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EDITORIAL

With the publication of this number, the *Review* attains the ripe old age of two years. Though, thus far, it can lay no claim to that peculiar prestige which is the exclusive attribute of antiquity of origin, it has at least found a solid place among its more venerable fellows in the world of law periodicals.

It has striven to be a medium of expression for legal thought, and its efforts toward the attainment of that end have met with a cordial recognition which is most gratifying and encouraging.

Through the kind interest and assistance of the Bench and Bar of Wisconsin and other states, the *Review* has been able to present to its readers many useful and valuable discourses upon various phases of general and local law. For this privilege it is deeply indebted to its contributors, to whom it is sincerely grateful.

The columns of the *Review* are always open to discussions on suitable subjects, and it is earnestly hoped that they will be freely utilized for that purpose by those who are in a position to do so.

CONCEALMENTS, REPRESENTATIONS AND WARRANTIES AS AFFECTING CONTRACTS OF INSURANCE

BY ORLAF ANDERSON, OF THE MILWAUKEE BAR.

The scope of this article is confined to concealments, representations and warranties, eliminating entirely the effect of waiver and estoppel, and limited to a discussion of the law as it is in Wisconsin. The subject must naturally be divided into two periods. (1) The period during which our court gave effect to the common law on the subject in the absence of any legislative enactment.¹ (2) The period following the enactment of legislation on the subject.²

THE COMMON LAW ON THE SUBJECT IN WISCONSIN.

Prior to legislative interference, the decisions of our courts would seem to settle the rule in this state that a concealment in order to avoid the policy must be (1) material to the risk, and (2) such concealment must amount to bad faith on the part of the assured or not be responsive to inquiries made upon the subject. The foregoing states the early rule in all branches of insurance except marine insurance.³ For the very obvious reason that marine insurance is inherently different in its nature and the facts surrounding the risk are more completely in the possession of the assured, in fact, the assured is often the only person who has any knowledge of the facts, he therefore is obligated to disclose every material fact pertaining to the risk of which he is charged with knowledge, and this is true even though the failure to disclose the material fact was the result of mistake or inadvertence and not due to fraud.⁴

1. Section XIII, Article XIV, Wisconsin Constitution.

2. Section 1941-45, Sec. 1941-x, Sec. 4202-m, Wisconsin Statutes.

3. *Penn. Mutual Life Ins. Co. vs. Mechanics Savings Bank & Trust Co.*, 72 Fed. 414, 38 L. R. A. 33; *Wright vs. Hartford Fire Ins. Co.*, 36 Wis. 522; *Campbell vs. American Fire Ins. Co.*, 73 Wis. 100; *Van Kirk vs. Citizen's Ins. Co.*, 79 Wis. 627; *Johnson vs. Scottish Union and National Ins. Co.*, 93 Wis. 223.

4. *Burritt vs. Insurance Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345. "In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of a mistake, accident, forgetfulness or inadvertence. It is enough that the insurer has been misled and has thus been induced to enter into a contract, which upon correct and full information, he would either have declined or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy."

INSURANCE CONTRACTS

In the case of *Alkan vs. The New Hampshire Fire Ins. Co.*, 53 Wis. 136, it was held that the assured was not bound to volunteer information concerning the incumbrance nor to disclose the existence of an oral executory contract to lease the premises. It did not appear that the assured made a written application. However, the policy provided that the omission "to make known a material fact representing the condition, situation, value or occupancy of the property" would invalidate the contract. This language was held to relate more particularly to the physical status of the property rather than to incumbrance. Where the assured warranted that he was the owner of certain lands by warranty deed and failed to disclose that he held a portion of it by parol trust, it was held that the answers were responsive, sufficient and true, that no information concerning outstanding equities was called for. The assured, therefore, was not bound to volunteer any.⁵ Notwithstanding, a provision that the policy shall be void if any fact material to the risk is concealed by the assured, and a policy issued without any written application by the assured and without any question being put to him as to matters material to the risk, will not be invalidated by the failure of the assured to disclose such material facts, if he did not intentionally or fraudulently conceal them.⁶

In England no distinction is made between marine and other branches of insurance, the strict rule requiring a full disclosure of material facts being enforced in all branches. The following is from *Carter vs. Boehm*, 3 Burroughs 1905, and expresses the English rule:

"The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back of such circumstance is a fraud and, therefore, the policy is void. Although the suppression should be through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement."

5. *Pavey vs. American Ins. Co.*, 56 Wis. 221.

6. *Van Kirk vs. Citizen's Ins. Co.*, 79 Wis. 627, 48 N. W. 798.

In 1895 the Wisconsin legislature enacted Section 1941-45 and required this section to be incorporated into fire insurance policies thereby adopting the English rule as laid down in *Carter vs. Boehm, supra*, as to fire insurance as well as marine insurance. In 1917 this section was slightly modified and re-enacted as 1941-x. This modification of the law makes a policy voidable at the option of the insurer if the assured conceals a material fact and he cannot be heard to say that the concealment was due to inadvertence or mistake.⁷

REPRESENTATIONS.

