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# Insurance - Construction of "Vacant or Unoccupied" Clause in Fire Policy - Proof Required to Invoke Louisiana Act 222 of 1928

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the case because the plaintiff and one of the defendants were both citizens of Pennsylvania was denied.[15]

If the instant decision is permitted to stand, it may prove a means of evading the *effect* of section 24 of the Judicial Code of the United States[16] whenever the plaintiff and one of the defendants are citizens of the same state.[17] The result would be an increase of litigation in the federal courts in cases in which only one of two or more joint tortfeasors have been sued. On the other hand, if Rule 14a is given a narrow construction it will frequently be absolutely useless.[18]

*R. K.*

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INSURANCE—CONSTRUCTION OF "VACANT OR UNOCCUPIED" CLAUSE IN FIRE POLICY—PROOF REQUIRED TO INVOKE LOUISIANA ACT 222 OF 1928—The plaintiff sued the defendant insurance company to recover for the destruction by fire of his dwelling house and its contents. The policy sued upon contained the provision that, if the premises were vacant for a period exceeding 30 days, or unoccupied for a period exceeding 60 days at any one time, the policy would be void unless a special form of permission therefor was attached. Payment was resisted on the ground that the plaintiff had not lived upon the insured property for a period of 112 days preceding and up to the time of the fire. Expert testimony to the effect that an unoccupied property increased the physical hazard was introduced.[1] *Held,* that the insured's failure to

15. The same rule was later followed in Cohens v. Maryland Casualty Co. of Baltimore, 4 F. (2d) 564 (1925), where the plaintiff, a resident of the Eastern District of South Carolina, brought an action of assault against the Maryland Casualty Company, a Maryland corporation that was surety on a sheriff's bond. This bond provided for indemnity of the Casualty Company by the sheriff if it was subjected to liability. The sheriff, a citizen of the Western District of South Carolina, was permitted to join the Casualty Company in defending the suit. The court held that since the jurisdiction of the court had once attached it could not be defeated by an extraneous agreement for indemnity between the Casualty Company and the sheriff.

16. 28 U.S.C.A. § 41 (1926).

17. Under § 24 of the U.S. Judicial Code, 28 U.S.C.A. § 41 (1926), it is provided: "The district courts shall have original jurisdiction as follows: First . . . Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy . . . is between citizens of different States. . . ."

18. Crum v. Appalachian Electric Power Co., 27 F. Supp. 138, 139 (1939).

1. Proof of the increased moral or physical hazard is necessary under La. Act 222 of 1928 [Dart's Stats. (1932) § 4191], providing that a policy of fire insurance cannot be avoided for "breach of any representation, warranty or condition contained in the said policy, or in the application therefor" unless such breach exists at the time of the loss and increases either

occupy his house increased the physical hazard of the risk so as to preclude recovery on the policy. *Terwilliger v. Union Fire, Accident & General Ins. Co.*, 185 So. 43 (La. App. 1938).

In the construction of the provisions in insurance policies relating to vacancy and occupancy, the courts have uniformly held that a building is "vacant" when its tenant has removed all his furniture and goods.[2] The authorities also agree that a house will not be regarded as "occupied" unless it is the dwelling place of some person living and sleeping therein and who, when temporarily absent, returns to it as a place of abode.[3] In the earlier policies the prohibition was against the building being "vacant and unoccupied," and the courts construed the condition to mean that the house had to be both vacant and unoccupied before the policy would be defeated.[4] However, this situation was remedied by replacing the conjunction "and" with "or," and the courts now interpret this latter form to mean that the policy will be defeated if the house is either vacant or unoccupied.[5]

Previous to regulation by statute, the generally stated rule as to the effect of misrepresentations was that they would avoid the policy only when material.[6] With respect to a breach of warranty, however, the materiality of the warranty was not considered by the court.[7] Statutes have been enacted in many states restricting

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the moral or physical hazard under the policy. Under the facts of the present case, expert testimony would be the only means of carrying this burden.

2. Herrman v. Merchants' Ins. Co., 81 N.Y. 184, 37 Am. Rep. 488 (1880); Herrman v. Adriatic Fire Ins. Co., 85 N.Y. 162, 39 Am. Rep. 644 (1881).

