Case No. 5,052a.

FRANKLE ET AL. V. PENNSYLVANIA FIRE INS. CO.
SAME V. INSURANCE CO. OF NORTH AMERICA.

{12 Ins. Law J. 614.}

Circuit Court, D. Colorado. June 18, 1883.

FIRE INSURANCE—PREPAYMENT OF PREMIUMS—WAIVER—OBJECTIONS TO PROOFS OF LOSS.

{1. The agents mailed a policy to the insured, without requiring prepayment of the premium, merely inclosing therewith a bill in their own names for the amount. The insured did not tender payment until some 15 days later, and after a loss had occurred. The policy contained a condition that it was not to take effect until payment of the premium: but the agents were accustomed, with the company's apparent acquiescence, to deliver policies without prepayment, and they testified that they were personally liable to the company for the premiums. *Held,* that the delivery of the policy was a waiver of prepayment, and that the company was bound to pay the loss.}

{See Bang v. Farmville Ins. & Banking Co., Case No. 838.}

{2. Objections to proofs of loss, not made when the same were served, but first brought forward at the trial, will be considered as waived.}

{These were two actions by Henry Frankle and others against the Pennsylvania Fire Insurance Company and the Insurance Company of North America, respectively, to recover insurance on a stock of goods.}

Decker and Yonley, for plaintiffs.

George W. Allen and Stuart Brothers, for defendants.

Frankle, one of the plaintiffs, testified that he had nothing to do in procuring these policies. He produced the policies, which were introduced in evidence; also identified the proofs of loss that were also introduced. He gave the letter of the agents showing the transmissal of the policies from Leadville on May 6th, and the envelope showing that they arrived there the same day. Inclosed with the policies was a bill for the

premium, $40, showing that the amount was then due. There was not the least intimation in letter or bill of any credit. The policies were for one month. He said that the fire occurred on May 19th; on May 20th he sends the check of Frankle & Butler, on a Denver bank, to Streeter & Lee, Leadville, for $40, the premium. No excuse was given for this delay of from twenty-one to twenty-two days in forwarding the check, or for their sending their check, and that on a Denver bank. Butler, the other plaintiff, testified that the conversation concerning the taking of the policies was had with him in the store at Denver; that Downing, Lee and himself were the only persons present. That nothing was said about giving time for the premium. That the policies were to be for one month from the date of policies that expired on the 5th of May, and the rate was to be eight per cent (There was no showing that the company ever had any knowledge of any agent, here or elsewhere, having at any time violated these conditions of the policy.) Did the agents have any authority to give any credit for the premium, or to insure any one without the payment of the premium as stated in the policy? The authorities are all to the effect that the burden of proving the authority of the agent lays upon the insured. Wood, Ins. §§ 17, 396, 397. In this case, however, the evidence is all one way. If we take the testimony outside of the policy, there is no conflict as regards the fact that no such authority was possessed by Streeter & Lee or any other agent Marvin v. Wilber, 52 N. Y. 270; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531. A party is conclusively presumed to have knowledge of the contents of his contract Wade, Notice, § 43; 8 N. Y. 271; 2 Corp. 597; 7 Taunt 646; 9 Wend. 209. But if it could be held that they did not have knowledge, plaintiffs would be in no better situation. This company offered to insure plaintiffs on certain conditions named in the contract. That was the only proposition they have made, and they had the right to fix their own terms. The plaintiffs had no knowledge of this condition, then they must say they did not assent to it. If they did not assent to it then there is no mutuality in the contract and consequently, upon their own showing, they are suing on a contract they cannot enforce. Let us say that there was an unconditional delivery to these plaintiffs of the contracts by the agents, and a credit of thirty days extended for the payment of the premium from the date of delivery, what result have we? Simply this: That the plaintiffs knew at the time they received the policy that the agent was acting in open and avowed disregard of and disobedience to the instructions of his principal. That he had no right whatever to deliver it or even to attempt to waive any of its conditions. Can they claim that such is a valid delivery? We have no knowledge of any court claiming the right to disregard a restriction, even if it is shown to be unreasonable. Holladay v. Dailey, 1 Colo. 466.

