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New-Jersey Court of Errors and Appeals.

THE COMMERCIAL INSURANCE COMPANY, plaintiffs in error, *v.* GEORGE W. HALLECK, defendant in error,	IN CASE.—*Writ of error to the Supreme Court. Upon a special verdict.*

Afterwards, that is to say, on the day and at the place within contained, before Elias B. D. Ogden, esquire, one of the associate justices of the said Supreme Court of New Jersey, assigned to hold the Circuit Court in and for the said county of Hudson, according to the form of the statute in such case made and provided, come as well the within named plaintiff as the within named defendants, by their respective attorneys, within mentioned; and the jurors of the jury summoned to try the said issue, being called, also come, who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oath— 10

That during the month of March, eighteen hundred and fifty-five, and before and after that time, George W. Breck, of Bath, Steuben county, in the state of New York, was the agent of the defendants, for the purpose herein after mentioned, who were an Insurance Company, located at Jersey City, in this state; that the said George W. Breck was authorized by the defendants to make surveys, receive proposals for insurance, and to receive premiums upon risks accepted by the company, but was not authorized to make insurance or to issue policies. The proposals for insurance made to him were sent by him to the company, at Jersey City; and if accepted by the company, the policies were made out by them, and sent to him to deliver. 20

That while he was such agent, and about the second day of March, eighteen hundred and fifty-five, the plaintiff applied to him to insure his building, called Head-quarters, situate in Bath, the insurance to be for twelve hundred dollars, and to commence on the tenth day of the same month,

at noon, at which time a policy in another company, then in existence, would expire. Breck made a survey of his building, and told him what the premium would be. He, the plaintiff, thereupon offered the premium to said Breck, who said he would consider it as paid; but he would leave it with the plaintiff, who was a banker, and with whom he kept his account, till the policy arrived, when he, Breck, would call and get the money. The application annexed to survey was signed by the plaintiff, and sent by said Breck to the com-
10 pany by mail, on the second or third day of March. The company deferred acting on the application until the thirteenth day of March, eighteen hundred and fifty-five, until the secretary of the company could procure a map of Bath, referred to by Breck; and on the thirteenth of March, between ten and twelve o'clock, A. M., the policy in question was filled up, and signed and mailed at Jersey City, directed to said Breck, at Bath.

That, by the regular course of mail, it should have arrived on the 14th of March, but owing to obstructions on the road
20 by snow, it did not arrive until the sixteenth of March, and at the same time the said Breck received the following telegraphic despatch, dated on the 15th March, A. M. "Risk not taken when burnt; return policy when received."

And the jurors aforesaid, on their oath aforesaid, further say—

That accompanying the policy, was a letter from the secretary, of the tenor following:

OFFICE OF THE COMMERCIAL INSURANCE COMPANY,
No. 3 Montgomery street, Jersey City, March 13th, 1855.

30 Messrs. Breck & Sawyer, Bath, N. Y.

Dear sirs,—Your application on G. W. Halleck's saloon has been held under advisement till we could procure a copy of the map of which you speak in your letter: we do not look on it as a very desirable risk, but nevertheless, as the rate seems a fair one, we enclose you a policy, relying very much on your representation in regard to the good character of the occupant. Enclosed please find policy, No. 1054, for $1200. Premium $24.

Respectfully,

J. M. CHAPMAN, *Sec'y, &c.*

And the jurors aforesaid, on their oath aforesaid, further say, that the plaintiff, on the sixteenth day of March, after the policy had arrived at Bath, tendered the premium in gold to said Breck, and demanded the policy. He, said Breck, accepted the money, because he had refused to accept the money when the application was made, and considered it on deposit. By so doing, he meant to put the plaintiff in the same situation he would have been in if he had taken it on the 2d March, 1855; but refused to deliver the policy, because he was so directed by the defendants, and returned the 10 policy, on the twenty-ninth, to the defendants, who cancelled the signatures thereto, and marked the same "*cancelled*" on the face of the policy, "not delivered, returned and cancelled."