A representation precedes and induces the policy and is no part of it. It contains the information upon which the insurer accepts or rejects the risk and fixes the rate; it is the basis of the contract and must be substantially true.

Until the passage of Section 4202-m R. S. Wis., a material false representation would render an insurance contract voidable. In the case of *Peterson vs. Independent Order of Foresters*, 162 Wis. 562, the assured represented that he had suffered no injury and had had no medical attendance within five years and the court said, "The representations made by the assured in his application to the effect that he had suffered no injury and had no medical attendance within five years, were not only warranties but they were necessarily material to the risk. They are shown by the proof of death to have been not only nominally but substantially false, and this fact avoids the policy." It was held that Section 4202-m did not apply, the defendant being a fraternal benefit society and Section 1956 R. S., sub-section 9, provides that express reference must be made to a fraternal benefit society in order to make the law applicable to it. Section 4202-m provides that in order to avoid the contract the representation must not only be material and false but must be made with actual

7. Section 1941-45 R. S. Wis., Sec. 1941-x R. S. Wis.

Sec. 1941-45: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss."

Sec. 1941-x: "This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss."

intent to deceive. There are American cases holding that a fraudulent representation of an immaterial fact will avoid the policy, but this is not the law. The true rule, except as the same has been modified by statute, is expressed in the case of *Vivar vs. Supreme Lodge*, 52 N. J. Law 455, 20 Atl. 836, as follows:

"If the representation made, though known by the insured to be false, did not differ from the truth in any respect which was, either in fact or in the view of the insurer, material to the contract, then the falsehood did not mislead the insurer or induce the contract, and should not be allowed to avoid it. Usually the materiality of a representation will be inferred from the fact that it was made pending the negotiations, in response to a specific inquiry by the insurer; but this rule is not universal, for the purpose of the inquiry must be considered, to see whether the information is sought to aid the insurer in fixing the terms on which he will contract, or with an entirely different object. Thus, if a mutual insurance company should require its premiums to be paid within a definite time after the mailing of notice addressed to the residence of the insured, and, with this rule in view, should require every applicant for insurance to state his residence in his application, and an applicant should give as his residence not the truth, but the place where he ordinarily received his mail, it would seem absurd to hold that such circumstance would invalidate the contract."

It has been held in Wisconsin that false representations as to incumbrance and upon the unprofitableness of the property insured are material to the risk and avoid the policy if they are relied upon,⁸ and a gross understatement by the applicant of the amount of incumbrance on the property, rendered the policy void.⁹

In 1909 the Wisconsin legislature enacted Section 4202-m and in 1917 broadened the scope of the section making it applicable to fraternal or mutual benefit societies.¹⁰ This section has been

8. *Ryan vs. Springfield Fire & Marine Ins. Co.*, 46 Wis. 671, 1. N. W. 426.

9. *O'Brien vs. The Home Ins. Co.*, 79 Wis. 399, 48 N. W. 714.

10. Section 4202-m: "No oral or written statement, representation or warranty made by the insured or in his behalf in the negotiation of a contract of insurance shall be deemed material or defeat or avoid the policy, or prevent its attaching unless such statement, representation or warranty was false and made with actual intent to deceive or unless the matter misrepresented or made a warranty, increased the risk or contributed to the loss.

"No warranty incorporated in a contract of insurance relating to any fact prior to a loss shall defeat or avoid such policy unless the breach of such warranty increased the risk at the time of the loss, or contributed to the loss, or unless such breach existed at the time of the loss.

"The provisions of this section shall apply to fraternal or mutual benefit societies."

held to apply in case of a bond to indemnify an employer for loss through the dishonesty of an employee or an agent, such a bond being held "a contract of insurance" within the meaning of this section. It was also held that an untrue statement by the employer in his application will not invalidate the bond even though denominated a warranty, where other language showed that an honest statement to the best of his ability was what he was required to make; it further appearing that the surety company did not rely upon the statement, but rather upon the report of its own agent.¹¹

Some confusion has been caused by the term "promissory representations" found in many of the books. What is really meant is not a representation but a promise to do, or not to do a certain thing, and a failure to comply with such a promise cannot be shown by parol unless the purpose is to show that the person making the promise made it fraudulently, to induce the contract and without any intention on his part to fulfill it; as for example, where the owner represented that the vessel insured would carry a moderate amount of freight. It would not be permissible to show that it carried a heavy cargo and in consequence was lost, except for the purpose of showing that the misrepresentation was fraudulent and that the owner made it to induce the contract, without any intention of keeping the promise.

WARRANTIES.

