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Insurance -- Misrepresentation -- Effect of Agent's Knowledge of Falsity of Statements in Application for Policy

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The lunatic's privilege to rescind is not, however, an absolute one. He must tender back any benefit which he has received,[13] or at least the court has within its discretion the power to require him to do so.[14]

Another class of cases in which fraud is presumed must be distinguished. In these, the showing is not total incompetency, but only mental weakness. In order to raise a presumption of fraud under such proof it is necessary to demonstrate some further "inequitable incidents —such as undue influence, great ignorance, want of advice, and inadequate consideration."[15] The fraud presumed from these circumstances is fraud in fact and may be rebutted by any evidence. Accordingly, it would seem that "presumption" here means "enough evidence to go to the jury on an issue of fraud."[16]

The trend of the cases seems to be away from the earlier rule of according high protection to insane persons in their business dealings and toward a policy of protecting those who in good faith trade with them. Particularly is this true in the cases involving the title to land. The question essentially resolves itself into a choice between throwing a loss on one of two innocent parties. A frank recognition of this problem by the courts would perhaps bring about a more satisfactory result in particular cases than the present *a priori* rules.

PETER HAIRSTON.

Insurance—Misrepresentation—Effect of Agent's Knowledge of Falsity of Statements in Application for Policy.

In an action on an insurance policy it appeared that insured had stated in his application for reinstatement of the policy that he was in good health, when as a matter of fact he had diabetes. Both insured and the agent who wrote the policy knew this. The trial court charged that in the absence of fraud or collusion between the agent and insured, the agent's knowledge would be imputed to the company. The jury found for the plaintiff. *Held,* judgment affirmed.[1]

Perhaps the clearest type of situation calling for the application of the doctrine stated by the trial judge in this case is found when the policy provides that it shall be void if certain facts are present, and the agent has full knowledge of the presence of such facts. Thus, where

[13] West v. Seaboard Air Line Ry. Co., 151 N. C. 231, 65 S. E. 979 (1909).
[14] Ipock v. Atl. & N. C. Ry. Co., 158 N. C. 445, 74 S. E. 352 (1912).
[15] Smith v. Beatty, 37 N. C. 456 (1843); Dixon v. Green, 178 N. C. 205, 100 S. E. 262 (1919).
[16] Suttles v. Hay, 41 N. C. 124 (1848). The issue submitted to the jury in these cases is not mental competency, but fraud. Dixon v. Green, 178 N. C. 205, 100 S. E. 262 (1919).

[1] Colson v. State Mutual Assurance Co., 207 N. C. 581, 178 S. E. 211 (1935).

the agent knew that a building sought to be insured stood on leased ground but assured the owner that this was an immaterial circumstance, it was properly held that the agent's knowledge would be imputed to the company, and that the company would then be estopped to assert the breach of the condition in the policy as a defense.[2] If the agent knows of a circumstance prohibited by the policy, but nothing is said between him and insured on the subject, the North Carolina decisions still hold that the same doctrine applies.[3] This holding is sound; if the company delivers a policy knowing, through the knowledge of its agent, of a circumstance which by the terms of the policy makes it void, then to permit the company to assert the circumstance as a defense would be to permit it to sell a policy which it knew to be void.

However, may it be argued against the position of the court as above described that the insured is under a duty to read his policy, and that if he does, he will discover the violated provision, and should be obliged to have the policy corrected? In a case presenting different facts our court has held that one who can read will not be heard to say that he was ignorant of the contents of his policy in the absence of fraud or mistake.[4] The court's position, however, was rendered uncertain by a later decision in which it appeared that the agent had induced insured not to read his policy.[5] There it was said, "It is unnecessary to determine the interesting question whether, if plaintiff had not thus been misled by the agent . . . his omission to read could be imputed to him as negligence which would exonerate the company." No reference was

[2] Bergeron v. Pamlico Ins. & Banking Co., 111 N. C. 45, 15 S. E. 883 (1892); *cf.* National Life Ins. Co. v. Grady, 185 N. C. 348, 117 S. E. 289 (1923).