We feel satisfied that this court will never render a judgment against us until plaintiffs' counsel can show: First. That a man is not bound with the knowledge of the contents of his own contract Second. That a party can assent to a condition of a contract without

having knowledge of its provisions. Third. That mutuality is not necessary in a contract Fourth. That a party seeking to recover on a contract can be heard to say that its obligations and conditions are not mutual. Fifth. That a party can be heard to say that he made a contract even to the last act viz. the delivery of the same, and, after it is delivered as a valid and binding obligation on both parties, for the first time became acquainted with its provisions. Sixth. That a party dealing with an agent and having full knowledge of his power and the extent of his authority, can come into a court of justice and admit that he knew the agent was violating his authority in delivering the contract and had no authority to do so, and still claim that such delivery confers on him rights as a valid delivery.

In considering this case, there are certain classes of authorities that cannot enter into its determination. We may describe them as: First. Those where the authority of the agent is not shown either in the conditions of the policy or a notice printed on the policy. Second. That class where there was a notice printed on the policy, but-no condition in it in which case the assured might prove, perhaps, (1) that he did not see the notice prior to the waiver; (2) and possibly it might be held that as it was simply a notice, and no part of his agreement, that he might prove it was false in fact and that the agent did have authority. Cases falling within either of these classes are not authority here on the question of waiver. If we suppose the agents had the authority, is there any reason for saying that this policy was delivered as and for a contract of insurance? On questions of delivery the intention of the parties must at all times prevail. The intent is derived from the act and words used, and all connected facts. There is no pretense made by the plaintiffs that they were ever given credit for one moment by any words that were used. Hicks v. Goode, 12 Leigh, 479; Bowen v. Bowen, 18 Conn. 539; Gray v. Blanchard, 8 Pick. 284; Spalding v. Hallenbeck, 30 Barb. 298; Shinn v. Roberts, 20 N. J. Law, 435; Thomas v. Record, 47 Me. 500; Fraser v. Davie, 11 S. C. 56, headnotes; Inman v. Western Fire Ins. Co., 12 Wend. 452; Marland v. Royal Ins. Co., 71 Pa. St 393; Bradley v. Potomac Fire Ins. Co., 32 Md. 108; 5 Durn. & E. [5 Term R.] 695; Lynn v. Burgoyne, 13 B. Mon. 322; 1 Allen, 294; Catoir v. American Life Ins. & Trust Co., 33 N. J. Law, 487; 103 Mass. 244; Dozier v. Freeman, 47 Miss. 647;

Thompson v. Insurance Co., 104 U. S. 252; Klein v. Insurance Co., Id. 91.

Before McCRARY, Circuit Judge, and HALLET, District Judge.

HALLET, District Judge. May 5, 1882, plaintiffs were merchants at Leadville, and a policy of insurance on their stock in trade, which they held of defendant, expired by limitation. Streeter & Lee were defendant's agents at Leadville, and Mr. Lee, of that firm, applied to plaintiffs to renew the policy. This application was made at Denver, probably on the 5th of May, if we may determine the fact from the circumstance that the policy was sent to plaintiffs on the next day. Some discussion took place at that time between Mr. Lee and plaintiffs' representative, touching the rate of insurance, which defendant intended to increase from six per cent, the rate previously paid, to eight per cent, the rate to be charged. Plaintiffs' representative was unwilling to pay eight per cent, and Mr. Lee would accept no less. The discussion resulted in an agreement by plaintiffs' representative to take a policy for one month at the increased rate, which would afford time to investigate the subject, and ascertain whether insurance could be obtained for less premium. With that understanding the parties separated, and on May 6th, Streeter & Lee mailed from Leadville the policy on which this suit was founded, addressed to plaintiffs at Denver. They inclosed with the policy a bill for the premium, in which plaintiffs were set down as debtors of Streeter & Lee for the amount Plaintiffs received the policy in due course of mail, but did not remit the premium to Streeter & Lee until after the goods were destroyed by fire, which occurred on the twentieth day of the same month of May. Streeter & Lee refused to accept the premium, and defendant claims in this action that by its terms the policy was not to take effect until the premium should be paid. And inasmuch as the premium had not been paid at the date of loss the defendant is not bound.

