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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

CONTRIBUTION AMONG JOINT TORT-FEASORS.—In the recent case of the Royal Indemnity Co. v. Becker et al.,1 John Webber obtained a judgment against David Gordon, John Becker and F. Becker for injuries sustained by him as the result of their joint and concurrent negligence. At this time, David Gordon was indemnified against loss of the above character by reason of a policy issued by the Royal Indemnity Company. This company paid the full amount of the judgment to Webber, took an assignment of the judgment, recorded the assignment, and had execution levy against real property owned by the Beckers. Suit was brought to procure an order to sell the realty and enforce the judgment against it. The Beckers thereupon brought this suit to restrain the sale of the realty and the enforcement of the judgment against them, upon the ground that the judgment had been fully satisfied by the payment by the Royal Indemnity Company. The court issued a permanent injunction holding: First, that the satisfaction of a judgment against one

1 122 Ohio St. 582.
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joint tort-feasor releases all therefrom, because there is no right of contribution between persons whose concurrent negligence has made them liable in damages; and second, that where an indemnitor of a joint tort-feasor fully pays and satisfies a judgment obtained against its indemnitee and another for damages resulting from their concurrent negligence, such indemnitor has no greater right than the indemnitee, and though upon payment it obtains an assignment of the judgment, it may not enforce payment of the whole or any part thereof from the co-defendant of the indemnitee.

It can readily be seen that this case presents the following questions: First, is there a right of contribution between joint tort-feasors whose joint or concurrent negligence resulted in a joint liability for damages? Second, has the indemnitor who pays the judgment any greater right in that respect than the joint tort-feasor who was indemnified, and may the indemnity company upon paying the judgment and procuring an assignment thereof, enforce payment in whole or in part from the unindemnified tort-feasor?

A reduction of the circumstances of the first question into the simplest elements will aid in arriving at the true answer to the question. These elements are: First, two or more persons have united in perpetrating a legal wrong upon some third person; second, the third person legally recovers damages from one of the parties committing the tort; and third, the tort-feasor who has been compelled to pay all the damages then seeks to charge his joint tort-feasor with an obligation, or liability, to the extent of a proportionate part of the damages the former has been compelled to pay because of their joint tort. The first question is then reduced to the proposition of whether or not the tort-feasor seeking this remedy has any right of action.

It is apparent that any right of action the tort-feasor might possibly have must be predicated upon his own wrong. To allow a person who has committed a wrong to set up his wrongdoing and recover therefor, merely because someone else joined with him in perpetrating the wrong, would create an anomalous condition—especially so, if one bears in mind that laws and courts of justice are created to redress and suppress the commission of wrongful acts. It would require an extraordinarily specious argument to explain how the fact that another has joined in the commission of the tort makes it any the less a recognized legal wrong.

The first question must be answered in the negative. The general principle, supported by the great weight of authority,
and recognized in law and equity,\(^2\) is that there is no right of contribution between joint tort-feasors whose joint or concurrent acts or omissions resulted in a joint liability for damages, even though one of the joint tort-feasors has been compelled to pay all the damages for the wrong done.\(^3\) In order to obtain a clearer conception of the application of the general principle, there are presented here the following short summaries of a few cases wherein the general principle is applied.

As a result of the concurrent negligence of an interurban railroad and one Beskin, who was driving an automobile across the track of the railroad, the passengers in Beskin’s car were injured. The passengers recovered a judgment against the railroad. The railroad company thereupon brought an action for contribution against Beskin. The court held that contribution between the interurban railroad and the automobile driver, whose concurrent negligence was the proximate cause of the tort, could not be compelled.\(^4\)

In another case, the plaintiff was injured as a result of the joint and concurrent negligence of the Chicago Railways Company, and the Pirola Company. He recovered a joint judgment against them. Pending an appeal by the railway, it entered into an agreement with the plaintiff, who covenanted not to sue nor proceed against the railway. Execution issued against the Pirola Company, upon the original judgment, and was returned unsatisfied. The plaintiff then brought this suit in equity in the nature of a creditor’s bill to discover assets, and apply any found on the judgment. The court held that the Chicago Railways Company, and the Pirola Company, were joint tort-feasors and there was no right of contribution between them.\(^5\)

In the third case, a railroad company delivered to a terminal company a car on which the wheel of the brake was improperly


\(^4\) Norfolk Southern R. Co. v. Beskin, 140 Va. 744.

