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Fire Insurance--Vacancy Provision

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STUDENT NOTES

FIRE INSURANCE—VACANCY PROVISION

The Queen Insurance Co. insured a house belonging to Ella Conley for a period of five years, the policy containing the following provision: "If this form is attached to a fire policy, and premises are vacant for a period exceeding sixty (60) days or unoccupied for a period exceeding six (6) months, at any one time, this policy is void unless a special form of permission therefor is attached hereto." When the agent of the insurance company delivered the policy, he was informed that the property was vacant, and "said agent said all right." The house remained vacant for longer than sixty days, and was afterward totally destroyed by fire. Held, that there could be no recovery under the policy for the loss occasioned.

Under such a vacancy clause, it is possible that three types of situations may arise: 1. The policy is issued on property which is occupied but which subsequently becomes vacant. 2. The policy is issued on property which is vacant, and the fact of vacancy will be imputed to be within the knowledge of the insurer. 3. The policy may be issued with the knowledge by the insurer that due to construction or the nature of the premises, it will not or cannot be occupied within the time allowed in the vacancy clause.

Under the first type of situation listed above, that the policy is issued on property which is occupied but which subsequently becomes vacant, the only avenue by which the insured may attack the clause when used as a defense by the insurer is to have it held unreasonable or invalid. Such provisions have been universally recognized as being reasonable and valid. They find their origin in the necessity for providing against an increase in the risk involved. When a house be-

1 Conley v. Queen Insurance Co. of America, 256 Ky. 602, 76 S. W. (2d) 906 (1934).
6 Moore v. Phoenix Ins. Co., 64 N. H. 140, 6 Atl. 27 (1886).
comes vacant or unoccupied,7 the risk becomes greater, and, accordingly, a different rate should be charged.8 But, since the provision is primarily for the benefit of the insurer,9 the company may waive it,10 or become estopped to set it up as a defense,11 and such a waiver may be made by parol agreement, although the policy contains a provision that any waiver must be in writing.12

The facts in the instant case involve the issue of a policy with a vacancy clause, the insurer having knowledge of the vacancy of the premises insured at the time of the insurance. As concerns this situation, the overwhelming weight of authority is to the effect that issue of the policy under such circumstances constitutes at least an implied waiver of the provision,13 while the minority adopt the more logical view that such a provision in effect amounts to an agreement by the insured to have the house occupied within the specified time.14

The majority view, viz., that an insurance company waives a vacancy clause by knowingly issuing a policy on vacant property is, to use the words of the New York courts, for the reason that "A contrary rule would be imputing a fraudulent intent to the defendant when the policy was delivered, not to give a valid and binding policy, although receiving pay for such a one, and although plaintiff should labor under the impression that he had one. Such an imputation can only be avoided upon the theory that this condition was overlooked, and the defendant forgot or neglected to express the fact in the policy, or that it waived the condition or held itself estopped from

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7 For discussion of meaning of terms "vacant" or "unoccupied", see Continental Ins. Co. of N. Y. v. Dunning, 249 Ky. 234, 60 S. W. (2d) 577 (1933); 4 Joyce on Insurance, Sec. 2229 et seq.
8 Continental Ins. Co. of N. Y. v. Dunning, ibid.
9 Ibid.
10 Commercial Ins. Co. v. Spankneble, 52 Ill. 53 (1869).
setting it up." In Iowa the same result has been reached, the insurer being precluded from setting up the vacancy clause as a defense because "Having issued the policy, taken the premium, and thereby induced the plaintiff to believe she was insured, the defendant is estopped from alleging or proving the policy never had a legal existence. By issuing the policy, the defendant waived the conditions as to the occupation of the building, and also that such waiver should be expressed on the policy in writing." The more logical view, followed by the minority, including the Kentucky courts, is well illustrated by the language of the court of Wisconsin, in the leading case of England v. Westchester Fire Ins. Co., which in effect overthrew the former rule in that state to the effect that issuance of the policy with knowledge of vacancy waived the vacancy provision. In the England Case the court said:

"It may well be said that actual knowledge, at the time of issuing the policy, of existing facts that, by the terms of the policy, would prevent it from attaching, and render it void from its inception, will amount to waiver of stipulations in the policy in relation thereto; but it cannot, we think, be successfully maintained that, conceding that knowledge of vacancy or non-occupancy is to be imputed as a matter of law to the insurer, there is any implied consent to the continuance of such condition of the premises, or that the insurer is thereby affected with notice that they so continued and remained thereafter vacant and unoccupied, contrary to the express continuing warranty or condition on that subject contained in the policy. Under the policy in question, it was clearly the duty of the insured to make good their warranty in this respect; and they knew perfectly well that they failed to do so. Nothing took place between the parties on the subject. There is no reason for imputing to the insurer, as a matter of law, knowledge of the breach of the stipulation in regard to the occupancy or use of the premises, for there is nothing inconsistent in the fact of existing vacancy or non-occupancy with the express stipulation of an executory character that it shall not so continue for ten days; for such implied knowledge at the date of the policy cannot be construed into a consent that it shall continue for a longer period, contrary to the express stipulation of the parties. There is, therefore, no ground for saying that the insurer, after having taken the stipulation in question, took the chances as to whether the insured complied with it. Failure to comply with the policy in this respect terminated all liability under it."

