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Specific Performance--What Constitutes Performance Sufficient to Take Contract Out of the Statute of Frauds (Outland v. Outland, 211 N.W. 32 (Mich. 1926))

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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

consideration of living with and assisting her in paying expenses of the home. Evidence showed that the deceased had told various persons that she intended plaintiff to have premises on her death. As a matter of fact, plaintiff had paid taxes on the premises, and made improvements on the property. Plaintiff now brings this action to enforce the oral agreement, to establish a contract, and that part performance on his part took it out of the statute of frauds, and to have the court decree specific performance. *Held*, it was the intention of the deceased that the plaintiff should have her property and that the performance on plaintiff's part took the agreement out of the statute of frauds. Judgment affirmed. *Outland v. Outland*, 211 N. W. 32 (Sup. Ct. Mich. Dec. 1926).

It is well settled in New York, Michigan, and other jurisdictions of this country that part performance of a contract will be sufficient to take it out of the statute of frauds. *Riggles v. Erney*, 154 U. S. 244 (1893); *Houser v. Hobart*, 22 Idaho 735, 127 Pac. 977 (1915), 43 L. R. A. (N. S.) 40 and note; *Martin v. Martin*, 170 Ill. 639, 48 N. E. 924 (1897); *Dragoo v. Dragoo*, 50 Mich. 573, 15 N. W. 910 (1883); *Hart v. Life Insurance Co.*, 86 Kans. 318, 120 Pa. 363 (1912); *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788 (1894); *Johnson v. Hubbell*, 10 N. J. Eq. 332 (1855); *Sleeth v. Sampson*, 237 N. Y. 73, 142 N. E. 355 (1923). There are, however, four jurisdictions which do not recognize the doctrine of part performance. 3 L. R. A. (N. S.) 803, Kentucky, Mississippi, North Carolina and Tennessee. *Doty v. Doty*, 118 Ky. 204, 80 S. W. 803 (1904); *Goodlow v. Goodlow*, 116 Tenn. 252, 92 S. W. 767 (1906); *Washington v. Soria*, 73 Miss. 665, 19 So. 485 (1896); *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143 (1900). What constitutes part performance varies in different states of the union, and apparently New York is inclined to be much more strict than Michigan on the question. *Sinclair v. Perdy*, 210 App. Div. 439, 210 N. Y. Supp. 208 (1st Dept. 1925); *Pike v. Pike*, 121 Mich. 170, 80 N. W. 5 (1899). The last two cases note the difference very well. In the *Pike* case, *supra*, the court held that where a son surrendered a lease on a farm on which he lived and came to live with his parents on their promise to convey the farm to him on their death, the performance of surrendering the lease and moving on the farm was sufficient to take case out of the statute. Whereas, in the *Sinclair* case, *supra*, on a similar set of facts such performance was deemed insufficient.

In the principal case relief was given as the court deemed the part performance and intention sufficient, but in a leading New York case on similar facts the court refused to give relief claiming the performance was not sufficient to take the case out of the statute of frauds. *Burns v. McCormick*, 233 N. Y. 230, 135 N. E. 273 (1920). Performance must be unequivocally referable to the agreement and explanatory without any aid and must point with certainty and definiteness to the existence of the contract period. *Pomeroy Contracts par.* 105, 107, 108; *McKinley v. Hesson*, 202 N. Y. 24, 95 N. E. 32 (1911); *Van Epp v. Redfield*, 69 Conn. 104, 36 Atl. 1011 (1897); *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252 (1889). An act which admits of explanation without reference to the alleged oral agreement is not enough to constitute part performance. *Burns v. McCormick, supra*.