3. Sexton v. Hawkeye Ins. Co., 69 Iowa 99, 28 N.W. 462 (1886); Fehse v. Council Bluffs Ins. Co., 74 Iowa 676, 39 N.W. 87 (1888); Snyder v. Fireman's Fund Ins. Co., 78 Iowa 146, 42 N.W. 630 (1889); Continental Ins. Co. v. Dunning, 249 Ky. 234, 60 S.W. (2d) 577 (1933); Union Trust Co. v. Philadelphia Fire & Marine Ins. Co., 127 Me. 528, 145 Atl. 243 (1929); Gibbs v. Continental Ins. Co., 13 Hun. 611 (N.Y. 1878); Herrman v. Adriatic Fire Ins. Co., 85 N.Y. 162, 39 Am. Rep. 644 (1881); Barry v. Prescott Ins. Co., 35 Hun. 601 (N.Y. 1885); Williams v. Pioneer Co-op. Fire Ins. Co., 183 App. Div. 826, 171 N.Y. Supp. 353 (1918); Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N.E. 1011, 26 L.R.A. 313, 49 Am. St. Rep. 699 (1894).

4. Herrman v. Merchants' Ins. Co., 81 N.Y. 184, 37 Am. Rep. 488 (1880).

5. Mauck v. Northwestern Nat. Ins. Co., 102 Cal. App. 510, 283 Pac. 338 (1929); Sonneborn v. Manufacturers' Ins. Co., 44 N.J. Law 220, 43 Am. Rep. 365 (1882); Herrman v. Adriatic Fire Ins. Co., 85 N.Y. 162, 39 Am. Rep. 644 (1881).

6. Carrollton Furniture Mfg. Co. v. American Credit Indem. Co., 115 Fed. 77 (C.C.A. 2nd, 1902), on rehearing 124 Fed. 25 (C.C.A. 2nd, 1903); Niagara Fire Ins. Co. v. Layne, 162 Ky. 665, 172 S.W. 1090 (1915); Smith v. American Auto. Ins. Co., 188 Mo. App. 297, 175 S.W. 113 (1915); Armour v. Transatlantic Fire Ins. Co., 90 N.Y. 450 (1882); Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806, 48 L.R.A. (N.S.) 714 (1913); Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 44 Am. Rep. 177 (1882).

7. Davey v. Aetna Life Ins. Co., 20 Fed. 482 (C.C. N.J. 1884); Gremier

the effect of warranties and the general result has been to transform them into common law representations, so that materiality is now essential before a breach of warranty can be urged successfully as a defense.[8] The statute involved in the principal case is one of that nature.

"Moral hazard," as used in the act, means a substantial hazard, one which would influence the conduct of a reasonable man, as distinguished from a mere psychological or ethical risk.[9] The burden of proving the increase of such a hazard is upon the defendant company.[10] It has been held that the moral and physical hazard of an automobile fire insurance policy was not increased within the meaning of the act where in direct contravention of a warranty clause the insured gave false information regarding his employment[11] or as to the model of a truck.[12]

Recovery has been allowed in a number of cases, where the defendant showed that the chattel mortgage clause in the policy had been violated.[13] In *Brough v. Presidential Fire & Marine Ins. Co.*,[14] the Louisiana Supreme Court held that, although the plaintiff owed a balance of two or three hundred dollars on a tract of land which he purchased for six hundred dollars under a "bond for deed" agreement, the violation of the fee simple clause in the policy did not defeat recovery as the moral hazard was not increased.[15]

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v. Springfield Fire & Marine Ins. Co., 109 La. 341, 33 So. 361 (1903); Kelly v. Life Insurance Clearing Co., 113 Ala. 453, 21 So. 361 (1897); Hoose v. Prescott Ins. Co., 84 Mich. 309, 47 N.W. 587, 11 L.R.A. 340 (1890); Ripley v. Aetna Ins. Co., 30 N.Y. 136, 86 Am. Dec. 362 (1864); Metropolitan Ins. Co. v. Rutherford, 98 Va. 195, 35 S.E. 361 (1900).

8. Ga. Code (1933) § § 56-821, 56-822, 56-824; Iowa Code (1935) § § 8980, 8981; N.Y. Consol. Laws (McKinney 1937) § 58; Ohio Gen. Code Ann. (Page 1926) § 9391. See additional references in Vance, Insurance (2 ed. 1930) 395, § 114.

