

**Insurance—Exclusion of Evidence of Fraud Reversible Error
(Sebring v. Fidelity-Phenix Fire Ins. Co., 255 N.Y. 382 (1931))**

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HUSBAND AND WIFE—FOREIGN DIVORCE—SEPARATION—AFFIRMATIVE RELIEF.—Plaintiff and one Dalinsky, domiciled and resident in New York, intermarried. Plaintiff left New York temporarily for the sole purpose of securing a Nevada divorce. Although on her suit in the district court at Reno, Dalinsky was personally served in New York, he did not appear nor submit himself to that jurisdiction. Plaintiff returned and remarried defendant in this action in New Jersey. Defendant was and is resident and domiciled in New York. In an action for separation and alimony on the grounds of desertion, *Held*, the decree of divorce from Dalinsky being invalid here, the second marriage was never recognized as valid by the laws of this State. *Fisher v. Fisher*, 254 N. Y. 463, 173 N. E. 680 (1930).

It is well settled that a decree of divorce rendered in a foreign state will be recognized in New York, where the court rendering the decree *had jurisdiction* of the subject-matter and parties, even though the divorce was granted for a cause which is not recognized in this state.¹ If the defendant, in a foreign action, was domiciled in New York and served personally while here and he does not appear, then, although the divorce may have full force and effect in the state wherein it was decreed, it will not be recognized in New York.² Where a party seeks to avoid a divorce on the ground of want of jurisdiction, he must show that he was domiciled in New York and did not make an appearance at the action.³ Where neither party to the foreign action is domiciled in New York at the time of the rendition of the decree, and the notice of the action is served by publication, this state will recognize the foreign divorce if the state wherein the defendant is domiciled recognizes it, but if the latter state does not recognize the decree, New York will not.⁴ The instant case is in harmony with previous expressions of the Court of Appeals and is sound practically.

H. L. B.

INSURANCE—EXCLUSION OF EVIDENCE OF FRAUD REVERSIBLE ERROR.—Plaintiff purchased a farm for \$11,500 and built a barn costing \$10,000 thereon. Defendant insurance company's experts estimated the property's market value at \$8,000. The buildings were insured for only \$1,600. The farm did not yield a profit. No stock

¹ *Stewart v. Stewart*, 205 App. Div. 587, 200 N. Y. Supp. 168 (2nd Dept., 1922); *Straus v. Straus*, 122 App. Div. 729, 107 N. Y. Supp. 842 (1st Dept., 1907); *Richards v. Richards*, 87 Misc. 134, 149 N. Y. Supp. 1028 (1914).

² *Hunt v. Hunt*, 72 N. Y. 217 (1878); *People v. Baker*, 76 N. Y. 78 (1879); *Olmstead v. Olmstead*, 190 N. Y. 458, 83 N. E. 569 (1908); *Ackerman v. Ackerman*, 200 N. Y. 72, 93 N. E. 192 (1911).

³ *Percival v. Percival*, 186 N. Y. 587, 79 N. E. 1114 (1905), *aff'g* 106 App. Div. 111, 94 N. Y. Supp. 909 (2nd Dept., 1905).

⁴ *Ball v. Cross*, 231 N. Y. 329, 132 N. E. 106 (1921).

was kept. In 1926 one Hubbard, a friend and client of the plaintiff, became the tenant. The insurance was gradually increased to \$16,050. In March 1927, plaintiff entered into a contract of sale with Hubbard. April 4th the policy was indorsed over to Hubbard and plaintiff, as interest should appear. On the night of May 23rd, fire destroyed all the buildings. Lightning was stated as the cause, although there was no competent evidence to uphold this contention. One year later Hubbard assigned his rights to the plaintiff. In the trial court the jury returned a verdict of \$3,900 for the plaintiff, which the Appellate Division unanimously affirmed. On appeal, *Held*, reversible error. Defendant should have been allowed to prove that Hubbard had been convicted of conspiracy to defraud insurance companies in Pennsylvania. Such facts if concealed were fraudulent. *Sebring v. Fidelity-Phenix Fire Ins. Co.*, 255 N. Y. 382, 174 N. E. 761 (1931).

Materiality of a representation is a question for the jury under ordinary circumstances.¹ The insured is under a duty to disclose all facts which might cause the underwriter to refuse the risk, and these facts need not be such as would increase the risk or contribute to the loss.² Decisions in the State and Federal Courts have held that in life and fire insurance policies the rule has been formulated which requires good faith and fair dealing by both the insured and the underwriter.³ Thus, if a fact be concealed in good faith and if the insured is not questioned regarding it, the non-disclosure of such fact will not void the policy.⁴ If, however, there be a wilful intention to defraud and not a mere oversight or mistake a contrary result will follow.⁵ A pyromaniacal tenant, or one who has been involved in litigation regarding the suspicious origin of fires is such a fact as the rule of good faith would require to be disclosed.

A. S.

¹ *Penn. Mut. Life Ins. Co. v. Mechanics S. B. & T. Co.*, 72 Fed. 413 (C. C. A., 6th, 1896); *Fidelity Mut. Life Ass'n of Philadelphia v. Miller*, 92 Fed. 63 (C. C. A., 4th, 1899); *Fidelity Casualty Co. of N. Y. v. Freeman*, 109 Fed. 847 (C. C. A., 6th, 1901).

² *Jefferson Ins. Co. v. Catheal*, 7 Wend. 72 (N. Y., 1831); *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69 (1881); *Cf. Rothmiller v. Stein*, 143 N. Y. 581 (1894); *American Credit Co. v. Wimpfheimer*, 14 App. Div. 498, 43 N. Y. Supp. 909 (2nd Dept., 1897); see also *Vance on Insurance* (2nd ed., 1930), p. 347.

³ *Mut. Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, 36 Sup. Ct. 676 (1915); *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. 359 (N. Y., 1837); *Valton v. Nat'l Fund Life Assur. Co.*, 20 N. Y. 32 (1859); *Smith v. Counterman*, 30 N. Y. 655 (1864).

⁴ *Browning v. Home Ins. Co.*, 71 N. Y. 508 (1877); *Cf. Farmers Ins. & Loan Co. v. Snyder*, 16 Wend. 481 (N. Y., 1836); *Gates & Downer v. Madison County Mut. Ins. Co.*, 2 N. Y. 43 (1848).

⁵ *Supra* note 1; see *Collins v. Iowa Ins. Co.*, 184 Iowa 747, 753, 169 N. W. 199, 201 (1918); *Bindell v. Kenton County Assn. Fire Ins.*, 128 Ky. 389, 108 S. W. 325 (1908); *Linzee v. Frankfort General Ins. Co.*, 162 App. Div. 282, 147 N. Y. Supp. 606 (2nd Dept., 1914).