\(^5\) Petroyanis v. Pirola, 205 Ill. App. 310.
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attached to the brake staff. The terminal company, without inspecting the car, placed one of its employees on the car. The employee was injured as a result of the defective brake and recovered damages from the terminal company. The terminal company then brought an action for contribution against the railroad company. It was held that the negligence of the railroad company and the terminal company was of the same character and degree. Both had joined in the commission of the tort and there was no right of contribution between them.6

The general principle, that there is no right of contribution between joint tort-feasors, is not exclusive since it is confined to cases where it may reasonably be presumed that the plaintiff in the action for contribution knew that he was doing a wrongful act,7 or where the negligence of each of the joint tort-feasors contributed proximately to the tort.8 The necessary result of this confinement in the application of the general principle is found in the development of certain recognized exceptions, or classes of cases, wherein the general principle is not recognized or given effect.

The first exception, or class of cases, where the general principle is not recognized as being applicable is found in admiralty law.9 The reason for this is given as being historical. It is very likely true that the reason for this exception may be traced to the distinctive liabilities created by maritime law.

The second exception arises when the injury grows out of a neglect of duty resting primarily upon one of the parties, and, but for his negligence, there would be no cause of action against the plaintiff seeking contribution.10 The reason for this exception is apparent when one considers the case of a person who

has been compelled to respond in damages to a third person, because some collateral proposition of law acts upon the relationship between the parties at the time the tort was committed. This occurs even though the party who has been compelled to pay did not participate in committing the tort. In this case the party who has responded in damages does not need to base his right of action upon any wrongful act of his own. The right of action for contribution, or indemnity, is based upon the legal wrong committed by the party against whom the action is brought.

The three following cases falling within the confines of this exception will aid in obtaining a better understanding of the operation of this exception.

The defendant built a sand plant for the plaintiff railroad. An employee of the railroad was injured as a result of the defective attachment of a counterweight to the sand plant. The employee recovered against the railroad for his injuries. Thereupon the railroad brought an action for contribution against the defendant. The court held that the railroad company and the contractor were not *in pari delicto* so as to make applicable the principle which prevents contribution between joint tortfeasors, and contribution would be permitted.11

The defendant operated an electric light company and supplied the plaintiff railway with light. The defendant had exclusive control over the lighting system. One of the plaintiff’s employees was killed, while loading coal, as a result of a short circuit in the lighting system. The short circuit was caused by a part of the coal loader rubbing against a defectively insulated wire. Recovery was had against the railway for causing wrongful death. The plaintiff brought an action for contribution against the defendant. The court held that the defendant’s negligence was the proximate cause of the accident. The plaintiff’s negligence was not of the same degree or kind as the defendant’s and contribution is permissible.12

The defendant was a gas company doing business in the District of Columbia. One Marietta Parker was injured because a gas box in the sidewalk was not covered. She recovered damages against the District of Columbia even though it was not shown that the District knew of the absence of the cover. The District thereupon brought an action for contribution against the defendant. The court held that a municipality which has been held liable for an injury sustained as a result of the negli-

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gence of another may obtain contribution from the other. The plaintiff and the defendant were not negligent in the same manner or degree. The negligence of the defendant was the proximate cause of the tort, and the injury was occasioned by the failure of the company to perform its legal duty in the first instance.\textsuperscript{13}

The third exception to the general principle—that there is no right of contribution between joint tort-feasors—arises when the act causing the injury is not a wrong \textit{per se}, and the plaintiff seeking contribution, whether or not he joined in the actual commission of the act, is not chargeable with knowledge of the wrongfulness of the act.\textsuperscript{14} It is possible that this exception has its source in natural justice, as understood at the present time. The fact that the tort-feasor must predicate his right of action for contribution upon his own tort is obscured for the moment. The necessity of suppressing the commission of wrongful acts is not felt very strongly in the present instance. The reason for this is that the tort is not wrongful \textit{per se}; there was no intent to commit a tort; it cannot be said that the parties knew they were committing a tort; and they acted for their mutual benefit upon what they had reasonable grounds to believe were the true facts. With these circumstances in mind, it seems reasonable and just that each of the parties to the tort should bear a proportionate part of any liability incurred by one of them because of their joint and concurrent acts.

It will be advantageous, in order to have a better conception of this exception, to consider a few cases falling within the operation of the exception.

The plaintiff and the defendant were both creditors of the same firm. They honestly believed that the debtor firm had made a fraudulent assignment of its goods to a third party. While being of this opinion, which was not unjustified under the circumstances, the creditors sued out writs of attachment against the said goods. The creditors could not justify the attachment. Thereafter the plaintiff was compelled to pay the damages, and brought this action for contribution against the defendant. The court held that the rule that there can be no contribution among joint wrongdoers applies only to cases where there has been an intentional violation of the law, or where the

\textsuperscript{13} Washington Gas Light Co. v. District of Columbia, 161 U. S. 316.
wrongdoer is presumed to have known that the act was unlawful. The action for contribution is therefore permissible in this case.\textsuperscript{15}