Warranties consist of representations, agreements and promises made a part of the policy, and appearing upon the face of it or upon some paper attached to it; as for example, the application.¹² They are vital parts of the contract and must be strictly complied with as they are in the nature of conditions precedent. Warranties are of two kinds, viz., affirmative and promissory.

An affirmative warranty is an agreement contained in the policy that certain facts relating to a risk are true, or that certain acts have been or will be performed.

Where the application was made a warranty and failed to disclose the condition of the title of the property insured and there was a provision that the policy should be void in case of erroneous representations or omissions of material facts, and the assured represented in the application that he held the property

11. *Whinfield vs. Mass. Bon. & Ins. Co.*, 162 Wis. 1, 154 N. W. 632.

12. *Redman vs. The Hartford Fire Ins. Co.*, 47 Wis. 89, 1 N. W. 393.

by contract and his only title was by virtue of a contract for sale and purchase entered into several years before it appeared that he was far in arrears on his payments, and the contract further provided that he was to hold the land as a tenant by sufferance, subject to be removed as a tenant holding over whenever default should be made in any of the payments, and that the agreement should be utterly void and all payments forfeited in case of failure to make timely payments and that it appeared that the assured had paid only two hundred dollars of the purchase money and was in default of the remainder with interest, it was held that such misrepresentations "rendered the policy void."¹³

PROMISSORY WARRANTIES.

A promissory warranty is a promise that a certain thing will or will not be done after the policy is in force, also that certain facts or conditions pertaining to the risk shall not change, it can only relate to matter subsequent. The presumption is that warranties are affirmative unless the contrary is clearly established. The line of demarcation between affirmative and promissory warranties is not difficult to locate if one bears in mind that an affirmative warranty pertains to existing facts and that a promissory warranty contemplates the future. For example, the applicant for insurance stated, "clerk sleeps in store." This was not a promissory warranty but an affirmative warranty pertaining to an existing fact, not a promise that the clerk would continue to sleep in the store.¹⁴

The words "no regular watchman, but one or two hands sleep in the mill" is an express warranty that one or two employes do sleep there each night and an undertaking that they shall continue to do so.¹⁵ To avoid the policy for a breach of a promissory or continuing statement or undertaking, true when made but afterwards departed from, the assured must show the change increased the risk or hazard of loss. Where there was a warranty to use only lard and sperm oil for lubricating and to keep a force pump on the premises and a proper supply of good hose, it was held that these were promissory warranties, and not of conditions subsequent.¹⁶ Although the application provided that

13. *Hinman vs. The Hartford Fire Ins. Co.*, 36 Wis. 159.

14. *Hosford vs. Insurance Co.*, 127 U. S. 399, 32 L. E. D., 1916.

15. *Blumer vs. Phoenix Ins. Co.*, 45 Wis. 622, S. C. 48 Wis. 535, 4 N. W. 674.

16. *Redman vs. The Hartford Fire Ins. Co.*, 47 Wis. 89, 1 N. W. 393; *Cobb vs. The German American Ins. Co.*, 51 Wis. 637, 8 N. W. 127.

an inventory be taken once a year, the contract was not breached because the assured permitted sixteen months to elapse before taking an inventory.¹⁷

As in the case of representations, Section 4202-m has likewise changed the rule pertaining to warranties and it is now necessary, in order to avoid the policy, to show that the warranty was not only false but that it was made with intent to deceive.

On account of legislative enactments herein pointed out, it is perceived that there is a wide distinction in the law of concealments and representations as applied to fire insurance policies and the other branches of insurance, but the law applicable to warranties, as provided by Section 4202-m, seems to apply with equal force to all branches of insurance.

17. *Newton vs. Theresa Village Mut. Fire Ins. Co.*, 125 Wis. 289, 104 N. W. 107.

TAX TITLES UPON WHICH THE THREE-YEAR STATUTE OF LIMITATIONS HAS RUN

BY K. K. KENNAN, OF THE MILWAUKEE BAR.

EDITOR'S NOTE:—This is the second of two articles on tax titles by Mr. Kennan. The first, dealing with *TAX TITLES UPON WHICH THE THREE-YEAR STATUTE HAS NOT RUN*, appeared in the April number of the *Review*.

Having examined some of the technical defects which can be utilized to set aside a tax deed *before* the three-years' statute has run in its favor, we shall now consider some of the points which can be raised to set aside a tax deed *after* the statute has run, or appears to have run, in its favor.

The three-years' statute of limitations, as against the former owner, will be found in Section 1188 of the Revised Statutes, and reads as follows:

"No action shall be maintained by the former owner or any person claiming under him to recover the possession of any land or any interest therein which shall have been conveyed by deed for the non-payment of taxes or to avoid such deed against any person claiming under such deed unless such action shall be brought within three years next after the recording of such deed. Whenever any such action shall be commenced upon a tax deed heretofore or hereafter issued after the expiration of three years