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Marine Insurance -- Return of Excess Premiums -- Innocent Overvaluation -- Risk Bearing in Transoceanic Shipments

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It is stated in a federal case in Indiana involving the same statute that Congress did not intend to include the offense of obtaining money under false pretenses in the statute, for it did not expressly provide for that offense.[25] This holding is an example of the same statute being given a strict interpretation. If the indictment had been as in the present case the defendant could have been convicted, for the writing of a bad check is a felony under the Indiana law.[26] A like result was reached in a Pennsylvania case where the defendant was released because his act of giving a forged check did not constitute either larceny or a federal felony;[27] but had he merely been indicted for intending to give a forged check he would have been within the present interpretation of the statute, for forgery is a felony under the Pennsylvania Code.[28] These decisions would tend to show that other judges and prosecuting officers are not completely in accord with the interpretation given in the present case, and the possibility of having non-uniform offenses against the federal government might make it wise either to rewrite the law, indicating freely the intention of Congress, or to interpret the statute so that it covers only felonies under the federal law.

Certiorari has recently been granted[29] in a case concerning the same issue involved in the instant decision, and an authoritative ruling may soon be forthcoming.

C. D. Hogue, Jr.

Marine Insurance—Return of Excess Premiums—Innocent Overvaluation—Risk Bearing in Transoceanic Shipments

A pearl necklace, left in Germany upon the death of the owner, was adjudged by a German "official protocol" to be worth $60,000, and was sought to be obtained from Germany by the executors of the estate

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§1167; Ann. Code of Md. (Flack, 1939), Art. 27, §§152 and 150. Virginia and West Virginia both have distinctions as to when the offense is a felony or a misdemeanor; Virginia turning the offense into larceny and making distinction between grand and petit larceny at $5.00; Va. Code Ann. (Michie, 1936) §4149(44), grand larceny being a felony, *id.* §4758. It is thus possible to commit the same crime within the same circuit and be guilty of an offense against the United States if it is committed in one part, and not guilty if committed in another part. There would not seem to be any apparent reason why the cashing of a check in a national bank would impair its efficiency more in one state so as to make it an offense against the United States than in another where it would be no offense against the United States.

[25] United States v. Mangus, 33 F. Supp. 596 (N. D. Ind. 1940). Here the indictment was for larceny by trick, and the court held that the defendant could not be convicted because there was consent to the taking of the title and the possession of the money.

[26] Ind. Stat. Ann. (Burns, 1933) §§10-2105, and 9-101.

[27] United States v. Patton, 120 F. (2d) 73 (C. C. A. 3rd, 1941) (indictment was for larceny, but the court held that the bank relinquished title and possession when it cashed the forged check and thus it could not be larceny).

[28] 18 Penna. Stat. Ann. (Purdon, 1930) §3611.

[29] Jerome v. United States, 11 U. S. L. Week 3106 (U. S. 1942).

and the heir. A war-risk insurance policy was taken out against loss in transit of the pearls, "valued at . . . [$60,000]." Premiums of over $2,000 were paid. Upon its arrival the necklace was found to be worth only a little more than $60.00, the German "official protocol" allegedly being incorrect in stating its value. Executors therefore sue to recover the excessive premiums paid the insurance company, basing their suit on a count for "money had and received," and also requesting reformation of the insurance policy. *Held:* Recovery denied. Equity will reform a contract when it does not state what the parties intended, but will not create a new and entirely different contract. Here there is no indication of intent to obtain a lesser amount of insurance than $60,000 worth. Also, the insurance company has rendered consideration worth all the premium paid, for if the necklace had been lost at sea the true value of it would never have been known, and the insurer would have had to pay the $60,000 loss.[1]

Practically all of the decisions (certainly the important ones) concerning overvaluation of the protected property by the insured have dealt with a situation in which a loss of the property has occurred, and the insurer is seeking to resist payment because of an alleged overvaluation. The present case differs in that the risk has terminated without a loss of the protected property so that insured is seeking to recover excess premiums paid because of mistaken overvaluation rather than to obtain indemnification. However, despite the factual peculiarity of the present case, a knowledge of the law as set down in the ordinary overvaluation decision is important background for the understanding of this case.

The effect of overstating the value of insured property has undergone a rather obvious change in the past century. The earlier cases abided by the rule that even an absolutely innocent and unintentional overstatement by the insured, if it were a material and substantial overstatement, would avoid[2*] the policy.[3] This rule put the duty squarely

[1] Orient Insurance Co. v. Dunlap, 193 Ga. 241, 17 S. E. (2d) 703 (1941).

[2*] See VANCE, INSURANCE (2nd ed. 1930) 360 n. 72.