The plaintiff contracted to build a bridge for the defendant, the city of Des Moines. The defendant agreed to furnish a right of way and an approach but failed to do so. The result was that the plaintiff, working under the direction of one of defendant's engineers, trespassed upon private property and was made to respond in damages even though he actually believed that the defendant had obtained the right of way. Thereupon, the plaintiff brought this action for contribution against the defendant. It was held that the plaintiff could not be charged with knowledge of the wrongfulness of the act and that an action for contribution would lie, although both parties joined in committing the act, since the act was merely \textit{malum prohibitum} and in no respect immoral.\textsuperscript{16}

A. Emmons and Charles Payne honestly believed they had acquired title to certain realty by inheritance. The basis for this belief was the fact that Emmons and Payne were close heirs of the decedent owner and Emmons occupied the land and paid taxes on it for fifteen years. Emmons cut timber standing on the land, sold the timber, and divided the proceeds with Payne. Thereafter, all parties having an interest in the land by the law of Kentucky brought an action for waste against Emmons who filed a cross-petition whereby, among other things, he sought to enforce contribution from Payne. The court held that where one of several joint tenants cut timber and divided the proceeds with another joint tenant, and thereafter was compelled to reimburse his other co-tenants, he could recover from the co-tenant, with whom he had divided, any excess of the amount he had paid him over his proportionate share. The defense that the parties were joint tort-feasors will not be permitted, since the parties to the transaction were under the mistaken belief that they owned the land.\textsuperscript{17}

In a few jurisdictions, notably Wisconsin and Minnesota, the general principle that there is no right of contribution between joint tort-feasors, is still further circumscribed in its operation. These jurisdictions permit contribution between joint tort-feasors, even where it is shown that both tort-feasors were negligent in the same manner and degree and it would not be unreasonable to presume that they knew they were acting negligently, if the acts or omissions constituting the tort did not involve

\textsuperscript{15} Farwell et al. v. Becker et al., 129 Ill. 261.
\textsuperscript{16} Horrabin v. City of Des Moines, 198 Iowa 549.
\textsuperscript{17} Emmons v. Evans, 178 Ky. 180.
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moral turpitude. It is apparent that these courts disregard the fact that the tort-feasor must set up his own wrong in order to recover contribution. The only thing given consideration, apparently, is the proposition that burdens and benefits common to the parties involved should be equally apportioned among them. These courts have extended the operation of an equitable principle without giving much thought to the reasons for the doctrine of contribution or the limits within which the doctrine was intended to operate. It would seem that they are inclined to dispense natural justice as understood at the present time and have found that, by considering only the statement defining contribution, this inclination may be given rein and justified. A necessary consequence of the proposition advanced by these courts is that the policy of aiding in the suppression of wrongful acts, by not permitting anyone to maintain an action based upon his own wrong, is limited to those wrongful acts or omissions which involve moral turpitude.

The second question under discussion must be answered in the negative. As was stated previously this is a question of whether or not the indemnitor of one joint tort-feasor who pays the judgment and takes an assignment thereof has any greater right than his indemnitee to enforce the payment of contribution from an unindemnified joint tort-feasor.

The indemnitor is interested in the controversy and its attendant results because his indemnitee is involved in the matter. If the injured party had proceeded against the indemnified joint tort-feasor, the latter would have been compelled to pay the whole of the joint judgment. In which event, under the general principle previously discussed, the indemnified tort-feasor would have no action for contribution against his fellow tort-feasors. In the event that the indemnitor paid his indemnitee, the former would be subrogated to the rights of the latter with the result that any defense which might have been set up against the indemnitee in his action for contribution, might be set up against the indemnitor in his action for contribution.

The fact that the indemnitor pays the judgment, takes an assignment thereof, and then proceeds against all the tort-feasors against whom the judgment was rendered, with the exception of his indemnitee, does not change the relationship of the real parties to the judgment and assignment thereof. In the final analysis, the payment and assignment of the judgment is an

\[18\] Mitchell v. Raymond, 181 Wis. 591; Mayberry v. Northern Pac. Ry. Co., 100 Minn. 79.

artifice by which it is attempted to do indirectly, that which cannot be done directly. The courts recognize the assignment as an artifice and look to the real nature of the entire transaction and the circumstances out of which it arose.

Since the indemnitee should be considered as being the indemnified joint tort-feasor, or substituted in the latter's place, the indemnitee, who pays a judgment rendered against his indemnitee and another as joint tort-feasors and takes an assignment thereof, may enforce payment of contribution from the unindemnified tort-feasor if the indemnitee might have obtained contribution, but may not enforce payment of contribution if the indemnitee would not have been able to obtain contribution.

**Liability of Carrier for Furnishing Disease-Infected Cars for Transportation of Cattle.**—E. P. Slade brought suit against the St. Louis and San Francisco Railway Company, alleging that he contracted with the defendant to transport certain hogs and cattle. Among other things, he alleged that the car furnished by the defendant was infected with cholera and that by reason thereof certain of his hogs became infected with it and died. The defendant's demurrer was overruled and verdict was given for the plaintiff. The Supreme Court of the state affirmed the decision.

