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APPLICATION FOR ISSUANCE OF INSURANCE POLICY INADMISSIBLE IN EVIDENCE UNLESS ATTACHED TO POLICY.—One of the purposes for the enactment of Section 58 of the New York Insurance Law,¹ requiring the whole contract for life insurance to be stated in the policy, was to impose upon the insurer the duty of setting forth the entire agreement as well as every statement or representation which was material in inducing the insurer to contract if it was to be available as a defense.² Under this section, misrepresentations or erroneous statements made by the insured in his application for an insurance policy, which are not in the policy, are not available as a defense in an action thereon.³ In other words, statements by the insured in his application, or elsewhere, cannot be considered unless incorporated in the policy.⁴ This is in derogation of the common law, for prior to the passage of Section 58 in 1906 all papers on which an insurance company acted, when it had decided to grant a policy, were admissible in an action upon it.⁵ The rule expressed by Section 58, which applies only to life insurance, that the insured should be given a copy of all the contractual provisions which may defeat or diminish his rights, was applied by subdivision 1 of Section 142 to accident and health insurance, and contracts of annuity.⁶

Since almost all insurers are corporations, they can act only through agents. If their agents, acting within the scope of their authority, cause estoppels to arise, such estoppels bind the corporate insurer.⁷ In cases where the agents have knowledge of existing facts concerning the applicant, which according to the terms of the policy would prevent the policy from taking effect, it has been ruled that the insurance company is estopped from disclaiming liability on the ground of material misrepresentation since the knowledge of the agent is imputed to the insurer.⁸ Furthermore, if the application is not attached to the policy it is not a part of the contract, and, consequently, there is no breach of warranty. The fact that the policy con-

¹ N. Y. Ins. Law (1906) § 58: "Every policy of insurance issued or delivered within the state or after the first day of January, nineteen hundred and seven, by any life insurance corporation doing business within the state shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are indorsed upon or attached to the policy when issued; * * *"

² Hurley v. John Hancock Mut. Life Ins. Co., 247 App. Div. 547, 288 N. Y. Supp. 99 (4th Dept. 1926).

³ Archer v. Equitable Life Assur. Soc. of U. S., 218 N. Y. 18, 112 N. E. 433 (1916); Bible v. John Hancock Mut. Life Ins. Co., 256 N. Y. 458, 176 N. E. 838 (1931); Lampke v. Met. Life Ins. Co., 279 N. Y. 157, 18 N. E. 14 (1938).

⁴ Murphy v. Colonial Life Ins. Co. of Am., 83 Misc. 475, 145 N. Y. Supp. 196 (1913), *mod'd*, 163 App. Div. 875, 147 N. Y. Supp. 565 (1st Dept. 1914).

⁵ Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282 (1863).

⁶ N. Y. Ins. Law (1939) § 142, subd. 1.

⁷ VANCE, HANDBOOK OF THE LAW OF INSURANCE (2d ed. 1930) 529.

⁸ Bible v. John Hancock Mut. Life Ins. Co., 256 N. Y. 458, 176 N. E. 838 (1931); Lampke v. Mut. Life Ins. Co., 279 N. Y. 157, 18 N. E. 14 (1938).

tained a provision to the effect that the agent could not waive any of the provisions of the policy, does not have the retroactive effect of nullifying a waiver or estoppel which had previously become effective.⁹

II

Due to the decisions of the courts holding that restrictions contained in the policy could not affect transactions which took place prior to its delivery so as to nullify waiver or estoppels, insurers began to use the application as the means of communicating limitations which they wished to impose on the authority of their agents. The application in effect contains an offer, which, upon acceptance by the insurer, constitutes a portion of the terms of the contract.¹⁰ However, the state legislature has sought to regulate this by providing that the application containing such limitations is not incorporated into the contract unless attached to the policy. In the case of *Abbott v. The Prudential Insurance Company*¹¹ an action was brought to recover upon policies of industrial life insurance, the applications for which were not attached to the policies. Each policy provided that the policy would not take effect if the insured was not of sound health. The applications limited the conduct of the agent by stating that he did not have the power to modify the application or to bind the company by receiving or making representations. The court held that although this application was not a part of the contract the "entire contract" statute did not prohibit the introduction of it as evidence, where it is relevant upon a controversy as to matter extrinsic to the contract. The reasoning of the court was that the insured was notified of the limitation in the application before the contract was made, and where there has been such a notification extrinsic of the policy the agent's knowledge alone is not a ground upon which a waiver or an estoppel as to any provision of the contract may be based. Evidence of such a notification is admissible. The beneficiary cannot be allowed to claim ignorance of matters revealed and so burden the insurer with a liability it never intended to assume. This was a four-to-three decision. The dissenting opinion stated that proof of notification to the insured of the limitation of the agent's authority may be shown by evidence extrinsic to the policy but not by any statement in the application if it is not attached to the policy. The statute provides that nothing in the application can be made a part of the contract between the parties, if it is not attached to the policy. To hold otherwise would permit the insurance company to perpetrate a fraud, since the knowledge of the agent is imputed to the insurance company. Both the majority and dissenting opinions interpret Justice Cardozo's opinion in *Bible v. John Hancock Mutual Life Insurance Company*¹² as favorable to