[3] The rule has been applied where the agent knew the status of the ownership of the property: Grabbs v. Farmers' Mutual Fire Ins. Co., 125 N. C. 389, 34 S. E. 503 (1899); Aldridge v. Greensboro Fire Ins. Co., 194 N. C. 683, 140 S. E. 706 (1927); Hauck v. American Eagle Fire Ins. Co., 198 N. C. 303, 151 S. E. 628 (1930); where he knew a building was still under construction and therefore uninsurable: Johnson v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124 (1916); where he knew the "iron safe clause" would be violated: Bullard v. Pilot Fire Ins. Co., 189 N. C. 34, 126 S. E. 179 (1924); where he knew that dynamite was kept on the premises: Midkiff v. N. C. Home Ins. Co., 197 N. C. 139, 147 S. E. 812 (1929); Midkiff v. Palmetto Fire Ins. Co., 198 N. C. 568, 152 S. E. 792 (1930); and where he knew that other insurance was carried on the property: Laughinghouse v. Great National Ins. Co., 200 N. C. 434, 157 S. E. 131 (1931). But if the agent has an interest in the insured property, notice to him will not be imputed to the company: Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869 (1912); nor does the doctrine apply where the agent gains his knowledge after the inception of the policy: Green v. Aetna Ins. Co., 196 N. C. 335, 145 S. E. 616 (1928). A member of a fraternal order knowing of the restrictions on its agents' powers will not be allowed to invoke the doctrine: Robinson v. Brotherhood of Locomotive Firemen and Engineers, 170 N. C. 545, 87 S. E. 537 (1915).

[4] Cuthbertson v. N. C. Home Ins. Co., 96 N. C. 480, 2 S. E. 258 (1889); *cf.* Weddington v. Piedmont Fire Ins. Co., 141 N. C. 234, 54 S. E. 271 (1906).

[5] Collins v. U. S. Casualty Co., 172 N. C. 543, 90 S. E. 585 (1916). This seems to be the only case involving notice to the agent in which the question of insured's duty to read his policy has been raised.

made to the former decisions in this state, but cases supporting both sides were cited from other jurisdictions.

A second type of case in which this doctrine of imputed notice is applied is where in his application the insured makes a misrepresentation in good faith, but the agent is aware that the statement made is false. For example where insured stated that he had no bodily infirmity when in fact he was partially deaf, it appearing that he did not consider deafness a bodily infirmity, it was held that he could recover upon showing that the agent of defendant company knew of the deafness.[6] Here again the equities are in favor of insured, and it would be unjust to refuse a recovery.

In a third type of case in which both agent and insured know of the falsity of the representation the doctrine has been applied on the basis of a jury finding that there has been no fraud or collusion.[7] Such is the situation in the instant case. But how can a jury say that one who has knowingly signed his name to a false statement, thus procuring insurance which otherwise he could not have obtained, is not guilty of a fraud? It is submitted that in these cases the fact that both agent and insured knew of the falsity of the representation is in itself fraud and collusion sufficient to exonerate the company from liability. This view is supported by authority in other jurisdictions.[8]

Finally there may be a question as to the materiality of the misrepresentation made. In the instant case it is said, "We see no error in the exclusion of the opinion of this doctor as to whether a person who has diabetes has an insurable risk. It was immaterial to the controversy—it may not be amiss to say that the evidence is to the effect that Colson did not die of diabetes, but another cause wholly apart from this disease." If by this it is meant to say that a misrepresentation concerning a matter not contributing to loss under the policy will not be regarded as material, it is submitted that the ruling is *contra* to the previous

[6] Follette v. U. S. Mutual Accident Ass'n., 107 N. C. 240, 12 S. E. 370 (1890) (judgment for defendant reversed); same case in 110 N. C. 377, 14 S. E. 923 (1892) (judgment for plaintiff affirmed); *cf.* Fishblate v. Fidelity Co., 140 N. C. 589, 53 S. E. 354 (1906); Short v. Lafayette Life Ins. Co., 194 N. C. 649, 140 S. E. 302 (1927).