When used with reference to insurance policies, the words "void," "vitiate," and similar language are generally used in decisions and texts not to mean void *ab initio*, but rather "voidable at the option of the injured party." Since most insurance cases arise from an attempt by the insurer to resist performance, so that the insurer will always exercise any option he may have to avoid the policy, the distinction between "void" and "voidable" is usually immaterial. In the present case, though, the distinction might be of prime importance. If this policy were void *ab initio* the insured here would have a much easier case for the return of his premiums than if the policy were merely voidable at the option of the insurer, since obviously the insurer does not elect to avoid. See *infra*, pp. 94 f., to the effect that insured might recover in the present case, notwithstanding the fact that the insurer has not exercised his option to avoid.

[3] Carpenter v. Providence Insurance Co., 16 Peters (U. S.) 495, 10 L. ed. 1044 (1842); Smith v. Royal Insurance Co., 37 F. Supp. 841 (N. D. Cal. 1941); Carrolton Furniture Co. v. American Indemnity Co., 115 Fed. 77 (C. C. A. 2nd,

upon the insured in all cases to find out the value of the goods he wished to have insured, and to state same to the insurer accurately, upon pain of being unable to recover for injury to or loss of the property even to the extent of the smaller true value of it.

The modern cases have looked the other way—so that today the majority rule may be said to be that an innocent mistake, even to a substantial amount, will not cause a policy to be void.[4] It would seem that under the modern rule neither insured nor insurer would be greatly interested in whether or not the protected property were overvalued. However, the insurer may be anxious to avoid overstatement so as to cut down the "moral hazard." And the insured is of course anxious to avoid paying too high a premium.

1902); Carpenter v. American Insurance Co., 1 Story 57, Fed. Cas. No. 2428 (C. C. D. R. I. 1839); National Insurance Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340 (1908); Continental Insurance Co. v. Farlan, 219 Ky. 462, 293 S. W. 952 (1927); Niagara Insurance Co. v. Layne, 162 Ky. 665, 172 S. W. 1090 (1915); Protection Insurance Co. v. Hall, 15 B. Mon. (Ky.) 411 (1854); Dennison v. Thomaston Insurance Co., 20 Me. 125 (1841); Wood v. Fireman's Insurance Co., 126 Mass. 316 (1879); Wilbur v. Bowditch Insurance Co., 10 Cush. (Mass.) 446 (1852); Davenport v. New England Insurance Co., 6 Cush. (Mass.) 340 (1849); Houghton v. Insurance Co., 8 Metc. (Mass.) 114 (1844); Bryant v. Ocean Insurance Co., 22 Pick (Mass.) 200 (1838); Stetson v. Massachusetts Insurance Co., 4 Mass. 330 (1808); Shelden v. Michigan Insurance Co., 124 Mich. 303, 82 N. W. 1068 (1900); Briggs v. Fireman's Insurance Co., 65 Mich. 55, 31 N. W. 616 (1887); Smith v. Automobile Insurance Co., 188 Mo. App. 297, 175 S. W. 113 (1915); Leach v. Insurance Co., 58 N. H. 245 (1883); Hersey v. Merrimack Insurance Co., 7 Fost. (N. H.) 149 (1855); Armour v. Transatlantic Insurance Co., 90 N. Y. 450 (1882); Evans v. Columbia Insurance Co., 40 Misc. 316, 81 N. Y. Supp. 933 (1903); Bobbit v. Liverpool Insurance Co., 66 N. C. 70 (1871); Lexington Insurance Co. v. Paver, 16 Ohio 324 (1847); Nassauer v. Susquehanna Insurance Co., 109 Pa. St. 507 (1885); Catron v. Tennessee Insurance Co., 6 Humph. (Tenn.) 176 (1845); Home Insurance Co. v. Eakin, 2 Tex. Civ. Cas. §665 (1885); Boutelle v. Westchester Fire Insurance Co., 51 Vt. 431 (1878); Ionides v. Pender, L. R. 9 Q. B. 531 (Eng. 1882); Newton v. Gore Insurance Co., 33 U. C. (C. P.) 92 (Eng. 1875); Riach v. Niagara Insurance Co., 21 U. P. (C. P.) 464 (Eng. 1861); Dickson v. Equitable Fire Insurance Co., 18 U. C. (Q. B.) 246 (Eng. 1859); Shaw v. St. Lawrence Insurance Co., 11 U. C. (Q. B.) 73 (Eng. 1851); Continental Insurance Co. v. Ware, 9 Ins. L. J. 519 (1876).

