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THE DELIVERY OF A LIFE-INSURANCE POLICY

WHERE a legal transaction is embodied in a written instrument the delivery of that instrument, by one party to the other has nearly always played an important, if not an indispensable rôle in the consummation of the legal transaction. The reasons are not far to seek. Not only does delivery of the writing supply the "deliveree" with the most satisfactory evidence of his right; it also marks the final stage in the series of inchoate acts of reflection, drafting, revision, etc., and thus manifests with certainty the final utterance of the deliveror.[1] Thus, the early common law made delivery of a sealed instrument indispensable, and delivery of a negotiable instrument is still a normal requirement. So, too, delivery of a formal written policy has been the customary mode of consummating an insurance contract. The demand for certainty, however, with its resulting formalism, must often yield to the desire for speed and flexibility; and thus the early rule as to delivery of a deed has been gradually whittled away[2] — the whittlings being often concealed under some such subtle verbiage as "constructive delivery." It was not to be expected that, in such a highly commercialized transaction as life insurance, the formality would maintain a hold which had been broken in the land law. Yet the demand for certainty does not yield without a struggle. Litigation involving questions as to the legal significance of delivery of a life-insurance policy has frequently come to appellate courts, who have more than once left the principles in doubt.

Before taking up these decisions, it seems well to indicate the steps of negotiation, reflection, drafting, etc., which take place in the usual life-insurance transaction: A soliciting agent of the insurance company, who has no power to conclude a contract of insurance,[3] induces an individual to apply to the company for a

[1] WIGMORE ON EVIDENCE, § 2408.

[2] *Ibid.*

[3] It is this which distinguishes the life-insurance cases, for our purposes, from fire insurance, in which it is customary to give the local agent power to approve risks and conclude contracts.

policy. The individual signs a formal "application," prepared by filling in a printed blank form provided by the insurance company, and prepared under the direction of its attorneys; the applicant has little opportunity to make changes in it. At about the same time, the applicant undergoes a physical examination by a physician appointed by the company, and pays the first premium to the solicitor,[4] who gives him a receipt therefor upon a printed form provided by the company. The application and medical report are then sent to the home office of the company, where they are gone over carefully by the medical director and other officials having plenary powers. If they approve, the policy is prepared upon a printed form, and is signed and sealed by the highest executive officials, *e. g.*, the president and secretary. The policy is then taken by clerks and mailed to the local agent. The local agent hands the policy over to the applicant. The applicant may signify that the policy is acceptable to him. In some instances this routine is varied in that the application is sent by the local agent to a district agent under whom he works; and the policy is sent from the home office to the district agent, who transmits it to the soliciting (or local) agent.

The process is highly mechanical and systematic. The application mounts through a hierarchy of officials, and by the same route the policy comes back. Communication all the way along the line is, with rare exceptions, in writing, and a systematic record of each step is preserved. The volume of business done would in itself require a highly organized mechanism, aside from the distance.

In legal terms, this means that the applicant makes an offer, his application, of the premium money for the company's promise to insure him. More precisely, since the money paid to the local agent becomes the company's money, the applicant offers to extinguish the company's obligation (evidenced by the receipt) to repay this sum, in exchange for the company's insurance promise. The contract formed by the acceptance of this offer is a unilateral one, even if the premium is paid in the shape of a negotiable note.[5] In determining whether and when the company is legally bound,

[4] Cases in which the first premium has not been paid, as well as cases in which the applicant makes false statements as to his health, will be excluded from this discussion.

[5] HARRIMAN, CONTRACTS, 11, 12 (1896). But see Busher *v.* N. Y. L. Ins. Co. 72 N. H. 551, 58 Atl. 41 (1904), where such a transaction is called bilateral.

one is not troubled by the perplexing parallelism between contractual and quasi-contractual liability, for insurance is an aleatory, as distinguished from a commutative, contract,[6] and the company's obligation as insurer is never based upon unjust enrichment.[7] The company's obligation is based upon contract; the policy is nothing if not a promise.[8]

The delivery of the policy, or the act of handing the policy to the applicant — for it is in this sense that the term will be used — may have legal significance in three ways: First, it may be a mere evidential fact; secondly, it may be an essential fact,[9] a means of communication; thirdly, it may be a condition precedent to the commencement of the risk.

I

It is all but universally conceded by American courts that a contract of life insurance may be formed before the contemplated delivery of the policy. That is, it may be consummated by words or informal writings, and the policy is treated as evidence, merely, of the company's promise. This would hardly be true if, as Professor Langdell suggests, the policy is a mercantile specialty.[10] In truth, there seems to be no recent judicial support for this view.[11] Occasionally one finds the delivery of a policy compared to the delivery of a deed,[12] but it is merely argument by analogy. Thus, the contract of insurance may be completed by letters or by conversations and may take effect before the policy is delivered,[13] or even before the

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[6] VANCE, INSURANCE, 46.

[7] The perplexity thus escaped will appear by comparing LANGDELL, SUMMARY OF CONTRACTS, § 17, with Ashley, "Formation of Contract *Inter Absentes*," 2 COL. L. REV. 1, 5.

[8] A possible qualification of this statement is noticed *infra*, p. 216.

[9] Based upon Austin's classification of titular facts. AUSTIN, JURISPRUDENCE, 5 ed., Campbell editor, 1885, LECTURE LVI, 887, 892; 4 ed. (1873), 919, 924.

[10] LANGDELL, SUMMARY OF CONTRACTS, 63.

[11] See "Letters of Credit," Omer F. Hershey, 32 HARV. L. REV. 1, 10.

[12] Heiman *v.* Phoenix Mut. L. Ins. Co., 17 Minn. 153 (1871); American Trust Co. *v.* L. Ins. Co. of Virginia, 173 N. C. 558, 92 S. E. 706 (1917); Mass. Ben. Life Ass'n *v.* Sibley, 158 Ill. 411, 42 N. E. 137 (1895).

[13] Kimbro *v.* N. Y. L. Ins. Co., 134 Iowa, 84, 108 N. W. 1025 (1906); Sheldon *v.* Connecticut Mutual L. Ins. Co., 25 Conn. 207 (1856); Union Central L. Ins. Co. *v.* Pauley, 8 Ind. App. 85, 35 N. E. 190 (1893) (*semble*); De Camp *v.* New Jersey Mut. L. Ins. Co., Fed. Cas. No. 3, 719, 3 Ins. L. J. 89 (U. S. Circ. Ct., 1873); N. Y. L. Ins. Co. *v.* McIntosh, 41 So. 381 (Miss. 1906) (for earlier appeal, see same case, 86 Miss. 236,

policy is executed by the company's officials.[14] Thus, in *Kimbro* v. *New York Life Insurance Co.*, just cited, the local agent wrote the applicant: "I am pleased to advise you that your policy arrived this morning." In fact, the policy which had arrived was not the one applied for but a substantially less valuable one. The court, in affirming a judgment for the plaintiff for the full amount of the policy applied for, said that the agent's letter was an acceptance of the application. In some instances the court professes to draw its decision from the principle of estoppel — that handy judicial scrap bag. Thus, in *New York Life Insurance Co.* v. *McIntosh*[15] the local agent wrote the applicant that his application (rejected but later renewed by the applicant) had been reconsidered and accepted (which was *true*) and that he (the agent) would send him the policy as soon as it arrived. The court said these facts gave the beneficiary a cause of action on the principle of estoppel.[16] Clearly, contract, not estoppel, is the basis of liability here.

When the contract is thus completed, the applicant is said to be entitled to a policy;[17] he may maintain replevin for the policy, if it has been executed;[18] he may recover damages for breach of contract to deliver the policy;[19] and he may obtain a decree for specific performance of the contract.[20] Conversely, the delivery of the policy to the applicant or to some one for him is not conclusive.

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38 So. 775 (1905)); Preferred Accident Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986 (1899); Moulton *v.* Masonic Mutual Benefit Soc., 64 Kan. 56, 67 Pac. 533 (1902); Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873 (1901); Ray *v.* Security Trust & L. Ins. Co., 126 N. C. 166, 35 S. E. 246 (1900); Union Central L. Ins. Co. *v.* Phillips, 102 Fed. 19 (1900); Carter *v.* Bankers L. Ins. Co., 83 Neb. 810, 120 N. W. 455 (1909) (by conversation); Devine *v.* Federal L. Ins. Co., 250 Ill. 203, 95 N. E. 174 (1911) (by conversation); Amarillo Ins. Co. *v.* Brown, 166 S. W. 658 (Tex. Civ. App. 1914); RICHARDS ON INSURANCE, 3 ed., § 77.

[14] N. Y. L. Ins. Co. *v.* McIntosh, *supra*, note 13; Preferred Accident Ins. Co. *v.* Stone, *supra*, note 13; Moulton *v.* Masonic Mut. Ben. Soc., *supra*, note 13; Carter *v.* Bankers L. Ins. Co., *supra*, note 13; Kennedy *v.* Mutual Benefit L. Ins. Co., 205 Fed. 677 (1913) (*semble*).