The evidence tended to prove first, that all the hogs so shipped were free from cholera or cholera contamination at the time they were shipped; second, that there was no cholera in the vicinity from which they came, nor had there been any there for a number of years prior to the date on which they were shipped and that after the shipment was made no cholera developed there; third, there was no cholera in the vicinity of Council, the destination, and no cholera had been there for a number of years prior to the time this shipment arrived and until the hogs of this shipment died of it. There was no possible way in which the disease could have been contracted except from the defendant's cars. There was also some testimony that this car had contained other hogs and had not been cleaned before the Slade shipment was made. The conclusion from this was that the hogs previously shipped in that car were infected, that the


car had not been cleaned and disinfected subsequent to that
date, and that the hogs of this shipment contracted cholera
by contact with the litter and manure from the former shipment,
and the loss complained of occurred.

The rules of common law determining the liability of common
carriers had been established long before the advent of the
railroad. With the development of railroads and the transpor-
tation of live stock, the courts differed in their opinion as to
whether the rules of the common law applicable to the liability
of common carriers also applied to the transportation of live
stock.

According to the early cases, the common carrier of inani-
mate goods is an insurer of the goods against all losses except
those arising from an act of God, the public enemy, an act of
the public authority, an act of the shipper, or the inherent
nature of the goods themselves. Unless the loss be due to one
of these exceptions the carrier cannot excuse himself from lia-
bility by showing that the loss is inevitable, that he is entirely
free from negligence, or that he has exercised the utmost possible
human diligence and foresight. He is absolutely liable. 23

Is the carrier of live stock an insurer? In other words, does
the same liability attach to the carrier of live stock as to the
carrier of inanimate goods? In some states, notably Michigan,
it has been held that those who undertake to transport live stock
are not liable as common carriers, but are only bound to trans-
port with ordinary care and skill. The reason for this rule
lies in the natural propensities of animals which may lead to loss
or damage regardless of the control exercised by those who
undertake their transportation. 24

In the case of Michigan Southern and Northern Indiana Rail-
road Company v. McDonough, 25 the court said in discussing
the early liability of carriers: "These responsibilities and
duties were fixed with reference to kinds of property involving
in their transportation much fewer risks, and of quite a different
kind from those which are incident to the transportation of live
stock by railroad. . . . It is a mode of transportation which,
but for its necessity, would be gross cruelty, and indictable as
such. The risk may be greatly lessened by care and vigilance,

23 Agnew v. Steamer Contra Costa, 27 Cal. 425; Hill Manufacturing

Hall, 124 Ga. 322; Stiles, Gaddie & Stiles v. Louisville & N. R. Co., 129
Ky. 175.

by feeding and watering at proper intervals, by getting up those
that are down and otherwise. But this imposes a degree of care
and an amount of labor so different from what is required in
reference to other kinds of property that I do not think this
kind of property falls within the reasons upon which the com-
mon law liability of common carriers are fixed."

However, the clear weight of authority is that the ordinary
liability of a common carrier attaches in the transportation of
live stock; and, on undertaking their transportation, a carrier
assumes the obligation to deliver them safely against all con-
tingencies except such as would excuse the non-delivery of other
property; that is, it is not accountable for loss resulting from
the inherent nature of the property and not due to any negli-
gence or fault on its part.26

The rule as established by the United States Supreme Court
in North Pennsylvania Railroad Company v. Commercial Na-
tional Bank,27 is quite clear on the subject. "A railroad com-
pany, it is true, is not a carrier of live stock with the same re-
sponsibilities which attend it as a carrier of goods. The nature of
the property, the inherent difficulties of its safe transportation,
and the necessity of furnishing to the animals food and water,
light and air, and protecting them from injuring each other, im-
pose duties in many respects widely different from those devolv-
ing upon a mere carrier of goods. The most scrupulous care in
the performance of his duties will not always secure the carrier
from loss. But notwithstanding this difference in duties and
responsibilities, the railroad company, when it undertakes gen-
erally to carry such freight, becomes subject, under similar
conditions, to the same obligations, so far as the delivery of the
animals which are safely transported is concerned, as in the
case of goods."

