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Insurance Contracts - Waiver by Estoppel

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In a recent California case, *People v. Garcia*,⁵² the disclosure of informer's identity doctrine was extended to include nonparticipating informers who had given the authorities the address of an apartment where they had purchased narcotics. The majority (4-3) of the supreme court based its holding on "fair trial" considerations. The court cited the *McShann* case as stating that identity disclosure would not necessarily be limited to those informers who took an active part in the commission of the crime. In *Garcia* the supreme court stated that the accused could force disclosure if he could "demonstrate a reasonable possibility that the anonymous informants could give exonerating evidence on the issue of guilt."⁵³ This case would seem to open the way for further extensions of the disclosure rule. The ramifications of a ruling that the prosecution must disclose an informant are that disclosure must be made or the case will be dismissed. The prosecution is very reluctant to disclose the identity of an informer because to do so might jeopardize his life in addition to terminating his usefulness to the law enforcement agency. Thus decisions like *Carter* and *Garcia* will force the enforcement agencies to prepare their cases without the aid of informers in many instances, a difficult task.

W. Bryan Pizzi II

INSURANCE CONTRACTS—WAIVER BY ESTOPPEL—Surrender by an insured of the right to change the beneficiary of his life insurance policy creates a vested interest in the then designated beneficiary and an acceptance by the company of the insured's subsequent request to change the beneficiary constitutes a waiver of the prohibition against such change and an estoppel to deny liability to the new beneficiary.

Phillips v. Continental Assurance Co., 210 Pa. Super. 178, 231 A.2d 422 (1967), *allocatur denied*, 231 A.2d 422 (1967).

Insured, in purchasing a life insurance policy, removed the provision reserving to him the right to change beneficiaries and inserted instead the provision that his policy be "without the right to revoke and change any beneficiary." At the same time he designated A and B as beneficiaries of the policy. The defendant company agreed to his changes and both signed the policy. Several years later insured requested defendant to change the designated beneficiary of the policy from A and B to Regina

53, and at 288 of 233 A.2d 284, that police officers are so conditioned in their duties that they cannot be objective witnesses, especially when their identification of a suspect is based on one observation.

52. 2 CRIMINAL LAW REPORTER 2307 (Calif. Sup. Ct. Dec. 7, 1967).

53. *Id.* at 2308.

Phillips. Defendant effected the change and shortly thereafter the insured died. A and B obtained a judgment in a suit against the defendant insurance company for the proceeds of the policy, after the trial court denied the defendant's motion to interplead the instant plaintiff, Regina Phillips. Regina Phillips then sued the insurer to recover on the policy as the named beneficiary. Reversing the lower court, the Pennsylvania Superior Court in a 5-2 decision,¹ held, that the defendant insurer by its acceptance of the change of beneficiary request waived the provision in the policy forbidding such change and that reliance on this waiver by the insured estopped the company from denying liability to the donee beneficiary plaintiff. Regina Phillips thus became entitled to payment despite the prior payment to A and B.

Judge Watkins, writing for the majority, noted as the question of law to be decided on this appeal: "whether under the agreed facts Regina Phillips is entitled to payment of the proceeds of the policy by the company despite payment already made to [A and B]."² He conceded the law is clear that: "If a policy designates the beneficiary without making any provision for a change of beneficiary, the interest of the designated beneficiary is vested at the time the policy takes effect, and no action of the insured or insurer can destroy such interest. . . ."³ He decided, however, that the question was actually one of additional liability, believing that the right of A and B to the proceeds, and the fact that only one payment was contemplated by the original parties to the contract, did not preclude a second and separate liability to Regina Phillips.⁴ The court imposed double liability on the authority of *Smith v. Metropolitan Life Ins. Co.*⁵ In *Smith*, H designated W as beneficiary of his life insurance policy. She predeceased him. On a form provided by the company, H requested that D be named beneficiary and the company effected the

1. Majority: Watkins; Ervin; Hoffman; Spaulding; Wright; Dissent: Montgomery; Jacobs.

2. *Phillips v. Continental Assurance Co.*, 210 Pa. Super. 178, 180, 231 A.2d 422 (1967) [hereinafter cited as Phillips].