[15] 41 So. 381, 86 Miss. 236 (1906).

[16] To the same effect, Preferred Accident Ins. Co. *v.* Stone, *supra*.

[17] Sheldon *v.* Conn. Mut. L. Ins. Co., *supra*, note 13.

[18] See De Camp *v.* New Jersey Equitable L. Ins. Co., *supra*, note 13; N. Y. L. Ins. Co. *v.* Babcock, 104 Ga. 67, 30 S. E. 273 (1898).

[19] Fried *v.* Royal Ins. Co. of Liverpool, 47 Barb. (N. Y.) 127 (1866), 50 N. Y. 243 (1872).

[20] Union Central L. Ins. Co. *v.* Phillips, *supra*, note 13.

The delivery may be only for the purpose of inspection,[21] or it may be made before some essential condition has been performed,[22] or under a mistake of fact.[23]

It must not be thought, however, that the delivery of the policy is a fact of no consequence. Possession of the policy by the applicant raises a presumption that the contract of insurance has been consummated,[24] and it is even more emphatically declared that the fact that no policy has been delivered is *prima facie* evidence that no contract has been made.[25]

Delivery of the policy has lost much of its peculiar evidential value for two reasons: The contract has become so highly standardized by business custom and by statute that the terms of the insurer's contract may be ascertained from the application and policy forms without the necessity of producing the completed policy;[26] and again, the highly systematic manner in which the business is carried on makes it comparatively easy to find out just what has been done in reference to a particular application, without the formal issuance and delivery of a policy.

II

Thus far the cases considered have been those in which some means of communication, aside from the delivery of the policy, was employed to consummate the contract. In a majority of the cases where delivery has been a vital issue, however, no other means of communication was used; and the question of the nature or necessity of a delivery of the policy has thus been a question of

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[21] Markey *v.* Mutual Benefit Ins. Co., 103 Mass. 78 (1869); Heiman *v.* Ins. Co., *supra*, note 12.

[22] Markey *v.* Ins. Co. *supra*, note 21.

[23] Newcomb *v.* Provident Fund Society, 5 Colo. App. 140, 38 Pac. 61 (1894).

[24] Mass. Ben. Life Ass'n *v.* Sibley, *supra*, note 12; Grier *v.* Mutual L. Ins. Co., 132 N. C. 542, 44 S. E. 28 (1903); Rayburn *v.* Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762 (1905); Travelers' Ins. Co. *v.* Jones, 32 Tex. Civ. App. 146, 73 S. W. 978 (1903); Waters *v.* Security Life & Annuity Co., 144 N. C. 663, 57 S. E. 437 (1907); American Trust Co. *v.* Life Ins. Co. of Virginia, 92 S. E. 706, 173 N. C. 558 (1917) (the court said here that delivery of the policy was "conclusive").

[25] Union Central L. Ins. Co. *v.* Pauley, 8 Ind. App. 85, 35 N. E. 190 (1893); Heiman *v.* The Phoenix Mutual L. Ins. Co., 17 Minn. 153 (1871); Paine *v.* Pacific Mutual Ins. Co., 51 Fed. 689 (1892).

[26] See De Camp *v.* New Jersey Mut. L. Ins. Co., Fed. Cas. No. 3, 719, 3 Ins. L. J. 89 (1873).

the nature or necessity of communication of the insurer's acceptance. In these cases the inquiry is: At what moment in the process of negotiation, drafting, reflection, etc., outlined above [27] is the insurer's obligation as insurer complete and irrevocable, and the applicant's right to the premium money extinguished? [28]

In only two states, it seems, is the formation of the contract postponed until the delivery of the policy by the local agent to the applicant, and in those states, the conclusion is supported upon the theory that the insurer's acceptance of the applicant's offer must be actually communicated to the latter; not until then is a contract formed.[29] On the other hand, the decided weight of authority is that the contract comes into existence before this final step takes place. Considerable uncertainty exists as to where the line of demarcation is to be drawn between that which is preliminary and inchoate, and that which is final. It is generally agreed that the contract is complete when the policy, duly executed, has reached the local agent, and that the beneficiary may recover the face amount of the policy if the *cestui que vie* dies at that time, if all conditions have been complied with, even though the policy is never delivered but is returned to the home office.[30] In a number

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[27] Pages 198, 199, *supra*.

[28] The view that one party, as the offeror, may be bound before the other, the acceptor, seems not to have found favor in American law. But *cf.* WINDSCHIED, PANDEKTEN., § 306; POLLOCK'S INDIAN CONTRACT ACT, § 4; J. KOHLER, UEBER DEN VERTRAG UNTER ABWESENDEN, I ARCHIV FÜR BÜRG. RECHT (1889), § 13.

[29] Horton *v.* N. Y. L. Ins. Co., 151 Mo. 604, 52 S. W. 356 (1899) (point arose on a question of conflict of laws; court held the place of delivery was the *locus contractus*); Kilcullen *v.* Metropolitan L. Ins. Co., 108 Mo. App. 61, 82 S. W. 966 (1904) (the case of Bowman *v.* Northern Accident Co., 124 Mo. App. 477, 101 S. W. 691 (1907) is in conflict with the Horton case); Busher *v.* N. Y. L. Ins. Co., 72 N. H. 551, 58 Atl. 41 (1904). *Accord:* Lee *v.* Guardian L. Ins. Co., Fed. Cas. 8, 190, 2 Cent. L. J. 495 (U. S. Circ. Ct., 1875); Paine *v.* Pacific Mutual Ins. Co., 51 Fed. 689 (1892); also, *dictum* in Alabama Gold L. Ins. Co. *v.* Herron, 56 Miss. 643 (1879).

[30] Payne *v.* Pacific Mutual L. Ins. Co., 141 Fed. 339 (1905); Yonge *v.* Equitable Life Ass'n Soc., 30 Fed. 902 (1887); N. Y. L. Ins. Co. *v.* Pike, 51 Colo. 238, 117 Pac. 899 (1911); N. Y. L. Ins. Co. *v.* Babcock, 104 Ga. 67, 30 S. E. 273 (1898) (based on Code); Mass. Mut. L. Ins. Co. *v.* Boswell, 20 Ga. App. 446, 93 S. E. 95 (1917) (same); Metropolitan L. Ins. Co. *v.* Thompson, 20 Ga. App. 706, 93 S. E. 299, Ga. App. 706, (1917) (same); Williams *v.* Atlas Ass'n Co., 97 S. E. 91, 22 Ga. App. 661 (1918) (same); Rose *v.* Mutual L. Ins. Co. of New York, 240 Ill. 45, 88 N. E. 204 (1909); Mulligan *v.* Metropolitan L. Ins. Co., 149 Ill. App. 516 (1909); Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96 (1854); N. Y. L. Ins. Co. *v.* Greenlee, 42 Ind. App. 82, 84 N. E. 1101 (1908) (*semble*); Michigan Mut. L. Ins. Co. *v.* Thompson, 56 Ind. App. 502, 105 N. E. 780 (1914) (s. c.), 44 Ind. App. 180, 86 N. E. 503 (1908); Neff *v.* Metropolitan L. Ins. Co.

of instances, the courts have declared that the contract is made as soon as the policy, duly executed, is placed in the mails, addressed to the company's local or district agent, for delivery by the latter to the applicant.[31] Indeed, judicial support is not wanting for the view that the contract is made as soon as the policy has been executed by the officials at the home office,[32] and some courts seem

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73 N. E. 1041, Ind. App. (1905); Unterharnscheidt *v.* Missouri State L. Ins. Co., 160 Iowa, 223, 138 N. W. 459 (1913); Sutton *v.* Wright, 94 Kan. 499, 147 Pac. 62 (1915) (action on premium note); Mutual L. Ins. Co. *v.* Thomson, 94 Ky. 253, 14 Ky. L. Rep. 800, 22 S. W. 87 (1893) (but see *contra, dictum* in Smith *v.* Commonwealth L. Ins. Co., 157 Ky. 146, 162 S. W. 779 (1914)); Schwartz *v.* Germania Ins. Co., 18 Minn. 448 (1872) (S. C.), 21 Minn. 215 (1875); Bowman *v.* Northern Accident Co., *supra*, note 29; Cooper *v.* Pacific Mut. L. Ins. Co., 7 Nev. 116 (1871); Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268 (1857), aff'd 27 N. J. L. 645 (a fire insurance case but same point involved); Birch *v.* Manufacturers Liability Ins. Co., 88 N. J. L. 655, 96 Atl. 1003 (1916) (liability insurance but same point involved); Fried *v.* Royal Ins. Co., 47 Barb. (N. Y.) 127 (1866), aff'd 50 N. Y. 243 (1872) (see *infra*, note 103); Gallagher *v.* Metropolitan L. Ins. Co., 67 Misc. 115, 121 N. Y. Supp. 638 (1910); Waters *v.* Security Life & Annuity Co., 144 N. C. 663, 57 S. E. 437 (1907) (*semble*); Prudential Ins. Co. *v.* Shively, 1 Ohio App. 238, 248 (1913); Williams *v.* Philadelphia L. Ins. Co., 105 S. C. 305, 89 S. E. 675 (1916); Lombard *v.* Columbia L. Ins. Co., 168 Pac. 269 (Utah, 1917); Porter *v.* Mutual L. Ins. Co., 70 Vt. 504, 41 Atl. 970 (1897); Fitzgerald *v.* Metropolitan L. Ins. Co., 98 Atl. 498, 90 Vt. 291 (1917) (*semble*); Hartwig *v.* Aetna L. Ins. Co., 164 Wis. 20, 158 N. W. 280 (1916). Additional cases cited in the next seven notes would seem *a fortiori* to sustain this view.