The building insured was destroyed by fire, which was communicated by the burning of the adjoining building, not owned by or under the control of the plaintiff. The fire was on the morning of the thirteenth of March, and the building was wholly consumed before eight o'clock on the morning of that day, two hours before the policy was executed. 20

And the jurors aforesaid, on their oath aforesaid, further say, that the building was the property of the plaintiff, was worth sixteen hundred dollars, and was a total loss. Proper notice of loss and preliminary proofs were furnished by the plaintiff to the defendants on the twenty-first day of March.

The agent never remitted the premium to the company, because they directed him to return the policy; and the company, when called upon, refused to pay the loss, on the ground that they had made no contract of insurance.

But whether or not, upon the whole matter aforesaid, by 30 the jurors aforesaid in form aforesaid found, the said defendants did promise and undertake, in manner and form aforesaid, the jurors aforesaid are altogether ignorant, and thereupon pray the advice of the said Supreme Court of Judicature, before the aforesaid justices thereof; and if, upon the whole matter aforesaid, it shall seem to the said court that the said defendants did promise and undertake, in manner and form aforesaid, then the jurors aforesaid, upon their oath aforesaid say, that the said defendants did promise and undertake in manner and form as the said plaintiff hath 40

within thereof complained against them, and in that case they assess the damages of the said plaintiff, by reason of the matters aforesaid, besides his costs and charges by him about his suit in that behalf expended, to twelve hundred and sixty-seven dollars and fifty cents, and those costs and charges to six cents.

But if, upon the whole matter aforesaid, it shall seem to the said court that the said defendants did not promise and undertake, in manner and form within mentioned, then the
10 jurors aforesaid, upon their oath aforesaid say, that the said defendants did not promise and undertake in manner and form as they have within in pleading alleged.

(Signed) E. B. D. Ogden, Justice.

New Jersey Court of Errors and Appeals.

The Commercial Insurance Company, plaintiffs in error, *v.* George W. Halleck, defendant in error,	*Assignment of errors.*

20 Afterwards, to wit, on the third Tuesday of November, in the year of our Lord one thousand eight hundred and fifty-seven, before the Court of Errors and Appeals come the said the Commercial Insurance Company, by J. M. Chapman, their attorney, and say, that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, to wit:

That the judgment aforesaid, by the record aforesaid, appears to have been given for the said George W. Halleck against the said the Commercial Insurance Company; where-
30 as, by the law of the land, the said judgment ought to have been given for the said the Commercial Insurance Company against the said George W. Halleck.

And there is also error in this, that the special verdict returned with the record aforesaid and the facts found by the

jury are not sufficient in law to enable the said George W. Halleck to have and maintain his aforesaid action against the said the Commercial Insurance Company.

And there is also error in this, that the said Supreme Court, by their opinion and judgment, did pronounce and declare in effect, that the said George W. Breck, in the said special verdict mentioned, was the general agent of the said company, and authorized to bind the said company by receiving the premiums on the said policy of insurance at a time when such policy had not been actually issued or legally effected by the said company; whereas, by the law of the land, under the facts found by the special verdict, the said George W. Breck was only the special agent of the said company, and was not authorized to receive or accept any premium on said policy of insurance, until the contract of insurance was perfected, and the policy issued by the said company.

And there is also error in this, that in the judgment and opinion of the said court, the said contract of insurance was declared to be complete and consummated when the said fire in the special verdict stated took place; whereas, by the law of the land, under the facts found by the said jury, the said contract of insurance was not complete and consummated when the said fire took place.

And there is also error in this, that by the judgment and opinion of the said court, it was declared and pronounced that there was a sufficient delivery in law of the said policy of insurance by the said the Commercial Insurance Company to the said George W. Halleck to bind the said company; whereas it appears, by the special verdict aforesaid, and the facts thereby found, there was no delivery by the said company to the said George W. Halleck before or at the time of the said loss; and, by the law of the land, the said policy could not be a valid and binding contract without a delivery of the same to the said George W. Halleck at or before the time of the said loss.

And there is also error in this, that by the judgment and opinion of the said court, it was held and determined that the obtaining possession of the said policy of insurance by the said George W. Breck, after the said fire took place, was

such possession as enabled the said George W. Halleck to recover on the said policy, and in that there was manifest error.

