QUASI-CONTRACTS-RECOVERY OF INSURANCE PAID UNDER MISTAKE OF FACT

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Quasi-Contracts—Recovery of Insurance Paid Under Mistake of Fact.—The plaintiff insured articles of jewelry for the defendant against loss. Defendant was unable to find a necklace covered by the policy in question and after an unsuccessful search the parties entered into an agreement whereby the defendant consented to accept other jewelry, equal in value to the necklace, as compensation for the loss. Later the necklace was found, and the plaintiff seeks rescission of the agreement and specific restitution of the articles delivered pursuant thereto. Held, payment made in settlement of an insurance claim may not be rescinded on the basis of mistake of fact as to the loss or destruction of the subject of the insurance, but plaintiff can recover the "lost" necklace. *Holmes v. Payne*, [1930] 2 K. B. 301.

The court declined to decide whether the necklace was actually lost within the meaning of the policy, this question being immaterial on the view adopted by them. To this extent the decision appears erroneous, for if there was no loss, recovery should have been allowed. By giving the necklace to the plaintiff, the court seems to have based its decision on the doctrine of abandonment.
RECENT IMPORTANT DECISIONS

drawn from the marine insurance cases. According to that doctrine, where a marine loss is practically complete, the insured may abandon, or cede, to the underwriter, all of his right to the recovery of the property insured, and claim indemnity as for a total loss. 6 COOLEY'S BRIEFS ON INSURANCE (2d ed.) 4821. This doctrine is generally confined to marine losses. Hicks, Lyle & Co. v. McGehee et al., 39 Ark. 264. In O'Connor v. Maryland Motor Car Insurance Co., 287 Ill. 204, 122 N.E. 489, the Illinois court adopts the theory of abandonment where a stolen car was replaced by the insurance company and later recovered, but bases its decision on the similarity of form of the insurance contract in question there to a marine policy, and also the special considerations of the public policy involved in the case of automobiles. Even in marine policies, however, an intent to abandon is necessary, and the receipt of the full amount of the insurance does not of itself import any abandonment. The St. Johns, 101 Fed. 469; Aitchison and Brandt v. Lohre, 4 App. Cas. 755. There is nothing in the instant case to indicate any such intent. The court does not rely on abandonment alone, however, but indicates that relief is not given insurance companies where payment has been made under mistake of fact. This doctrine finds no support in the American cases. Masonic Life Association of Western New York v. Crandall, 9 App. Div. 400, 41 N. Y. S. 497 (Life insurance paid on mistaken belief that insured was dead); In re Waage's Estate, 83 Pa. Super. Ct. 51 (Annuity paid after death of annuitant); Chickasaw County Farmer's Mutual Fire Insurance Co. v. Weller, 98 Iowa 731, 68 N.W. 443 (Fire insurance paid after insured had collected damages covering loss); Columbus Insurance Co. v. Walsh, 18 Mo. 229 (Payment on policy voided by breach of condition). Nor is there anything in the facts to show an assumption of risk by the insurance company, which would have been an independent ground for refusing rescission. Sears v. Grand Lodge A. O. U. W., 163 N. Y. 374, 57 N.E. 618, 50 L. R. A. 204; Woodward, QUASI-CONTRACTS, sec. 16.