LONDON & L. FIRE INS. CO. v. FISCHER.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 615.

1. INSURANCE—CONDITION AGAINST INCUMBRANCE—WAIVER.
The delivery of an insurance policy, by an agent having authority to deliver or withhold it, with knowledge of an existing incumbrance on the property insured, is a waiver of a condition of the policy against incumbrances, which is binding on the company as to such existing incumbrances.

2. SAME—CONSTRUCTION OF POLICY.
In a clause in an insurance policy providing that it shall be void if "there be kept, used, or allowed * * * gasoline" on the premises, the word "allowed" is to be construed as meaning "allowed to be kept or used," and the condition is not violated by merely permitting gasoline to be carried through the building on the premises.

In Error to the Circuit Court of the United States for the District of Kentucky.

Action on insurance policy. For former report, see 83 Fed. 807.

This was an action by John Fischer, upon an insurance policy, to recover the value of a stock of goods in the city of Louisville, upon which the defendant insurance company had issued a policy of $3,000. The defense of the company rested upon alleged violations of three conditions of the policy. The conditions were as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void (1) if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; * * * or (2) if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage; or (3) if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorus, or petroleum, or any of its products, of greater inflammability than kerosene oil of the United States standard."

The cause was tried before a jury. Upon the issue whether the first and second of the foregoing conditions had been broken, the trial court instructed the jury as follows:

"Then the next inquiry is whether at the time of the delivery of the policy there was a chattel mortgage. The provision of the policy is that if the subject of insurance is personal property,—and it is personal property here,—and be or become incumbered by a chattel mortgage, the policy shall be void. The plaintiff says in regard to that, by his evidence, by his pleading, by statement of counsel, that there was a chattel mortgage on it; that the plaintiff had previously bought that stock of goods, or a stock, part of which, perhaps, remained, and that he owed some $2,900 on it, or $3,000, and to secure that he had taken out policies in his own name,—two policies,—one of $2,500 and the other of $500, and had assigned them to the person from whom he purchased, and that that was known and communicated to Mr. Rehkopf, who was the agent of the insurance company, and that he had full knowledge of it before he delivered the policy sued on. If that be true, from the evidence, if you find that to be true, this provision of the policy is not effectual as a defense, because he is estopped,—the company has waived, through him (to rely on such breach of), that provision of the policy; and, if the fact be that there was one or more chattel mortgages on it, it makes no difference, the

policy is good, the evidence being that he had the right and had the authority, as the agent, to deliver or not to deliver this policy. Now, if he delivered this policy with the knowledge of the existence of those several mortgages, then the knowledge under such circumstances precluded the insurance company from making such a defense. It is a waiver. It is estopped now from making any such defense. If, however, he delivered the policy, made the contract complete as the agent of this defendant, and the knowledge was communicated to him afterwards, the fact that he knew it afterwards would not release the plaintiff from this obligation, because by the very terms of the contract between the parties any agent was precluded from waiving the provision of the contract, except where it was indorsed in writing upon the paper,—the contract itself."

Upon the remaining condition (3) cited above, the charge of the court was as follows:

"Did the plaintiff in this case, between the 7th of October, 1895, and the 31st of May (the time of the fire), 1896,—did he, in the language of the policy, 'keep, use, or allow in the premises, to wit, the main building, gasoline'? If you conclude that he did 'keep, use, or allow' to be used, or kept, gasoline in the premises, thus described, why, then, you should find for the defendant, because by the very terms of the policy the plaintiff agreed that the policy should be void, if he did this thing, which was prohibited. You must keep in mind, now, this proposition refers only to the main building, which excludes the shed behind. Now, this language here is not used in any technical sense, either. It is for you to say whether, from the evidence, this plaintiff kept, used, or allowed to be kept or used, gasoline between the 7th of October, 1895, and the 31st of May, following. You must consider the whole evidence on that subject."

Augustus E. Wilson, for plaintiff in error.

John Barret, for defendant in error.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts). We think the judgment must be affirmed. It is well settled in the law of fire insurance that the insurer is estopped to plead as a defense the breach of conditions against other insurance or incumbrances without the consent of the company in writing on the face of the policy, if it appears that, when the agent of the company, with authority to deliver or withhold policies, delivered the policy in question, he then knew of the existence of the other insurance or the incumbrance. In Insurance Co. v. Norwood, 32 U. S. App. 490, 16 C. C. A. 136, and 69 Fed. 7, which was decided by the circuit court of appeals for the Eighth circuit, it was held that, where the agent was advised by the insured at the time of the issuing of the policy that he intended to take out other insurance, the estoppel would apply. Judges Caldwell and Thayer upheld this view. Judge Sanborn dissented on the ground that the rule did not apply to the knowledge of the agent of the intention on the part of the insured to take out other insurance in future, but only to knowledge of existing insurance at the time the policy was issued. But the proposition formulated above, and which goes as far as is needed to sustain the charge of the court below, was expressly approved, not only by the majority of the court, but also by the dissenting judge. Other cases sustaining this doctrine are Putnam v. Insurance Co., 4 Fed. 753 (a decision by Mr. Justice Blatchford, then circuit judge); Whited v. Insurance Co., 76 N. Y. 415; Insurance Co. v. Hick, 125 Ill. 361, 17 N. E. 792; In-

surance Co. v. Copeland, 86 Ala. 551, 6 South. 143; Patten v. Insurance Co., 40 N. H. 375–381; 1 May, Ins. (3d Ed.) § 294e; 2 May, Ins. § 372c, and cases there cited. There was, therefore, no error in the charge of the trial court upon this point.

