

Case No. 4,174. DUNN V. COMMONWEALTH INS. CO.
[1 Flip. 379;¹ 3 Ins. Law J. 631.]

Circuit Court, N. D. Ohio.

April Term, 1874.

LIFE INSURANCE—COMPROMISE—FRAUD AND
MISREPRESENTATION—IMMATERIALITY—IRREGULARITIES.

1. Where facts are within knowledge of both parties, or can be known by the exercise of reasonable diligence by the party complaining, they cannot be used as the foundation of a suit by the latter, though falsely represented by the other party. Mere irregularities do not invalidate the policy.
2. The allegation that the compromise and settlement were obtained by representing that the policy was lapsed for non-payment of premiums is a conclusion of law, and not material.
3. The allegation that the defendant had reinsured one-half of the policy in another company, and that the plaintiff would have to incur the expense of another suit, is the assertion of something in futuro of the nature of a threat, and fraud in law is not applicable in such cases.

Suit was brought to compel payment of a life policy of \$10,000 on life of husband of plaintiff [Fanny Dunn].

Among other things, the defense was that the defendant had settled said policy with the plaintiff by the payment of \$4,500 on compromise.

Reply was made that the settlement had been procured by false representations of the person acting at the time as agent of the defendant, which were: 1st—That said policy was not regularly issued, because not signed by the proper officers. 2d—That it was lapsed by the fact of unpaid premiums. 3d—That the agent of defendant and intestate had colluded together and procured the policy by false representations as to the health of

DUNN v. COMMONWEALTH INS. CO.

the applicant. 4th—That defendant had reinsured one-half the risk in the Continental Life Insurance Company—that said company would not pay on this suit, and that plaintiff would have to bear the expense of suing said companies.

Defendant moved to strike out the alleged misrepresentations as set out in the reply Nos. 1, 2, 3 and 4.

W. J. Boardman and Geo. Willey; for the motion.

W. E. Lowe, against motion.

WELKER, District Judge. The court holds that the motion should be granted. That the first representation, if made, was in a legal sense liable to the objection that it undertook to state a matter of law instead of fact, and moreover that the plaintiff by the terms of the policy in her own hands, could know, with reasonable diligence, that the policy could not be invalid for any mere irregularities; that the second, as well as third, alleged representation was liable to a like objection, to wit: that the plaintiff would be bound to know as to the truth of the representation, so far as it asserted matter of fact, and that so far as it asserted a conclusion of law it was immaterial, as all were presumed to know the law; that the fourth alleged misrepresentation was no representation of which the law could take cognizance, it being no representation of a past or existing fact, but an assertion of something in futuro in the nature of a threat or discouragement, which was not a fraud in the law applicable to such cases.

Motion granted, with leave to amend reply.

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]