith than formerly, to both parties." *Penn Mutual Ins. Co.,* v. *Mechanics' Savings Bank,* 37 U. S. App. 692, says, "If Schardt was not required by any specific questions to disclose the fact of his embezzlement, the policy would still be avoided if it were material to the risk, and he intentionally concealed it from the company. *Talley* v. *Metropolitan Life Ins. Co.,* 111 Va.

778, 69 S. E. 936 says, "The suppression or concealment of material facts known to the applicant is a fraud upon the company, and avoids the policy." *Tyler* v. *Savage*, 143 U. S. 79..

It is not the purpose of this article to advocate applying the harsh rule of marine insurance to life insurance, nor is its object that of denying to the insured any rights which he justly deserves. The desire is to point out that the insurer, even with his opportunity for examination and right of questioning, may fail to obtain the very information which would, if discovered, keep him from entering the contract. When such information is possessed by the applicant, and can be reasonably said to be regarded by him as a material fact, a failure to reveal this fact should not result in a reward to the insured. —J. G. J. Jr.

CRIMINAL LAW—SELF DEFENSE—DEFENSE OF ANOTHER—D was convicted of an unlawful assault on P. He admits the assault, but pleads defense of his father. Evidence showed that D shot P in defense of his (D's) father, who was at the time engaged in an affray with P. Evidence also showed that D's father was at fault in bringing on the affray, and that D apparently knew this. *Held,* D was justified in shooting P in defense of his father, regardless of the question of whether the father had or had not been at fault in bringing on the affray between himself and P. *State* v. *Jas. Wisman,* 94 W. Va. 224, 118 S. E. 139 (1923).

Such a decision seems a substantial extension of the law of self defense and would seem to justify a son in doing more in defense of his father than the father could do in his own defense. It is well settled law that whatever one may do in his own defense, a relative may do in his behalf, *Stanley* v. *Commonwealth,* 86 Ky. 440, 6 S. W. 155, 13 R. C. L. 837, but the right of a person to take life in defense of another is recognized by the law only when such other would be entitled to kill in his own defense, *State* v. *Cook,* 78 S. C. 253, 59 S. E. 862, 13 R. C. L. 838, and the one interfering acts at his peril if it turns out that the person defended had forfeited his right of self defense. 13 R. C. L. 838. It is submitted that the father here had, by bringing on the affray with P, forfeited his right of self defense until he had retreated and withdrawn from the fight. What one may do in defense of himself when threatened with death, he may also do in defense of a brother,