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Insurance--Forfeiture of Policy--Insanity Not an Excuse for Failure to Notify Insurer as to Total Disability

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rights,[18] but the mere opinion of the chancellor with no decree adjudicating them is not enough.[19] For an appeal it is not necessary that there be an actual enforcement of the relief sought,[20] or that the principles adjudicated be applied to the facts of the case.[21] But there must be a decree putting these principles into effcet, for otherwise the appellant has suffered no prejudice.[22]

Both of the statutes in question were taken from the Code of Virginia, but they were not there construed together until after West Virginia had adopted the statute authorizing the transfer of causes from one forum to the other. In Virginia it has been held that a decree dismissing a suit in equity, with leave to transfer the cause to the law court, is not final, but it is appealable as a decree adjudicating the principles of the cause.[23] Since the effect of such a decree is to deny to the plaintiff all of the relief sought in his bill, the case seems to be correct in the light of both precedent and principle.

—PAUL D. FARR.

INSURANCE — FORFEITURE OF POLICY — INSANITY NOT AN EXCUSE FOR FAILURE TO NOTIFY INSURER AS TO TOTAL DISABILITY. — An insurance policy provided that, upon the insured's giving notice of total disability before default in payment of premiums, further payment thereof would be excused during the disability. The insured was adjudged insane previous to the due date of a premium. While so incapacitated, the period of grace expired,

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that portion of subsection 1, which allows an appeal to any decree or order 'adjudicating the principles of the cause' '').

[18] Reed v. Cline's Heirs, 9 Gratt. 136 (1852) (Bill to enforce a title bond for sale of land, and after statute of limitations pleaded, court directed an issue to try whether the bond had been executed and lost. Held, that this impliedly adjudicates the plaintiff's right, as not barred by the statute of limitations).

[19] Armstrong v. Ross, 56 W. Va. 16, 48 S. E. 475 (1904).

[20] Richmond v. Richmond, 62 W. Va. 206, 57 S. E. 736 (1907) (The decree ordered partition of certain lands, but the actual partition had not been made).

[21] Wood *et al.* v. Harmison *et al.*, 41 W. Va. 376, 23 S. E. 560 (1895).

[22] Garrett v. Garrett *et als.*, 91 W. Va. 243, 112 S. E. 494 (1922) (The decree sustained a demurrer to an affirmative answer, but did not dismiss the answer or give any relief sought in the bill); Watson v. Wigginton, 28 W. Va. 533, 552 (1886) (The trial court may correct the errors committed, or commit others, before enforcing the decree); Steenrod v. Railroad Co., 25 W. Va. 133 (1884).

[23] Colvin *et al.* v. Butler, 150 Va. 672, 143 S. E. 333 (1928); Hodges & De Jarnette v. Thornton *et al.*, 138 Va. 112, 120 S. E. 865 (1924).

no payment of premium having been made, nor notice of disability having been given to the company. The plaintiff, as committee, seeks, *in equity*, to have the policy declared to be in full force. *Held*: The policy lapsed. *Iannerelli v. Kansas City Life Insurance Company.*[1]

It is a well-settled rule that no excuse for failure to pay premiums can be offered to avert a forfeiture, save —

(a) War in some jurisdictions.
(b) Insolvency of the insurer.
(c) Refusal of tendered premiums.
(d) Any wrongful act of insurer preventing payment.
(e) Want of notice, when it is the duty of the insurer to give notice.
(f) Waiver of prompt payment.[2]

An act of God, sickness or insanity rendering the insured wholly incapable of attending to business affords no defense for failure to pay premiums when due, and will not avoid a lapse of the policy.[3] The reason usually given is that the act required is not necessarily personal to the insured, but may be performed by another for him.[4]

However, the payment of premiums may be waived by the intervention in the policy of a "disability clause", provided the company be given notice, in the form of proof of total disability before default in the payment of premiums. If notice is given, then payment of premiums will be waived. There is a division in the authorities as to the effect of failure to give notice. One line of authority holds that notice of the disability is a condition precedent, which must be performed prior to default in the payment of premiums. Sickness or insanity of the insured, which has made it impossible for him to give the requisite notice, will

[1] 171 S. E. 748 (W. Va. 1933); Accord: Da Corte v. New York Life Ins. Co., 171 S. E. 248 (W. Va. 1933).