3. *Id.*, at 180, 231 A.2d at 423, quoting GOLDIN, *THE LAW OF INSURANCE IN PENNSYLVANIA*, § 833 at 705-06 (2d ed. 1946). See *Knoche v. Mutual Life Ins. Co. of New York*, 317 Pa. 370, 176 A. 230 (1934) stating:

Where, however, the designation of the beneficiary is absolute and unconditional because the right to change the beneficiary is not expressly reserved to the insured, the beneficiary has a vested interest in the policy and cannot be deprived of its proceeds by anything the insured may do without the beneficiary's consent (emphasis added).

4. Phillips, at 180. The court states, "This takes care of the vested claim of [A and B] but does not decide whether the company . . . created a liability by it to the plaintiff (emphasis added).

5. 222 Pa. 226, 71 A. 11 (1908). The court does not expressly state that this is why they cite this case, but a close reading of the opinion and of the "See also" cite generates this conclusion.

change. H died and the proceeds were paid to the executor of W's estate instead of to D. D sued, and on appeal was held entitled to the proceeds. The supreme court held the company estopped to dispute the validity of D's designation as beneficiary and stated, "[i]f the plaintiff's [D's] substitution as beneficiary was valid, as prima facie it appears to be, the payment to [W's estate] . . . , is no defense."⁶ In *Phillips* the court merely cited *Smith* and its facts, which are distinguishable,⁷ and thus impliedly⁸ argued that prior payment to A and B was no defense to the claim of plaintiff.

With the citation to *Smith* and a statement of its facts apparently satisfying the court as to the propriety of compelling a payment to plaintiff, the court turned to *Spry v. Farmers' Union Mutual Fire Ins. Co. of Pa.*⁹ wherein it was stated: "The law is well settled that an insurance company may waive the right to insist upon written compliance with policy provisions, and by its authorized agents, may make such representations of fact as will estop the company from denying the fact so represented. . . ."¹⁰ The court in *Phillips* reasoned from this that the acceptance of the change in beneficiary by the company was a waiver of the "no change" provision in the policy and in addition a "clear representation of fact" to the insured that Regina Phillips was now the properly designated beneficiary.

Satisfied, because of the declaration in *Spry*, that the insurer in *Phillips* had waived the "no change" provision, the court proceeded to offer the rule established in *Gould v. Dwelling-House Ins. Co.*¹¹ that:

If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall properly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel.¹²

The majority argued that defendant Continental Assurance Co. was under a duty to notify the insured that it was in error in accepting his change

6. *Id.* at 231. 71 A. at 13.

7. The facts in *Smith* do not correspond to those in *Phillips*. Whether Regina Phillips designation is valid is in issue in *Phillips* whereas in *Smith* the court assumes that D is the proper beneficiary. The first payment to W's estate was erroneous in *Smith* while in *Phillips* the first payment was justified and was conceded by the court to have been valid. Thus, the *Phillips* court has not established the right to a double recovery by means of precedent.

8. See n.5 *supra*.

9. 101 Pa. Super. 49 (1930).

10. *Id.* at 53.

11. 134 Pa. 570, 19 A. 793 (1890).

12. *Id.* at 588.

of beneficiary application and would not be bound by that acceptance—that “[t]he insured . . . should have had notice of the objection of the company so that [he] would have the opportunity to take whatever action he desired to obviate those objections.”¹³ They concluded that since the company, according to the decision in *Spry*, had waived the “no change” provision, and had represented to the insured that the change had been made and that since the insured had relied on this representation by failing to either provide in some other manner for Regina Phillips or to take steps to obviate the objection of the company, the doctrine of waiver by estoppel applied and Regina Phillips, as a donee beneficiary, could recover.

