

FORTUNATA LUCERO VIUDA DE SINDAYEN, PLAINTIFF AND APPELLANT, VS. THE INSULAR LIFE ASSURANCE CO., LTD., DEFENDANT AND APPELLEE.

G.R. No. 41702. September 04, 1935

Ponente: BUTTE, J.

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BUTTE, J.:

This is an appeal from a judgment of the Court of First Instance of Manila in an action brought by the plaintiff-appellant as beneficiary to recover P1,000 upon a life insurance policy issued by the defendant on the life of her deceased husband, Arturo Sindayen.

The essential facts upon which this case turns are not in dispute and may be stated as follows:

Arturo Sindayen, up to the time of his death on January 19, 1933, was employed as a linotype operator in the Bureau of Printing at Manila and had been such for eleven years prior thereto. He and his wife went to Camiling, Tarlac, to spend the Christmas vacation with his aunt, Felicidad Estrada. While there he made a written application on December 26, 1932, to the defendant Insular Life Assurance Co., Ltd., through its agent, Cristobal Mendoza, for a policy of insurance on his life in the sum of P1,000 and he paid to the agent P15 cash: as part of the first premium. It was agreed with the agent that the policy, when and if issued, should be delivered to his aunt, Felicidad Estrada, with whom Sindayen left the sum of P25.06 to complete the payment of the first annual premium of P40.06. On January 1, 1933, Sindayen, who was then twenty-nine years of age, was examined by the company's doctor who made a favorable report to the company. On January 2, 1933, Sindayen returned to Manila and resumed his work as linotype operator in the Bureau of Printing. On January 11, 1933, the company accepted the risk and issued policy No. 47710 dated back to December 1, 1932, and mailed the same to its agent, Cristobal Mendoza, in Camiling, Tarlac, for delivery to the insured. On January 11, 1933, Sindayen was at work in the Bureau of Printing. On January 12, he complained of a severe headache and remained at home. On January 15, he called a physician who found that he was suffering from acute nephritis and uremia. His illness did not yield to treatment and on January 19, 1933, he died.

The policy which the company issued and mailed in Manila on January 11, 1933, was received by its agent in Camiling, Tarlac, on January 16, 1933. On January 18, 1933, the agent, in accordance with his agreement with the insured, delivered the policy to Felicidad Estrada upon her payment of the balance of the first year's annual premium. The agent asked Felicidad Estrada if her nephew was in good health and she replied that she believed so because she had no information that he was sick and he thereupon delivered to her the policy.

On January 20, 1933, the agent learned of the death of Arturo Sindayen and called on Felicidad Estrada and asked her to return the policy. He testified: "pedia a ella que me devolviera la poliza para traerla a Manila para esperar la decisi6n de la compania" (t. s. n. p. 19). But he did not return or offer to return the premium paid. Felicidad' Estrada on his aforesaid statement gave him the policy.

On February 4, 1933, under circumstances which it is not necessary to relate here, the company obtained from the

beneficiary, the widow of Arturo Sindayen, her signature to a legal document entitled "accord, satisfaction and release" whereby in consideration of the sum of P40.06 paid to her by a check of the company, she "assigns, releases and forever discharges said Insular Life Assurance Co., Ltd., its successors and assigns, of all claims, obligation or indebtedness which she, as such beneficiary ever had or now has, hereafter can, shall, or may have, for, upon, or by reason of said policy of life insurance numbered 47710 upon the life of said Arturo Sindayen, the latter now deceased, or arising therefrom or connected therewith in any manner", which appears in the record¹ as Exhibit A, attached to the deposition of the notary who executed the fraudulent acknowledgment to Exhibit A. The said check for P40.06 was never cashed but returned to the company and appears in the record of this case as Exhibit D. Thereupon this action was brought to enforce payment of the policy.