[2] VANCE ON INSURANCE (2d ed. 1930) 291; but see W. VA. REV. CODE (1931) c. 33, art. 3, § 18 (Rights of insured after default in payment of premium).

[3] Klein v. Life Ins. Co., 104 U. S. 88, 26 L. Ed. 662 (1881); Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252, 26 L. Ed. 765 (1881); Carpenter v. Centennial Mut. Life Ass'n, 68 Iowa 453, 27 N. W. 456, 56 Am. St. Rep. 96 (1895); Rocci v. Mass. Accid. Co., 222 Mass. 336, 110 N. E. 972 (1916); New York Life Ins. Co. v. Alexander, 122 Miss. 813, 85 So. 93, 15 A. L. R. 314 and note p. 318 (1920).

[4] See cases, *supra* n. 3 (In these cases, the courts have applied the well-established doctrine, that non-performance of a contract which does not require or contemplate performance by the promisor personally, is not excused by impossibility of performance).

not prevent the forfeiture.[5] The other line of authority escapes forfeiture of the policy by holding that, while notice may in theory be a condition precedent, yet its performance is excused by the total disability; alternatively, such cases hold notice is simply a condition subsequent, the non-fulfillment of which will not be permitted to extinguish "accrued rights".[6] Many of the decisions cited in this group involve fire and accident insurance litigation.[7] These can be distinguished from the principal case, in that, at the time of the disability, the interest has vested; and where the loss insured against has already been suffered, all further acts required of the insured are to be viewed as conditions subsequent, thus to be excused by impossibility of performance.[8]

In the able concurring opinion of the present case, it is argued that notice has merely the effect of waiver of payment of premiums: if proper notice has not been given, the policy automatically lapses, and in such event there are no provisions for its reinstatement.[9] From the angle of strict construction this may be true, but the insurance contract being one of adhesion,[10]

[5] New York Life Ins. Co. v. Alexander, *supra* n. 3; Wick v. Western Union Life Ins. Co., 104 Wash. 129, 175 Pac. 953 (1918); Hanson v. Life Ins. Co., 229 Ill. App. 15 (1923); Courson v. Life Ins. Co., 295 Pa. 518, 145 Atl. 530 (1929) (Suit for the recovery of premiums. The insurance company was paying the benefits of the policy without protest); Yohalem v. Life Ins. Co., 136 Misc. 748, 240 N. Y. Supp. 666 (1930); Smith v. Life Ins. Co., 134 Kan. 426, 7 P. (2d) 65 (1932); Dean v. Life Ins. Co., 175 Ga. 321, 165 S. E. 235 (1932); Berry v. Life Ins. Co., 165 Miss. 405, 142 So. 445 (1932); Bergholm v. Peoria Life Ins. Co., 284 U. S. 489, 52 S. Ct. 230, 76 L. Ed. 416 (1932); Egan v. Life Ins. Co., 60 F. (2d) 268 (D. C. N. D. Ga. 1932) (The condition is, "if insured furnish proof of the disability and not the disability itself."); New England Mut. Life Ins. Co. v. Reynolds, 217 Ala. 307, 116 So. 151 (1928) (It was urged that waiver of premiums was but a further method of paying the premiums and thus impossibility of performance would not excuse payment).

[6] Southern Life Ins. Co. v. Hazard, 148 Ky. 465, 146 S. W. 1107 (1912); Marti v. Midwest Life Ins. Co., 108 Neb. 845, 189 N. W. 388, 29 A. L. R. 1507 (1922); Metropolitan Life Ins. Co. v. Carrol, 209 Ky. 522, 273 S. W. 54 (1925); Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600 (1927); Levan v. Met. Life Ins. Co., 138 S. C. 253, 136 S. E. 304 (1927); Minnesota Inc. Co. v. Marshall, 29 F. (2d) 977 (C. C. A. 8th, 1928); Missouri State Life Ins. Co. v. LeFevere, 10 S. W. (2d) 267 (Tex. Civ. App. 1928); Rhyne v. Jefferson Standard Life Ins. Co., 196 N. C. 717, 147 S. E. 6 (1929); Rhyne v. Jefferson Standard Ins. Co., 199 N. C. 419, 154 S. E. 149 (1930); Swan v. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192, reported subsequently 168 S. E. 423 (1931).