9. Godfrey v. Security Ins. Co., 147 So. 101 (La. App. 1933).

10. Knowles v. Dixie Fire Ins. Co., 177 La. 941, 149 So. 528 (1933); Sigrest v. Federal Ins. Co., 14 La. App. 55, 129 So. 379 (1930).

11. Perry v. Fidelity & Guaranty Fire Corp., 17 La. App. 563, 136 So. 755 (1931).

12. Alexander v. Home Ins. Co., 142 So. 708 (La. App. 1932).

13. Roach v. Harmonia Fire Ins. Co., 176 La. 356, 145 So. 769 (1933); Knowles v. Dixie Fire Ins. Co., 177 La. 941, 149 So. 528 (1933) (where the property was mortgaged up to one-third of its value); Godfrey v. Security Ins. Co., 147 So. 101 (La. App. 1933).

14. 189 La. 880, 181 So. 432 (1938).

15. This holding has been criticized in Note (1938) 13 Tulane L. Rev. 148, on the ground that it failed to take into account "the factors naturally tending to produce such a psychological state in the insured" as would increase the moral risk. A close examination of the facts of the case leaves considerable doubt as to the absolute soundness of this criticism, since the act requires the introduction of evidence showing that the hazard has been

Considering these decisions with that of the principal case, the defendant insurance companies have the burden under the statute of proving that the moral or physical hazard of the risk has been increased. What proof will be required will depend on the facts of each particular case. That expert testimony may suffice is evidenced by the principal case.

*W. S.*

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LIFE INSURANCE—CHANGE OF BENEFICIARY—DEFEASIBLE VESTED INTEREST AS OPPOSED TO MERE EXPECTANCY—As collateral for a note, the insured assigned a life insurance policy payable to his wife, in which he had reserved the power to change the beneficiary. At his death the widow claimed the proceeds on the ground that the assignment was never executed and endorsed on the policy as required by the change of beneficiary clause and that, therefore, her interest as beneficiary had never been divested. The insurance company impleaded both the wife and the assignee and deposited the money into court. *Held,* that the interest of the wife was a mere expectancy and the assignment was sufficient to effect a change of beneficiary. *Davis v. Modern Industrial Bank,* 279 N.Y. 405, 18 N.E. (2d) 639 (1939).

It is the rule of every American jurisdiction[1] except Wisconsin[2] that, unless the power to change the beneficiary is reserved by the insured, the beneficiary acquires a vested interest in the policy.[3] That this rule does violence to the actual intent of the

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*actually* increased. Consequently, acts which *might tend* to increase the moral or physical hazard are not sufficient to justify the insurer's defense of a breach of condition. In this case the fact that a third party was foreclosing a mortgage executed by the insured's vendor did not necessarily increase the moral hazard. The insured would still retain an interest in the improvements to the extent that the latter might have enhanced the value of the property. Cf. Art. 3407, La. Civil Code of 1870; Glass v. Ives, 169 La. 809, 126 So. 69 (1930), noted in (1930) 4 Tulane L. Rev. 633. For all that the evidence showed, the insured's interest may not have been affected by the foreclosure of the mortgage to the extent that the moral hazard of the risk was actually increased.

1. There are many collections of such cases. See Vance, Insurance (2 ed. 1930) 542; Richards, Insurance (4 ed. 1932) 556; Note (1929) 60 A.L.R. 191. See more specifically: Bingham v. United States, 296 U.S. 211, 56 S.Ct. 180, 80 L.Ed. 160 (1935); Succession of Kugler, 23 La. Ann. 455 (1871); Breard v. New York Life Ins. Co., 138 La. 774, 70 So. 799 (1916); Pollock v. Pollock, 164 La. 1077, 115 So. 275 (1928).

2. In re Allis' Will, 174 Wis. 527, 184 N.W. 381 (1921), in which many Wisconsin cases are collected and discussed.

3. The doctrine is of recent origin. For an excellent discussion of its genesis and growth see Vance, The Beneficiary's Interest in a Life Insurance Policy (1922) 31 Yale L. J. 343.