And there is also error in this, that by the judgment and opinion of the said court, it was held and determined that the said contract for insurance, under the facts in said special verdict stated, could lawfully be made by the said company, after the property in the said policy described had been destroyed by fire, and when the same was no longer in existence to be insured; whereas, by the law of the land, said contract of insurance could not lawfully be made under the facts in said special verdict found after the said property described in the said policy of insurance had been destroyed by fire, and in that there is manifest error.

And there is also error in this, that by the judgment and opinion of the said court, it was held and declared that the plaintiff could recover on the said policy, notwithstanding, by the said special verdict, it appeared that the said policy of insurance had been returned to and had been cancelled by the said the Commercial Insurance Company prior to the commencement of the said action, and in that there is manifest error.

And there is also error in this, that it appears, by the special verdict, that the said George W. Breck tendered the premium for said insurance after the said loss had occurred; whereas, by the law of the land, such premium should have been tendered before the said loss had occurred to bind the said company, and therefore in this there is manifest error.

And there is also error in this, that by the special verdict aforesaid, it appears that the said policy of insurance never became a valid, binding, and consummated contract between the said George W. Halleck and the said the Commercial Insurance Company: nevertheless the said court did pronounce and declare that the said policy of insurance did become a valid, binding, and consummated contract between the said George W. Halleck and the said the Commercial Insurance Company, and in that there is manifest error.

And the said the Commercial Insurance Company pray that the judgment aforesaid, for the errors aforesaid and for other errors in the said record and proceedings being, may

be reversed, annulled, and altogether holden for nought, and that they may be restored to all things which they had lost by occasion of the said judgment.

J. M. CHAPMAN,
Attorney for and of counsel with the plaintiff in error.

I. W. SCUDDER,
Of counsel, &c.

There is a joinder in error by Abraham O. Zabriskie, attorney for George W. Halleck.

The following opinions were delivered in the Supreme Court, by Justices VREDENBURGH and POTTS, in which the CHIEF JUSTICE concurred. 10

VREDENBURGH, J. G. W. Breck was the agent of the defendants at Bath, New York, to make surveys, receive proposals for insurance, and receive premiums on risks accepted by the company, but was not authorized to make insurances or issue policies. The proposals for insurance were sent by him to the company at Jersey City; and if accepted by them, the policies were to be sent to him to deliver.

On the 2d of March, 1855, the plaintiff applied to him to insure his building in Bath, for one year from the 10th of March, for $1200. Breck made the survey, and told him what the premium would be. The plaintiff thereupon offered the premium to Breck, who said he would consider it as paid, but would leave it with the plaintiff, who was a banker, and with whom he kept his account, until the policy arrived, when he would call and get the money. The application was signed by the plaintiff, and with the survey attached, was sent by Breck to the company, on the 2d or 3d of March. The defendants deferred acting on the application until the secretary could procure a map of Bath, referred to by Breck. 20 30

On the 13th of March, between ten and twelve, A. M., the map having been received, a policy was filled up on said building, insuring it, from the 10th of March, for one year, signed by the proper officers, and mailed at Jersey City, directed to Breck at Bath, which by due course of mail would have reached him on the 14th March, but which, ow-

ing to the snow, did not until the 16th of March. At the same time that Breck received the policy, he also received a telegraphic despatch, dated the 15th March, as follows: "Risk not taken when burnt. Return policy when received."

Accompanying the policy, was also a letter from the secretary, of the tenor following:

"Office of the Commercial Insurance Company, No. 3 Montgomery st., Jersey City, March 13th, 1855.

Messrs. Breck and Sawyer, esq'rs, Bath, N. Y.

10 Dear sirs,—Your application on G. W. Halleck's saloon has been held under advisement till we could procure a copy of the map, of which you speak in your letter. We do not look on it as a very desirable risk, but nevertheless, as the rate seems a fair one, we enclose a policy, relying very much on your representation in regard to the good character of the occupant. Enclosed please find policy, No. 1054, for $1200, premium $24.

Respectfully,

J. M. Chapman, Sec'y."

20 On the 16th March, after the policy arrived, the plaintiff tendered the premium in gold to Breck, and demanded the policy. Breck accepted the money, because he had refused to accept it when the application was made, and considered it on deposit, meaning to put the plaintiff in the same situation as if he had received it on the 2d of March, but refused to deliver the policy, because so directed by the defendants.