The second assignment is based upon the construction which the court gave of the word "allowed" in the clause providing that the policy should be void "if there be kept, used, or allowed" on the premises gasoline. The court construed the word "allowed" to mean "allowed to be kept or used." The evidence tended to show that gasoline was carried through the store from a shed in the back yard, not connected with the main building, where the stock of goods was insured. It was conceded that such carrying of gasoline through the store without leaving it there permanently did not come within the adjudicated meaning of the terms "kept and used"; but it was contended that the word "allowed" embraced more than "kept or used," and was sufficiently broad to include the carrying of gasoline through the store for immediate delivery to customers, even though gasoline was not allowed to be stored on the premises, or to remain there longer than the time required to carry it from the back door to the customer, and to deliver it to him. The court construed the word "allowed" as if inserted for the purpose of making it clear that the condition would be broken, whether the keeping and using was done by the insured himself, or was allowed or permitted by him to be done by some one else. The argument made on this construction is that under it the word "allowed" is merely redundant, and adds nothing to the meaning of the other two words, because it has often been adjudicated that they are broad enough to cover, not only the act of the insured, but also the act of any person whom the insured may permit or allow to keep or use gasoline upon the premises, and in some cases even the act of a tenant in keeping gasoline against the express command of the insured. The mere fact that the words "kept or used" might, by construction, be made wide enough to include "allowed," does not require of us, when the word "allowed" is expressly made a part of the policy, to give it any different meaning from what it would have when it was implied from the use of other words. The habit of using apparently redundant expressions in statutes and contracts and deeds, for the purpose of excluding any possibility of a misconstruction, is very frequent. It justifies us in giving the word "allowed" its ordinary meaning, instead of attributing to it a strained and vague significance, which will defeat the policy. The duty of the court, where the meaning is ambiguous, is to construe the words used against the insurer, who framed them, so as to validate the policy, rather than destroy it. London Assurance v. Companhia De Moagens Do Barreiro, 167 U. S. 157, 17 Sup. Ct. 785; Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 462, 14 Sup. Ct. 379; National Bank v. Insurance Co., 95 U. S. 673. This disposes of all the assignments of error made by the plaintiff in error, and leads to an affirmance of the judgment.

UNITED STATES LIFE INS. CO. v. SMITH.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 605.

1. LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATION—WAIVER—AUTHORITY OF AGENT.

An application for life insurance, which was made part of the contract, and the representations in which were part consideration for the issuance of the policy, consisted of two parts, one of which (to be filled and signed in the presence of the medical examiner) contained a provision that "no information or statement, unless contained in this application, made, given, received, or required by any person at any time, shall be binding on the company." Such application contained the following question: "Has any application ever been made for insurance on this life, on which a policy was not issued for the full amount and of the same kind as applied for, and at ordinary rates?" This question was answered, "No." In an action on the policy it was shown without dispute that the insured had previously made three applications for insurance to different companies, all of which had been absolutely rejected. *Held*, that the fact that the local agent of the company, who had no duty in connection with such application, had been told of such rejections, and advised the answer made, did not bind the company, or change the effect of the answer as a fraudulent misrepresentation on a material matter, which rendered the policy void, the question not being ambiguous.

2. SAME—DEFENSE TO ACTION ON POLICY—TENDER OF PREMIUMS PAID.

A life insurance company is not required to tender back the premiums paid on a policy, to enable it to defend against an action thereon on the ground of fraudulent misrepresentations made in the application, where by the terms of the policy such defense is permitted, and the premiums paid are forfeited, in case the fraud is discovered, and notice thereof given the insured, within two years from the date of its issuance, and such provision has been complied with, and no premiums thereafter received. In such case, where the fraud is established, the forfeiture may be enforced.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This is an action upon a policy of life insurance issued by the United States Life Insurance Company of New York upon the life of Joseph Smith; the beneficiary being Minnie J. Smith, wife of the assured. The policy was for $5,000, issued April 1, 1895. The assured died September 25, 1895. All liability was denied by the company, and suit was brought in the circuit court for the county of Hamilton, state of Tennessee, and removed therefrom by the company upon the ground of diversity of citizenship. The plea was, in effect, the general issue, with notice, according to Tennessee practice, that the defendant on the trial would rely, among other defenses, upon the fact that the person insured, in his application, had made untrue statements in respect to former applications for insurance which had been rejected, and had also made untrue statements in respect to certain diseases to which he had been subject,—among others, jaundice, palpitation of the heart, disease of the genital or urinary organs, diabetes, etc.,—and that the falsity of his statements had been discovered, and communicated to the insured and assured, within two years from the date of the policy. The policy, among other things, provided (1) that it was issued "in consideration of the statements and agreements in the application" for the same, "which are made a part of this contract," and the further consideration of the payment of an annual premium, "and upon the conditions and agreements upon the back thereof." Among these conditions and agreements referred to were the following: "(3) In case of understatement of age, the amount payable shall be the insurance that the actual premium paid would have purchased at the