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QUASI CONTRACTS — INSURANCE — RECOVERY OF PREMIUMS WHEN PARTIES MISTAKEN AS TO VALUE OF THE SUBJECT MATTER OF INSURANCE CONTRACT — Plaintiff's intestate, a resident of Georgia, owned items of jewelry which were located in Germany and which were subject to a death tax there, intestate having died in Germany. An appraisal was made by a German court commissioner in assessing the tax and a copy of the appraisal was forwarded to plaintiff executor, who, relying thereon, effected a policy of insurance with the defendant covering all the goods, the principal item being a pearl necklace appraised at $60,000. It was discovered on the safe arrival of the jewelry that the pearl necklace was worth but $60.00, being composed of cultured pearls. Plaintiff seeks to recover the premium which was paid for the insurance policy. *Held*, plaintiff is not entitled to restitution because it is likely that had the necklace been lost the defendant would never have been able to prove the mistake and would have had to pay on the basis of the $60,000 valuation. It would be inequitable to allow the plaintiff to recover the premium since actually defendant assumed the risk. *Orient Insurance Co. v. Dunlap*, 193 Ga. 241, 17 S. E. (2d) 703 (1941).

Before considering the facts of the instant case it should be noted that mistakes in insurance contracts present characteristic difficulties not ordinarily present in other mistake cases. The contract of insurance is usually initiated by the insured's statement as to the nature and value of the subject matter and this statement often determines the terms of the contract and the amount of premiums. Even though the insured makes an innocent misstatement, having induced the mistake, he is at a disadvantage in seeking to recover premiums.[1]

[1] This is the principal point of distinction from the ordinary mistake as to subject matter in sales cases. In sales cases it would seem that as long as the mistake is so substantial as fundamentally to alter the contract of the parties, relief may be granted. Chandler v. Lopus, 2 Cro. Jac. 4, 79 Eng. Rep. 3 (1603); Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919 (1887); Cotter v. Luckie, [1918] N. Z. L. R. 811. In insurance contracts apparently the mistake must have the effect of destroying the consideration and result in no risk whatever being assumed. See note 8, infra. The insurance company may be interested in the value of the subject matter as a warning of possible fraudulent intentions and it might therefore be argued that the insured bears the whole risk of correctly stating the value. However, this argument will not lead to the conclusion that the insured is never entitled to return of excess premiums since the ground of granting relief is that a mistake was made which was so basic as to thwart the reasonable expectations of the parties. This might well be the result even though the general rule is that when the risk is consciously assumed no relief for mistake will be given. However, the fact that it is the insured who does ordinarily induce the mistake makes his position more difficult. But see Mobile County v. London &

He at least must show that he was not negligent in inducing the mistake.[2] Often the form of the contract is such that the statement is a representation or a warranty, and since it relates to a material fact, it will avoid the policy even though innocently made.[3] If an insurance company pays out the stipulated value of the property insured and it is subsequently discovered that for any reason the insurer was not liable on the policy, it may recover the payment,[4] except in cases where the reason for nonliability was the breach of a condition which the company waived.[5] Thus in the instant case if the jewelry had been destroyed and the insurance company had paid the face amount of the policy, it could recover from the insured the amount paid upon subsequently learning the true value of the necklace. Yet the court held that the plaintiff could not recover the premium. The mistake made in the present case was as to the value of the subject matter of the contract, but since value of the subject matter is pertinent only in that it determines the risk insured against, the right of the plaintiff to recover will be based on the law relating to cases where through mistake no risk is assumed,[6] or where the risk assumed is very much different from that which the parties

Lancashire Ins. Co., 27 Ala. App. 384, 173 So. 99 (1937), which followed the rule that if any part of the risk was assumed no part of the premiums are recoverable, even though the mistake was entirely chargeable to the insurer.

Another pertinent inquiry in the instant case would be whether the plaintiff was justified in basing his expectations on the report of the German court commissioner. Costello v. Sykes, 143 Minn. 109, 172 N. W. 907 (1919).

[2] As to the effect of negligence of the party inducing the mistake, see 5 WILLISTON, CONTRACTS, rev. ed., § 1596, note 7 (1937).