This waiver by estoppel relied upon by the court is a hybrid of the established and accepted doctrine of equitable estoppel and the somewhat criticized¹⁴ doctrine of waiver. As stated by the Pennsylvania Supreme Court in *Northwestern National Bank v. Commonwealth*:¹⁵

Equitable estoppel arises where one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.¹⁶

The doctrine of equitable estoppel is grounded on fraud, when fraud is taken to mean that which is inequitable or unjust, as opposed to deceit.¹⁷ The fraud manifests itself in the form of a misrepresentation. As a remedy to this fraud “the operation of an estoppel is ordinarily to prevent the proof of the truth . . .”¹⁸ by forbidding the estopped party from asserting and proving false this previous assertion (misrepresentation). Where both parties have equal knowledge of the facts there can be no

13. Phillips, at 182.

14. ANDERSON, VANCE ON INSURANCE (3rd ed. 1951) at 498, comments that “this elusive term is applied to so many differing legal relationships that the statement of any rule as governing waivers in general is apt to be inaccurate and misleading.” Williston says, “there are few principles in the law with vaguer boundaries than those applied under the name of waiver. . . .” 1 S. WILLISTON, CONTRACTS, § 203 (3rd ed. 1957).

It has been persuasively argued that the doctrines of election, estoppel, contract and release so sufficiently cover all situations applying the waiver concept that there exists no valid reason for the continued use of the term. Ewart, *Professor Williston's Review of Waiver*, 11 MINN. L. REV. 415 (1926). MURRAY, GRISMORE ON CONTRACTS § 169, (rev. ed. 1965) agrees by stating at 250 that “any attempt to find a compendious word or phrase to exclude all the factors that may give rise to an excuse of condition . . . is foredoomed to failure . . .” And at 249 he asserts that, “As a guide to decision it is worthless.”

15. 345 Pa. 192, 27 A.2d 20 (1942), cited with approval in *Atlantic Refining Co. Unempl. Comp. Case*, 203 Pa. Super. 262, 199 A.2d 735 (1964) and *In re Estate of Tallarico*, 425 Pa. 280, 228 A.2d 736 (1967).

16. *Northwestern Nat. Bank v. Com.*, 345 Pa. 192, 196, 27 A.2d 20, 23 (1942).

17. See G. BISHPAM, PRINCIPLES OF EQUITY § 280 (10th ed. 1922).

18. *Hill v. Epley*, 31 Pa. 331, 334-35 (1858).

misrepresentation and hence no estoppel,¹⁹ since a reasonable man would not have relied on something he knew to be false.

The other element of waiver by estoppel, waiver,²⁰ is most often defined as the intentional relinquishment of a known right.²¹ It may be either express or implied.²² In either case it is a "clear, unequivocal and decisive *act* of the party with knowledge of such right and an evident purpose to surrender it" (emphasis added).²³ Its effect is to remove a condition in a contract. "When a provision, condition or limitation in a contract is waived, it is given up, relinquished—it is gone. Waiver of protest, waiver of proofs of loss etc., are examples of true waiver."²⁴ Since the basis of waiver is intention, it cannot be found when an act is done in ignorance of material facts. But an intention to "waive" some part of a contract, standing alone, is never sufficient to make the waiver legally effective.²⁵ There must be something more; and this something more is either consideration,²⁶ or the "inducement to prejudice" element of estoppel.²⁷

19. *Id.* at 334.

20. As defined in *Sudnick v. Home Friendly Ins. Co. of Maryland*, 149 Pa. Super. 145, 151, 27 A.2d 468 (1942), "To waive means to 'relinquish voluntarily, as a right which one may enforce if he chooses' . . . 'To relinquish (a right, claim, or contention) either by express declaration or by some intentional act which by law is equivalent to this.'"

21. *In re Bells Estate*, 139 Pa. Super. 11, 10 A.2d 835 (1940).

22. *Atlantic Ref. Co. v. Wyoming Nat. Bank*, 356 Pa. 226, 236, 51 A.2d 719 (1949), *reaffirming* *Dougherty v. Thomas*, 313 Pa. 287, 169 A. 219 (1933).

23. *Brown v. Pittsburgh*, 409 Pa. 357, 360, 186 A.2d 399 (1962). See also *Kahn v. Bancamerica-Blair Corp.*, 327 Pa. 209, 193 A. 905 (1937).

24. *Sudnick v. Home Friendly Ins. Co. of Maryland*, 149 Pa. Super. 145, 151 (1942), 27 A.2d 468.