It is expressly declared in the policy that it "shall not take effect before the premium is paid," and the question is how far the plaintiffs are subject to this provision. The right of the defendant to limit the authority of its agents, and to demand the premium on a policy before it shall assume any risk, is not doubted. But it seems that defendant's agents are in the habit and practice of delivering policies without payment of premiums, and apparently with the knowledge and consent of defendant That course is practiced in Denver and Leadville, and if we may rely on some general knowledge of the business, we may add that the practice is quite general among insurance companies in this country. Defendant's agent at Denver states that he holds himself personally responsible to the company for premiums due on policies so issued, and the circumstance that in this instance the bill for premium was made out in the name of Streeter & Lee is evidence to show that they had adopted the same view. The bill is for money due Streeter & Lee, general fire insurance agents, and the company is not mentioned, except in describing the policy. These agents are selected with special reference to the important duties they are requested to perform on behalf of the company; security for good conduct in office is usually required of them;

and it is not reasonable to believe that they will constantly violate instructions from their principals. The position in which they are placed, subject to dismissal at any moment, forbids any such conclusion. Insurance companies can secure obedience from their agents whenever they demand it. The pretense that this policy was delivered without authority from the defendant is not to be considered. While professing to give insurance only on payment of the regular premium therefor, defendant does, in fact, give out many policies on a short credit. If the premium is paid before loss it is cheerfully accepted—as well the part which is applicable to the time since the date of the policy, in which, according to its own construction of that instrument, it was not liable for loss, and the remainder which was not applicable to the future life of the policy. But when loss occurs before the premium is paid, the clause in the policy relating to its payment is invoked to protect the company from liability. Courts are not bound to recognize double dealing. That some of them have felt inclined to do so may be a matter for regret, but in the court to which we look for correct principles, the rule for which we contend is fully established. Miller v. Life Ins. Co., 12 Wall {79 U. S.} 285. In that case defendant sought to escape all liability upon a clause in the policy of insurance very similar to that on which defendant relies in this case, and the court was of the opinion that the contract was complete on delivery, without payment of the premium. So, also, it is held that an agreement to insure is binding before a policy has been made or delivered, and before the time for paying the premium arrives. Commercial Mut Marine Ins. Co. v. Union Mut Ins. Co., 19 How. {60 U. S.} 318; Insurance Co. v. Colt, 20 Wall. {87 U. S.} 560. And generally it should be said and maintained as a sound and wholesome rule of good conduct and fair dealing that upon a promise of indemnity supported by any consideration whatever, the company shall be bound, whatever may be concealed in a labyrinth of conditions and exceptions to defeat its operation. It is easy enough to withhold the policy until payment of the premium, and that course of dealing will deceive no one. But the delivery of the policy imparts indemnity in a way which most men will accept without question. We think that

the contract between these parties was complete when the policy was delivered, and the defendant is liable on it

Objection is also made to the proof of loss, that it does not meet the requirements of the policy. But it comes too late at the trial. The rule is that objections existing at the time of the service of the proof of loss, if not then made, will be regarded as waived. Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553. Deducting the premium and interest thereon from the date of the policy, the judgment will be for the amount of the policy with interest from the time when it became due under the terms of tin policy.

In another action by these plaintiffs against the Insurance Company of North America the facts are similar, and the like judgment will be entered.