⁹ *Ibid.*

¹⁰ VANCE, HANDBOOK OF THE LAW OF INSURANCE (2d ed. 1930) 434.

¹¹ 281 N. Y. 375, 25 N. E. (2d) 141 (1939).

¹² 256 N. Y. 458, 176 N. E. 838 (1931) (Here an agent for the defendant)

their decisions. However, that case cannot be used as authority for the question involved in the *Abbott* case,¹³ since in the *Bible* case¹⁴ there was no notification extrinsic to the policy of a limitation on the apparent authority of the agent. The notice was in the policy and was not given effect because it could not act by retroaction. Upon careful examination of Judge Cardozo's opinion in the *Bible* case¹⁵ one cannot fail to note that it is in accord with the dissenting opinion of the *Abbott* case:¹⁶

"Today, the restriction upon the authority of the agent and the manner of its exercise is commonly stated in the application signed by the insured. Controversy is foreclosed if the application is annexed. Here it was not annexed and notice of the limitation, if imparted must be proved in some other way. * * * The purpose of Section 58 of the Insurance Law in requiring the whole contract to be stated in the policies, and not pieced out by documents included by mere reference, was not the relief of the insurer. It was the protection of the beneficiaries claiming under them. The Legislature had no design to make their situation harder."¹⁷

The dissenting judges agree with those presenting the majority opinion that proof of information conveyed orally or by writings other than applications is admissible, but the latter fail to agree that a distinction should be drawn between such proof of knowledge and proof of knowledge made through offering in evidence a signed application. They maintain that no interpretation of the letter or the spirit of the statute justifies such a distinction. No dispute similar to the one presented in the *Abbott* case has arisen in this state or any other state possessing a like statute. However, there have been cases in which the unattached application was permitted to be introduced as evidence without regard to the statute.¹⁸ But not one of the cases caused the Legislature to amend the existing statute. In the case of *Edelson v. Metropolitan Life Insurance Company*¹⁹ an insurance policy was issued providing that if the age of the insured be misrepresented the amount payable shall be such as the premium paid would have pur-

insurance company visited a patient in an insane asylum and procured her signature to applications for insurance. He gave her the policy without the application attached and received payment of the premiums. The policy contained a provision which stated that it would not go into effect if the insured was not in good health at the time of the issuance of the policy).

¹³ 281 N. Y. 375, 25 N. E. (2d) 141 (1939).

¹⁴ 256 N. Y. 458, 176 N. E. 838 (1931).

¹⁵ *Ibid.*

¹⁶ See note 13, *supra*.

¹⁷ 256 N. Y. 458, 464, 176 N. E. 838, 840 (1931).

¹⁸ *Wilkins v. National Life and Accident Ins. Co.*, 23 Ga. App. 191, 97 S. E. 879 (1919); *James v. National Life and Accident Ins. Co.*, 256 Ill. App. 436 (1933); *Edelson v. Met. Life Ins. Co.*, 95 Misc. 218, 158 N. Y. Supp. 1018 (1916).

¹⁹ 95 Misc. 218, 158 N. Y. Supp. 1018 (1916).

chased at the correct age. The insured was sixty-six years of age but gave his age as sixty in the application, which was not attached to the policy. The court enforced the above provision of the policy and in order to so hold the court permitted the introduction of the application as evidence on the ground that it was material and competent evidence to show that the contingency had occurred which made the provision effective. The court maintained that it was merely enforcing the contract according to the intent of the parties and was not adding anything to the contract by introducing extrinsic evidence. This is a lower court decision and appears to be in contradiction with all the cases²⁰ holding that false statements made by an insured in an application for insurance, which application was not attached to the policy, were not a defense to an action thereon, even though the policy contains a provision stating that the existence of a particular contingency, *e.g.*, ill-health of the insured, would render the policy ineffective. These cases differ slightly from the *Edelson* case²¹ because there the occurrence of the contingency did not render the policy completely void, whereas in the other cases the policy became totally ineffective. No language of the statute can be pointed out to justify such a distinction, so as to make possible the rendition of different verdicts.