25. *Dougherty v. Thomas*, 313 Pa. 287 at 297, 169 A.

A simple declaration or voluntary manifestation of an intention to surrender a legal right, standing alone, is insufficient to bind the actor. 1 A. CORBIN CONTRACTS § 114 (1963). It has long been a general principle of our law that a legal right "cannot be discharged by the mere intent to relinquish it." MURRAY, GRISMORE ON CONTRACTS, (rev. ed. 1965) §§ 169, 249. "The requirement of consideration [or some substitute therefor] is one that cannot be avoided by an express waiver on the part of the promisor . . ." 1 A. CORBIN, CONTRACTS, § 114 (1963).

26. *Tagg v. Bowman*, 108 Pa. 273, 277 (1885) states that, "An agreement to waive the right, if founded on a good consideration, is undoubtedly binding."

Where consideration is present and the waiver is held effective by the courts to divest the insurer of the "waived" legal right, the substance of the transaction appears to be contract, and "waiver" only a pseudonym for substituted contract. A new contract arises modifying an old one—a substituted contract. The process may—but only inaccurately—be termed a waiver. Ewart, *Professor Williston's Review of Waiver*, 11 MINN. L. REV. (1926) 415.

Corbin agrees, stating that, "If the vendor offers to eliminate the condition in return for a requested consideration, the case can still be described as a 'waiver'; but it is also a modification by mutual agreement—by a substituted contract . . ." 3A A. CORBIN, CONTRACTS § 752 at p. 481 (1960).

27. *Brown v. Pittsburgh*, 409 Pa. 357, 186 A.2d 399 (1962).

Waiver and estoppel usually remain quite distinct;²⁸ but in insurance contract (and other) cases, where the courts have a strong tendency to protect policy holders,²⁹ the doctrines have been commingled. Corbin explains the unification:

If a vendor requests and receives no consideration for his waiver, but, as he had reason to foresee, it causes the purchaser to change his position in reliance upon it, this too deprives the vendor of his power of retraction. . . . The vendor is then said to be estopped; his own action can still be described as a "waiver," while the resulting action of the purchaser justifies the added description of estoppel.³⁰

Waiver by estoppel is then simply a waiver where the validating device which gives it legal effect is not consideration but the detrimental reliance on the waiver (the act of waiving) by the other party. It is to be distinguished from pure estoppel in that the misrepresentation element is replaced by a waiver.³¹ In *Dougherty v. Thomas*³² it is said, "[a] waiver to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition."³³ If as is said, the operative element which validates this waiver is consideration, then nothing more than a substituted con-

28. *Id.* The court stated in a note at 361 that:

Waiver and estoppel are closely akin. Frequently the terms are incorrectly used interchangeably. While implied waiver is in the nature of an estoppel and sustained on similar principles, waiver and estoppel are not convertible terms. For instance, in estoppel, the intention to relinquish a right need not be present, whereas in waiver the choice between relinquishment and enforcement of a right is vital. Further, in waiver the intention of the party is controlling regardless of the attitude of the other party. Waiver basically involves the conduct of only one of the parties. Estoppel involves the acts of both.

Note here the apparent synonymous use of waiver and implied waiver, and see note 35 *infra*.

29. Much of the appeal possessed by the waiver by estoppel doctrine arises from its effects. It protects against a forfeiture in cases where regular legal remedies would be inapplicable or ineffective. ANDERSON, VANCE ON INSURANCE 471, n.3 (1951). Williston states "The conditions in insurance policies are often harsh and highly technical. The disposition to stretch the law to its utmost in order to favor the insured is constantly observable in the decisions . . ." 5 S. WILLISTON, CONTRACTS, (3d ed. 1961) § 693, 327. Supporting this is the further explanation that "the technical character of insurance contracts with their numerous and intricate provisions seldom studied by the ordinary layman, and if at all, with a sense of mystification, has naturally aroused the sympathy of both courts and juries." Langmaid, *Waiver and Estoppel in Insurance Law in California*, 20 CALIF. L. REV. 1, 41 (1931).

30. 3A A. CORBIN, CONTRACTS § 752, at p. 481 (1960).

31. *Id.*, and accompanying text.