By the terms of the policy, an annual premium of P40.06 is due on the first day of December of each year, the first premium already paid by the insured covering the period from December 1, 1932, to December 1, 1933. It is to be noted that the policy was not issued and the company assumed no actual risk prior to January 11, 1933.

The policy contains the following paragraph:

"THE CONTRACT. This Policy and the application hereof constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void the Policy unless it is contained in the written application, a copy of which is attached to this Policy. Only the President, or the Manager, acting jointly with the Secretary or Assistant Secretary (and then only in writing signed by them) have power in behalf of the Company to issue permits, or to modify this or any contract, or to extend the time for making any premium payment, and the Company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above-named officials, and" by them only in writing and signed conjointly as stated."

The application which the insured signed in Cailing, Tarlac, on December 26, 1932, contained among others the following provisions:

"2. That if this application is accepted and a policy issued in my favor, I bind myself to accept the same and to pay at least the first year's premium thereon in the City of Manila.

"3. That the said policy shall not take effect until the first premium has been paid and the policy has been delivered to and accepted by me, while I am in good health.

"4. That the agent taking this application has no authority to make, modify or discharge contracts, or to waive any of the Company's right or requirements."

The insurance company does not set up any defense of fraud, misconduct or omission of duty of the insured or his agent, Felicitad Estrada or of the beneficiary. In its answer it pleads the "accord, satisfaction and release" (Exhibit A) signed by the widow of Arturo Sindayen, the plaintiff-appellant. With respect to Exhibit A, it suffices to say that this release is so inequitable, not to say fraudulent, that we are pleased to note that counsel for the defendant company, on page 51 of their brief, state: "si resultara que la póliza aquí en cuestión es válida la apelada sería la primera en no dar validez alguno al documento Exhibit A aunque la apelante hubiera afirmado que lo otorgó con conocimiento de causa."

It is suggested in appellee's brief that there was no delivery of the policy in this case because the policy was not delivered to and accepted by the insured in person. Delivery to the insured in person is not necessary. Delivery may be made by mail or to a duly constituted agent. Appellee cites no authorities to support its proposition and none need be cited to refute it.

We come now to the main defense of the company in this case, namely, that the said policy never took effect

because of paragraph 3 of the application above quoted, for at the time of its delivery by the agent as aforesaid the insured was not in good health. We have not heretofore been called upon to interpret and apply this clause in a life insurance application, but identical or substantially identical clauses have been construed and applied in a number of cases in the United States and the decisions thereon are far from uniform or harmonious. We do not find it practicable to attempt to determine where the weight of authority lies and propose to resolve this case on its own facts.

There is one line of cases which holds that the stipulation contained in paragraph 3 is in the nature of a condition precedent, that is to say, that there can be no valid delivery to the insured unless he is in good health at the time; that this condition precedent goes to the very essence of the contract and cannot be waived by the agent making delivery of the policy. (*Rathbun vs. New York Life Insurance Co.*, 30 Idaho, 34; 165 Pac, 997; *American Bankers Insurance Co. vs. Thomas*, 53 Okla., 11; 154 Pac, 44; *Gordon vs. Prudential Insurance Co.*, 231 Pa., 404; *Reliance Life Insurance Co. vs. Hightower*, 148 Ga., 843; 98 S. E., 469.)

On the other hand, a number of American decisions hold that an agent to whom a life insurance policy similar to the one here involved was sent with instructions to deliver it to the insured has authority to bind the company by making such delivery, although the insured was not in good health at the time of delivery, on the theory that the delivery of the policy being the final act to the consummation of the contract, the condition as to the insured's good health was waived by the company. (*Kansas City Life Insurance Co. vs. Ridout*, 147 Ark., 563; 228 S. W., 55; *Metropolitan Life Insurance Co. vs. Willis*, 37 Ind. App., 48; 76 N. E., 560; *Grier vs. Mutual Life Insurance Co. of New York*, 132 N. C., 543; 44 S. E., 38; *Bell vs. Missouri State Life Insurance Co.*, 166 Mo. App., 390; 149 S. W., 33.)

