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Preliminary mandatory injunctions in the nature of specific performance, however, issue very rarely.¹⁴ Courts occasionally adopt this form of relief for abating nuisances.¹⁵

The case under discussion has all the prerequisites necessary for a preliminary mandatory injunction. In view of petitioner's conduct, his insolvency, and the possible dissipation of part of the decedent's estate, the court quite properly invoked the provisional remedy to place the bonds in the custody of the court until final hearing. At that time the petitioner may set up his claim and have his rights adjudicated. The court wisely took that course in preference to transferring the property to the other claimants. While the case turns in part on a West Virginia statute¹⁶ providing for the equitable protection of property in a case pending, that statute only strengthens the court's hand.

WM. CAREY PARKER.

Insurance—Incontestable Clause as Defense in Action on Life Policy.

The plaintiff issued a life insurance policy containing a liability exemption clause in case insured met his death while engaged in railroad employment. A statute provided that life insurance policies

Worth, etc., Contractors, Inc., 8 S. W. (2d) 730 (Tex. Civ. App. 1928) (revocation of plumber's license).

¹⁴In *Boskowitz v. Cohn*, 197 App. Div. 776, 189 N. Y. Supp. 419 (1921) an injunction ousted sub-lessees where lessees sub-leased in violation of a condition in their lease giving lessors right to possession without notice in case of breach, and in *Kellerman v. Chase & Co.*, 101 Fla. 785, 135 So. 127 (1931), the court ordered performance of contract to deliver tomato crop, it being highly perishable. See also *American Lead Pencil Co. v. Schneeegg*, 178 Fed. 735 (C. C. N. D. Ga. 1910) where mandatory relief was properly refused. Where complainant acted in bad faith relief was denied in *Winton Motor Carriage Co. v. Curtis Pub. Co.*, 196 Fed. 906 (E. D. Pa. 1912) (contract for commercial advertising in periodical). Accord: *Amalgamated Furniture Factories, Inc. v. Rochester Times-Union, Inc.*, 128 Misc. Rep. 673, 219 N. Y. Supp. 705 (1927).

¹⁵*Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 75 Atl. 758 (1910) (defective building a public and private nuisance which must be removed or repaired); *Salisbury v. Andrews*, 128 Mass. 336 (1880) (light and sunshine shut out by alley obstruction); *Pierce v. City of New Orleans*, *supra* note 11; relief refused in *Ort v. Bowden*, 148 S. W. 1145 (Tex. Civ. App. 1912) (baseball park blocking street).

¹⁶W. VA. CODE (1931) c. 53, art. 6, §1: "A court of equity may, in a proper case pending therein, in which funds or property of a corporation, firm or person is involved, and there is danger of the loss or misappropriation of the same or a material part thereof, appoint a special receiver of such funds or property, or of the rents, issues and profits thereof, or both, who shall give bond with good security to be approved by the court. . . ."

should be incontestable, for any reason save nonpayment of premiums and military service, one year from date of issue.¹ The insured was killed in railroad employment more than one year after issuance, and this suit was instituted to cancel the policy.² *Held*: The defense of incontestability was not good since the action was not a contest of the policy (*i.e.*, a denial of it), but an insistence upon its terms.³ On the theory that an insurance company may assume only such risks as it sees fit,⁴ the decision appears both clear and reasonable and represents the majority view in the United States.⁵

Incontestable clauses in life insurance policies are required in twenty-five states.⁶ By way of inducement to purchasers of insurance, companies voluntarily insert similar provisions in policies sold elsewhere.⁷ With few exceptions statute-prescribed clauses are uniform.⁸ They allow a two year contestable period and permit after

¹ VA. CODE ANN. (Michie, 1930) §4228.

² *United Security Life Ins. & Trust Co. v. Massey*, 164 S. E. 529 (Va. 1932). The policy was a fifteen year endowment life insurance contract which provided that the insurer advance the sum of the policy, \$5,000, to the insured immediately. The latter agreed to pay \$51.75 per month for fifteen years should he live that long; but in case of death the obligation was to be discharged. By way of security the insured gave a bond in the penalty of \$10,000 and a deed of trust on certain real estate.