The fact that the carriage of live stock was unknown at com-
mon law in nowise affected the question, as the liability of
carriers was fixed by the character of the business, and not by
the character of the goods carried.28 The liability of carriers
of animals is modified only where the damage for which recom-
 pense is sought is a consequence of the conduct or propensities

26 Covington Stock Yards Co. v. Keith, 139 U. S. 128; Chicago &
Alton R. Co. v. Erickson, 91 Ill. 613; St. Louis & Southeastern Ry.
Co. v. Dorman, 72 Ill. 504; Chicago & I. & L. R. Co. v. Baugh, 175 Ind.
419; Kimball v. Rutland & Burlington R. Co., 26 Vt. 247; Evans v.
Pitchburg R. Co., 111 Mass. 142; South & North Alabama R. Co. v.
Henlein & Barr, 52 Ala. 606.
27 123 U. S. 727.
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of animals undertaken to be carried. In other respects, the common-law responsibility of the carrier will attach. 29

In an early Illinois case the court said: "The common-law liability of a carrier to deliver live animals is not different from that where the delivery of merchandise or other dead matter is concerned." 30 But this must be impliedly qualified so as to excuse the carrier if loss occurs because of the inherent nature or vicious propensities of the animal. While the courts differ as to whether the carrier of live stock is a common carrier, yet the difference is of no practical importance, because they arrive at the same result, freeing the carrier if loss is due to the inherent nature of the animal. It was stated in Adams Express Company v. Bratton, 31 that it was unimportant whether live-stock bailments for transport should be considered a further exception to the carrier's insurance liability where the damage arises out of the vitality of the animals, or whether it should be considered merely as a fuller statement of the common-law rule which, on the question of the insurance liability, took note of the inherent quality of the freight.

With reference to the Slade case, a disease, such as hog cholera, contracted in the carrier's cars does not fall under such a classification as "natural propensities of animals." It appears from the evidence that the plaintiff's hogs were free from disease and had the defendant not furnished a disease-infected car no loss would have resulted.

Is there a duty on the carrier of live stock to furnish a car free from contagious disease? That a carrier of live stock is bound to provide cars for transportation that are fit and suitable under existing conditions, 32 and the failure to discharge that duty is negligence making a carrier liable for all damages resulting therefrom. 33

The reported cases are in harmony in holding that a carrier which undertakes to transport live stock is liable for damages where the stock becomes infected with a contagious disease through its fault. The carrier must protect from exposure to contagious and infectious disease, shipments of live stock while

30 St. Louis & Southeastern Ry. Co. v. Dorman, 72 Ill. 504.
31 106 Ill. App. 563.
33 Illinois Central R. Co. v. Harris, 184 Ill. 57; Lake Erie & W. R. Co. v. Holland, 162 Ind. 406.
transporting them. It is the duty of the carrier to furnish cars which are not infected with any contagious disease. If failure in this duty results in contraction of a disease by the live stock, the carrier is liable for such damages as have been sustained.

The liability of a railroad company in negligently furnishing an infected car for the transportation of live stock is recognized in St. Louis, Iron Mountain & Southern Railroad Co. v. Henderson. A verdict for the plaintiff in that action was reversed because evidence was presented to show that the cattle were exposed to infection outside the car. The liability of a carrier for negligence in furnishing infected pens for the reception of cattle previous to shipment is impliedly recognized in Texas & Pacific Railway Co. v. Beal & Self.

A carrier must also protect stock from exposure to infectious diseases during transportation. Hence, where a carrier negligently exposes a shipment of hogs to hog cholera by switching them through a zone in which hogs are so infected, it is liable for losses occasioned by the disease contracted from such exposure.

The carrier is not liable for injury to livestock from sickness caused by severe storms—where it has done all that it could to prevent injury—since the proximate cause is an act of God. So, also, where the death of an animal which is being transported is caused by an attack of meningitis, the carrier is not liable where it does all in its power to protect the animal after such an attack. Nor is a carrier liable for the loss of live stock through sickness where it does not appear that such sickness was caused by its negligence.

A carrier cannot be held liable merely because some cattle carried by it die or are sick from a contagious disease several days after they are delivered, unless it is shown that the carrier was responsible for their contracting the disease.

34 Illinois Central R. Co. v. Harris, 184 Ill. 57; Baltimore & O. R. Co. v. Dever, 112 Md. 296.
35 Illinois Central R. Co. v. Harris, 184 Ill. 57; Baltimore & O. R. Co. v. Dever, 112 Md. 296.
42 Baltimore & O. R. Co. v. Dever, 112 Md. 296.
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The law in Illinois is well established by the case of *Illinois Central Railroad Company v. Harris*. Here, the plaintiff shipped some cattle from Centralia to Seymore over the defendant's road. Shortly after their arrival they became sick with Texas fever, and some died. It was shown by evidence that the cattle shipped were all native; that Texas fever had never existed in the territory where they were raised, and that they had never been exposed to it before the date of their shipment. No Texas fever had existed within twenty-five years either in the vicinity of shipment or destination. It was also proved that the cars had been used recently by the company in carrying other cattle. The conclusion to be drawn is that the cattle must necessarily have contracted the disease in the cars from germs which had been left in the cars from recent shipments. The court said: "A duty rested upon the defendant to furnish plaintiff cars not infected with disease, and a failure in that regard would render it liable for the loss sustained thereby. . . . It was the duty of the defendant to furnish reasonably safe cars in which the cattle might be transported, and it was also the duty of the defendant to furnish cars which were not infected with any contagious cattle disease, and if defendant failed to discharge its duty and appellee was injured in consequence of such failure, then plaintiff was entitled to recover such damages as he may have sustained."

