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INSURANCE-CONSUMMATION OF THE CONTRACT-DELIVERY OF THE POLICY

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INSURANCE—CONSUMMATION OF THE CONTRACT—DELIVERY OF THE POLICY —An application for life insurance was accepted, and a policy issued, mailed to, and received by the agent of the insurer. The application provided that the pol-

icy would not take effect until "manual" delivery thereof. The agent made several unsuccessful attempts to deliver the policy, but before any physical transmission of the policy, the insured died. The beneficiaries sued to recover the amount of the policy. The trial court gave judgment for the defendant insurance company. On appeal, *held,* affirmed. Manual delivery was a valid condition precedent. There having been no manual transmission to the insured, and the plaintiffs having failed to sustain the burden of showing that delivery to the agent of the insurer amounted to delivery to the insured, the policy never became effective. *Smith v. Rio Grande Nat. Life Ins. Co.,* (Tex. Civ. App. 1950) 227 S.W. (2d) 579.

"A jural act does not come into existence as such until its utterance is final and complete." Traditionally the mark of finality in the case of deeds, gifts, and negotiable instruments is delivery, while in the case of informal contracts, it is the manifestation of mutual assent.[1] Hence, in the absence of an expression of contrary intent, the insurance policy need not be delivered to commence the liability of the insurer.[2] When the parties stipulate that the policy shall not become effective until it is delivered,[3] they undoubtedly assume that they are adding a condition, not otherwise required by law, for the inception of a valid contract. If the parties meant, and the courts interpreted, delivery to mean actual physical transmission to the insured, then clearly their assumption would be correct. But courts, while professing to interpret the insurance contract according to the intent of the parties, have not looked to their actual intent, but have employed the concept of constructive delivery[4] as developed in the interpretation of the legal requirement of delivery in the case of deeds and negotiable instruments. The result of applying this idea of constructive delivery may be that the parties not only do not add anything by requiring delivery, but that they may thereby in effect circumvent the general proposition that assent must be manifested to the offeror, unless the parties agree otherwise, before a valid contract may exist.[5] Thus, where transmission of a policy has been made to the agent of the insurer, or it has been mailed to that agent,[6] it seems clear that the insurer's acceptance has not thereby been communicated to the insured.[7] Yet, courts, in

[1] 9 WIGMORE, EVIDENCE §§2408-2410 (1940).

[2] N.Y. Life Ins. Co. v. Babcock, 104 Ga. 67, 30 S.E. 273 (1898); VANCE, INSURANCE §69 (1930). 44 C.J.S. §263 at 1052 (1945).

[3] Which they clearly may do. Wells v. Prudential Ins. Co. of America, 239 Mich. 92, 214 N.W. 308 (1927); Hruska v. Prudential Ins. Co. of America, 203 Iowa 1165, 211 N.W. 858 (1927).

[4] 1 COUCH, CYCLOPEDIA OF INSURANCE LAW §119 (1929).

[5] Limbaugh v. Monarch Life Ins. Co., 84 S.W. (2d) 208 (1935); 1 WILLISTON, CONTRACTS §70 (1936); 1 COUCH, CYCLOPEDIA OF INSURANCE LAW §87 (1929); 29 Am. Jur. §140 (1940). Cf. 1 COOLEY, BRIEFS ON INSURANCE 595 (1927). Robinson v. U.S. Benev. Soc., 132 Mich. 695, 94 N.W. 211 (1903).

[6] See cases collected 53 A.L.R. 492 (1928) and 145 A.L.R. 1434 (1943).

[7] "Communication of acceptance to a third person, not the offerer's agent, is not sufficient, nor is communication to the offeree's agent. . . ." 17 C.J.S. §45 at 387.

construing policies whose language has required "delivery,"[8] "actual delivery,"[9] or that the policy be "delivered to and received by"[10] the insured, have found valid contracts of insurance to exist in such cases.[11] Possibly such holdings could be explained by a finding that a separate communication of acceptance had been made,[12] or that the agent occupies a dual capacity and is also the agent of the insured,[13] or that the stipulation for delivery simply eliminates the need for communication of acceptance, the parties having intended that whatever act would constitute delivery would be sufficient manifestation of assent to bind them. This latter idea seems open to criticism when it is considered that probably the parties actually intended to add a condition precedent to the inception of the contract when providing for delivery, and that they probably understood delivery in its ordinary, rather than legal sense. While many courts have failed to find a delivery of insurance contracts in similar cases,[14] there is no indication in these cases that the court considered that if delivery were found that the acceptance might remain uncommunicated, and the contract uncompleted. In the principal case the policy was "accepted" and mailed to and received by the agent of the insurer, but not manually transmitted to the insured. The court does not reject the idea that manual delivery to the agent of the insurer would be sufficient to constitute "manual delivery" but states the burden of so proving was on the plaintiff. The necessity for communication of mutual assent is not mentioned. In cases where there is actual physical transmission to the insured or his agent, or where there is constructive delivery by mailing the policy to either of them, there would be sufficient communication of acceptance to consummate a valid contract,[15] yet in such cases the parties have gained nothing by adding delivery as a requirement. The reader of insurance cases is left to wonder, when the parties require "delivery" of the policy, whether delivery displaces the requirement for communication of acceptance, or whether a finding of delivery absolutely imports communication, in that the intent of the parties is conclusively presumed to be that delivery be the method by which acceptance is to be manifested. And to the draftsman remains the problem of defining the intended delivery in terms that will require physical receipt of the policy by the insured, and not be subject to the judicial inroads of declaring constructive delivery.

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[8] Amer. Nat. Ins. Co. v. Few, 224 Ala. 576, 141 S. 234 (1932); Guaranty Income Life Ins. Co. v. Ball, 19 La. App. 759, 141 S. 520 (1932).

[9] Jefferson Standard Life Ins. Co. v. Lyons, 122 Fla. 346, 165 S. 351 (1936); Kansas City Life Ins. Co. v. White, 33 Ariz. 303, 264 P. 474 (1928).

[10] Cantor v. Reserve Loan Life Ins. Co., 161 S.C. 198, 159 S.E. 542 (1931); Republic Nat. Life Ins. Co. v. Merkley, 59 Ariz. 125, 124 P. (2d) 313 (1942).

[11] Supra note 6.

[12] But no case has been found noting this possibility.

[13] Jefferson Standard Life Ins. Co. v. Lyons, supra note 9; Mutual L. Ins. Co. v. Otto, 153 Md. 179, 138 A. 16 (1927).

[14] Supra note 6.

[15] 1 WILLISTON, CONTRACTS, rev. ed., §§70, 81 (1936).