³ "The incontestable clause should be construed merely as an agreement on the part of the insurer not to contest the validity of the policy as written." VANCE, *INSURANCE* (2d ed. 1930) 281, citing *Sipp v. Philadelphia Life Ins. Co.*, 293 Pa. 292, 142 Atl. 221 (1928).

⁴ ". . . a policy of insurance is a voluntary contract. Nearly any kind of agreement that is not contrary to law or public policy may be included therein. An insurer may impose such conditions as it desires and the insured may take them or go without the policy, as it may choose." *Whitney v. Union Central Life Ins. Co.*, 47 F. (2d) 861, 864 (C. C. A. 8th, 1931).

⁵ *American Trust Co. v. Life Ins. Co. of Va.*, 173 N. C. 558, 92 S. E. 706 (1917); *Dibble v. Reliable Life Ins. Co.*, 170 Cal. 199, 149 Pac. 171 (1915).

⁶ Ala., Ariz., Colo., Idaho, Ill., Ind., Kan., Me., Mass., Mich., Minn., Neb., N. H., N. J., N. M., N. Y., N. D., Okla., Ore., Pa., Tenn., Utah, Vt., Va., and Wyo. North Carolina has no such statute. An excellent interpretation of a voluntarily inserted clause is to be found in *American Trust Co. v. Life Ins. Co. of Va.*, *supra* note 5.

⁷ "Premiums upon life policies are often paid at a great sacrifice, and one of the most disturbing and unsatisfactory features of the insurance contract is the fact that after the sacrifices and payments have been made for a number of years, and the insured has died, so that his testimony and perhaps that of others has been rendered unavailable by the lapse of time and the occurrence of death, instead of receiving the promised reward, the beneficiary will be met with a contest and a lawsuit to determine whether the insurance ever had any validity or force. Hence it has become an almost universal practice with insurance companies to provide against any contest or forfeiture of their policies after a certain length of time, greater in some cases and less in others." *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 562 (1898).

that time the specific defenses of nonpayment of premiums and military service.⁹ Self-imposed incontestability clauses contain provisions similar to those prescribed by statute.¹⁰ They do, however, often provide broader defenses, and sometimes waive the period of contestability altogether.¹¹

Interpretation of incontestability clauses, both mandatory and voluntary, has not been uniform.¹² Courts differ as to what constitutes a sufficient contest of the policy, a substantial majority holding that court action is necessary, such as instituting a suit for cancellation or filing an answer to a suit brought on the policy.¹³ A few courts have held that a definite and positive repudiation of the policy plus a tender of the premiums paid is sufficient.¹⁴ Most courts hold that the contestable period runs its course irrespective of the insured's death beforehand;¹⁵ but they allow a suspension of the running of the period from the time of the insured's death to the appointment of his administrator, for in the interim there is no one

⁹ A typical example of incontestability statutes is found in Indiana: ". . . the policy shall be incontestable after it shall have been in force during the life-time of the insured for two years from its date, except for nonpayment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war." *IND. ANN. STAT.* (Burns, 1926) §9036 (3). The Virginia statute provides a one year period only. *VA. CODE ANN.* (Michie, 1930) §4228. Alabama sets the final date of contestability "after two annual premium payments have been made." *ALA. CODE* (Michie, 1928) §8365.

¹⁰ *Supra* note 8.

¹¹ *Hardy v. Phoenix Mutual Life Ins. Co.*, 180 N. C. 180, 104 S. E. 166 (1920).

¹² *Union Central Life Ins. Co. v. Fox*, 106 Tenn. 347, 61 S. W. 62 (1901) was a contest of a policy which provided for incontestability for any reason other than misstatement of age, and was to take effect upon issuance. (This case arose before the adoption of the Tennessee incontestable statute.)

¹³ This is to be expected since all clauses do not embody the same provisions and all courts do not maintain the same attitude toward insurance companies.

¹⁴ In *Northwestern Mutual Life Ins. Co. v. Pickering*, 293 Fed. 496, 499 (C. C. A. 5th, 1923), it was said that "a contest so provided for imports litigation, the invoking of judicial action to cancel or prevent the enforcement of the policy, either by a suit to that end, or by a defense to an action on the policy. A mere denial or repudiation by the insurer of its liability under the policy, accompanied by a tender of the premiums paid, is not a contest, within the meaning of the provision." *Missouri State Life Ins. Co. v. Cranford*, 161 Ark. 602, 257 S. W. 66 (1923).