Thus, it is seen that it is the duty of a carrier of live stock to furnish cars which are not infected with any contagious disease and that failure to discharge such duty renders the carrier liable for resulting damages.

**Effect of Fraud in Overvaluation in Fire Insurance Policy.**—A fire insurance company in issuing a policy of insurance on personal property undertakes to assume the risk described in the policy and based upon the valuation of the property as there stated, and if the property actually insured is of a different value from that stated in the policy it has assumed a different risk from that intended. An intentional misrepresentation of value would be a fraud upon the insurer. Several items may, however, be insured in the same contract, and an overvaluation may have been placed by the insured only on one item. What effect does this have upon the contract as a whole?

This question was considered in the recent case of *Moreau v. Palatine Insurance Company of London, England*. In that

43 184 Ill. 57.

44 (N. H.) 151 Atlantic 817.
action, one of assumpsit on a fire insurance policy, the facts, briefly, were these: The plaintiff had insured his house, barn, and some personal property. In the proof of loss the defendants contended there had been an intentional and fraudulent overvaluation which avoided the contract. The defendant insurance company contended further that since the contract provided that such fraud would void the whole policy, the plaintiff could not even recover for his real property loss, even though the overvaluation related only to the personalty. And the court sustained this contention.

Before considering the reasoning of the court, it is perhaps pertinent to consider some relative matters, among them "value" as used in insurance policies. In Phoenix Insurance Company v. Pickel, the court discusses value and cites Wood on Insurance to this effect:

"How is value to be determined? Is it not a matter of judgment and opinion wholly, except, it may be, in special instances? How is the value of real estate to be estimated? What is the standard by which to ascertain the value of a building? Is it what this man or that says it is worth? Is it what it would cost to build another of the same style and material? The ascertainment of any of these facts is a mere matter of judgment. Has not the assured the same right to exercise his judgment if he exercises it honestly that his neighbors on the jury have? When the insurers propound this inquiry, upon what basis and by what standard is it to be presumed they expect the insured to estimate the value? Is it reasonable to suppose that they expect him to estimate the value of the materials composing it, the cost of labor to build it, or rather, to give his honest judgment and opinion upon the question? Suppose the question in the application to be: 'What in your honest judgment and opinion, is the value of the property?' Would it not be held that in order to avoid the policy, the insurer must show that the value was not given according to the honest judgment and opinion of the insured? Most certainly. And it is difficult to conceive how the introduction of the words 'judgment or opinion' into the question can affect the rights of the parties at all, for in nearly all instances the question of value is well known to be mere matter of opinion. Particularly is this so as to buildings and real estate generally, and all the insurer expects or has the right to expect in answer to a question of the value thereof, is simply the honest judgment and opinion of the assured; and it is absurd to hold the assured

45 119 Ind. 155.
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responsible for an error of judgment honestly made, simply because his neighbors differ with him in that respect. A doctrine that held the insurer up to a strictly exact valuation would be extremely unjust, and would result in vitiating one-half the policies issued, for, under the rule, the difference of one cent is as disastrous as a difference of a large amount."

What is true of valuation in the application is equally true of valuation in proof of loss. A study of the cases shows it is almost axiomatic that a policy is always void by the common law for the least want of good faith in the assured. The law is that a person who has made a fraudulent claim should not be permitted to recover.

Generally the condition against fraud or false swearing applies to all matters concerning the insurance, whether before or after loss. However, such statements do not avoid the policy unless they are knowingly false and fraudulent. Honest mistakes, though negligently made, do not violate the condition. If the insured resorts to false or fraudulent conduct to induce making of a contract where none would otherwise be entered into, it is sufficient to avoid the insurance without stipulation to that effect.

In the standard policy, the clause which makes the contract void "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" extends this rule to all statements made by the insured with reference to the insurance either before the loss or after it. Such a condition is held to be reasonable and valid. It is intended to give the insurer a remedy against false and fraudulent claims that may be made about the value of property lost or damaged, and it is especially aimed at falsehood and fraud in the statements required to be made in connection with notice and proofs of loss.

However, no legal inference of intentional fraud can be derived from the mere fact that the insured overstates the value. To constitute fraud or false swearing which will work a forfeiture of insurance there must be, it was decided in National Fire Insurance Company v. Itasca Lumber Company, a false state-

51 148 Minn. 170.
ment wilfully made regarding a material matter with the intention of thereby deceiving the insurers.