[4] First National Bank v. Hartford Insurance Co., 95 U. S. 673, 24 L. ed. 563 (1877); Franklin Insurance Co. v. Vaughan, 92 U. S. 516, 23 L. ed. 740 (1876); Hartford Live Stock Insurance Co. v. McMillen, 9 F. (2d) 961 (C. C. A. 6th, 1925); Columbian Insurance Co. v. Modern Laundry, 277 Fed. 355 (C. C. A. 8th, 1921); Miller v. Alliance Insurance Co., 7 Fed. 649 (C. C. D. N. Y. 1881); Atlas Insurance Co. v. Robison, 94 Ark. 390, 127 S. W. 456 (1910); Cottam v. National Church Insurance Co., 209 Ill. App. 404 (1918); Home Insurance Co. v. Overturf, 35 Ind. App. 361, 74 N. E. 47 (1905); Dwelling House Insurance Co. v. Freeman, 12 Ky. Law Rep. 894, 15 S. W. 856 (1891); Garnier v. Aetna Insurance Co., 181 La. 426, 159 So. 705 (1935); German Fire Insurance Co. v. Cohen, 114 Md. 130, 78 A. 911 (1910); Bernadich v. Lincoln Mutual Insurance Co., 287 Mich. 137, 283 N. W. 5 (1938); Mississippi Fire Insurance Co. v. Dixon, 133 Miss. 570, 98 So. 101 (1923); Delaware Insurance Co. v. Hill, 127 S. W. 283 (Tex. Civ. App. 1910); Morotock Insurance Co. v. Fostoria Glass Co., 94 Va. 361, 26 S. E. 850 (1897); see especially Lynchburg Insurance Co. v. West, 76 Va. 575 (1882). See comment (1941) 19 LEHIGH LAW JOURN. 139.

A few of even the very early cases did follow the "modern" rule, and these gradually became more and more numerous. It appears that the very first reported American case to offer a faint suggestion of what ultimately became the modern rule was *Wolcott v. Eagle Insurance Company*,[5*] in 1827. Plaintiff operated a brig and was away from the home port for many months at a time, making many stops in distant lands. The value of the cargo was great at times and small at times. Plaintiff had stated that the average value was around $2,500, and defendant insurer issued him a policy in that amount. At the time of the loss sued on, the insured part of the cargo was worth considerably less than $2,500. The case turned on other questions than the one of valuation, but the counsel for plaintiff interposed the argument that "Where the assured in a valued policy has anything at risk under the policy, *there being no fraud,* the valuation is conclusive." The *Wolcott* case was then cited by counsel in *Borden v. Hingham Fire Insurance Company*,[6] which stated, on the subject of overvaluation, "The plaintiffs made and the defendants accepted the estimate; and the contract was made on that basis. No fraud, concealment, or gaming is suggested. We are all of the opinion that the plaintiffs are entitled to recover." The *Hingham Insurance Company* case was then cited in *Fuller v. Boston Fire Insurance Company*,[7] and in Wood on *Fire Insurance*.[8] Thus the modern rule was born.

Some cases pretended to abide by the settled rule that any material overvaluation, whether fraudulent or innocent, would avoid the policy, yet circumvented the rule in cases where it would work an injustice by simply calling any overvaluation, even one of twofold the actual value,[9] or of a third again actual value,[10] an immaterial and unsubstantial overvaluation.

A clear and typical clash of the two doctrines, the old and the new, can be seen in the three *Eakin* cases, quite noted in their day. The intermediate court of appeals, citing the Massachusetts cases, *supra,* and Wood on *Fire Insurance,* held that only an overvaluation so gross that fraud must of necessity be presumed would vitiate the policy.[11] The

[5*] 4 Pick (Mass.) 445, 21 Mass. 429 (1827). 2 May, Insurance (3d ed., 1890), §373A, p. 827, n. 3, states that the modern rule was born in Texas. The most diligent search by the author, however, would clearly give Massachusetts this honor.

[6] 18 Pick (Mass.) 523, 35 Mass. 523 (1836). In the Borden case the question was whether the value of the insured's *interest* in the protected property was worth the full value of the face of the policy. There was no question as to the value of the property itself. The court held that in the absence of fraud, insured could recover the full face of the policy.

[7] 4 Metc. (Mass.) 206, 45 Mass. 206 (1842).

[8] Wood, Fire Insurance (1878) 431, §220, n. 6.

[9] Conn v. Imperial Fire Insurance Co., 1 R. & C. (Nova Scotia) 240.

[10] Franklin Insurance Co. v. Vaughan, 92 U. S. 516, 23 L. ed. 740 (1876).

[11] R. E. Eakin v. Home Insurance Co., 1 Tex. Civ. Cas. 155 (1883).

highest appelate court reversed this holding, stating that any material overvaluation, whether by mistake or fraud, would bar recovery on the policy.[12]

The old rule has still been followed in some comparatively recent decisions.[13]

As to the case where there is a *fraudulent* overvaluation, the law appears the same in nearly all cases, old and modern: If the misvaluation was material or substantial the policy is void; otherwise not.[14*]

The change that has occurred in the law is clearly reflected by the text writers, the early ones stating the "old" (now minority) rule, the transition ones being rather confused, and the recent writers stating the modern majority rule.