The building insured was entirely consumed by fire on the 13th of March, at 8 A. M., about two hours before the risk was accepted or the policy signed. There was a vari-
30 ance between the policy declared on and the original, in the time of payment of the insurance and the name of the officers who signed the policy. The suit is on the policy, and the plea the general issue.

As to the variances, there is no proof, nor even any allegation, that the defendants were misled by them to their prejudice, and they must consequently, under the 43d section of the act of 1855, (*Nix. Dig.* 641) be deemed to be immaterial.

The defendants submit two other points, *viz :*

First. That the policy is void, because when made the loss had already occurred; second, that the policy never did become a contract of insurance.

As to the first point, the policy is not dated, but it was signed on the 13th of March, at noon. The fire happened about two hours before. The policy, by its express terms, insures the building from the 10th of March, 1855, at noon, to the 10th of March, 1856, at noon. There is raised no question of fraud, concealment, or misrepresentation. 10

So far as appears by the case, when the policy was signed both parties were equally ignorant of the fire; even if the plaintiff knew, and the defendants were ignorant of it, it was so in both cases by a physical necessity. Or even if the plaintiff had known of it, and could have telegraphed it to the defendants in time to have reached them before they signed the policy, (neither of which appears) he was, in the circumstances then existing, under no legal or moral obligation so to do.

There can be no doubt but that the policy, in its terms, is 20 precisely as both parties intended it should be. The application was for insurance from the 10th; the defendants had held it under advisement from the 2d to the 13th, thereby preventing the plaintiff from applying elsewhere, and then, by express terms, insured from the 10th for one year. They intentionally made the year's risk commence from the 10th. If the fire had occurred on the 13th March, 1856, instead of 1855, under this policy the defendants could not have been held liable. When they filled up the policy, they elected to take the premium from the 10th. They took their pay for 30 the very time during which the fire occurred, and thus say now, in effect, this is a very good policy from the 10th to the 13th, if no fire occurs, but a void one if there does. The question, therefore really is is a contract to insure against fire from a time past void in law.

No decision, or authority, or principle, sustaining such a doctrine has been referred to before us. It is every day's practice in both marine and fire insurance. A contract is good, unless shown to be against good morals or sound policy. I do not see how this contract contravenes either, or 40

what difference in principle there can be between insuring from a time past and a time to come. Many cases will be found recognising the validity of such contracts. *Lightbody* v. *The N. American Ins. Co.*, 23 *Wend.* 18; *Perkins* v. *Washington Ins. Co.*, 4 *Cow.* 645, 665; *Kohne* v. *The Ins. Co. of N. America*, 1 *Wash. C. C. R.* 93; 12 *Wheat.* 408; 20 *Barb.* 475.

Secondly. The defendants insist that the policy never did become a contract of insurance; that even if the fire had
10 happened on the 14th of March, or at any time afterwards, no action could have been sustained upon it.

The defendants suggest three reasons why the policy never became a contract.

First. Because the premium never was paid.

Second. Because the application of the plaintiff cannot be considered as an existing offer when the policy was signed.

Third. Because the policy never was delivered.

Upon the first point it is insisted, in the first place, that on the 2d of March Breck was not the agent of the defendants
20 to receive the premium; that he was such agent only *after*, and not before the risk had been *accepted* by the company; that the acceptance of the risk was a condition precedent to Breck's authority to receive the premium.

One of the conditions of the policy is, that no insurance shall be binding until payment. The premium must consequently be paid, either at or before the legal acceptance of the risk. The case, therefore, when it says that Breck was the agent of the company to receive the premium on risks accepted, cannot mean that he was not authorized to receive
30 until after the risk was accepted; because if that were so, no insurance could ever be effected at all. When the case says Breck was the agent to receive premiums on risks accepted by the company, it can only mean that he was the agent to receive premiums, not absolutely, so as to bind the defendants to accept the risk, but conditionally, provided the risk should be accepted. The words "upon risks accepted" is applied in the same sense to the receipt of premiums as it is to the making of surveys and receiving proposals. Breck had no athority to insure, and the case, by the terms "risk accept-
40 ed," meant to negative the idea that he could so receive

premiums as to bind the company to accept the risk. Breck was authorized to receive the premium in the same way as the defendants themselves would receive it, with the proposals, before they had decided to take the risk, *viz.* on deposit and conditionally, so as to make the proposal perfect, and so as to leave nothing further to be done by the applicant, and leaving nothing to be done by the defendants to perfect the contract but a simple election. If they elected not to accept the risk, the money was not theirs, it belonged, and must be returned to the applicant; but if they elected to accept, it 10 *eo instanti* was rightfully in their possession, and became their property. As the defendants could receive the premium with the proposal, and as a part of the proposal to await their election, so they could and did authorize Breck to receive the proposal and the premium to await the result, and the reception of the premium by Breck was the reception by them.