[31] N. Y. L. Ins. Co. *v.* Pike, *supra*, note 30; Kilborn *v.* Prudential Ins. Co., 99 Minn. 176, 108 N. W. 861 (1906); Shattuck *v.* Mutual L. Ins. Co. (U. S. Circ. Ct., Mass., 1878) Fed. Cas. No. 12, 715, 4 Cliff. 598 (question arose on conflict of laws); Yonge *v.* Equitable Life Ass'n Soc., 30 Fed. 902 (1887); Harrington *v.* Home L. Ins. Co., 128 Cal. 531, 58 Pac. 180 (1899) (on conflict of laws question); Mutual Reserve Fund Life Ass'n *v.* Farmer, 65 Ark. 581, 47 S. W. 850 (1898); Bowman *v.* Northern Accident Co., *supra* (*semble*); Waters *v.* Security Life & Annuity Co., *supra*, note 30 (*semble*); Francis *v.* Mutual L. Ins. Co. of N. Y., 55 Ore. 280, 106 Pac. 323 (1910) (mailing to district agent); Mutual L. Ins. Co. of N. Y. *v.* Reid, 21 Colo. App. 143, 121 Pac. 132 (1912) (*semble*); Unterharnscheidt *v.* Missouri State L. Ins. Co., *supra*, note; 30 Prudential Ins. Co. *v.* Shively, 1 Ohio App. 238, 34 Ohio Circ. Ct. Rep. 357 (1913); Williams *v.* Philadelphia L. Ins. Co., 105 S. C. 305, 89 S. E. 675 (1916).

[32] The most clear-cut decision on this point seems to be one involving hail insurance, where, however, the transaction was similar to life insurance: Van Arsdale-Osborne Brokerage Co. *v.* Robertson, 36 Okla. 123, 128 Pac. 107 (1912): — Action on the premium note given by the applicant; the defense, that the applicant had never been notified of the acceptance of his application. The court held defendant liable, saying the contract of insurance was completed as soon as the policy was executed at the home office of the insurance company. Statements of similar import may be found in: Metropolitan L. Ins. Co. *v.* Thompson, *supra*, note 30; Dailey *v.* Preferred Masonic Accident Ass'n, 102 Mich. 289, 57 N. W. 184 (1894); Robinson *v.* United States Benevolent Society, 132 Mich. 695, 94 N. W. 211 (1903); Rose *v.* Mutual L. Ins. Co. of New York, 240 Ill. 45, 88 N. E. 204 (1909); N. Y. L. Ins. Co. *v.* Greenlee,

to regard the contract as completed as soon as the application is approved.

Thus, in *Kohen* v. *Mutual Reserve Fund Life Ass'n*,[33] the application was received at the home office, was approved by the medical director, and was turned over to the "executive committee," whose duty, it seems, was to pass finally upon all applications. One member of this committee marked it "approved"; but later in the same day, having learned of the applicant's death, the chairman of the committee erased this notation and marked it "declined." The court declined to allow a recovery because of a clause in the application that the policy should not take effect until delivered; but Brewer, J., said (page 706):

"If that was all that there was in this case, under well-settled rules it would have to be held that the minds of the parties had come to a concurrence; that a contract was created between them, and the complainant entitled to relief."

In *Kentucky Mutual Life Insurance Co.* v. *Jenks*,[34] the court's decision was based on the following language:

" . . . the application reached the company on the 1st of *October*, 1850. Its approval or acceptance on that day, as shown by the books of the company, closed the contract."

In *McCracken* v. *Travelers' Insurance Co.*,[35] the court emitted the following *dictum*, which was taken from the opinion in *Van Arsdale* v. *Robertson*:[36]

"The correct rule under such an application seems to be that the obligation of the insurer or insurance company depends on the fact of the acceptance or approval of the application for insurance, and not on notice of such acceptance to the insured."[37]

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42 Ind. App. 82, 84 N. E. 1101 (1908); Hallock *v.* Commercial Ins. Co., *supra*, note 30; Unterharnscheidt *v.* Missouri State L. Ins. Co., *supra*, note 30; Stringham *v.* Mutual L. Ins. Co., 44 Ore. 447, 75 Pac. 822 (1904).

[33] 28 Fed. 705 (1886).

[34] 5 Ind. 96, 99 (1854).

[35] 156 Pac. 640, 642 (Okla., 1916).

[36] *Supra*, note 30.

[37] See also Metropolitan L. Ins. Co. *v.* Thompson, *supra*, note 30 ("A contract of life insurance is consummated upon the unconditional written acceptance of the application for insurance by the company to which such application is made"); Cooper *v.* Pacific Mut. L. Ins. Co., 7 Nev. 116 (1871). Here the receipt stated the money paid

If, however, only the medical director has approved[38] or if the approval of the executive officials is based upon an error of fact, perhaps,[39] no contract exists. Finally, one finds a few statements that mere retention of the premium and failure to notify the applicant of the rejection of his application within a reasonable time, constitute the completion of a contract of insurance.[40] The weight of authority, however, is against this view, for it is generally held that mere delay in passing on the application does not subject the company to contractual liability.[41] At the other extreme are occasional intimations to the effect that the contract is not complete until the policy has been delivered to the applicant *and accepted* by him — meaning that the applicant has, after delivery of the policy, the privilege of rejecting it. Upon examination, these cases will be found to rest upon facts differing from those described above, or to be clearly erroneous. Thus, where the applicant reserves the right to reject the policy after it has been issued and sent to him,[42] or where the applicant effectively revokes his application before it has been accepted,[43] or where the company, unwilling

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was to be applied as premium, provided the company "should conclude to take the insurance." The court held the contract was formed "the moment the company concluded to make the insurance" (7 Nev. 122).

[38] Provident Savings L. A. Co. *v.* Elliott's Executor, 29 Ky. L. Rep. 552, 93 S. W. 659 (1906).

[39] Kennedy *v.* Mutual Benefit L. Ins. Co. of Newark, 205 Fed. 677 (1913).

[40] Preferred Accident Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986 (1899). ("The retention of the premium and its [the company's] failure to reject the application, and its holding of it while it took time to adjust a matter only of concern to itself, were tantamount to an acceptance of the application and an agreement to issue the policy"); Richmond *v.* Travelers' Ins. Co., 123 Tenn. 307, 130 S. W. 790 (1910) (*semble*, delay in accepting or rejecting the application will subject the company to liability "where the party making the application has been misled into believing that the insurance would be accepted, and relying thereon, has refrained from obtaining other insurance"). See also Duffie *v.* Bankers' Life Ass'n, 160 Iowa, 19, 139 N. W. 1087 (1913), where, however, the recovery was based upon tort.

[41] VANCE ON INSURANCE, 161; Coker *v.* Atlas Accident Co., 31 S. W. 703 (Tex. Civ. App., 1895); Alabama Gold L. Ins. Co. *v.* Mayes, 61 Ala. 163 (1878); Misselhorn *v.* Mutual Reserve Fund Life Ass'n, 30 Fed. 545 (1887); Steinle *v.* N. Y. L. Ins. Co., 81 Fed. 489 (1897); Ross *v.* N. Y. L. Ins. Co., 124 N. C. 395, 32 S. E. 733 (1899).

[42] Dickerson's Administrator *v.* Prudential Savings & Life Assur. Soc., 21 Ky. L. Rep. 611, 52 S. W. 825 (1899); Oliver *v.* Mutual L. Ins. Co., 97 Va. 134, 33 S. E. 536 (1899).