The third edition of May on *Insurance*, published in 1891, follows the earlier editions in stating that where the policy provides that overvaluation will avoid it, then any substantial overvaluation, innocent or fraudulent, will avoid the policy; and where the policy does not state that overvaluation will avoid it, the same is true. However, May recognizes that in the latter case there is a tendency to hold that only *gross* innocent overvaluation will avoid the policy.[15*]

As late as 1921, Corpus Juris stated the law in accordance with May above. A few pages later, however, it states that the "old" rule applies only to warranties, and not to representations. A general confusion of the cases on the matter is said to exist.[16]

The fourth edition of Richards, in 1932, emphasized still another way of dividing and distinguishing between the cases using the "old" and the "new" rules: viz., that the "old" rule that an innocent overvaluation would avoid the policy is still today the majority rule in *marine* insurance cases, while the "new" rule is the majority in other types of property insurance cases. The reason, as indicated by Richards, is that a marine insurer is entitled to practically a guaranty of

[12] Home Insurance Co. v. R. E. Eakin, 2 Tex. Civ. App. Reps. 587 (1885).

[13] Smith v. Royal Insurance Co., 37 F. Supp. 841 (N. D. Cal. 1941).

[14*] 2 May, Insurance (3rd ed. 1891), §373; 4 Richards, Insurance (4th ed. 1932), 363, §233; 26 Corpus Juris, Fire Insurance (1921), §189(b); Vance, Insurance (2d. ed. 1930), §190; 29 American Jurisprudence, Insurance (1940), §1132. But see Lycoming Insurance Co. v. Ruben, 79 Ill. 402 (1876), and 4 Appleman, Insurance (1942), §2601, to the effect that *any* fraudulent overvaluation may avoid the policy, whether material or not.

[15*] 2 May, Insurance (3rd ed. 1891), §§373-4. The case of Citizens Fire and Marine Insurance Company v. Short, 62 Ind. 316 (1878), in discussing an identical section from an earlier edition of May, criticized May's adherence to the "old" rule: "It states the law on the subject of overvaluation more strongly in favor of the insurer than we think the cases will warrant. In our opinion, the overvaluation must be knowingly false and fraudulent, or it will not have the effect of vitiating or avoiding the policy."

[16] 26 Corpus Juris, Fire Insurance (1921) §§188-191, 205-6.

the truthfulness of the insured's description of the protected property, because in many cases the property may be overseas so that the insurer has no opportunity to inspect it. This circumstance is said not to be true of other forms of property insurance. Richards' conclusions seem to be backed up by good case authority.[17]

Vance, in 1930, seems to have committed the error of stating quite bluntly in one place that the "old" rule is the law (except as to mere statements of opinion and belief),[18] while several chapters later he clearly states that the modern rule is in the majority.[19] However, Vance's point seems to be that *all* statements as to the value of property must be treated as mere opinion, except valuations of items which have a definite stipulated value (such as the value of a mortgage on the insured property). Thus the inconsistency is largely explained away.

Patterson concurs with Vance's conclusion that statements of valuation are largely opinion, citing *First National Bank of Kansas City v. Hartford Fire Insurance Company*.[20] Hence the insurer can avoid the policy only if there is a fraudulent misvaluation, which would involve the considerable difficulty of proving that the insured did not actually "think what he said he thought." Such a statement of opinion is therefore "worthless," says Patterson, insofar as aiding the insurer in litigation upon the policy.[21]

Appleman on *Insurance*, 1941, presents a very discerning analysis of the cases on this point.[22] He begins by giving a general statement of the "new" majority rule that a fraudulent and substantial overvaluation will usually avoid the policy whereas an innocent one usually will not. Appleman points out the confusion on the point of innocent overvaluation, but states that the better modern courts realize that statements of value are largely mere opinion and that nearly everyone is inclined quite innocently to place an exaggerated value on his own goods. These considerations, plus the fact that a court may always fall back on the device of presuming fraud in case there is a very grossly exaggerated value, have been the principal reasons for the switch to the "new" rule. Appleman indicates, and with a substantial backing of decisions, that innocent overvaluation is more apt to be excused where the policy is of the "open" form than where it is "valued." Nearly all policies today are "open" ones (another reason for the switch to the new rule). Under such a policy the original statement of value is not of importance in determining the amount that an

[17] RICHARDS, INSURANCE (4th ed. 1932) §§79-80.
[18] VANCE, INSURANCE (2d ed. 1930) §107, at p. 368.
[19] VANCE, INSURANCE (2d ed. 1930) §190, at p. 724.
[20] 95 U. S. 673, 24 L. ed. 563 (1877).
[21] PATTERSON, INSURANCE (1935) §67, at p. 278.
[22] 4 APPLEMAN, INSURANCE (1941) §§2601-2.

insurer must pay in the event of loss, for the insured is indemnified in accordance with the value of the property at the time of the loss. The original statement of value is therefore important only in determining the amount of the premium, and because the moral hazard is thought to be increased if property is insured for more than actual value. If it is a valued policy, on the other hand, then the amount the insurer must pay after a loss is calculated in accordance with the original statement of value in the application for insurance. Courts are therefore much less willing to excuse an overvaluation in such a policy, and much more willing to consider the overvaluation as fraudulent.[23*] The very fact that the policy is of the valued type is calculated to put the insured on notice that he must be especially careful and accurate in his statement of value.