The defendants next insist, that if Breck was authorized to receive the premium on the 2d, yet that he did not in fact receive it until after countermand. 20

The case shows that the plaintiff, when he made his application, offered Breck the premium, who said he would consider it as paid, but would leave it with the plaintiff, who was his banker, till the policy arrived, when he would call and get it. Would it have made the payment more real if the plaintiff had handed Breck the money, and Breck had deposited it with his banker? The money was, in legal effect, paid to Breck, and by him placed in deposit. It was, in contemplation of law, an actual payment to the company, as much so as if Breck had transmitted the money, as well as 30 the application, to the company. But if not an actual payment, the defendants are estopped from saying that it is not. They must be considered as doing what Breck did, *viz.* saying to the plaintiff, on the 2d of March, when he tendered them the money, we will consider it as paid. *N. York Central Ins. Co.* v. *National Protection Ins. Co.*, 20 *Barb.* 474.

Secondly. The defendants insist that the application, having been made on the 2d of March, and no action having been taken by the defendants until the 13th, we cannot consider the plaintiff as still continuing his offer to the defend- 40 ants; that we are bound to consider it as withdrawn. But

why so? There is no pretence of any express withdrawal. The question and the answer can never, in any case, be simultaneous; the question must always remain for some length of time with the one to whom it is put, and abide the answer. In every negotiation, whether by telegraph, by letter, or by word of mouth, the application and the answer can never be at the same precise instant. The application must wait upon the answer. If the application is considered to be withdrawn as soon as made, no two minds ever could
10 meet upon any proposition. The *aggregatio mentium* never could take place. In all cases, the application is construed to stand until the contrary appears; until it is either withdrawn or answered. *Pothier Traite du Contrat du vente, p.* 1, § 2, *Art.* 3, *No.* 32; *Mactier* v. *Frith*, 6 *Wend.* 103.

But here the plaintiff avers the application to be still standing. The defendants treat it as still before them on the 13th of March, by accepting it, and making out the policy. We must therefore treat it as the parties treat it, as still at noon on the 13th of March a standing and valid offer by the
20 plaintiff to the defendants.

Thirdly. The defendants contend that the policy never was delivered, so as to make it a living contract. But it appears, by the case, that the contract to insure was complete before they mailed the policy to Breck. Their telegraphic despatch, dated on the 15th of March, says, "risk not taken when burnt; return policy when received." This necessarily implies that the risk was taken, but taken after the fire. Breck had no authority to insure. *After* the proposals were accepted by the company, they made out the policies, and sent
30 them to Breck to deliver; so that it appears, by the case, that before they mailed the policy to Breck, they must have received the premium and accepted the risk, and thus completed the contract to insure. If the case had gone no further, and no policy had ever been made out, it is well settled that the plaintiff could have sued them upon this contract at law or forced from them a policy in equity. *Perkins* v. *Washington Ins. Co.*, 4 *Cow.* 660; *Hamilton* v. *Lycoming Ins. Co.*, 5 *Barr.* 339; *Angell on Fire Ins.* § 34, 47; *Union Mutual* v. *The Commercial Mutual, Law Reporter, March* 1856,
40 *p.* 610.

Under these circumstances, a policy drawn up and signed by the proper officers wants no further delivery. It is a vital policy as soon as signed, becomes instantly the property of the insured, and is held by the insurer for his use. *Ang. on Fire Ins.* § 33, 31; *Pim* v. *Reed*, 6 *Man. & Grang.* 1; *Kohne* v. *Ins. Co.*, 1 *Wash. C. C. R.* 93.