It is submitted that the purpose of the Legislature, by amending subdivision 1 of Section 142 of the Insurance Law, was to abrogate the recently enunciated doctrine as expressed in *Abbott v. Prudential Insurance Company*.²²

III

The amended section went into effect March 6, 1940. It provides:

"1. Every policy of life, accident or health insurance, or contract of annuity, issued or delivered in this state shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings, unless a copy thereof is endorsed upon or attached to the policy or contract when issued. No application for the issuance of any such policy or contract shall be admissible in evidence unless a true copy of application was attached to such policy when issued."²³

The last sentence of the above section consists of the entire amendment. The amendment undoubtedly changes the law as expressed in

²⁰ *Archer v. Equitable Life Assur. Soc. of U. S.*, 218 N. Y. 18, 112 N. E. 433 (1916); *Bible v. John Hancock Mut. Life Ins. Co.*, 256 N. Y. 458, 176 N. E. 838 (1931); *Lampke v. Metropolitan Life Ins. Co.*, 279 N. Y. 157, 18 N. E. 14 (1938).

²¹ 95 Misc. 218, 158 N. Y. Supp. 1018 (1916).

²² 281 N. Y. 375, 25 N. E. (2d) 141 (1939).

²³ N. Y. INS. LAW (1940) § 142, subd. 1, as amended L. 1940, c. 94, eff. March 6, 1940.

the *Abbott* case.²⁴ Under the present statute no application is admissible in evidence, to decide either an extrinsic or intrinsic question, if the application is not attached to the insurance policy. The amendment only provides for applications and makes no mention of any other writings such as is made in the previously enacted part of the section. Therefore, it follows that writings other than applications are admissible in evidence when it is necessary to decide an extrinsic question, even though they are not attached to the policy, particularly since both the majority and the dissenting opinions in the *Abbott* case²⁵ agreed on this point and it has not been disturbed by the Legislature.

The insurance corporations may see fit to contest Section 142 as being unconstitutional, on the ground that it interferes with their contract rights under the United States Constitution. The insurance business is *quasi*-public in character because of its vast effect on all classes of people and their property. Therefore, it is competent for the state by virtue of its police power to regulate and control both the business and the contracts.²⁶

The principle underlying former Section 58, that the insurance policy should contain the entire contract, is a sound principle for the protection of the public and its extension by Section 142 to insurance policies other than for life is a further indication of the legislative intention to add more weight to the unbalanced bargaining power of the insured.

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DESIGNATION OF PARTICULAR INSURANCE AGENT PROHIBITED.

—The right to make contracts is protected by the "due process" clause of the Federal Constitution.¹ The courts have guarded few rights more zealously, being ever on the alert to prevent an undue invasion of this guarantee.² However, in the same breath, they have constantly reiterated their holding that the right is not absolute, that it must be restrained when the public welfare demands it,³ and legislation to that effect will be upheld as constitutional.⁴

²⁴ 281 N. Y. 375, 25 N. E. (2d) 141 (1939).

²⁵ *Ibid.*

²⁶ CADY, *THE LAW OF INSURANCE* (3d ed. 1934) 79.

¹ U. S. CONST. AMEND. XIV, § 1; *Adkins, et al. v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1923); *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769 (C. C. Kan. 1933).

² *Chas. Wolff Packing Co. v. The Court of Industrial Relations of the State of Kansas*, 262 U. S. 522, 43 Sup. Ct. 630 (1923); *Liberty Warehouse Co. v. Burley Tobacco Growers Co-operative Ass'n*, 276 U. S. 71, 48 Sup. Ct. 291 (1928); *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., et al.*, 284 U. S. 151, 52 Sup. Ct. 69 (1931).

³ *Advance Rumely Thresher Co., Inc. v. Jackson*, 287 U. S. 283, 53 Sup. Ct. 133 (1932).

⁴ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 Sup. Ct. 578 (1937).