The sketch treatment of this subject in the American Jurisprudence volume on *Insurance* seems well taken in so far as it goes.[24] It is clearly stated that the majority rule today is that an innocent overvaluation will not avoid a policy of insurance. Also, it is well shown that generally it makes no difference, in cases concerning overvaluation of property, whether the misstatement occurred in the proofs of loss, or in the original application for the policy. The law is the same in both cases.[25]

Such, then, is the law as stated by the cases and the authorities who have attempted to analyze them.

As to the present case, it should be noted at the outset that if the insured is to be allowed any relief it cannot be by reformation of the policy as sought by the plaintiff here. Some other basis for relief must be found, such as that the mistake was of such nature that it will avoid the policy; or that the authorities have generally allowed a return of premiums when they "reopen" the valuation of a valued policy. For the court in the principal case decided, and rightly so, that the insured could not have had reformation here. "There was no agreement or intention as to insurance of a necklace made of 'Japanese' or cultured pearls; and if the contract should now be so reformed as to cover a necklace of the latter character, it would be converted into something which the parties never intended." While in a proper case equity may

[23*] See, *infra*, pp. 95 f., as to the right of the insurer to "reopen" the stipulated valuation after a loss, if he feels there has been an overvaluation; and as to the right of the insured, upon such "reopening," to recover excess premiums paid because of an innocent overvaluation.

[24] 29 AMERICAN JURISPRUDENCE, INSURANCE (1940) §§1132-4.

[25] Orenstein v. Star Insurance Co., 10 F. (2d) 754 (C. C. A. 4th, 1926); Columbian Insurance Co. v. Modern Laundry, 277 Fed. 355, 20 A. L. R. 1159 (C. C. A. 8th, 1921); Erb v. German-American Insurance Co., 98 Iowa 606, 67 N. W. 583 (1896); Stone v. Hawkeye Insurance Co., 68 Iowa 737, 28 N. W. 47 (1886).

reform a written contract which, because of a mistake or inadvertence in drawing up the instrument—as a stenographical error, etc.—does not express what the parties intended, it can do so only to the extent of making it speak the actual agreement, and cannot make a new and different contract for the parties.

The present case is an attempt by the insured to recover excess premiums, rather than an attempt by the insurer to escape liability because of misvaluation. However, whether or not these premiums can be recovered depends upon whether or not the policy was valid, for it is the well-established rule in marine insurance that, with regard to return of premiums for overinsurance, if the insurer could have at any time and under any circumstances been called upon to pay the whole sum on which he had received premiums, then the entire premium is earned, and there can be no recovery of any part of it by the insured. But if the insurer could never have been called upon to pay the whole, then he must return an amount of the premium commensurate with that percentage of the whole value of the insured property which he could not have been forced to make good in case of a loss.[26] In short, the insurer can usually keep the premiums only if he bore the risk. The rule therefore is based upon failure of consideration.[27]

It would seem that the insurer did not bear a risk in the present case because if he had been sued on the policy there are several defenses which he might have interposed so as to escape any payment. First, this was a marine insurance policy. As stated,[28] the so-called "old" rule is controlling in such a case. An innocent overvaluation, if substantial, will avoid the policy. Second, in many cases where the valuation is very greatly inaccurate (as in the present case, where a $60.00 necklace was stated to be worth $60,000) the courts have adopted the device, in order to prevent obvious injustice, of presuming fraud, so that the policy is void under the universally accepted rule that a fraudulent substantial misstatement will avoid the policy.[29] And third, the policy in the present case was a valued one. As stated,[30] proper valuation is of such importance in such a policy that the courts have generally expected an applicant for insurance to be positive of the value of the protected property. A substantial overvaluation, even an innocent one, will usually avoid a valued policy.

The insurer may claim, however, and upon good authority, that

[26] VANCE, INSURANCE (2d ed. 1930) §92, at p. 322; 2 ARNOULD, MARINE INSURANCE (11th ed. 1924) §1259.
[27] Tyrie v. Fletcher, 2 Cowp. 666, 98 Reprint 1297 (Eng. 1777); VANCE, INSURANCE (2d ed. 1930) §93, at p. 321.
[28] See, *supra*, pp. 91 f., the summary of Richards' discussion.
[29] See, *supra*, pp. 92 f., the summary of Appleman's discussion.
[30] *Ibid.*

these defenses do not render the policy absolutely void, but merely *voidable* at his option so that until the insurer has exercised his option (which naturally he did not do here) the policy must be treated as valid and he must be regarded as having carried the risk.[31]

This contention of the insurer may be discounted in several possible ways. First, the language in many cases and texts seems to indicate that a material misvaluation of the protected property in a marine policy will cause the policy to be *ab initio* void (so that the risk never attaches), and not merely voidable at the will of the insurer.[32*]

And second, there is authority that the risk does attach, but that nevertheless there may be a recovery of premiums commensurate with the amount of overinsurance, by a "reopening" or reconsideration of the value even in a valued policy. In *Forbes v. Aspinwall*,[33] and *Rickman v. Carstairs*,[34] it was established that notwithstanding the fact that

[31] See, *supra*, n. 2.