[7] Gardner v. North State Mutual Life Ins. Co., 163 N. C. 367, 79 S. E. 806 (1913); Marsh v. Durham Life Ins. Co., 199 N. C. 341, 154 S. E. 313 (1930). But where there was strong evidence of a conspiracy between insured, agent, and the examining physician, it was error to charge that notice to the agent was notice to the company: Sprinkle v. Knights Templar Indemnity Co., 124 N. C. 405, 32 S. E. 734 (1899); judgment for defendant affirmed in 126 N. C. 678, 36 S. E. 112 (1900).

[8] Triple Link Mutual Indemnity Ass'n. v. Williams, 121 Ala. 138, 26 So. 19 (1899); Globe Res. Mutual Ins. Co. v. Duffy, 76 Md. 293, 25 Atl. 227 (1892); Mudge v. Supreme Court, I. O. F., 149 Mich. 467, 112 N. W. 1130 (1907); Newsholme Brothers v. Road Transport Ins. Co. [1929] 2 K. B. 356; Rocco v. Northwestern National Ins. Co., 64 Ont. L. Rep. 559 (1929).

North Carolina cases on the subject.[9] The cases heretofore have held that the important factor in determining the materiality of a representation is whether it is one that would have influenced the company in deciding the important questions of accepting the risk and fixing the premium rate.

FRANKLIN T. DUPREE, JR.

Mortgages—Corporations—Removal of Trustees under Security Deeds of Trust.

The defendant was named as trustee in a Georgia real estate mortgage securing a number of bonds. Thereafter the holders of ninety-two per cent of these bonds filed a petition in the Georgia court praying the defendant's removal from the trusteeship on the grounds that he was insolvent, that he had misappropriated trust funds committed to his care, that he had been convicted of a fraudulent breach of trust, and that for other reasons he was not a suitable person to act as trustee. Service was by publication. The lower court ruled that the action was properly brought. *Held,* by the Georgia Supreme Court, that the action should have been dismissed, since, *inter alia,* the proceeding was *in personam,* and service by publication was insufficient to give the court jurisdiction.[1]

Contrary to a proposition advanced by the court in its opinion,[2] it has been quite generally conceded that, even in the absence of statutory authority,[3] the equity court's inherent supervisory power over all trusts includes the power, in a proper case, to remove an unfit mortgage trustee.[4] In the situation which is perhaps most analagous in so far as the

[9] Fishblate v. Fidelity Co., 140 N. C. 589, 53 S. E. 354 (1906); Gardner v. North State Mutual Life Ins. Co., 163 N. C. 367, 79 S. E. 806 (1913).

[1] Caldwell v. Hill, 176 S. E. 381 (Ga. 1934).

[2] 176 S. E. at 382-385.

[3] Quite commonly statutes now provide a procedure for the removal of trustees. The grounds for removal are also stated in many. For example, KAN. REV. STAT. (1923) Ch. 67-412: "Trustees having violated or attempting to violate any express trust, or becoming insolvent, or of whose solvency or that of their sureties there is reasonable doubt, or for other cause, in the discretion of the court having jurisdiction, may, on petition of any person interested, after hearing, be removed by such court; and all such vacancies in express trusteeships may be filled by such court." These provisions are applicable to mortgage trusteeships. Sanders v. Hall, 74 F. (2d) 399 (C. C. A. 10th, 1934). The North Carolina statute, N. C. CODE ANN. (Michie, 1931) §2583 (a), provides for removal by vote of a majority of the note or bondholders, when the trustee has removed from the state, become a bankrupt, or, if corporate, ceased to do business, etc. This provision, however, is expressly stated to be "in addition to the rights and remedies now provided by law." §2583, as amended, Public Laws 1933, c. 493, provides for a proceeding before the clerk for the appointment of a successor where the trustee has absented himself or become otherwise incompetent.

[4] 4 THOMPSON, CORPORATIONS (3rd ed. 1927) §2667. On the removal of trustees generally see 1 PERRY, TRUSTS (6th ed. 1911) §275 *et seq.*