

Insurance—Knowledge of Agent Imputable to Principal (Cassels v. S. Dakota Threshermen's Mut. Ins. Co., 211 N.W. 805 (S. Dak. 1927))

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there can be found some secondary purpose to promote public health and safety.

However, it was held in New York, *People v. Murphy*, 195 N. Y. 126 affirming 129 A. D. 260 (1909), that an ordinance which limited the height of a sky sign to nine feet was unconstitutional, but the same court, in a later case, *People v. Ludwig*, 172 A. D. 71 affirmed 218 N. Y. 540, 113 N. E. 532 (1916), held that an ordinance restricting the height of a sky sign to thirty-one feet in the case of solid signs and seventy-five feet in the case of open signs was valid. This was followed by the case of *People v. Wolf*, 216 N. Y. S. 741, 127 Misc. 382 (1926), which held unconstitutional a village ordinance prohibiting the erection of any advertising signs except those used for the purpose of advertising real estate, on the ground that it was not calculated to remedy an existing evil; that it does not tend to promote public health, public safety, public morals or general welfare; and that it is discriminatory, in that it permits one kind of advertising and prohibits all other kinds. The case of *People v. Wolf*, supra, although it has not yet gone up on appeal seems to be the last word of the New York Courts. It would, therefore, seem that there is a serious conflict of authority as to those ordinances aesthetic in their nature. It is submitted that the rule followed by Massachusetts, *Welch v. Swasey*, supra, and Maryland; *Cochran v. Preston, et al.*, supra, is the sounder one for, in time to come, courts will be compelled to take judicial notice of the fact that a beautiful city, whose buildings present a picture of symmetry in art and design, is as much a property right of the city and its inhabitants as any other property right and as such should be protected. These views were voiced by Crownhart, J., in a dissenting opinion in the Wisconsin case of *Piper, et al., v. Ekern*, supra, in which he said: "I do not believe that the constitutionality of the statute need rest upon the narrow ground of safety and health, though I think them ample to sustain the present statute as an exercise of the police power. If 'public welfare' has not done so already, it is high time it took on a meaning for the courts which it has already done for the rest of the world. . . ."

INSURANCE—KNOWLEDGE OF AGENT IMPUTABLE TO PRINCIPAL.—The defendant insurance company employed one Bowler as a soliciting agent. Bowler took the written application of Otto Rose for insurance on a threshing machine. The policy was issued upon the application which contained a clause voiding the policy should the subject of the insurance be or become incumbered by chattel mortgage. The plaintiff at the time of the destruction of the machine had a chattel mortgage covering it though it was in the possession of Rose. After the destruction Rose assigned his entire interest in the policy to the plaintiff. When the application was filed by Rose he informed Bowler of the mortgage. Bowler, after receiving this information, proceeded to fill out application and caused policy to be issued on same. Policy issued had no mortgage clause, or indorsement, or rider attached referring to the incumbrance. In an action by the plaintiff on the policy the defense is voiding of same because of the incumbrance. *Held*, in reversing the decision of the lower court, which nonsuited the plaintiff, that when an agent of an insurance company procures the issuance of a policy after being informed of an incumbrance

thereon, the company cannot thereafter take advantage of a provision rendering the policy void because of the incumbrance. The question of knowledge of the agent is a question of fact to go to the jury and it is relevant evidence to introduce oral testimony to determine the point. *Cassels v. S. Dakota Theshermen's Mut. Ins. Co.*, 211 N. W. 805 (Sup. Ct. S. D. 1927).

In a case which presented an almost similar set of facts, the subject of the insurance being an automobile, but where the agent received the information after issuing the policy but prior to accepting the premium, the acceptance of the premium did not estop the insurer from setting up the incumbrance provision as a defense to an action on the policy when the loss occurred. *Prose v. Hawkeye Sec. Fire Ins. Co.*, 211 N. W. 970 (Sup. Ct. S. D. 1927).

The court apparently distinguishes the two cases upon a provision in the policy in the *Prose* case which does not allow an oral waiver of condition. It is well settled that where a company retains the premium on a policy, knowing of an incumbrance, it waives a condition that if there is an incumbrance on the subject the policy is void. *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, 71 N. E. 897 (1904); *Cowart v. Capital City Ins. Co.*, 114 Ala. 356, 22 So. 574 (1897); *Neafe v. Woodcock*, 15 App. Div. 618, 44 N. Y. Supp. 768 (2d Dept. 1897). It is also well settled that notice to a solicitor authorized to deliver and issue policies for the company was notice to the company. *Rogers v. Farmers Mutual Aid*, 106 Ky. 371, 50 S. W. 543 (1899); 2 *Joyce Insurance* (2d Ed. 1917) 1126, Sec. 439. The rule has been laid down in New York that the receipt by the company, through its general agent, of renewal premiums taken by him with knowledge of other insurance, operates as a waiver of a condition requiring a formal notice and indorsement thereof on the policy, although the policy provides that the conditions can only be waived by a writing signed by the secretary, and it was also held that the waiver might be by parol. *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292 (1863). It is conceded that in the *Prose* case the appellant did not have knowledge of the mortgage at the time of the issuance of the policy, but at the time of acceptance of the premium, and that therefore the acceptance works an estoppel against the forfeiture. *Lawyer v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615 (1910). The court, however, read a statute into the facts upon which they declared it would be contrary to the settled rule of the state to attribute such knowledge to the company. A New York decision laid down a rule that a distinction must be drawn between an existing fact which renders a policy void when delivered and the omission of the insured to give notice of and procure the required consent to a subsequent act, which by its conditions invalidated it, although previously consented to. *Gray v. Germania Fire Ins. Co.*, 155 N. Y. 180, 49 N. E. 675 (1898). Such a distinction might be recognized in the two principal cases. In the first, the agent by waiving the condition gave the contract a valid inception, and in the second, by subsequent acceptance of the premium, after knowledge of the breach of the condition.

SPECIFIC PERFORMANCE—WHAT CONSTITUTES PERFORMANCE SUFFICIENT TO TAKE CONTRACT OUT OF THE STATUTE OF FRAUDS.—Deceased orally agreed that the plaintiff should have her home on her death in