[32*] For example, 4 APPLEMAN, INSURANCE (1941) §2601, states, "A gross exaggeration of the value or substantial misstatement *will relieve the insurer of all liability thereunder*." And 2 MAY, INSURANCE (3rd ed. 1891) §373, says, "It is not necessary that the overvaluation be intentional and fraudulent to have the effect of *vitiating* the policy." Further, "For no overvaluation but a gross and clear one . . . will in either case be held to *vitiate* the policy; and such a one will avoid the policy, whether provided against or not." And RICHARDS, INSURANCE (4th ed. 1932) §79, states, "In marine insurance, a concealment of a material circumstance . . . whether intentional or unintentional, innocent or fraudulent, *avoids* the contract." Further, "The *validity* of the marine policy impliedly is conditioned upon the completeness and accuracy of the description of the character of the risk as put forth by the applicant."

And Merchants Insurance Co. v. St. Paul Insurance Co., 219 App. Div. 636, 220 N. Y. S. 514 (1927), says, "The relationship between insurer and insured on marine insurance is one which calls for *uberrima fides*." Further, Delaware Insurance Co. v. Hill, 127 S. W. 283 (Tex. 1910) is to the effect that a valued policy will be absolutely void if there is misrepresentation of value, provided there is actual fraud, or such a gross misstatement of value that fraud may be presumed. Also, see Tyrie v. Fletcher, 2 Comp. 666, 98 Reprint 1297 (Eng. 1777); Stevenson v. Snow, 3 Burr. 1240, 97 Reprint 809 (Eng. 1761); Martin v. Sitwell, 1 Shower 156, 89 Reprint 509 (Eng. 1700); Colby v. Hunter, 3 C. & P. 7, 172 Reprint 298 (Eng. 1827).

However, see, *supra*, n. 2. And also to the contrary is the one case most directly in point, Morrison v. The Universal Marine Insurance Co., 8 Exch. 197 (Eng. 1873). Plaintiff-insured's agent was instructed to secure marine insurance on freight on the *Cambria*. The agent had been informed that the *Cambria* might be grounded, there being some news to that effect. Upon careful investigation the agent determined that the ship had not grounded, whereupon he applied for the policy, not mentioning the supposedly false rumor. The insurer heard of the rumor from another source shortly after receiving the application, but issued the policy notwithstanding. Upon suit on the policy (the *Cambria* having in fact been grounded and lost) *held*, the failure of the agent to mention the rumor made the policy *voidable* at the option of the insurer. This option could be exercised within a reasonable time after the insurer learns that it has cause to avoid. *Held*, also, that the insurer's issuing the policy after hearing of the unconfirmed rumor did not amount to an election not to avoid.

Also, see 38 CORPUS JURIS, MARINE INSURANCE (1921) §139; and 4 RICHARDS, INSURANCE (4th ed 1932) §136.

[33] 13 East 323, 104 Reprint 394 (Eng. 1811).

[34] 5 B. & Ad. 651, 110 Reprint 931 (Eng. 1833).

the policies were "valued," the value would be "reopened," and the insurer could show that the amount stated in the policy was not the true amount on board ship at the time of the disaster at sea. In those cases the boat owner insured his freight charge (*Forbes* case) and cargo (*Rickman* case) before picking up the cargo, which then turned out to be considerably smaller than anticipated. A loss at sea occurred. It was held that the insurer had to pay, in the former case, freight charges equivalent only to the actual charge that would have been due on the smaller cargo, and, in the latter case, only the value of the actual cargo.[35*]

The case of *The Main*[36] extended this doctrine by allowing the insured a return of the extra premium that had been paid for the unnecessary overinsurance. In this case, a ship operator took out insurance to make sure that he received his freight charge (which he otherwise would not receive in case of a loss at sea). Before he set sail, however, the owner of the cargo unexpectedly paid the ship operator about one fourth of the freight charge, so that there ceased to be any risk at all that such part of the charge would not be received. A loss at sea occurred. The court held that the insurer was liable only for the remainder of the freight charge, and also that the insured could recover the excess premiums.[37*] Also, in *Fisk v. Masterman*[38] there was overinsurance because of a mistake in good faith as to the size and value of the cargo. Return of appropriate premium was allowed.[39*]

New York has adopted for all types of property insurance cases the

[35*] The *Forbes* and *Rickman* cases conform to the general rule that the valuation in a valued policy may be reopened where there is fraud or mistake; but beyond this it may not be reopened, not even where there is only a partial loss. Griswold v. Union Insurance Co., 11 Fed. Cas. 69, No. 5840 (C. C. N. Y. 1854); Brooke v. Louisiana Insurance Co., 4 Mant. N. S. (La.) 640 (1826); Stanton v. Natchez Insurance Co., 6 Miss. 340 (1844). See Hall v. Jefferson Insurance Co., 279 Fed. 892 (S. D. N. Y. 1921); Standard Marine Insurance Co. v. Nome Beach Lighterage, 133 Fed. 636 (C. C. A. 9th, 1904); Muirhead v. Forth Insurance Assoc., 1894 A. C. (Eng.) 72.