[3] The contract in the principal case was not set out, but it is difficult to imagine an insurance contract covering marine and war risk where no statement as to value of the goods insured was made. Where the statement of value is substantially greater than the actual value, even though the misstatement was innocently made it will have the effect of avoiding the policy. 3 COOLEY, BRIEFS ON INSURANCE, 2d ed., 2103 (1927); Rosser v. Georgia Home Ins. Co., 101 Ga. 716, 29 S. E. 286 (1897).

[4] Roney v. Commercial Union Fire Ins. Co., 225 Ala. 367, 143 So. 571 (1932). See note to Holmes v. Payne, [1930] 2 K. B. 301 in 29 MICH. L. REV. 644 (1931) where the cases on this point are collected.

[5] Fireman's Fund Ins. Co. v. Vinton, (App. Div. 1921) 190 N. Y. S. 525, affd. 206 App. Div. 615, 198 N. Y. S. 913 (1923). Contra, Roney v. Commercial Union Fire Ins. Co., 225 Ala. 367, 143 So. 571 (1932). In Brough v. Presidential Fire & Marine Ins. Co., (La. App. 1937) 176 So. 895, recovery of premiums paid by the insured was allowed where for breach of condition at the outset the policy was void ab initio.

[6] Taylor v. Sumner, 4 Mass. 56 (1808) (marine insurance was effected against a blockade then existing around a port of call; no such blockade existed and the insured was allowed to recover his premiums); Lattarulo v. National Surety Co., 119 Misc. 154, 196 N. Y. S. 98 (1922) (insured purchased a bond necessary for liquor licensees; he was unable to procure a license and was allowed to recover his premium); Equitable Life Assurance Society v. Brame, 112 Miss. 859, 73 So. 812 (1916) (where beneficiary paid premiums on husband's life for seven years after he disappeared, she was allowed to recover them on a showing that in fact he died on the date of his disappearance).

thought the insurer was assuming.[7] In general, the rule is that if no risk attaches the premiums are recoverable, but if any risk whatever is assumed even though it be for a shorter time than was anticipated, or, in the case of indivisible risks, even though it be of a lesser degree of risk than was anticipated, the premiums are not recoverable.[8] In the principal case the risks as to the individual items of jewelry were divisible, so it might be said that no legal risk attached as to the necklace.[9] Nevertheless, since it is obvious that defendant would have been unable to prove the value, had a loss occurred, the case should be classed with those in which a risk different from that contemplated was assumed. The court in the principal case indicates that it prefers to recognize the real as opposed to the theoretical aspects of the matter and refuses relief to the plaintiff, invoking the principle that in order to recover for money had and received the plaintiff must show that it would be against equity and good conscience for the defendant to retain it. The case indicates that the defense that plaintiff's claim is inequitable, which has hitherto been used principally where the defendant receiving the money had disbursed it to third parties,[10] has a wider application and is applicable where it is clear to the court that had the mistake harmed the other party he would have been unable to avoid liability.

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[7] Ordinarily this will be a unilateral mistake, such as insured paying premiums on an employer's liability contract, thinking that the policy covered the whole group of employees whose wages were the measure of the amount of premium. If the policy covers some but not all of the employees no recovery may be had. Maryland Casualty Co. v. Little Rock Railway & Electric Co., 92 Ark. 306, 122 S. W. 994 (1909). If it covers none of the employees, relief is available. Bituminous Casualty Exchange v. Ford-Elkhorn Coal Co., 243 Ky. 456, 48 S. W. (2d) 1057 (1932).

[8] MACGILLIVRAY, INSURANCE LAW, 2d ed., 960 (1937); 2 COOLEY, BRIEFS ON INSURANCE, 2d ed., 1730 (1927); 5 WILLISTON, CONTRACTS, rev. ed., § 1568 (1937).

[9] A substantial difference in value becomes a difference in kind. 5 WILLISTON, CONTRACTS, rev. ed., § 1570 (1937). Here there was an intent to insure a $60,000 necklace made of real pearls which did not exist. There was no intent to insure a $60 necklace of cultured pearls. Even without reliance on insurance principles, supra, note 3, it would seem clear that no contract existed.

[10] Walker v. United States, (C. C. Ala. 1905) 139 F. 409; Bessler Movable Stairway Co. v. Bank, 140 Miss. 537, 106 So. 445 (1926).