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Divorce - Alimony - Power of Courts to Decline Liens

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This ruling being predicated "upon whether a third party would have reasonable grounds for believing the agent had authority given by the principal, and this a question of actual fact and not mere title." *Anderson v. Northwestern Fire & M. Ins. Co.*, 51 N. D. 917, 201 N. W. 514 (1924). True, the insurer may limit the powers of the agent, but these limitations must be made known to third parties dealing with the agent, and the principal is bound by the acts of the agent when such acts are within the apparent scope of the agent's authority. *Michigan Idaho Lumber Co. v. Northern Fire & M. Ins. Co.*, 35 N. D. 244, 16 N. W. 130 (1916); *Union Mutual Ins. Co. v. Wilkinson*, 80 U. S. 222, 13 Wall. 222, 20 L. Ed. 617 (1872); *St. Paul Fire & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240 (1891).

In the principal case an ostensible agency relationship arose, for the insured was under the impression that the agent was the company to all intents and purposes; hence, the insurer was estopped to deny the agent's apparent authority to accept the application and waive the payment of the first premium, *Wieland v. St. Louis Farmers' Mutual Fire Ins. Co.*, 146 Minn. 255, 178 N. W. 499 (1920); *Phoenix Ins. Co. v. Walter*, 51 Neb. 182, 70 N. W. 938 (1897). And the taking of an oral application, when accepted, binds the insurer, notwithstanding that the policy has not yet been issued or delivered. *Anderson v. Northwestern Fire & M. Ins. Co.*, 51 N. D. 917, 201 N. W. 514 (1920); 26 C. J. 54; 44 C. J. S. 968.

In the instant case, where the policy had been issued and forwarded to the agent but had not been delivered by the agent to the insured, the defendant company contended that the policy had not been delivered, therefore the contract of insurance was not effective. "In the absence of other evidence to show assent of the company to the making of a contract of insurance, delivery of the policy must be shown." *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L.R.A. 768 (1893).

Thus, it may be stated as a general rule, "that delivery is necessary to the validity of a written instrument, nevertheless, the actual delivery or non-delivery of a policy of insurance is not always the final test of a contract of insurance, ..." *Hartford Fire Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218 (1906); *Herring v. American Ins. Co.*, 123 Iowa 553, 99 N. W. 130 (1904); *Pruitt v. Great Southern Life Ins. Co.*, 202 La. 527, 12 So. (2d) 261 (1942). Accordingly, on the facts of the principal case, the policy had been issued and the act of issuance bound the insurer; since the issuance, unequivocally, was indicative of the assent of the company to the making of the contract of insurance, thus the actual delivery of the policy to the insured was immaterial.

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DIVORCE—ALIMONY—POWER OF COURTS TO DECLINE LIENS. A divorce decree was awarded granting the plaintiff-wife a specific amount of money payable monthly until further order of the court. The court further ordered that, "she have and is awarded judgment against the defendant for said sums and debts as aforesaid, all in favor of the plaintiff and against the defendant and such judgment is made a lien upon any and all properties of and belonging unto him and any and all earnings which he may hereafter attain or acquire." The action under discussion was then brought by the husband to clear title to land owned by him, and to test the lien declared on the land by the court in the divorce decree.

The Supreme Court of North Dakota in the syllabus stated "While the district court, in an action for divorce, has power to decree alimony to the wife and to require future payments thereof for an indefinite period, subject to the power of the court to change the amounts and terms of payment, the district court has no power to decree that the provision for such payments is a lien upon all the property of or belonging to the

husband and upon any and all moneys which he may hereafter attain and acquire as such provision is not a definite liability or a judgment for a specific amount so that it may become a lien upon the husband's property." The court also maintained that equity courts in North Dakota have no inherent power to decree alimony in a divorce proceeding unless specifically authorized by the statute. *Leifert v. Wolfer*, N. D., 24 N. W. (2d.) 690 (1945).

N. D. Rev. Code (1943) §35-0104 provides that: "a judgment which, in whole or in part, directs the payment of money," may be docketed and that: "judgment shall be a lien on all the real property, except the homestead, of every person against whom any such judgment is rendered, which he may have in any county in which such judgment is docketed at the time of docketing or which he thereafter shall acquire in such county, for ten years from the time of docketing the same in the county in which it was rendered." There is also a provision that: "The court may require either party to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by appointment of a receiver or by any other remedy applicable to the case. . ." N. D. Rev. Code (1943) §14-0525.

In *Gaston v. Gaston*, 144 Cal. 542, 46 Pac. 609 (1896), the court said, referring to a statute similar to North Dakota's, that a statute authorizing the court, in a divorce proceeding, to require the husband to give reasonable security for providing maintenance, and giving the court the power to enforce its order, should not be so construed as to abridge the equitable power of the court to make the maintenance a lien or charge upon the real estate of the husband.

"A lien is created by contract of the parties or by operation of law." N. D. Rev. Code (1943) §35-0104.

An example of a lien created by contract of the parties is found in *Gray v. Gray*, 24 N. D. 89, 176 N. W. 7 (1919), where the parties signed an agreement that the property of the husband should be incumbered by a lien in favor of the wife to secure the payment of alimony.

A majority of the state courts regard a decree for alimony as a debt of record in the same manner as any other judgment for money. Glenn, *Creditors Rights*, 1915 §71 n. 2, *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125 (1900), *Conrad v. Everick*, 50 Ohio St. 476, 35 N. E. 48 (1893). The judgment itself is a lien upon the real property of the debtor. *Hulbert v. Hulbert*, 216 N. Y. 430, 111 N. E. 70, L.R.A. 1916 D 661, Ann. Cas. 1917 D 180 (1916).

The case under discussion hinges on the power of the courts and their jurisdiction with regard to divorce decrees. "Jurisdiction in matters relating to divorce and alimony is conferred by statute, and the power of the courts to deal with such matters must find support in the statute or it does not exist." *Sate ex rel. Hagert v. Templeton ect.* 18 N. D. 525, 123 N.W. 383, 25 L.A.R. (N.S.) 234 (1909). Justice Burke, dissenting in *McLean v. McLean*, 69 N. D. 665, 290 N. W. 913 (1940), said, "there is no question but that the trial court in a divorce action has the power, when a divorce is granted, to make an equitable distribution of the property of the parties (14-0524) and to impress the property of a party to the action with a lien to enforce payment of the sums such party was directed to pay the other (14-0525)."

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BASTARDY—WHO MAY INSTITUTE PROCEEDINGS. A pregnant mother in consideration of a sum of money released the putative father from all liability for support and maintenance. The child, two years old, now sues the putative father for support and education and to have the release made between mother and defendant set aside. *Held*, neither common law nor the statutes of New York or New Jersey authorize a suit by the child