[36] (1894) Prob. (Eng.) 320.

[37*] Despite the liberality of this case in allowing a return of the premium for overinsurance caused by unexpected payment of freight, it strongly criticized the *Forbes* case, *supra*, for recognizing any overinsurance in the case where, in a valued policy, the parties had merely mistaken the size of the cargo. The *Main* case stated that a court was *not* at liberty to reopen the valuation agreed upon by the parties as an arbitrary and unchangeable figure. As to the merit of distinguishing between overvaluation caused by unexpected payment of the freight charge and that caused by mistake as to the value of the cargo, *query*. See discussion of Fisk v. Masterman, *supra*.

[38] 8 M. & W. 165, 151 Reprint 994 (Eng. 1841).

[39*] When the voyage began, there was no overinsurance. But while the ship was on the high seas additional insurance was secured with another company, on a mistaken belief that the cargo was of greater value than it actually was. *Held*, only the second insurance company must return excess premiums to the insured; for the first insurer bore the entire risk for at least a part of the voyage, so is not liable for returning a ratable share of the premium paid for overinsurance.

wise custom of refusing to consider a valued policy void when there is an innocent overvaluation; but instead, that state merely sets aside the stated value, and awards recovery on the policy to the insured on the basis of a smaller and more accurate valuation.[40] This in effect converts a valued policy into an open one, except that the valuation has to be calculated, in such a case, by reference back to the time the policy was taken out, rather than as of the time the loss occurred. Also, Ohio has adopted a statute requiring every fire insurer to have an agent appraise the value of the property at the time the policy is renewed;[41] and under such a statute of course a misstatement of value by the insured would not be held to avoid the policy.[42]

Finally, regardless of whether or not the *insurer* exercised his option to void the policy, it would appear that there was such a mistake here that the *insured* himself should be allowed to avoid it. As stated by the Restatement of Contracts,[43*] ". . . where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable *by either party* if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be . . ."[44*] (with

[40] Huth v. New York Insurance Co., 21 N. Y. Super. Ct. 538, 8 Bos. 538 (1861).

[41] 6 OHIO GEN. CODE (Page, 1937) §9583. The effect of this statute is to make all five policies, which are renewed, valued policies. Originally the statute applied to original issues as well as renewals.

[42] Queens Insurance Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072 (1890).

[43*] RESTATEMENT, CONTRACTS (1932) §502. This section begins by stating that it shall be applicable notwithstanding the fact that there is no such mistake as would render the original offer void, or render the contract void as ambiguous, or render the contract void because of impossibility not foreseen or reasonably foreseeable by the promisor.

[44*] This section of the Restatement is in accord with the general case law. Relief for mistake (cancellation, rescission, reformation, etc.) is allowed where there is a mistake going "to the essence" of the subject matter of a contract. Fritzler v. Robinson, 70 Iowa 500, 31 N. W. 61 (1886); Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651 (1888); McKay v. Coleman, 85 Mich. 60, 48 N. W. 203 (1891); Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919 (1887); Costello v. Sykes, 143 Minn. 109, 172 N. W. 907 (1919); Du Pont Chemical Co. v. Buckley, 96 N. J. Eq. 465, 126 Atl. 674 (1924); McCaull-Webster Co. v. Steele Brothers, 43 S. D. 485, 180 N. W. 782 (1921).

Relief is also generally allowed where there was a mistake in counting, or other mathematical computation. Miller v. First Savings Bank, 90 Cal. App. 387, 266 Pac. 294 (1928); Freeman v. Ralph Realty Corp., 198 App. Div. 788, 191 N. Y. S. 72 (1921); 5 WILLISTON, CONTRACTS (2nd ed. 1938) §1574, n. 1; Annotation: 59 A. L. R. at 825, 830.

Relief is frequently denied where it would result in placing the defendant in a worse position than he was in originally—as, for instance, where he has performed services or entered into contractual obligations which he otherwise would not have undertaken, on the assumption that he was rightfully entitled to the assets which the plaintiff seeks to recover from him. Grymes v. Saunders, 93 U. S. 55, 23 L. ed. 798 (1876); Olson v. Shephard, 165 Minn. 433, 206 N. W. 711 (1926); Harper v. Newburgh, 159 App. Div. 695, 145 N. Y. S. 59 (1913); Murray v. Saunderson, 62 Wash. 477, 114 Pac. 424 (1911).

three exceptions not applicable here).[45*] All of the requisites for the application of this section are present in the principal case: (1) The mistaken fact was the basis on which the parties bargained. It was a material mistake affecting the identity and attributes of the subject matter of the contract.[46] (2) The mistake was harmful to the insured to the extent of over $2,000.[47] (3) The insured is willing to pay premiums on the true ($61.50) value of the necklace. (This requirement is generally a condition precedent to relief for mistake.)[48]

However, the contention of the insurer in this case is that to judge the case on the established rules concerning return of premiums and void policies is to beg the entire question, for this case contains, says the Orient Insurance Company, a special equity which makes the established law inapplicable—namely, that regardless of legal theories, the insurance company did actually, as a practical matter, bear a risk here—for if the insured property were at the bottom of the ocean, then the insurance company could never prove, save perhaps by sending divers to the bottom, that the pearls were worth only $60.00 instead of $60,000. Hence the Orient Company says it is entitled to a premium commensurate with the $60,000 risk borne.