The Pennsylvania courts have been hardly less forceful in their

27 81 Wis. 583, 51 N. W. 954 (1892).
29 Cf. Day v. Hustiford Farmers' Mut. Ins. Co., 192 Wis. 160, 212 N. W. 301 (1927), cited in note 14, supra, which, though it makes no reference to the England Case, supra, has the effect of directly overruling it and thus restoring the holding of the Devine Case, supra. Thus, it would appear that Wisconsin has again adopted the rule that insuring vacant premises constitutes a waiver of the vacancy clause, though the rule is not well settled in that state. See note 36 A. L. R. 1259, at page 1261.
denunciation of the majority rule. In *Moore v. Niagara Fire Ins. Co.*, in reaching the conclusion that there was no waiver of the vacancy clause when the insurer knowingly issued a policy containing such a clause on vacant property, the court found that such a vacancy clause would avoid the policy upon the happening of either of two conditions: 

"(a) The property being vacant, and so remaining for ten days; or (b) its becoming vacant after being occupied, and then remaining vacant for ten days." In discussing the law involved in a situation concerning the first of these two divisions, the court said:

"The former has reference to a state of things presently existing when the policy is issued, and continuing thenceforth without interruption. The latter, as is said in *Haight v. Continental Ins. Co.* (1883) 92 N. Y. 51, 'assumes a policy already existing and valid in its inception,' and refers to a vacancy commencing in the future. It is a mistake, however, to suppose that the condition (a) undertakes to avoid the insurance simply because the building is unoccupied when insured. On the contrary, it contemplates that possibility as consistent with the attaching of the policy. In order to come within the operation of the condition, there must be both a present vacancy and a continuation thereof for ten days. . . . The effect of the provision being as stated, there is no relevancy to this case in the decisions which say that when an insurance company insures a vacant property, knowing or not caring that it is vacant, a clause in the policy avoiding the insurance if the property be vacant must be deemed waived and the company held estopped from taking advantage of it." 

The two views above set out are not to be confused with the situation where the building is in the process of construction, and the insurance company knows, through its agent, that the premises cannot be occupied within the time specified in the vacancy clause. In such cases it is the general rule that the insurer, by issuing the policy adaptable to *occupied* premises, when it should have insured the premises as *unoccupied* property, has by its own actions waived such a provision, which is for its own benefit, and is estopped to set it up as a defense.

In construction of insurance contracts, that interpretation must be adopted which is most favorable to the insured, but this is so only where there is fair room for construction; and, if words are used clearly indicating the intention of the parties, effect must be given thereto; courts cannot construe a policy contrary to its express terms, where it is plain, unambiguous, fair and not vitiated by fraud or mistake. It is submitted that the vacancy clause embraced in

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20 199 Pa. 49, 48 Atl. 869 (1901).
21 199 Pa. 49, at 50, 48 Atl. 869, at 870 (1901).

K. L. J.—7
the policy in the instant case is plain, unambiguous, fair and reasonable, and, since no fraud or mistake is alleged or proven, the Court of Appeals of Kentucky arrived at the proper result when it decided that there was no waiver of the vacancy clause by the insurer.

SAMUEL C. KENNEDY.

CONTRACTS—CONDITIONS PRECEDENT—PROMISE TO PAY WHEN ABLE

Action by an architect to recover the balance claimed to be due for services rendered in drawing up plans and specifications for a building to be built for the defendants. Under the terms of the contract the plaintiff was to receive his final compensation, which was to be a percentage based on the lowest bid, when the building was completed and approved by him. It was further provided that, if the church was unable to complete the building, he should receive his pay based on the lowest bona fide bid. The lowest bid was so much beyond what the church had expected to pay that they were forced to defer construction. The plaintiff sent in his bill for his services in full. The defendants claimed, bona fide, that they did not owe him the amount claimed. A compromise was reached whereby the defendants promised to pay the plaintiff the full amount claimed, and the plaintiff agreed to wait for final payment until such time as the defendant was financially able and deemed it advisable to complete the building. The plaintiff waited four years and then brought this suit to recover the amount still owing. Held: That when payment was to be made on the happening of an occurrence (becoming able to complete the building), it is implied that payment shall be made within a reasonable time, and that in the instant case, more than a reasonable time had elapsed, therefore payment was due. Mock v. Trustees of First Baptist Church of Newport.1

The plaintiff in this case presented a just claim and should have been allowed to recover. However, the court would seem in error in its reasoning. There is no call for the court to imply in the compromise agreement a provision that payment was to be made within a reasonable time other than to reach the result desired, which result could have been reached by a line of reasoning more in accord with the generally accepted theories of contract law.

The decision in the instant case is based on Section 2100 of Page: The Law of Contracts, which reads as follows: "The time of performance is sometimes made to depend on the doing of some specified act other than that which the parties to the contract agree to do or is made to depend on the happening of some event which the parties to the contract do not covenant to cause to happen. The tendency of the courts is to hold that unless the contract clearly shows that such an action is an express condition, the provision with refer-

1 252 Ky. 243, 67 S. W. (2d) 9 (1934).