[7] Rhyne v. Life Ins. Co., *supra* n. 6; Levan v. Met. Life Ins. Co., *supra* n. 6.

[8] VANCE, *supra* n. 2 at p. 1788. See New England Mut. Life Ins. Co. v. Reynolds, *supra* n. 5 (where the distinguishment is made). Obviously, it might be argued similarly that, with the event of the disability, the interest under the life policy has also vested, notice of such disability being required merely for purposes of verification. The cases, however, attempt no such analogy.

[9] Iannerelli v. Kansas City Life Ins. Co., *supra* n. 1.

ought not to be governed by meticulous rules of contract law.[11] Supervening impossibility of performance should apply equally to conditions precedent as well as to conditions subsequent.[12] "Where the failure to perform is the result of impossibility, it would seem fair to excuse non-performance, inasmuch as the insurer has been paid for its additional obligation and is slightly, if at all, prejudiced by the omission to notify."[13] Judicial opinion, which thus forbids lapse of the policy, does so by attacking the innate injustice of a contract, that by its technicalities might work forfeiture because of lack of notice. It is probable that the possibility of fraud may have somewhat influenced the West Virginia court in reaching its strict decision.[14] Nevertheless, the insured's "total disability" in the case at bar would seem to have been a matter of public record, since his confinement in the aslyum occurred by court order.[15] Hence, little justification for any fraud *motif* is to be discerned here.[16] Unless the case can be supported upon the "theory of the bill",[17] from the angle of equity pleading, the result would appear to facilitate a forfeiture. Surely, modern equity should abhor such an outcome.[18]

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[10] VANCE, *supra* n. 2, at pp. 201, 215.

[11] WOODRUFF, CASES ON INSURANCE (2d ed.) 5 ("What do they know of the law of the insurance contract, who only the law of contract know?").

[12] See Note (1927) 40 HARV. L. REV. 1016. *Cf.*, as to the effect of initial impossibility in the performance of a condition precedent, in Roman law, GAIUS, III., § 98, holding the stipulation of no effect if subject to such condition, (—the common law *acc.*, CO. LITT. 206a); INSTITUTES, III., 19, § 11; SAVIGNY, SYSTEM DES HEUTIGEN ROMISCHEN RECHTS, III., § 124, citing DIGEST, XLIV., 7, 31. As to the civil law, see FRENCH CIVIL CODE, arts. 1172-1173; GERMAN CIVIL CODE, § 158.

"*Lex non cogit ad impossibilia,* — (the law does not compel the impossible). BROOM'S LEGAL MAXIMS, (9th ed.) 171". Hatcher, J., writing in Watson v. Watson, 168 S. E. 373, 374 (W. Va. 1933).

[13] See Note (1927) 36 YALE L. J. 1021, 1022.

[14] See W. VA. REV. CODE (1931) c. 33, art. 3, § 32 (providing for penalties in certain cases of fraud in obtaining money from an insurance company).

[15] Presumably, by virtue of the provisions of W. VA. REV. CODE (1931) c. 27, art. 2.

[16] Unquestionably, frauds currently perpetrated on insurance companies should require careful safeguards against abuse of the total disability privilege. Hence, in a majority of instances, there might be adequate justification for rigid enforcement of the notice provision. On the other hand, the harsh penalty may seem unconscionable, as here, where there is ample opportunity for verification.

[17] LANGDELL, SUMMARY OF EQUITY PLEADING (1883) 61.

[18] The present case is unusual, in that the court of *equity* has deliberately refused to relieve against supervening impossibility, even though complainant obviously had no remedy at law. Perhaps, the fact that the insured was still alive, albeit insane, may have actuated the court to a considerable extent. In any event, the circumstance that the Virginia decision on practically the same facts achieves an opposite result, should be significant. See Swan v. Atlantic Life Ins. Co., *supra* n. 6.