32. 313 Pa. 287, 169 A. 219 (1933).

33. *Id.* at 297.

tract exists, and the appellations "waiver," "implied waiver" or even "waiver by estoppel" are most certainly misnomers.³⁴ When detrimental reliance gives legal effect to the waiver, courts also variously refer to the resulting situation as a "waiver," an "implied waiver" or (most accurately) a "waiver by estoppel."³⁵ The result is a certain amount of confusion. With respect to the reliance element in waiver by estoppel it is immaterial whether both parties had equal knowledge of the facts, which is critical in estoppel,³⁶ since the basis of waiver is intention and the question of fraud (misrepresentation) is not involved. It is enough that a waiver was made and relied upon.³⁷

34. See n.26 *supra*.

35. BIEGLOW, *THE LAW OF ESTOPPEL*, (6th ed. 1916) 730-31 where it is said, "In ordinary cases it appears to be necessary to make a waiver effective, that the party claiming it . . . should have been led to act upon the facts going to make up the waiver to his detriment."

When it is this inducement to prejudice element rather than consideration which gives legal effect to the intentional relinquishment of the known right, the courts confuse the situation by variously referring to the total process as a "waiver," an "implied waiver" or a "waiver by estoppel." Thus, in *Dougherty v. Thomas*, 313 Pa. 287 at 297, 169 A. 219 (1933), it is stated, "A *waiver* to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition" (emphasis added).

And *Brown v. Pittsburgh*, 409 Pa. 357, 360-61, 186 A.2d 399 (1962) claims, "the doctrine of *implied waiver* in Pennsylvania applies only to situations involving circumstances equivalent to an estoppel, and the person claiming the waiver to prevail must show that he was misled and prejudiced thereby . . ." (emphasis added).

Finally, *Gould v. Dwelling-House Ins. Co.*, 134 Pa. 570, 588, 19 A. 793 (1890) asserts that the insurer by "mere silence may so mislead [insured] to his disadvantage to suppose the company satisfied, as to be of itself sufficient evidence of *waiver by estoppel*" (emphasis added).

36. In *Hill v. Epley*, 31 Pa. 331, 334 (1858) it is stated that, "The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up. . . . If . . . the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel." See also *Culbertson v. Cook*, 308 Pa. 557, 162 A. 803 (1932).

37. BIEGLOW, *LAW OF ESTOPPEL*, (6th ed. 1913) 728-29 states:

Treated as a waiver it is immaterial that the party claiming the estoppel knew the facts; waiver is not only consistent with, it is created upon knowledge of, all the facts by both parties. Treated as a representation, the case would fall under the head of estoppels by conduct, and knowledge by the party alleging the estoppel would . . . be fatal. The difference between the two estoppels is perhaps founded upon a difference in subject matter, to be seen in the fact that in the present case parties are openly and expressly dealing with known rights; in the other case a secret concealed right is brought forward against one who has been led by the party originally owning it to believe that that one has acquired it. He had not acted in good faith if he knew the facts. . . .

[I]n the case of concealed rights or titles, pure silence may be misleading and so raise an estoppel. That proceeds upon the ground that the right or title is unknown to and withheld from the person acting. In the present case, however, the facts are known to him as well as to the other party; it should accordingly re-

The cases relied upon by the *Phillips* court to show the application of waiver by estoppel deal with conditions precedent to liability on the part of insurance companies,³⁸ a waiver of those conditions or requirements,³⁹ and an attempt by the courts to protect against forfeitures.⁴⁰ In *Phillips*, however, application of waiver by estoppel to establish liability evidences a neglect to recognize that the provision claimed waived by the court—the prohibition provision—was not a condition precedent,⁴¹ was not capable of being waived,⁴² and that a refusal to allow recovery would not have resulted in a forfeiture.⁴³ Thus the rule established in *Gould*⁴⁴ and cited by the court with approval has no application in this case.