[43] Crutchfield *v.* Dailey, 98 Ga. 462, 25 S. E. 526 (1896) (here the court indulges in much mysterious talk about the contract being "executory" — meaning that the applicant had successfully revoked his offer); Travis *v.* Nederland Ins. Co., 104 Fed. 486

to issue a policy of the kind applied for, sends a substantially different form of policy,[44] the policy issued is nothing more than an *offer* on the part of the company, and there is no contract until this offer is communicated to the offeree (insured) and accepted by him. In these cases it is not erroneous to say that acceptance of the policy by the applicant is necessary. But where the applicant's offer is accepted, it is too late for him to revoke after the policy has been delivered or tendered to him.[45]

To one who believes with Professor Langdell that where the offeree makes a promise, the acceptance must be communicated to the offeror,[46] the authorities cited above,[47] to the effect that the contract may nevertheless be completed without such communication, will seem unorthodox. Yet the doctrine that a promissory acceptance must be communicated to the promisee has not been followed in the case of contracts by correspondence. It is generally held nowadays that a promissory acceptance by correspondence is complete as soon as the letter of acceptance is mailed.[48] The life-insurance cases follow this rule. The mailing of the policy directly from the home office to the insured,[49] or the mailing of the policy

(1900); Ten Broek *v.* Jansma, 161 Mich. 597, 126 N. W. 710 (1910); Wheelock *v.* Clark, 21 Wyo. 300, 131 Pac. 35 (1913).

[44] Provident Savings L. Ins. Co. *v.* Elliott's Executor, 29 Ky. L. Rep. 552, 93 S. W. 659 (1906); Mohrstadt *v.* Mutual L. Ins. Co., 115 Fed. 81 (1902); New York L. Ins. Co. *v.* Levy's Administrator, 122 Ky. 457, 29 Ky. L. Rep. 6, 92 S. W. 325 (1906); McNicol *v.* N. Y. L. Ins. Co., 149 Fed. 141 (1906); Mutual L. Ins. Co. *v.* Jordan, 111 Ark. 324, 163 S. W. 799 (1914); McCracken *v.* Travelers' Ins. Co., 156 Pac. 640 (Okla. Sup., 1916); Riordan *v.* Equitable Life Ass'n Soc., 31 Idaho, 657, 175 Pac. 586 (1918).

[45] Travelers' Ins. Co. *v.* Jones, 32 Tex. Civ. App. 146, 73 S. W. 978 (1903); Waters *v.* Security Life & Annuity Co., 144 N. C. 663, 57 S. E. 437 (1907). *Contra*, Citizens Nat'l L. Ins. Co. *v.* Murphy, 154 Ky. 88, 156 S. W. 140 (1913), where the action was on the premium note, and the court held that the applicant might reject the policy when it was offered to him by the agent, though it conformed to the application. The case is clearly unsound in principle. Misleading *dicta* that delivery and acceptance are necessary are to be found in Lee *v.* Guardian L. Ins. Co., Fed. Cas. No. 8, 190, 2 Cent. L. J. 495 (1875), *per* Sawyer, J., and in Stringham *v.* Mutual L. Ins. Co., 44 Ore. 447, 75 Pac. 822 (1904), *per* Wolverton, J.

[46] LANGDELL, SUMMARY OF CONTRACTS, 15.

[47] Notes 30–37, *supra*.

[48] WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 39, and note 42; HOLLAND, JURISPRUDENCE, 10 ed., 262.

[49] Kilborn *v.* Prudential Ins. Co., 99 Minn. 176, 108 N. W. 86 (1906) (*semble*); Busher *v.* N. Y. L. Ins. Co., 72 N. H. 551, 58 Atl. 41 (1904) (*semble*); Hartford Steam Boiler Inspection & Ins. Co., *v.* Lasher Stocking Co., 66 Vt. 439, 29 Atl. 629 (1894)

by the local agent to the applicant[50] completes the contract. It is important to note, however, that the foregoing decisions in which the contract was held to have been completed when the policy reached the local agent, or at some earlier stage in the process, represent a distinct advance in legal doctrine beyond the ordinary contract-by-correspondence cases.

Thus, two reasons commonly given for the latter decisions were: (1) that the offeror by using the mails to send his offer, made the post-office his "agent" and hence that mailing the acceptance was delivery to the offeror's agent for him;[51] and (2) that the mailing of the letter was an "irrevocable" act signifying acceptance, which put the letter out of the acceptor's control.[52] Neither of these reasons is applicable to these life-insurance cases. The courts have generally refused to treat the local agent as the agent of the applicant, and wisely, because of the embarrassing effect such a conclusion would have upon the questions of waiver, representations, etc.[53] Nor can it be said that mailing the policy to the local

(boiler insurance); Dailey *v.* Preferred Masonic Mut. Accident Ass'n, 102 Mich. 289, 57 N. W. 184 (1894); Triple Link Indemnity Ass'n *v.* Williams 121 Ala. 138, 26 So. 19 (1898); Armstrong *v.* Mutual L. Ins. Co., 121 Iowa, 362, 96 N. W. 954 (1903); Dupriest *v.* American Central L. Ins. Co., 97 Ark. 229, 133 S. W. 826 (1911).

[50] Sutton *v.* Wright, 94 Kan. 499, 147 Pac. 62 (1915); Hartwig *v.* Aetna L. Ins. Co., 164 Wis. 20, 158 N. W. 280 (1916).

[51] See, for example, BISHOP ON CONTRACTS (1887), § 328; note the curious play upon the word "agent" by which this author seeks to support his statement: "in the nature of things any power which a man employs is his agent" (page 124, note 3). See, also, Horton *v.* N. Y. L. Ins. Co., 151 Mo. 604, 52 S. W. 356 (1899); Charles Noble Gregory "Completion of Contracts by Mail or Telegraph," 48 AM. L. REG. (o. s.) 354, 367.

[52] See HOLMES, THE COMMON LAW, 306; Marcy, J., in Mactier *v.* Frith, 6 Wend. (N. Y.) 103 (1830). *Cf.* POLLOCK'S INDIAN CONTRACT ACT, § 4: "The communication of an acceptance is complete, as against the proposer, when it is put in course of transmission to him, *so as to be out of the power of the acceptor*;" . . . (Italics are the author's.)

[53] In a few cases, the courts have suggested this agency fiction as a solution: Hallock *v.* Commercial Ins. Co., *supra*, note 30 (the word "trustee" used); Payne *v.* Pacific Mutual L. Ins. Co., *supra*, note 30 ("his [the insurance agent's] possession was her [the applicant's] possession" of the policy); Porter *v.* Mutual L. Ins. Co., *supra*, note 30 ("the custody of the latter [the insurance agent] must be treated as that of the insured"); N. Y. L. Ins. Co. *v.* Babcock, *supra*, note 30 ("the possession of the agent was the possession of the applicant"). In Bowman *v.* Northern Accident Co., *supra*, note 29, and Alabama Gold L. Ins. Co. *v.* Herron, 56 Miss. 643 (1879), the application stipulated that the policy should be delivered to the local agent, and the courts held the latter was the applicant's agent for that purpose; but in Robinson *v.* United States Benevolent Soc., 132 Mich. 695, 94 N. W. 211 (1903), the court said

agent is an "irrevocable" act, or one which puts the writing "beyond the control" of the insurance company, unless, indeed, the courts make a new rule of law whereby the company is deprived of its privilege of preventing the formation of the contract by recalling the policy. By settled rules of law and business custom a direction to an agent is revocable by the principal at any time before it has been acted upon,[54] and in the foregoing cases [55] the insurer often exercised his power of retaking the policy after it had reached the local agent.

Still a third possible construction is that the applicant's offer impliedly calls for acceptance by delivering the policy to the local agent. It is difficult to find the basis for such an implication in the terms of the application. In truth, the application (except in the cases hereafter discussed)[56] does not indicate the mode of acceptance, and it is the mode which "the law deems to be reasonable under the circumstances." [57] And what the law deems to be reasonable under the circumstances depends upon what the judges hold to be the theory of contracts. Not that the courts are given to much theorizing on the subject; on the contrary, they seem to proceed largely by intuition. Still, one can see three types of contract theory striving for recognition: The "meeting of minds" theory, the "communication" theory, and a rough working principle which may be designated the "significant act" theory.

A number of the courts whose decisions are cited in the preceding notes do real homage or lip-service to the "meeting of minds" view of a contract.[58] What does the phrase mean, and whence its

such a stipulation would be invalid. See *infra*, p. 219, as to cases where the offeror specifies the mode of acceptance.

[54] *Cf.* VANCE, INSURANCE, 169, where it is said that the insurer must put the policy "beyond his legal control, though not necessarily beyond his physical control." The word "legal" begs the question.

[55] Notes 30 and 31.

[56] See *infra*, p. 219.

[57] Professor A. L. Corbin, "Offer and Acceptance," 26 YALE L. J., 202.

