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Usury--Insurance--Requiring Borrower to Take Life Insurance Policy to be Used as Collateral

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Thus the Georgia court requires that the value of the land and the value and extent of the services be alleged in the bill to enable the chancellor to determine the question of adequacy.⁸ That notion is hardly persuasive. If the burden is imposed on the defendant he can allege the facts relative to adequacy of consideration. The very language of the Georgia Code, that "mere inadequacy . . . may justify a court in refusing to decree a specific performance", seems to assume that adequacy is not a part of plaintiff's case since the court "may" rely on inadequacy to deny relief. The only sound basis for relying on inadequacy of consideration in resisting specific performance is a combination of unfairness and hardship,⁹ and it depends upon the particular transaction whether inadequacy even suggests such a combination. If the plaintiff has a binding contract supported by a consideration¹⁰ and the legal remedy is inadequate it seems both logical and just to impose the burden of establishing special objections to specific relief upon the defendant.¹¹

—EDWARD S. BOCK, JR.

USURY — INSURANCE — REQUIRING BORROWER TO TAKE LIFE INSURANCE POLICY TO BE USED AS COLLATERAL. — Proceedings were begun to enjoin a sale under a deed of trust and to purge

mere inadequacy of price, independent of other circumstances, is not of itself sufficient to set aside a transaction, yet it may . . . stay the exercise of its (equity's) power to enforce the specific performance of a contract." However, the court did not depend upon mere inadequacy of consideration alone.

⁸In addition to the principal case see *Shropshire v. Rainey*, 150 Ga. 566, 104 S. E. 414 (1920); *Potts v. Mathis*, 147 Ga. 495, 100 S. E. 110 (1919). "In the absence of allegations . . . as to the value of the lands, or of the value and extent of the services alleged as the consideration of the contract, it is impossible for a court to determine whether the services performed constituted an adequate or grossly inadequate price for the estate of the person with whom the alleged contract was made; nor could it be determined, in the absence of such essentials, whether the contract was unfair, or unjust, or against good conscience." *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148 (1905) (The complaint or petition must show the adequacy of the consideration). *Contra*: *Finlen v. Heinze*, *supra* n. 6 (The burden of proof is on the party resisting specific performance, and though inadequacy of consideration alone is a defense, complete in itself, adequacy of the price or consideration need not be alleged); *Saint v. Beal*, *supra* n. 3.

⁹See *Harrison v. Town*, 17 Mo. 237 (1852), quoted in *WALSH*, *Equity* (1930) 482, n. 34.

¹⁰There is no sound reason why equity should refuse to enforce a contract under seal enforceable at law but that is the case. See *Pound*, *Consideration in Equity* (1919) 13 *ILL. L. REV.* 667. *Cf.* *Fletcher v. Fletcher*, 4 *Hare* 67 (1844).

¹¹*Bauermeister v. Sullivan*, 37 *Ind. App.* 628, 160 *N. E.* 105 (1928).

the loan secured thereby of usury. Lending insurance company had required the borrower to take out an insurance policy and assign the same to the lender, in addition to the security provided by a deed of trust. The loan was made at a legal rate of interest, and the premiums were those regularly charged against non-borrowing customers. Held: The loan was not usurious. *Heaberlin v. Jefferson Standard Life Ins. Co.*¹

Where the lender requires the borrower to take out insurance and assign the policy to the lender as additional security for a loan, provided the policy be obtained from a third party and premiums paid to that third party, the loan is not usurious.² Where, however, the insurance is underwritten by the lender, there are two conflicting lines of decisions. One holds that such a requirement does not constitute usury, at least when the policy is actually issued at the same rate and on the same terms as policies issued to non-borrowers.³ The reasoning in these cases has its basis in the belief that the subject matter of the contract is divisible, since if the insured had died immediately after the policy were issued, the insurance company would have been liable on the policy.⁴ Moreover, the insurance is held to be for the benefit of the insured, rather than simply a bonus to the insurance company lender, which actually bears a risk in proportion to the amount of the policy.⁵ This tends somewhat to slur over the reality that life insurance, while possessing no doubt an element of indemnity, may nevertheless be primarily a contract of investment.⁶ Still, the courts say the borrower receives ample consideration for his premiums.⁷ Apparently, the addition by the insurer of a thirty per cent. "loading charge", over and above the net

¹ 171 S. E. 419 (W. Va. 1933).