¹⁵ *Mutual Life Ins. Co. v. Rose*, 294 Fed. 122 (E. D. Ky. 1923).

¹⁶ *Plotner v. Northwestern Nat. Life Ins. Co.*, 48 N. D. 295, 183 N. W. 1000 (1921). This case is discussed with approval in (1921) 20 *MICH. L. REV.* 111. *Monahan v. Metropolitan Life Ins. Co.*, 283 Ill. 136, 119 N. E. 68 (1918). This line of cases is based on the reasoning that such interpretation is in accord with the intent of the parties as expressed in the plain language of the policies.

against whom the insurer can bring suit.¹⁶ Some, however, take the position that death under these circumstances stops the running of the period.¹⁷

It is not necessarily true that an incontestability clause denies the insurer, after the expiration of the period of contestability, all defenses not specifically excepted.¹⁸ Courts allow the defense of lack of insurable interest¹⁹ even after the period of contestability²⁰ on the ground that wager policies are contrary to public policy.²¹ After the contestable period has expired fraud is universally denied as a defense.²² When policies are made incontestable from date of issue, some courts allow a reasonable time in which to interpose this defense.²³ Others, however, construe these policies in their strictest terms and deny relief.²⁴

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¹⁶ *Jensen v. Metropolitan Life Ins. Co.*, 251 N. Y. 336, 167 N. E. 462 (1929); *Ramsay v. Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108 (1921).

¹⁷ *Mutual Life Ins. Co. v. Stevens*, 157 Minn. 253, 195 N. W. 913 (1923).

¹⁸ This would appear so from the face of the policy. Implications of law are not, of course, printed in the policy. *Infra* note 19. In *Elwood v. New England Mutual Life Ins. Co.*, 158 Atl. 257 (Pa. 1931), an exceptional defense was allowed an insurer in an action on a policy containing an incontestable clause. The plaintiff made an unsuccessful attempt to take his life, but only maimed himself. His suit to collect damages was denied on the grounds of being opposed to public policy.

¹⁹ What amounts to an insurable interest is a problem of considerable difficulty. See VANCE, *INSURANCE* (2d ed. 1930) 147-164.

²⁰ Clearly the defense would be a good one before the expiration of the period.

²¹ *Dakota Life Ins. Co. v. Midland Nat. Bank of Minneapolis*, 18 F. (2d) 903 (C. C. A. 8th, 1927); *Bromley's Adm. v. Washington Life Ins. Co.*, 122 Ky. 402, 92 S. W. 17 (1906). A case *contra* is cited and discussed in (1931) 19 GEO. L. J. 501, that of *Bogacki v. Great West Life Assurance Co.*, 253 Mich. 253, 234 N. W. 865 (1931). This case cites as its authority *Wright v. Mutual Benefit Asso.*, 188 N. Y. 237, 23 N. E. 186, 16 Am. St. Rep. 794 (1890), but this is a doubtful precedent since the defense of lack of an insurable interest was not pressed, and the opinion of the court proceeded on other grounds.

²² *Wright v. Mutual Benefit Asso.*, *supra* note 21. Incontestability clauses are said to be in the nature of short statutes of limitation, and are not contrary to public policy as condoning fraud. *Drews v. Metropolitan Life Ins. Co.*, 79 N. J. L. 398, 75 Atl. 167 (1910); *Hardy v. Phoenix Mutual Life Ins. Co.*, *supra* note 10. Note (1920) 6 A. L. R. 448.

²³ *Reagan v. Mutual Life Ins. Co.*, 189 Mass. 555, 76 N. E. 217 (1905).

²⁴ *MacKendree v. Southern States Life Ins. Co.*, 112 S. C. 335, 99 S. E. 806 (1919); *Duvall v. Nat. Ins. Co.*, 28 Idaho 356, 154 Pac. 632 (1916). Note (1920) 6 A. L. R. 448.