[58] For example, Hallock *v.* Commercial Ins. Co., *supra*, note 30; Kohen *v.* Mut. Res. Fund L. Ass'n, 28 Fed. 705 (1886); Union Central L. Ins. Co. *v.* Pauley, 8 Ind. App. 85, 35 N. E. 190 (1893); Heiman *v.* Phoenix Mut. L. Ins. Co., 17 Minn. 153 (1871); Fried *v.* Royal Ins. Co., *supra*, note 30, *per* Pother, J., and *per* Church, J.; Travis *v.* Nederland L. Ins. Co., 104 Fed. 486 (1900); Dickerson's Administrator *v.* Prudential Savings & Life Assur. Soc., 21 Ky. L. Rep. 611, 52 S. W. 825 (1899); Kennedy *v.* Mutual Benefit L. Ins. Co., 205 Fed. 677 (1913); Bowen *v.* Prudential Ins. Co., 178 Mich. 63, 144 N. W. 543 (1913); Marshall, J., in Hartwig *v.* Aetna L. Ins.

potency in judicial thought? In the first place, since "mind" does not possess the quality of extension in space, and "meeting" is predicated of tangible things, the phrase is either a metaphorical description of a real event, or a purely transcendental reality.[59] "Union of wills," the equivalent phrase of Vice-Chancellor Kindersley[60] and of Savigny[61] must have the same meaning. This metaphysical conception of contract, which was fortified, if not created, by the speculative philosophers[62] and supported by the prestige of Savigny, proved so impracticable in Germany, with its doctrine of unilateral error, that it was discarded for the teleological views of Jhering.[63] It is certainly no more satisfactory for determining the time when the contract is made.

Whether it be metaphorical or metaphysical, "meeting of minds" corresponds, in the view of those who use it, to some perceptible reality; and this reality, one may infer, is "co-existence of identical mental acts." [64] Thus, in *Travis* v. *Nederland Life Insurance Co.*,[65] the applicant notified the company's local agent that he withdrew his application, but the president of the company (Dubourcq), unaware of this withdrawal, afterward, on November 27, executed a policy. In holding that no contract was made, the court said (Sanborn, J.):

"When, on November 27, 1896, the mind of Dubourcq accepted and consented to the terms of the proposition contained in the original written application, the mind of Travis had receded and withdrawn its assent from those terms, and settled upon different terms, which no

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Co., 164 Wis. 20, 158 N. W. 280 (1916). This list is not meant to be exhaustive. See also VANCE ON INSURANCE, 147, and RICHARDS, INSURANCE, 3 ed., § 78; BISHOP, CONTRACTS (1887), § 313.

[59] See 2 CAIRD, THE CRITICAL PHILOSOPHY OF KANT, 251, 253.

[60] In Haynes *v.* Haynes, 1 Dr. & Sm. 426, 433 (1861).

[61] See HOLLAND, JURISPRUDENCE, 10 ed., 253, citing System III, 309.

[62] For Kant's analysis of contract as a "union of wills," see 2 CAIRD, *op. cit.*, 328, 329. *Cf.* HEGEL, ENCYKLOPÆDIE, § 493, WALLACE, HEGEL'S PHILOSOPHY OF MIND (1894), 108.

[63] Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605, 610 (1908).

[64] Thus, BISHOP, CONTRACTS, § 313, who quotes Savigny's definition (§ 22, note), says: " . . . to constitute a contract in fact, the two or more parties must concurrently assent to exactly the same thing at the same instant of time. So that . . . if the former consents at one time and the latter at another, by reason of which their wills do not at any instant coincide, they do not enter into a contract." For Kant's similar view, see 2 CAIRD, *op. cit.*, 328.

[65] 104 Fed. 486, 43 C. C. A. 653 (1900).

agent of the company ever accepted; so that there never was a time when the minds of the parties to this negotiation met upon, and they agreed to comply with, the same stipulations of any contract."[66]

Realizing that this coexistence in point of time, however true it may have been of more primitive forms of bargaining between parties face to face,[67] is utterly unattainable in the case of contracts *inter absentes*,[68] the courts have modified the theory with a fiction that the offeror will be conclusively presumed to be repeating his offer (and thinking it) as long as the offeree's power to accept continues.[69] And when, as in the class of cases here discussed, one party is a corporation, the "mind" of the corporation can be conceived as existing in the mind of the executive official only by the aid of another fiction, "*qui facit per alium facit per se*." "Meeting of minds" is thus a misleading description of the formation of contracts *inter absentes*.

The identity of wills or of mental acts is no less fictitious than their coexistence in time.[70] The union, the harmony, does not exist, since the interests of two persons engaged in making a con-

[66] See, also, the language of Brewer, J., in Kohen *v.* Mut. Res. Fund. L. Ass'n, 28 Fed. 705, 706 (1886).

[67] It would seem that practically all contracts were concluded between persons face to face in early English law (2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Chap. V) and in the earlier Roman law (JHERING, GEIST DES RÖM. R., III, 47 *d*, IV, 53; *cf.* FRIEDLÆNDER, ROMAN LIFE AND MANNERS UNDER THE EARLY EMPIRE (Magnus, trans.), I, 305). For a clear statement of the inapplicability of the subjective or metaphysical theory to contracts by correspondence, see "Offer, Acceptance, and Withdrawal of Offer by Correspondence," 24 JOUR. OF JURISPRUDENCE, 337 (Edinborough, 1880); BENJAMIN ON SALES, 3 Am. ed. by Bennett, § 69, note *u*; also Charles B. Elliott, "Contract by Correspondence," 16 WESTERN JURIST, 337 (1882). On the general tendency to regard the habitual and the simple as identical with the natural and the necessary, see KORKUNOV, GENERAL THEORY OF LAW, 134–41.

[68] It is here assumed that these life-insurance contracts are properly classed as "contracts *inter absentes*" (Kohler, *op. cit.*, 301, 302). But in Busher *v.* N. Y. L. Ins. Co., 72 N. H. 551, 58 Atl. 41 (1904), the court distinguished these life-insurance contracts from contracts by correspondence on the ground that the former are *inter praesentes*.

[69] Adams *v.* Lindsell, 1 B. & Al. 681 (1818). Kant says that the acts which give rise to a contractual relation are, of course, successive in their performance; but we are to remember that "properly they must proceed from the united will of both parties in one moment." 2 CAIRD, *op. cit.*, 328.

[70] DUGUIT, MODERN FRENCH LEGAL PHILOSOPHY, 272. Kant is careful to state that "in this reciprocal relation of wills, what is taken into account is not the *matter* willed, *i. e.*, the end which each has in view in the object which he wills . . . but only the *form* of the relation of wills, regarded as on both sides a relation of freedom." 2 CAIRD, *op. cit.*, 320, 321.

tract are not identical, but opposed.[71] Moreover, the particular mental act is legally irrelevant.[72] Thus, in *American Home Life Insurance Co.* v. *Melton*,[73] the president of the company testified that, when he signed the policy, he intended it to take effect at once; yet the court enforced a stipulation in the policy itself that it should not take effect until delivered. The question is, after all, one of emphasis;[74] the degree of emphasis to be placed upon the mental act as compared with the outward expression will depend largely upon the circumstances of the particular class of transactions.[75] The "meeting of minds" conception tends to overemphasize the mental act, the subjective element, which is relatively unimportant for the highly systematized, standardized, mechanical, impersonal transactions of life insurance.

It is, indeed, not meant to be asserted here that courts make a practice of deducing their decisions from metaphysical principles. Yet the paucity of analysis, coupled with the undoubted fact that the trend of the decisions is to push the moment of consummation of the contract nearer and nearer to the moment of mental decision — a result to be expected from the metaphysical theory — leaves open the inference that they are intuitively relying upon it. The indictment against it is twofold: It places undue emphasis upon the mental act; and it gives a misleading description of what actually takes place.

That communication of a promissory acceptance is indispensable, is the orthodox view. Thus, Vice-Chancellor Kindersley in *Haynes* v. *Haynes*,[76] after declaring communication essential, says:

"Now this is not a mere theoretical disquisition, but a statement of sound practical principles of universal law, and of the law of England in particular."

Professor Langdell is equally emphatic that this is the law.[77] While communication is sometimes added as a requisite by those

[71] 1 JHERING, DER ZWECK IM RECHT (1893), 125; THE LAW AS A MEANS TO AN END, 95.

[72] HOLMES, *op. cit.*, 309.

[73] 144 S. W. 362 (Tex. Civ. App. 1912).

[74] "Without reference to the will, the inner intention, if one chooses, the expression of agreement would be meaningless. It must in the last resort be connected with the man, with the personality; . . ." — W. A. WATT in ENCYCLOPEDIA OF RELIGION AND ETHICS, sub tit., "Contracts."

[75] WIGMORE, EVIDENCE, § 2404.

[76] 1 Dr. & Sm. 426, 433 (1861).

[77] LANGDELL, SUMMARY OF CONTRACTS, 15. To the same effect, WILLISTON'S WALD'S

who avow the "meeting of minds" principle,[78] yet the ethical basis of this rule is essentially teleological. Austin says: "It the [promise] binds, on account of the expectation excited in the promisee."[79] The consequence of a broken promise is injury to the promisee who relies upon it. He cannot rely upon it unless he knows of it, hence, unless it be communicated to him, it can produce no harmful consequences.[80] In strict logic, therefore, the promisee must at all costs be made actually conscious of the promise. Thus, if the letter comes and he does not read it, there is no contract. Professor Langdell consistently adopts this view. It needs no citation of authorities to show that the courts do not apply this principle. The fact, for instance, that the insured has not read his policy is not fatal; the receipt of a writing setting forth the promise is always enough. Nor does the court inquire, where the promisee has read the promise, whether or not he has actively relied upon it.