More important even than the inapplicability of the *Gould* rule is the absence of the “waiver” element of waiver by estoppel. If waiver is the intentional relinquishment of a known right⁴⁵ which works to remove a condition in a contract,⁴⁶ then to have a waiver of a right, there must first be a right. In *Phillips* the company did not possess any right which they could waive. While the rule is that a company may waive any provision inserted in the policy for its benefit,⁴⁷ the company has no right to waive a provision where its effect would be to divest rights already vested.⁴⁸ To permit a waiver in *Phillips* would be to sanction the removal of the provision from the contract, thereby allowing the insurer and the insured complete freedom to remove A and B as designated beneficiaries

quire more to make out the estoppel than in the other case. There should be some clear and decisive act or conduct, beyond silence to work the waiver, as we have seen in regard to waiver of proofs of loss under policies of insurance. The party claiming the benefit in this case should as much as in the other show that he has been misled into the confidence reposed; and pure silence by the one party in regard to a right perfectly known to the other can rarely mislead a man of average intelligence, by whose probable action the case must of course be judged.

38. *Gould* dealt with a waiver of preliminary proofs of loss which were a condition precedent to a right of action by the insured.

In *Spry* the waiver was of a condition in the policy requiring insurer's written consent to a transferral of the insured property. The company refused to pay because the condition had not been fulfilled, thus causing the insured to forfeit the proceeds. Insured asserted that there had been a waiver of this condition by the company.

39. *Id.*

40. See *Brown v. Pittsburgh*, 409 Pa. 357, 186 A.2d 399 (1962).

41. The provision was a prohibitory provision. It set up no conditions which had to exist to create a liability on the part of the insurer to pay.

42. See discussion *infra*.

43. Since the court is seeking to impose an additional liability rather than require the payment of a sum originally contracted for, and since the original sum was in fact paid to A and B, there would be no forfeiture should plaintiff not be permitted to recover.

44. See n.11 *supra* and accompanying discussion.

45. See n.20 *supra*.

46. *Brown v. Pittsburgh*, 409 Pa. 357, 360, 186 A.2d 399 (1962). See also *Kahn v. Bancamerica-Blair Corp.*, 327 Pa. 209, 193 A. 905 (1937).

47. *Hoffman v. Mutual Fire Ins. Co.*, 274 Pa. 292, 117 A. 917 (1922).

48. See n.3 *supra*.

and to substitute—not add as an additional beneficiary—Regina Phillips in their place. The result: the deprivation of the vested interest of A and B because Regina Phillips and not A and B would be entitled to the policy proceeds. The company has no right to remove this provision and in effect remove the vested interest of A and B—A and B have rather the right to remain the named beneficiaries of the policy. If the company has no right to waive, then there can be no waiver. If there is no waiver, then there can be no waiver by estoppel.

Although there was no effective waiver because there was no right to waive, there was still the act of waiving which was relied on by insured. But this act was not a waiver, it was only a representation (misrepresentation). Insured relied thereon, but cannot hold the company liable because he did. The representation by the company was that they did in fact do what both parties knew the company was incapable of doing. At first glance the above appears to be a proper situation for the application of equitable estoppel. However, this doctrine offers no relief since no fraud or misrepresentaion exist and where both parties have equal knowledge of the facts⁴⁹ there can be no estoppel.⁵⁰

Note here also that the whole problem centers around the insurer-insured relationship and in no way has plaintiff relied or even been misrepresented to. The court found both a waiver and a reasonable reliance by the *insured*, and, on the basis of these two, established a right of action by the insured against the company. Thus Regina Phillips was permitted to recover as a “donee beneficiary.” This seems to be a crucial point, but is treated in a cursory manner. The court merely mentions it once in passing, without explanation or citation to authority. There was no consideration and no new contract between the insured and the insurer of which Regina Phillips might validly become a third-party beneficiary.

The *Phillips* decision presents a situation of somewhat counterbalancing equities in an area where strong sentiment and public policy both bend and make law to protect individuals against corporations. It is submitted that in this case, however, upon an analysis of the applicable law and its application to the stipulated facts, the conclusion must be reached that the case should have been otherwise decided.

Mark A. Rock

49. Insured is presumed to know all the contents of his policy by virtue of his signing it. *McCready's Estate*, 316 Pa. 246, 175 A. 554 (1934).

50. See n.18 *supra*, and accompanying text.