Denver Law Review

Volume 9 | Issue 5 Article 7

January 1932

Insurance - Provison against Encumberance of Insured Property - Waiver - Agency

Dicta Editorial Board

INSURANCE—PROVISION AGAINST ENCUMBRANCE OF INSURED PROPERTY—WAIVER—AGENCY*

Sun Insurance Office v. Scott, Adv. Op. 55; 52 Supreme Ct. 72.

A PROVISION in a fire insurance policy rendering the policy void in case the subject of the insurance be or become encumbered by a chattel mortgage is valid as a provision to reduce moral hazard.

A loss payable clause, attached to the policy by a local agent of the insurer, which merely states that any loss proved under the policy shall be payable to the assured and to a certain bank, which in fact held a chattel mortgage on the insured property, does not operate as a consent to the chattel mortgage or as a waiver of the provision against encumbrances.

In the absence of a statute otherwise providing, knowledge on the part of the local agent that the property insured was subject to a chattel mortgage will not be imputed to the insurance company to effect a waiver of the provision referred to, or a consent to the mortgage, when the policy expressly provided that no agent had power to waive any provision or condition of the policy unless the waiver be written upon or attached to the policy.

This opinion, delivered by Mr. Justice Roberts, disposed of an appeal from three judgments rendered in actions on three fire insurance policies. The judgments under review were for the respondent who was the owner of certain wool which the petitioning companies had insured. The policies contained the following provision rendering them void if the property insured should be encumbered:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void. . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be . . . personal property and be or become incumbered by a chattel mortgage."

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*Dicta calls attention to this case as one causing much comment and controversy among lawyers.

The wool insured was subject to a chattel mortgage executed prior to the date of one of the policies, and subsequent to the date of the other two. Riders were attached to the policies by local agents of the insurance companies reading as follows:

"Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The insurance companies set up a defense based on violation of the chattel mortgage clause. To this defense the respondent answered that the loss payable clause, as a matter of law, constituted a waiver of that clause; and that by custom in the community the loss payable clause was understood and used to give the insurer's consent to the chattel mortgage. He also in answer relied upon provisions of §9586 of the Ohio General Code. Under that section a person who solicits insurance and procures an application therefor is the agent for the company which thereafter issues the insurance. This agency, the respondent urged, had the effect of imputing to the company the knowledge of the existence of the chattel mortgage which the agent had.

The insurance companies denied the alleged custom, and set up a provision of each policy to the effect that no agent had power to waive any provision of the policy except such as by the terms of the policy might be subject to agreement endorsed on the policy, and which should be, in fact, endorsed on the policy.

The Circuit Court of Appeals held that although the mortgage might be valid as between the respondent and the mortgagee, it would be sufficient to avoid the policies except for the loss payable clause. This it thought by its own force or by customary use constituted a waiver of the clause and a consent to the chattel mortgage. On certiorari this was reversed by the Supreme Court, which held that the loss payable clause did not constitute a waiver of the chattel mortgage provision.

We are of opinion that upon the uncontradicted facts the petitioners made out a valid defense to the suits and were entitled to directed verdicts in their favor. The provision in the policies prohibiting chattel mortgages without consent endorsed on the policy is intended to reduce the moral hazard, and

is a valid stipulation, the violation of which constitutes a complete defense . . . The loss payable clause above quoted is not informative to the insurer of the existence of a chattel mortgage, but performs the office of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

In *Bates v. Equitable Insurance Co.*, 10 Wall. 33, a policy contained a covenant that if the property were sold the insurance should cease unless consent of the insurer to the sale were given in writing. The policy was endorsed, "payable, in case of loss, to E. C. Bates," to whom it appeared the insured goods had been sold. There was no evidence except the endorsement of any consent to accept Bates, the purchaser, as the party whose interest was insured. It was said of the practice of making such loss payable endorsements:

"It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire, or the perils of navigation. . . .

"In the face of this frequent use of the two indorsements on the policy, it cannot be held that they imply of themselves a knowledge of the sale or a consent to insure the purchaser."

We are of opinion that the doctrine announced in the *Bates* case is controlling here; that the attachment of a loss payable clause is entirely consistent with the condition against change of interest, or encumbrance of the insured property, and does not constitute a waiver of the condition against sale or mortgaging, or a consent thereto.

No sufficient evidence was found in the record to establish the customary use of the loss payable clause as a consent to the chattel mortgage.

As to the effect of the Ohio statute constituting the solicitor an agent of the insurer, the Court found nothing in it or in the State decisions construing it to impute to the company all knowledge which the agent had touching the contract.

We have examined the authorities cited and fail to find that they give it any such force or effect. They do not, as respondent claims, define the scope of the agency created by the statute, but leave it to be defined by applicable principles of common law. In the present cases the policy limits its scope, and we think the written contract must control.

The case was argued by Mr. Rolland M. Edmonds for the petitioners, and by Mr. F. S. Monnett for the respondent.