Obviously, then, the teleological conception of contractual liability — or, if one prefers, the rule requiring communication — is nowhere carried out with rigorous logic. The law seeks to avert not alone the individual disappointment, but the social and economic consequences of broken promises and of the promise-breaking habit. The law might refuse to regard a breach of promise as harmful unless it were shown with absolute certainty that the promisee relied thereon. That it does not is due to the fact that man lives in a world of probabilities, not certainties.[81]

POLLOCK ON CONTRACTS, 37; 9 COL. L. R. 633; 7 AM. L. REV. 453–457; cases cited *supra*, note 29. *Contra*, HARRIMAN, CONTRACTS, 86; Holmes, J., in Lennox *v.* Murphy, 171 Mass. 370, 50 N. E. 644 (1898). A summary treatment of the conflicting views of civil law writers on this question is given in 7 AM. L. REV. 443–453.

[78] See Vice-Chancellor Kindersley in the case cited above; Savigny (HOLLAND, JURISPRUDENCE, 10 ed., 252); Alabama Gold L. Ins. Co. *v.* Herron, 56 Miss. 643 (1879).

[79] *Op. cit.*, 5 ed., II, 906, also, I, 317; 4 ed.; II, 939, I, 326. *Cf.* SIDGWICK, THE METHODS OF ETHICS, 3 ed. (1884), 303, where the distinction is clearly stated: "Thus the essential element of the Duty of Good Faith seems to be not conformity to my own statement, but to the expectations I have intentionally raised in others." To the same effect, PALEY, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY, 8 Am. ed., 1815, Chap. V; PAULSEN, SYSTEM OF ETHICS (Thilly's trans.), 613; WIGMORE, *op. cit.*, § 2413; HOLLAND, *op. cit.*, 253; WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 1, and Appendix, note A, where the learned author points out that he has abandoned Savigny's definition, used in previous editions.

[80] Arthur L. Corbin, "Offer and Acceptance," 26 YALE L. J. 169, 203.

[81] " . . . practical life must be contented with probabilities." DEMOGUE, MODERN FRENCH LEGAL PHILOSOPHY, 361, note 15. *Cf.* JAMES, PRAGMATISM, Chap. VI.

The theory of communication becomes a theory of probability. Logic must compromise with experience.

"Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation." [82]

The prevailing rule as to contracts by correspondence is thus a compromise. The same may be said of these life-insurance cases. Once it is conceded that the promise need not actually come to the consciousness of the promisee, the question, how far back in the sequence of events between the mental determination to accept and the delivery of the policy the decisive utterance is to be found, is to be answered with a view to the practical result attained. Where the applicant does not require a particular mode of acceptance,[83] the courts usually say that some "overt act," some "significant act," some "manifestation of intention" is necessary and sufficient for the formation of the contract.[84]

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[82] Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605.

[83] See *infra*, p. 219.

[84] "The meeting of two minds, the *aggregatio mentium*, necessary to the constitution of every contract, must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party; everything else must be question of proof or of the binding force of the contract by matters subsequent." Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268, 281 (1857). "The contract is consummated when the company accepts the application, executes a policy and deposits it in the mail directed to its agent for delivery to the applicant." Kilborn *v.* Prudential Ins. Co., 99 Minn. 176, 108 N. W. 861 (1906). "Contracts of insurance are completed when the proposals of the one party have been accepted by the other by some appropriate act signifying such acceptance." By executing the policy and mailing it to the local agent for delivery to the insured, the company "did signify the acceptance of the proposals by an appropriate act, if not by the only act adapted to make known their intention to insure the life of the applicant." Shattuck *v.* Mutual L. Ins. Co., 4 Cliff. 598, Fed. Cas. No. 12, 715 (1878). " . . . The contract is completed when the proposals of the one party have been accepted by the other, by some appropriate act signifying the acceptance. . . ." MAY, ON INSURANCE, 71, quoted in Yonge *v.* Equitable Life Assur. Soc., 30 Fed. 902 (1887). "When the insurer signifies his acceptance of it to the proposer, and not before, the minds of the parties meet and the contract is made." Heiman *v.* Phoenix Mut. L. Ins. Co., 17 Minn. 153 (1871). "No doubt the mere mental assent of the officers of an insurance company to the terms of the application will not make a contract of insurance. There must be some outward manifestation of their assent. It is not the law that this manifestation must reach the insured

While the element of communicativeness, or communicative tendency, is not emphasized in the opinions, it seems clear that the act of acceptance must possess this characteristic in some degree. What considerations should determine the degree? In the first place, life insuring is a desirable social habit, which will not be encouraged if people learn that a slight delay in delivering the policy will defeat the beneficiary's (apparent) claim. Secondly, the company computes and charges a premium from the date of the application, as a rule, and hence, it is arguable, the risk should attach at the earliest possible moment.[85] Thirdly, certainty is highly desirable. Uncertainty as to the time when the policy takes effect leads to litigation, and litigation is nowhere more unfortunate than in life-insurance cases. The uncertainty of the rules laid down by the cases last cited is to be deplored. Yet the rule must be flexible, for formalism could not long survive. Fourthly, the systematic, mechanical, and impersonal way in which the transactions are carried on gives a communicative character to every act done subsequent to the mental determination of the proper official to accept the application. The insurance organism may be regarded as a huge machine for grinding out policies; once the machinery is set in motion by the act of approving the application and the policy (acceptance) is on its way to the applicant in much the same way that a letter (of acceptance), when mailed, is on its way to the addressee. True, the company may physically intercept the acceptance before it leaves the hands of its agents; but a mailed letter may be physically intercepted, too, though the interception of a letter of acceptance would be legally ineffective. It is arguable, then, that approval of the application — *a fortiori*,

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person, so that he will be personally apprised that the company has acted favorably on his application." Goode, J., in Bowman *v.* Northern Accident Co., 124 Mo. App. 477, 482 (1907). " . . . where . . . such application has been unconditionally accepted, and the acceptance signified by some definite act of the company, the contract . . . is then complete. . . ." Waters *v.* Security Life & Annuity Co., 144 N. C. 663, 669, 57 S. E. 437, 439 (1907). "The mailing of the policy . . . manifests an intention on the part of the insurer to complete the negotiations for insurance." Williams *v.* Philadelphia L. Ins. Co., 105 S. C. 305, 89 S. E. 675, 676 (1916). "The adoption in good faith of the ordinary method employed by the business world for the transmission of such articles was sufficient." Sutton *v.* Wright, 94 Kan. 499, 147 Pac. 62 (1915). See, also, HOLMES, THE COMMON LAW, 306.

[85] See Unterharnscheidt *v.* Missouri State L. Ins. Co., 160 Iowa, 223, 138 N. W. 459, 464 (1912); Duffie *v.* Bankers' Life Ass'n, *infra*, note 92.

that mailing the policy to the local agent — creates a probability of communication. The law requires only a probability.

Finally, while mere inaction or silence cannot ordinarily be regarded as possessing a sufficiently communicative character, yet in one class of cases, at least, inaction is communicative, namely, in those cases where the offeror delivers something to the offeree when the offer is made, and the offeree consents to receive the thing, and agrees to return it if he does not accept the offer. In such cases, the offeree's omission to return the thing received is a sufficient communication of his acceptance,[86] because he is under a duty either to return the thing or accept the offer.[87] The life-insurance transaction falls under this head, and it is not surprising, then, that a few cases, albeit a distinct minority, have held that undue delay in notifying the applicant of the rejection of his application will constitute an acceptance of the policy.[88] *A fortiori*, perhaps, any manifestation of intention to accept would suffice.

It must be confessed, however, that with the "meeting of minds" theory discarded, these insurance cases put a considerable strain upon accepted theories of contract. It is submitted, therefore, that the law may well be coming to the point where these decisions will be explained, less with reference to principles of contract than to the principles governing a fixed status of insured and insurer. What objection is there to regarding the insurance corporation as a public service company, under a legal duty to insure upon reasonable terms all properly qualified applicants — just as a railroad company is under a similar duty to furnish transportation? The insurance business has been held to be impressed with a public use under statutes prohibiting discriminations in rates,[89] and the company's freedom of contract has been abridged by statutes curtailing its privilege of inserting stipulations against suicide [90] or fraud.[91] It would not, therefore, be a very long step to the rule

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[86] Wheeler *v.* Klaholt, 178 Mass. 141, 59 N. E. 756 (1901). *Cf.* Ostman *v.* Lee, 91 Conn. 731, 101 Atl. 23 (1917), 27 YALE L. J. 272; Evans Piano Co. *v.* Tully, 116 Miss. 267, 76 So. 833 (1917), 27 YALE L. J. 561.