² *Niles v. Kavanagh*, 179 Cal. 98, 175 Pac. 462 (1918). See *Union Central Life Ins. Co. v. Hillard*, 63 Ohio St. 478, 492, 59 N. E. 230, 232, 53 L. R. A. 462 (1900) reversing 16 Ohio C. C. 434 (1898).

³ *Washington Life Ins. Co. v. Patterson Silk Mfg. Co.*, 25 N. J. Eq. 160 (1874); *Homeopathic Mut. Life Ins. Co. v. Crane*, 25 N. J. Eq. 418 (1874); *Lane v. Washington Life Ins. Co.*, 46 N. J. Eq. 318, 19 Atl. 618 (1889), *aff'd* 46 N. J. Eq. 316, 19 Atl. 617 (1889); *Utica Ins. Co. v. Caldwell*, 3 Wend. 296 (N. Y. 1829); *John Hancock Mut. Life Ins. Co. v. Nichols*, 55 How. Prac. 393 (N. Y. 1878); *Union Central Life Ins. Co. v. Morrow*, 16 Ohio C. C. 351, 8 Ohio C. D. 419 (1898), *aff'd* without opinion in 61 Ohio St. 661, 57 N. E. 1133 (1900); *Union Central Life Ins. Co. v. Hilliard*, *supra* n. 2; *Edinburgh Life Assur. Co. v. Graham*, 19 N. C. Q. B. 581 (1860); *Downes v. Green*, 12 M. & W. 481, 152 Eng. Rep. 1287 (1844).

⁴ *Union Central Life Ins. Co. v. Morrow*, *supra* n. 3.

⁵ *Downes v. Green*, *supra* n. 3.

⁶ VANCE ON INSURANCE (2d ed. 1930) 123.

⁷ *John Hancock Mut. Life Ins. Co. v. Nichols*, *supra* n. 3.

premium as fixed by conservative actuarial estimate,⁸ is not worthy of judicial notice. But if the insurance be used obviously as a shift or device to exact usury, the transaction will then be declared usurious.⁹ As regards such decisions the analogy may fairly be drawn of a loan transaction requiring the borrower to purchase property at an excessive price; courts uniformly rebuke the ill-concealed usury.¹⁰

The other line of decisions is to the effect that the insurance stipulation renders the arrangement usurious.¹¹ The loan and policy blend into one transaction; and the company makes a profit thereby.¹² It is not even necessary to show that the premiums charged were unreasonable; it will be presumed that the company benefits materially through its insurance activity. If such profit be in excess of the legal rate allowed for the loan there is usury.¹³

The instant case is peculiarly of interest in that Woods, J., in formulating the common law result for West Virginia seemed to reason by analogy from a North Carolina statute declaratory of the social policy in this regard.¹⁴ The court thus determined

⁸ See, for the basis of the estimate of net premiums, KNIGHT, *ADVANCED LIFE INSURANCE* (1926), and HUEBNER, *LIFE INSURANCE* (1925) cc. 12-15.

⁹ *Homeopathic Mut. Life Ins. Co. v. Crane*, *supra* n. 3 (while the *bona fides* of the transaction was questioned, there was not enough evidence to convince the court of the existence of an agreement to discontinue the policy, after payment of the first premium. *Semble*, the court would otherwise have held the loan usurious); *John Hancock Mut. Life Ins. Co. v. Nichols*, *supra* n. 3 (The court adverted to cases in which the issuing of the policy was resorted to as a disguise to cloak over the attempted usury, yet distinguished the pending litigation on its facts.)

¹⁰ *Gibson v. Fristoe*, 1 Call. 62, 1 Am. Dec. 502 (Va. 1797); *Watkins v. Taylor*, 2 Munf. 424, 5 Am. Dec. 486 (Va. 1811); *Stribling v. Bank*, 5 Rand. 132, 19 L. R. A. 223 n. (Va. 1827); *Selby v. Morgan*, 3 Leigh 577 (1832); *Bank of Valley v. Stribling*, 7 Leigh 26, 43 L. R. A. (n. s.) 230 (Va. 1836).