George J. Couch in his comprehensive work on insurance⁵² points out that a policy will be vitiated by the suppression of known material facts by the insured though withheld unintentionally or by mistake or inadvertence without actual fraud. If a material fact is concealed, intentionally or not, the policy is void.

What then is the fraud which will vitiate a policy? "Where fraud is alleged against an insured, if the insurers wish to repudiate liability on this ground, it is necessary for them to obtain proof of the existence of the fraud sufficient to sustain the charge before a jury. The distinction must, however, be noted between a false representation honestly believed to be true and one known to be false. Where overvaluation is so palpable as to exclude the plea of misjudgment, there would be no question as to the intention to defraud."⁵³

It thus appears that mere mistakes in stating facts which do not in themselves annul the policy's conditions and do not appear to be wilful misrepresentations will not defeat an action to recover on an insurance contract. In the case of Commercial Insurance Company of California v. Friedlander,⁵⁴ in which it was decided that "mere overvaluation of the property destroyed honestly made without intent to deceive in proofs of loss will not defeat a recovery on a policy which declares that fraud or overvaluation or misrepresentation shall avoid it, and that proofs of loss shall state the actual cash value of the property. An appraisal of the value of property not destroyed by a person selected for that purpose is not conclusive of the amount of loss, so as to preclude proof of the quantity, quality, and value of the property insured."¹⁵

Even an attempt to defraud is generally considered sufficient to avoid the policy. This was decided in a case where the policy provided that "the policy shall be void if the insured has made any attempt to defraud the company either before or after the loss." The contract was held to be plain and unambiguous and the insured's effort to recover ten thousand dollars on the policy was frustrated by the evidence, which, although not uncontradicted showed plainly an effort to overstate, with knowledge, the value of the property.⁵⁵

⁵² Couch, Cyclopedia of Insurance Law, sec. 781.
⁵³ Remington, Dictionary of Fire Insurance.
⁵⁴ 156 Ill. 595.
Where the mistake of the insured was due to his ignorance of the English language and the statement which is considered offensive was made under the direction of the person who aided him in making the proofs, and it appeared it was not made by the assured wilfully or with any intent to defraud the company, there was held to be no forfeiture.\(^5\) Again, innocent misstatements of interest, such as that another had an interest in the property whereas no such interest existed, do not constitute fraud or false swearing sufficient to avoid liability on the policy, especially where the statutes provide that intent to deceive is an essential element of false swearing in proofs of loss.\(^5\) In another Federal case,\(^8\) it was decided that where the policy stipulated that fraud or false swearing by the assured should work forfeiture of all claims under them, statements in the proofs of loss, honestly made, although subsequently discovered to be mistaken, would not work a forfeiture.

Whether the intention to deceive will be implied in law is clearly answered in \textit{Claflin v. Commonwealth Insurance Company},\(^5\) a leading case, where the court held that "a false answer as to any matter of fact material to the inquiry knowingly and wilfully made with intent to deceive the insurer would be fraudulent. If it accomplished its result it would be a fraud effected; if it failed it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied for the law presumes every man to intend the natural consequences of his act."

As a general rule, statements made in proofs of loss are not conclusive upon the claimant provided they are made in good faith and without intent or attempt to defraud the insurer.\(^9\) From this it follows that mere mistakes and bona fide errors therein may be corrected, unless the insurer has acted upon the proofs in such a manner that to permit correction would be inequitable. Where a statement in the proofs is substantially correct, inclusion of one item by mistake is of no consequence.

The well-established rule is that in making proofs of loss a mere overvaluation of the property made through mistake or inadvertance does not constitute false swearing or fraud, if it represents the honest opinion, estimate or belief of the insured.\(^6\)

\(^{58}\) Republic Ins. Co. v. Weides, 14 Wall. 375.
\(^{59}\) 110 U. S. 81.
\(^{60}\) Couch, Cyclopedia of Insurance Law, sec. 1586.
\(^{61}\) Commercial Ins. Co. v. Friedlander, 156 Ill. 595.
Where the value of the property destroyed is largely in excess of the insurance so that an exaggeration cannot operate to defraud or injure the insurer, an overvaluation if honestly made will not avoid the policy. But, any attempt to collect on a fictitious overvaluation works forfeiture.

A mistake as to the name of the owner of the property, the cause of a fire, the incumbrance when the owner does not deem it a lien, whether there is other insurance, the amount of the insurance on the property, whether fire or smoke or water caused the damage—would have no effect on the validity of the fire insurance policy and the right of the insured to collect under this contract.