[87] Holmes, J., in Wheeler *v.* Klaholt, note 86, *supra*.

[88] The cases are cited *supra*, note 40.

[89] Equitable Life Assur. Soc. *v.* Commonwealth, 113 Ky. 126, 67 S. W. 388 (1902).

[90] Whitfield *v.* Aetna L. Ins. Co., 205 U. S. 489 (1907); Head Camp Woodmen of the World *v.* Sloss, 49 Colo. 177, 112 Pac. 49 (1910).

[91] Northwestern L. Ins. Co. *v.* Riggs, 203 U. S. 243 (1906).

that the insurance company must give its service to all proper applicants.

The logical consequence of this view would be that every person who applied to a company for a kind of policy issued by that company, who paid the premium, and who submitted to a physical examination would be insured from that date if it could be subsequently demonstrated that he was, when he applied, an acceptable risk; or at least that the company would be under a duty to approve every acceptable application, and that the applicant would have to be regarded as insured from the date of his application if his application were subsequently approved by the company. No decisions have sustained the first of these propositions; but there is some authority for the view that the company is liable in tort for its failure to pass upon an application with diligent promptness,[92] and that failure to reject the application within a reasonable time will constitute an acceptance thereof.[93] The company may well rest under a duty to notify the applicant promptly of the acceptance (as well as of the rejection) of the application. Such notice, however, not being essential to the completion of the transaction, could be waived by the applicant or beneficiary whom it would benefit, and hence absence of notice could not be urged by the company as a defense to an action on the policy.

That the company is under a duty to deliver the policy promptly after it has been executed, is the view encountered in several

[92] Duffie *v.* Bankers' Life Ass'n, 160 Iowa, 19, 27, 28, 139 N. W. 1087, 1089, 1090 (1913), where the court says: "But it is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and that there is no such thing as negligence of a party in the matter of delay in entering into a contract. This view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it . . . they [insurers] are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such resonable time as will enable them to act intelligently and advisedly thereon or suffer the consequences flowing from their neglect so to do." The court further held that, if the applicant was an acceptable risk, the measure of damages would be the face amount of the policy which would have been issued. In Misselhorn *v.* Mutual Reserve Fund Life Ass'n, 30 Fed. 545 (1887), Brewer, J., said "receipt of the application may cast a moral duty upon the company to act promptly . . ."; but he declined to regard it as a legal duty. See, also, the *dictum* in Northwestern Mut. L. Ins. Co. *v.* Neafus, 145 Ky. 563, 140 S. W. 1026 (1911).

[93] See the cases cited *supra*, note 40.

opinions. For example, in *New York Life Insurance Co.* v. *Babcock*,[94] the local agent, who received the policy on November 30, failed to deliver it that day, and the applicant met a violent death the next day. In holding the company liable, the court said:

"That policy was received by its local agent, who, through negligence or in disregard of his obligations both to his company *and to the other contracting party*, failed, without excuse and without authority, to hand the policy to its real owner. In consequence of this failure and negligence the company contends it is not liable. It thus seeks to take advantage of the wrong of its own agent, by virtually pleading his negligence as a defense to this action."[95]

It is submitted that if such a duty rests upon the agent, it arises, not out of a contract (even assuming one to have been formed) but out of the peculiar status of the insurer and applicant. Perhaps the existence of a public service duty is also back of the thought, frequently expressed by the courts, that the policy is in force as soon as executed and started on its journey to the applicant, because "nothing more remains to be done by the applicant."[96] At all events, indications are not wanting to show that the contract-to-status transition may ere long attain conscious and articulate recognition.

III

The insurance companies have endeavored to combat the prevalent tendency to dispense with delivery of the policy by inserting stipulations, either in the application, in the premium receipt, or in the policy, stating that the policy shall not "take effect," "be in force," "become operative," etc., unless and until the policy is delivered to the applicant.[97] The following clause from the

[94] 104 Ga. 67, 30 S. E. 273 (1898).

[95] 104 Ga. 67, 77, 30 S. E. 273 (1898). Italics are the author's. Similar statements occur in Gallagher *v.* Metropolitan L. Ins. Co., *supra*, note 30; Unterharnscheidt *v.* Missouri State L. Ins. Co., *ibid.*; Williams *v.* Philadelphia L. Ins. Co., *ibid.*; Bowen *v.* Prudential Ins. Co., 178 Mich. 63, 144 N. W. 543 (1913).

[96] Duffie *v.* Bankers' Life Ass'n, *supra*, note 92; Kilborn *v.* Prudential Ins. Co., *supra*, note 31; Yonge *v.* Equitable Life Ass'n Soc., *supra*, note 30; Harrington *v.* Home L. Ins. Co., *supra*, note 31; Unterharnscheidt *v.* Missouri State L. Ins. Co. *supra*, note 30; N. Y. L. Ins. Co. *v.* Babcock, *ibid.*; Mass. Mut. L. Ins. Co. *v.* Boswell, *ibid.*

[97] L. G. Fouse, president of a life-insurance company, has stated that of fifty-one companies whose applications and policy forms he examined, all inserted stipulations

application in *Misselhorn* v. *Mutual Reserve Fund Life Ass'n*[98] is typical:

" . . . This policy is not to be in force until it has been signed by the officers of the association and delivered to the applicant."

These stipulations raise two interesting questions: (1) Where the stipulation is contained in the offer (the application or the premium receipt, since the two are to be construed together), is it to be regarded as a condition of the offer, prescribing the mode of acceptance, or as a condition of the contract, fixing the time of commencement of the risk? (2) What is the effect to be given to such stipulations (aside from the first question)?

1. The offeror may, as a part of his offer, prescribe the mode of acceptance, and where he does so, no contract is made unless the acceptance is made in this manner.[99] In *Yount* v. *Prudential Life Insurance Co.*,[100] the court said:

"The provision that the policy should not take effect until its delivery is an agreement which the parties could lawfully make, and, having made it, there is no reason why it should not be enforced. . . . All that was done by either party to the proposed contract was merely preliminary to and dependent upon, its final consummation by delivery to Mr. Yount while he was in the good health he was enjoying at the time he made the proposal to defendant to be insured. No contract could come into existence until his proposal had been accepted upon the terms required, and notice of such acceptance conveyed to him: . . . Clearly a delivery of the policy to the applicant during his life-time and while he was in good health was required before the things done by the parties could ripen into a contract. It was a condition precedent to a completion of the contract." [101]

to the effect that the policy should not become binding until delivered during the life-time and good health of the applicant. YALE READINGS IN INSURANCE (1909), 219, 223; 26 ANNALS ACAD. POL. & SOC. SCI. 209–228.

[98] 30 Fed. 545 (1887).

[99] WILLISTON'S WALD'S POLLOCK, CONTRACTS, 29; Corbin, "Offer and Acceptance," 26 YALE L. J. 199. *Cf.* J. KOHLER, *op. cit.* 307, 308.

[100] 179 S. W. 749, 750 (Mo. App., 1915).

[101] In the following cases the courts seem to have regarded the stipulations in this light, though there are frequently expressions which would support the other construction. Kilcullen *v.* Metropolitan L. Ins. Co., 108 Mo. App. 61, 82 S. W. 966 (1904); Paine *v.* Pacific Mutual L. Ins. Co., 51 Fed. 689 (1892) (answer denied making a contract); Reserve Loan L. Ins. Co. *v.* Hockett, 35 Ind. App. 89, 73 N. E. 842 (1905) (equivocal); Goldstein *v.* N. Y. L. Ins. Co., 176 App. Div. 813, 162 N. Y. Supp. 1088 (1917); American Home L. Ins. Co. *v.* Melton, 144 S. W. 362 (Tex. Civ. App. 1912) (not clear).