But here were further acts of delivery of the policy. It was, on the 13th of March, mailed, and sent to Breck, to deliver to the plaintiff. This was sending it to the plaintiff by Breck. Breck and the mail were only the vehicles to carry 10 it to him. It was the same thing as if mailed or sent directly to the plaintiff. The defendants suggest, in answer, that Breck was their agent, and that, by sending it to him, they did not part with the possession of the policy, and that they only gave authority to Breck to deliver, which they could and did revoke before actual delivery. But when they mailed the policy to Breck to deliver, they did not constitute him their agent to receive or keep it for them, nor to retain it as their agent. He was, in that regard, no agent of theirs; he had nothing further to do for them. By sending 20 him the policy to deliver, they made Breck trustee for the plaintiff; they made it a deposit with Breck to the credit of the plaintiff. It was a delivery to Breck to deliver to the plaintiff, which was a good delivery to the plaintiff. *Shep. Touch.* 58. This is not a question of the authority or acts of an agent, but whether the defendants, by sending the policy to Breck to deliver, did an overt act intended to signify that the policy should have a present vitality. This certainly was such an act. Without any further interference on their part, it would have resulted in actual delivery to the plaintiff. It 30 was intended to signify to the plaintiff not only that the policy was a present contract, but to effect an actual delivery of it to him. *Kentucky Mutual Ins. Co.* v. *Jenks*, 5 *Porter* (*Ind.*) *R.* 96; 5 *Barr.* 339; 9 *How.* 390.

Suppose the defendants had retained the policy, and had merely told Breck to tell the plaintiff that they held the policy subject to the plaintiff's order, would they not have been deemed as holding the policy for the plaintiff?

The defendants next suggest that the plaintiff was ignorant of their acceptance of the risk, of their making out and 40

mailing the policy to Breck until after they had countermanded its delivery, and that the *aggregatio mentium* could not take place until after the acceptance of the proposition by the defendants came to the plaintiff's knowledge, and that before that the defendants had changed their own minds, so that in fact it never did take place, and that consequently there was no legal delivery of this policy.

This involves the more general question, does a contract arise when an overt act is done intended to signify the acceptance of a specific proposition, or not until that overt act comes to the knowledge of the proposer? This question may arise upon every mode of negotiating a contract, whether the parties be in each other's presence or not. First comes the mental resolve to accept the proposition; but the law can only recognise an overt act. Whether that act be a word spoken, a telegraphic sign, or a letter mailed, some interval of time, more or less appreciable, must intervene between the doing of the act and its coming to the knowledge of the party to whom it is addressed. In the mean time, what is the condition of affairs? is it a contract or no contract? If the bidder does not see the auctioneer's hammer fall; if the article written for and sent never arrives; if the verbal answer, when the parties are in each other's presence, is in a foreign tongue, or by sudden noise or distraction is not heard; if the telegraphic circuit is broken; if the mail miscarries; if the word spoken or the letter sent is overtaken, and countermanded by the electric current, is there no contract? In the progress of the negotiation, at what precise point of time does mind meet mind, does the contract spring into life?

Upon this subject, with respect to negotiations conducted by written communications, there has been some variety of decision, but it appears to me that the weight of authority, as well as reason and necessity, admit of but one solution.

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. The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing or by delivery of the paper, and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium;* at that instant the bargain is struck. The acceptor can no more overtake and countermand by telegraph his letter mailed, than he can his words of acceptance after they have issued from his lips on their way to the hearer. If the two minds do not meet *eo instanti* with the act signifying acceptance, when can they, in the nature of things, ever approach each other more closely? The defendants say, when the act of acceptance comes to the knowledge of the other party. But this knowledge would be a fact without any force, unless we suppose in the proposer a power still of electing not to accept the acceptance. But if we do this, it is apparent that the negotiation is yet precisely in the same stage of development it was in when the first proposition was waiting upon the first answer. The notion that there is no contract until the acceptance comes to the knowledge of the other party, proceeds upon the ground, in the first place, that the proposal has been withdrawn or lost its force, which is against the intent of the parties and the necessities of the case; and in the second place, upon the ground that the answer is conditional, whereas we suppose it to be absolute. We suppose the acceptor to say not simply I agree, but to say I agree if you do, which requires an answer from the proposer; so that the minds do not meet till he answers. But in the mean time the acceptor may have changed his mind, and for the same reason as before, there is no bargain until this last answer comes to the knowledge of the other party; and so, upon this theory, it must go on *ad infinitum* without the possibility of the *aggregatio mentium* ever taking place. There is in fact no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air, in the other, written