It would seem that the present case is incorrect in allowing this contention of the insurer to control the decision. No reason is shown why the insurer could not have obtained the second protocol from Germany—the one subsequently obtained by the insurer, in which the German commissioner admitted his original mistake in stating the value of the pearls, and restated their true value at $61.50. And not even this would have been necessary if there had been a disaster in which the pearls were merely partially lost, or crushed, or otherwise damaged, but not sunk. In short, this present case is no different from any other in which owners take out marine insurance that their goods in distant parts of the world will be safely transported.[49*] Every insurer, and in fact every litigant, must run the risk of not being able to find evidence to prove his defenses.

Although this was a valued policy, the insurer could not very well

[45*] The second exception is where the party seeking to avoid the transaction can obtain satisfaction by reformation. See, *supra*, pp. 93 f., to the effect that this exception would not apply here.

[46] See RESTATEMENT, CONTRACTS (1932) §502, comment a.

[47] *Id.*, comment b.

[48] *Id.*, comment c.

[49*] For example, see the *Forbes, Rickman, Main,* and *Fisk* cases, *supra*. If the Orient Insurance Co. was seeking to change the existing law, would the following line of argument have been more effective? The owner of property generally has, even in cases such as the present, a better chance of obtaining, and more likelihood of knowing, the value of the protected property than the insurer, who in practically every case has never had any dealings with such property before—so that the policy of the courts should be to make the owner bear the loss caused by overvaluation, where the property is in a distant country, and not available for inspection.

contend, in the face of the *Forbes* and *Rickman* cases, that he could not "reopen" the value so as to offer his evidence that the pearls were of lesser value.

MILTON SHORT.

Taxation—Powers of Appointment—Will Contests—Taxation of Property Passing under Compromise of Attempted Testamentary Exercise of Power of Appointment

Decedent, Zachary Smith Reynolds, died at the age of twenty, being at that time the beneficiary of three trusts set up by the deed and wills of his parents. One trust directed that he receive the income until he reached 28 years of age, at which time he became outright owner; from the other trusts he was to receive income for life. All three trusts gave him a general testamentary power of appointment over the trust property whereby he could, in his sole discretion, appoint to anyone. In default of exercise of the power, the property was to go to his descendants, or if he had none, to his brother and sisters and their issue *per stirpes.* Decedent's attempt to exercise the power in favor of his brother and sisters by a New York will was contested by his two children who (1) denied the validity of the New York will and, (2) challenging the right of the brother and sisters to take in default, asserted their own right to do so. The brother and sisters claimed under decedent's will and in the alternative as takers in default, contending that one child was precluded because of a prior separation agreement and the other by reason of illegitimacy. These issues were never finally resolved by judicial decision, and eventually a compromise was entered into under which 37½% of the trust property went to the brother and sisters. In a 5 to 4 decision[1*] the Supreme Court de-

[1*] Helvering v. Safe Deposit and Trust Company of Baltimore, — U. S. —, 62 S. Ct. 925, 86 L. ed. (Adv. Ops.) 851 (1942). Both the majority and minority agreed that if the power of appointment were unexercised decedent did not have such an interest in the trust property as to require its inclusion in his gross estate under §302(a). This conclusion was based upon the legislative history of the statute and upon implications from *United States v. Field,* 255 U. S. 257, 41 S. Ct. 256, 65 L. ed. 617 (1921), rather than upon the economic equivalence of decedent's rights to complete ownership. Thus the court refused to expand the scope of §302(a) by the concept of "substantial ownership" which is developing under §22(a) for income tax purposes. 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION (1942) §4.12, p. 223. Except for the unavailability of the corpus, the ordinary life estate coupled with a general power of appointment closely resembles a fee simple. For this reason, the inclusion of such property under §302(a), even though the power be unexercised, would perhaps have been not unreasonable, especially inasmuch as by so doing the court, at one stroke, could have escaped the complicated question of apportionment raised by their actual decision, and also laid at rest any possible doubt concerning the constitutionality of the taxation under the 1942 Revenue Act of property subject to an unexercised power of appointment. See *Reeves v. Fidelity & Columbia Trust Company* (1941-1943) C. C. H. Inheritance Tax Service—State, ¶90, 530 (Ky. 1942), where the court at the end of its opinion expresses doubts as to the ability of the legislature to tax property subject to an unexercised power as a part of the donee's estate.