It may be argued in support of such a construction that the applicant is not interested in having the contract consummated before the risk attaches; and that the company may lawfully refuse to consider offers which do not prescribe the mode of acceptance which it desires. The arguments in favor of the other construction seem more weighty, however. If the delivery is a condition of the offer, inserted by the applicant, it cannot be "waived" by the insurance company; whereas, if delivery is a condition precedent to the commencement of the risk, it may be "waived" by the company, for whose benefit, obviously, it is inserted — more precisely, the company may by its conduct elect not to enforce compliance with the condition. Moreover, since the applicant has little to say about these printed clauses in the application, and since delay in the commencement of the risk is to his disadvantage, it seems a strained construction to regard him as prescribing any such mode of acceptance. Accordingly, most courts have held that these stipulations fix a condition precedent to the commencement of the risk.[102] The class of stipulations just discussed must be carefully distinguished from those sometimes inserted in the premium receipt to the effect that the receipt shall constitute a temporary contract of insurance, which may be terminated by rejection of the application.[103]

2. These stipulations requiring a delivery of the policy to the

[102] Nat'l Life Ass'n *v.* Speer, 111 Ark. 173, 163 S. W. 1188 (1914) (not clear); Snedeker *v.* Metropolitan L. Ins. Co., 160 Ky. 119, 169 S. W. 570 (1914); McClave *v.* Mutual Reserve Fund Life Ass'n, 55 N. J. L. 187, 26 Atl. 78 (1893); Provident Savings L. Ins. Co. *v.* Elliott's Executor, 29 Ky. L. Rep. 552, 93 S. W. 659 (1906); Ray *v.* Security Trust & L. Ins. Co., 126 N. C. 166, 35 S. E. 246 (1900); Oliver *v.* Mut. L. Ins. Co. of N. Y., 97 Va. 134, 33 S. E. 536 (1899); Michigan Mut. L. Ins. Co. *v.* Thompson, 44 Ind. App. 180, 86 N. E. 503 (1908); Powell *v.* North State Mutual L. Ins. Co., 153 N. C. 124, 69 S. E. 12 (1910); Rhodus *v.* Kansas City L. Ins. Co., 156 Mo. App. 281, 137 S. W. 907 (1911); Bell *v.* Missouri State L. Ins. Co., 166 Mo. App. 390, 149 S. W. 33 (1912); Pierce *v.* N. Y. L. Ins. Co., 174 Mo. App. 383, 160 S. W. 40 (1913); Bowen *v.* Prudential Ins. Co., 178 Mich. 63, 144 N. W. 543 (1913); Missouri State L. Ins. Co. *v.* Burton, 129 Ark. 137, 195 S. W. 371 (1917); Kohen *v.* Mutual Reserve Life Ass'n, 28 Fed. 705 (1886); Misselhorn *v.* Mutual Reserve Life Ass'n, 30 Fed. 545 (1887).

[103] Fried *v.* Royal Ins. Co., 50 N. Y. 243, 247 (1872) (*per* Church, J.); Starr *v.* Mutual L. Ins. Co., 41 Wash. 228, 233, 83 Pac. 116 (1905); Union Central L. Ins. Co. *v.* Phillips, 102 Fed. 19 (1900); Kempf *v.* Equitable Life Assurance Soc., 184 S. W. 133 (Mo. App. 1916), affirmed on this point, State *ex rel. v.* Robertson, 191 S. W. 989 (Mo., 1917). See, also, Lombard *v.* Columbia Nat'l L. Ins. Co., 168 Pac. 269 Utah, 1917).

applicant have been literally construed in most instances and it has accordingly been held by most of the courts which have passed upon the question that if the applicant dies before the delivery of the policy to him, no recovery on the policy can be had. Thus, in *Ray* v. *Security Trust & Life Insurance Co.*,[104] the application contained a stipulation that "no insurance shall be in force until the delivery of the policy." The court found there was no delivery and denied a recovery, Faircloth, C. J., saying:

"The proviso is not unreasonable. There is nothing in it illegal, nor does it contravene any feature of public policy. The applicant wants certainty and desires a certain day, when the agreement becomes absolute, and is stripped of all doubt. The defendant wants protection against unforeseen trouble that may arise after approval of the application and before delivery of the policy."

Adopting the traditional attitude toward "freedom of contract," a majority of the courts have strictly enforced such stipulations.[105] The advantage of certainty as to the time of commencement of the risk is not to be disregarded. On the other hand, the balance of advantage in such cases is clearly on the side of the insurer, for the premium is usually charged from the date of the application, and the stipulation requiring delivery, by postponing the commencement of the risk, deprives the applicant of a few days' insurance which he would otherwise have. While the insurer should

[104] 126 N. C. 166, 169, 35 S. E. 246 (1900).

[105] McCully's Administrator *v.* Phoenix Mutual L. Ins. Co., 18 W. Va. 782 (1881); Newcomb *v.* Provident Fund Society, 5 Colo. App. 140, 38 Pac. 61 (1894) (*semble*) (condition required countersignature by local agent); Noyes *v.* Phoenix Mut. L. Ins. Co., 1 Mo. App. 584 (1876) (same as last case); McClave *v.* Mutual Reserve Fund Life Ass'n, 55 N. J. L. 187, 26 Atl. 78 (1893); Chamberlain *v.* Prudential Ins. Co., 109 Wis. 4, 85 N. W. 128 (1901); Preferred Accident Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986 (1899) (*semble*); Reserve Loan L. Ins. Co. *v.* Hockett, 35 Ind. App. 89, 73 N. E. 842 (1905); Oliver *v.* Mutual L. Ins. Co., 97 Va. 134, 33 S. E. 536 (1899); Bowman *v.* Northern Accident Co., 124 Mo. App. 477, 101 S. W. 691 (1907) (*semble*); Powell *v.* Prudential Ins. Co., 153 Ala. 611, 45 So. 208 (1907); Michigan Mut. L. Ins. Co. *v.* Thompson, 44 Ind. App. 180, 86 N. E. 503 (1908); American Home L. Ins. Co. *v.* Melton, 144 S. W. 362 (Tex. Civ. App. 1912); Bowen *v.* Prudential Ins. Co., 178 Mich. 63, 144 N. W. 543 (1913); Smith *v.* Commonwealth L. Ins. Co., 157 Ky. 146, 162 S. W. 779 (1914); Nat'l Life Ass'n *v.* Speer, 111 Ark. 173, 163 S. W. 1188 (1914); Snedeker *v.* Metropolitan L. Ins. Co., 160 Ky. 119, 169 S. W. 570 (1914); John Hancock Mutual L. Ins. Co. *v.* McClure, 218 Fed. 597 (1914); Yount *v.* Prudential L. Ins. Co., 179 S. W. 749 (Mo. App. 1915); Goldstein *v.* N. Y. L. Ins. Co., 176 App. Div. 813, 162 N. Y. Supp. 1088 (1917); Missouri State L. Ins. Co. *v.* Burton, 129 Ark. 137, 195 S. W. 371 (1917).

from every standpoint have ample time and opportunity to investigate fully the acceptability of the risk, the period of investigation need not be added to the period for which the applicant pays a premium; nor need the insurer execute a policy before it has completed its preliminary acts of reflection, investigation, etc. No hard and fast stipulation requiring delivery is necessary to protect the company, for if it acts with reasonable dispatch, it should be able to reject an undesirable applicant even under the most drastic rulings. Furthermore, "freedom of contract" rarely exists in these cases. Life-insurance contracts are contracts of "adhesion." [106] The contract is drawn up by the insurer and the insured, who merely "adheres" to it, has little choice as to its terms.

Accordingly, the onslaught of the insurance companies does not go unchallenged. While the consideration of public policy does not seem to have been strong enough in any case to induce the court to make a direct frontal attack, courts have in several cases executed successful flanking movements, as by finding that the insurance company had "waived" the benefit of the stipulation requiring delivery,[107] or by calling a delivery to the local agent, or a mailing of the policy, "delivery to the applicant" — thus straining the language out of its clear meaning.[108] Thus the battle between certainty and flexibility goes on.

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[106] This expressive term seems worthy of a place in our legal vocabulary. See RENÉ DEMOGUE in MODERN FRENCH LEGAL PHILOSOPHY, 472, 477; 2 M. PLANIOL, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL, § 972. A similar usage occurs in international law. See 1 OPPENHEIM, INTERNATIONAL LAW, §§ 532, 533.

[107] Rhodus *v.* Kansas City L. Ins. Co., 156 Mo. App. 281, 137 S. W. 907 (1911) (failure to repay premium a "waiver"); Bell *v.* Missouri State L. Ins. Co., 166 Mo. App. 390, 149 S. W. 33 (1912) (*ibid.*); Pierce *v.* N. Y. L. Ins. Co., 174 Mo. App. 383, 160 S. W. 40 (1913) (sending blanks for change of beneficiary).

[108] Triple Link Indemnity Ass'n *v.* Williams, 121 Ala. 138, 26 So. 19 (1898) (placing in mail); Mutual Reserve Fund Life Ass'n *v.* Farmer, 65 Ark. 581, 47 S. W. 850 (1898) (mailing policy); Gallagher *v.* Metropolitan L. Ins. Co., 67 Misc. 115, 121 N. Y. Supp. 638 (1910) (delivery to solicitor); N. Y. L. Ins. Co. *v.* Greenlee, 42 Ind. App. 82, 84 N. E. 1101 (1908) (*ibid.*); Powell *v.* North State Mutual L. Ins. Co., 153 N. C. 124, 69 S. E. 12 (1910) (*semble*, delivery may be "actual or constructive"); Unterharnscheidt *v.* Ins. Co., *supra*, note 30 (delivery to local agent); Thompson *v.* Michigan Mut. L. Ins. Co., 56 Ind. App. 502, 105 N. E. 780 (1914) (*ibid.*); Prudential Ins. Co. *v.* Shively, 1 Ohio App. 238, 248 (1913) (*ibid.*); Amarillo Ins. Co. *v.* Brown, 166 S. W. 658 (Tex. Civ. App. 1914) (applicant told agent to keep policy for him). See, also, the *dictum* in Preferred Acc. Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986, 988 (1899).