¹¹ *Clague v. Creditors*, 2 La. 114, 29 Am. Dec. 300 (1830), (The court attempted to follow what was really non-existent New York case law. As to New York authorities, see n. 3, *supra*; *Moore v. Union Mut. Life Ins. Co.*, Fed. Cas. No. 9,777 (C. C. D. Neb. 1876), (Borrower was required to procure insurance for himself and others, pay a three per cent. commission upon the loan, plus an additional sum alleged to be for services rendered); *Missouri Valley Life Ins. Co. v. Kittle*, 2 Fed. 113 (C. C. Neb. 1880); *National Life Ins. Co. v. Harvey*, 7 Fed. 805 (C. C. Iowa 1881); *Miller v. Life Ins. Co.*, 118 N. C. 612, 24 S. E. 484, 54 Am. St. Rep. 741 (1896) (The court here assumed the *Kittle* case, *supra*, to represent the weight of authority); *Roberts v. Ins. Co.*, 118 N. C. 429, 24 S. E. 780 (1896); (N. C. Pub. Laws, 1915, c. 8, N. C. Code Ann. (Michie, 1927) § 6291, abrogated the decisions regarding such transactions, by enacting that if the premiums were no greater than those charged non-borrowers, there was no usury); *Brower v. Life Ins. Co. of Va.*, 86 Fed. 748 (C. C. W. D. N. C. 1898).

¹² *Missouri Valley Life Ins. Co. v. Kittle*, *supra* n. 9; *National Life Ins. Co. v. Harvey*, *supra* n. 9.

¹³ *National Life Ins. Co. v. Harvey*, *supra* n. 9.

¹⁴ See Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383, 395; "(Courts) . . . might receive it, (legislation), fully into the body of

that the sounder principles lay in those authorities which hold that the transaction is not usurious. After all, the borrower is obliged merely to furnish additional security; it is scarcely likely that local usury laws have been intended to forbid such a relatively harmless practice.¹⁵ It is true that a requirement to take out insurance with the lender may be a clever scheme for selling insurance, still that consideration should bear no weight as an argument based on usury. Perhaps there is another factor in this line of cases, namely, a judicial belief that fair collateral advantages should be upheld. Clearly, one now discerns a growing tendency to approve and enforce collateral stipulations¹⁶ that were once held to be "clogs on the equity of redemption" in mortgages.¹⁷ Though the insurance policy may properly be held to typify a contract of adhesion,¹⁸ and, therefore, one to be construed most narrowly against the insurance company lender, there is no such strong social interest in usury as to invalidate the present security transaction.

—R. E. HAGBERG.

VERDICT — JUROR'S ASSENT — WHAT CONSTITUTES. — In the trial of a recent criminal case, juror no. 12 told the court that he feared for his health and life if he had to continue in jury service. Medical examination disclosed that he was suffering only physical discomfort which would not affect his capacity as a juror. He continued in jury service, and a verdict of guilty was rendered. On the poll, all of the jurors agreed to the verdict. In answer to further questions asked him by the court concerning his physical condition, juror no. 12 said that he agreed in order to escape further confinement and suffering, although he did not believe that the defendants were guilty. The verdict was then recorded over the defendants' objection, and a new trial was re-

the law to be reasoned from analogy the same as any other rule of law)"

¹⁵ The excess profit to the lender is hardly an evil of such magnitude as to outweigh advantages of free capital investment in West Virginia.

¹⁶ *John Hancock Mut. Life Ins. Co. v. Nichols*, *supra* n. 3 (The theory of the court is that the business of the company is to insure lives. Since its surplus funds must be invested it is not unreasonable to confine its loans to policy-holders; in other words, the company may validly insist upon fair reciprocity).

¹⁷ See *Williams, Clogging the Equity of Redemption* (1933) 40 W. VA. L. Q. 31, 50.

¹⁸ See *Vance*, *supra* n. 6, pp. 201, 215.