signs carried by the mail or by telegraph. The vital question is, was the intention manifested by any overt act, not by what kind of messenger it was sent. The bargain, if ever struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance, or the instrument itself intended for the other party, is certainly such an act. *Adams* v. *Lindsell*, 1 *Barn. & Ald.* 681; *Dunlop* v. *Higgins*, 1 *House of Lords Cases* 381; *Duncan* v. *Topham*, 8 *C. B.* 225; *Potter* v. *Saunders*, 6 *Hare* 1; *Tayloe* v. *Mer-*
10 *chants Ins. Co.*, 9 *How.* 390; *Hamilton* v. *Lycoming Ins. Co.*, 5 *Barr.* 339; *Vassar* v. *Camp*, 14 *Barb.* 341; *Mactier* v. *Frith*, 6 *Wend.* 103; *Kentucky Mutual* v. *Jenks*, 5 *Porter's* (*Ind.*) *R.* 96. This last case, in all its essential features, is identical with the one before us.

The only English case sustaining the defendants in their view, that I have seen, is that *Cooke* v. *Oxley*, 3 *Term R.* 653, which it will be perceived, by the above references, has been effectually overruled in their courts.

In the state of New York, the case of *Mactier* v. *Frith*,
20 1 *Paige* 434, was reversed in their Court of Errors by a very large vote (6 *Wend.* 111), and the doctrine sustained as contended for by the plaintiff.

The only other American case on this side of the question is that of *McCulloch* v. *The Eagle Fire Ins. Co.*, 1 *Pick.* 278. This last is against the whole current of authorities both in England and in this country, and appears to me requires for the creation of a contract a fact without significance, or a condition that would render its creation impossible.

30 Let judgment be entered on the verdict for the plaintiff.

Potts, J. I concur in the opinion that the plaintiff is entitled to judgment upon the verdict in this case. The contract of insurance was complete when the company executed the policy, and forwarded it to their agent at Bath, to be delivered to the plaintiff. The agent was authorized by the defendants to make surveys, receive proposals for insurance, and to receive premiums upon risks accepted by the company. The plaintiff applied to him for an insurance of $1200 on his buildings, and being informed the premium would be

$24, he offered him the premium, and the agent said he would consider it as paid, but would leave it with the plaintiff, who was a banker, and with whom he, the agent, kept an account, till the policy arrived, when he would call and get the money. The agent states expressly that he considered the money on deposit. The plaintiff had therefore done everything on his part which was to be done. The premium, being under the control and subject to the check of the agent, must be considered as paid to the company the moment the policy was issued. It is very much like the case 10 of *The N. Y. Central Ins. Co.* v. *National Protection Ins. Co.*, 20 *Barb.* 474.

Then the acceptance of the proposal to insure for the premium offered was the completion of the negotiation; and after the policy had been executed and forwarded by mail to the agent for delivery, the contract could not be rescinded without the consent of the insured party. The cases of *Tayloe* v. *Merchants Fire Ins. Co.*, 9 *How.* 400, and *Mactier* v. *Frith*, 6 *Wend.* 115, are authorities for this.

There is no pretence here of any misrepresentation, con- 20 cealment, or fraud on the part of the plaintiff. The fact, that when the company actually executed the policy the buildings had been destroyed by fire, is no defence. The company chose to take a risk that was retrospective as well as prospective. They contracted, on the 13th, to insure the buildings from the 10th of March. They intended to include the risk from the 10th to the 13th, as well as the future risk. No other possible construction can be given to the contract without altering its terms, and that the court cannot do. There is nothing illegal or contrary to public policy in this. Though 30 both the contract and policy are subsequent to the destruction of the property, the insurers may be bound. 12 *Wheaton* 408, *General Int. Ins. Co.* v. *Ruggles*; 23 *Wendell* 24, *Lightbody* v. *North Am. Ins. Co.* Where there isnothing to impugn the honesty of the transaction, courts are bound to give effect to the intention of the parties, when that intention is clearly expressed in the contract they enter into.