As to whether or not there has been sufficient fraud to avoid the policy is a matter for the jury to decide. Ordinarily, when "it appears from the evidence that there was an overestimate of value it is a question of fact for the jury to determine whether the insured acted honestly and in good faith in making such valuation or whether there was an intention on his part to defraud the insurer." But this is not always the case, as, for instance, where the disparity between the value as given and the actual value is so great as plainly to evince intent to defraud. Here, the question of false swearing becomes one of law for the court and not one of fact for the jury. In fact, a verdict should be directed for the defendant insurance company in any case where the evidence clearly establishes fraud or false swearing.

Overvaluation of property by the insured may take place either at the time of making the contract or at the time of submitting proofs of loss. In either event, under the standard policy conditions, such overvaluation if fraudulent entirely voids the insurance. The mere fact of overvaluation, even though it be great, is not alone sufficient proof of fraud. It must be alleged and clearly proved by the insurer that the insured in overvaluing his property did so knowingly and with fraudulent intent.

In the case of Commercial Cabinet Company v. North British & Marine Insurance Company, the court declared that "the mere fact that an assured in the proofs of loss has made an overvaluation of property destroyed is insufficient to establish that the assured was guilty of fraud or false swearing rendering

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62 Couch, Cyclopedia of Insurance Law, sec. 1557.
64 220 Ill. App. 453.
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policies of insurance void under their terms, where the values mentioned in the proofs represent the honest opinion, estimate or belief of the assured."

It is important to notice here that for a false statement of value at the time of making the contract to avoid the insurance, such statement must have been made with the fraudulent intent to injure the insurer. No such specific intent is necessary, however, in order that a consciously false statement in connection with the proof of loss will avoid the insurance.

In Pottle v. Liverpool and London and Globe Insurance Company, it was held that "it is a firmly established legal doctrine that if a plaintiff in an action on a policy of fire insurance falsely and knowingly inserts in his sworn proof of loss such a false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover."

From the cases considered, the answer is given to the question brought forth in the case of Moreau v. Palatine Insurance Company of London, England: If the policy covers both realty and personalty, or various items of either, will fraud in the proofs of loss of any one void the whole policy? The obvious answer is, "it will," for such fraud goes to the very root of the contract.

In Moore v. Virginia Insurance Company, where the fire policy provided that all fraud or attempted fraud or false swearing on the part of insured should forfeit all claims under the policy, the insured was covered for two thousand dollars on buildings, one thousand dollars on machinery and fixtures, and two thousand dollars on a stock of grain and incidentals. A loss occurred, and the insured in his sworn proofs made a false and fraudulent statement as to the stock of grain, but not as to the other subjects of insurance. It was held the entire policy was forfeited. This same view is taken by the court in Dolloff v. Phoenix Insurance Company, where it was said that "fraud in any part or as to any items of a formal statement of loss taints the whole and operates to defeat a recovery upon any part of the policy, it having been said that thus corrupted, it should be wholly rejected and the suitor left to repent that he has destroyed his actual claim by his false swearing."

65 Home Ins. Co. v. Mendenhall, 164 Ill. 458.
66 108 Me. 301. See also Kavooras v. Insurance Co. of Illinois, 167 Ill. App. 220.
67 (N. H.) 151 Atl. 817.
68 69 Va. 508.
69 82 Me. 266.
Where the false swearing clause provides for the avoidance of the entire policy or "all claims" thereunder, false swearing as to any articles covered will avoid it even though the different articles are severally valued and insured.\(^7\)

The rule is followed in the Illinois case of *Ledford v. Hartford Fire Insurance Company*.\(^7\) There it was held: "Where a policy contains a stipulation to the effect that it shall be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, whether before or after loss, a false statement under oath knowingly and purposely made by the assured for the purpose of procuring falsely excessive valuation of the property lost, causes a forfeiture of all claims under the policy and prevents a recovery thereunder."

In the Moreau case,\(^7\) which involved a fraudulent overvaluation in the proof of loss concerning the personalty, the court declared the whole policy void, including the coverage for the realty, and refused to recognize the contention of the plaintiff that the policy is divisible. The court said: "The issue is one of construction of the policy. In its wording no intimation of such a divisional theory is suggested. There is no semblance of an indication of a combination of a number of policies, at least in respect to fraud. . . . Whatever the rule when the breach of condition is not fraud, there appears to be but little dissent from holding the entire policy void when the breach is fraud."

The result of the study of the cases, then, makes certain essentials stand out. First, the contract of insurance, in its standard form, provides that the policy shall be void for fraud in the application or proofs of loss. Second, the proof of fraud in the application must be more strictly presented than that in the loss statement. Third, an honest mistake will not avoid a policy, and it is a matter for the jury to determine whether an overvaluation, misstatement of fact, or error was made with or without the intention to defraud. Fourth, the policy of insurance is a unit, and all matters covered by it are effected by the fraud clause so that fraud as to one of the items vitiates the whole contract.

\(^{70}\) Alfred Hiller Company v. Insurance Company of North America, 125 La. 938.

\(^{71}\) 161 Ill. App. 233.