A number of these cases go to the extent of holding that the delivery of the policy by the agent to the insured consummates the contract even though the agent knew that the insured was not in good health at the time, the theory being that his knowledge is the company's knowledge and his delivery of the policy is the company's delivery; that when the delivery is made notwithstanding this knowledge of the defect, the company is deemed to have waived the defect. Although that appears to be the prevailing view in the American decisions (14 R. C. L., 900) and leads to the same conclusion, namely, that the act of delivery of the policy in the absence of fraud or other ground for rescission consummates the insurance, we are inclined to the view that it is more consonant with the well known practice of life insurance companies and the evidence in the present case to rest our decision on the proposition that Mendoza was authorized by the company to make the delivery of the policy when, he received the payment of the first premium and he was satisfied that the insured was in good health. As was well said in the case of *McLaurin vs. Mutual Life Insurance Co.* (115 S. C, 59; 104 S. E., 327) :

"So much comes from the necessity of the case; the president, the vice-president, and the secretary cannot solicit, or collect, or deliver; they must commit that to others, and along with it the discretions we have adverted to. * * * The power in the local agent to withhold the policy involves the power to deliver it; there is no escape from that conclusion,

"But the appellant says, even though the local agent should have concluded that the applicant was in good health, yet, if the fact be the contrary, then the policy never operated. The parties intended to make a contract, and that involved the doing of everything necessary to carry it into operation, to wit, the acceptance of the applicant as a person in good health. They never intended to leave open that one essential element of the contract, when the parties dealt fairly one with the other. It is plain, therefore, that upon the facts it is not necessarily a case of waiver or of estoppel, but a case where the local agents, in the exercise of the powers lodged in them, accepted the premium and delivered the policy. That act binds their principal, the defendant."

Mendoza was duly licensed by the Insurance Commissioner to act as the agent of the defendant insurance

company. The well known custom of the insurance business and the evidence in this case prove that Mendoza was not regarded by the company as a mere conduit or automaton for the performance of the physical act of placing the policy in the hands of the insured. If Mendoza were only an automaton then the legally effective delivery of the policy and the consummation of the contract occurred when the company expressed its will to release the policy by mailing it to its agent, namely, on January 11, 1933. In such a case the agent would perform a purely ministerial act and have no discretion. He could do nothing but make unconditional delivery. The legal result would be the same as if the company had mailed the policy on January 11, 1933, to the insured directly using the post-office as its conduit for delivery. On January 11, 1933, the insured was in good health performing his regular duties in the Bureau of Printing.

But we are not inclined to take such a restrictive view of the agent's authority because the evidence in the record shows that Mendoza had the authority, given him by the company, to withhold' the delivery of the policy to the insured "until the first premium has been paid and the policy has been delivered to and accepted by me (the insured) while I am in good health". Whether that condition had been met or not plainly calls for the exercise of discretion. Mendoza's decision that the condition had been met by the insured and that it was proper to make delivery of the policy to him is just as binding on the company as if the decision had been made by its board of directors. Granted that Mendoza made a mistake of judgment because he acted on insufficient evidence as to the state of health of the insured. But it is not charged that the mistake was induced by any misconduct or omission of duty of the insured.

It is in the interest not only of the applicant but of all insurance companies as well that there should be some act which gives the applicant the definite assurance that the contract has been consummated. This sense of security and of peace of mind that one's dependents are provided for without risk either of loss or of litigation is the bedrock of life insurance. A cloud will be thrown over the entire insurance business if the condition of health of the insured at the time of delivery of the policy may be inquired into years afterwards with the view to avoiding the policy on the ground that it never took effect because of an alleged lack of good health, at the time of delivery. Suppose in the present instance that Sindayen had recovered his health, but was killed in an automobile accident six months after the delivery of the policy; and that when called on to pay the loss, the company learns of Sindayen's grave illness on January 18, 1933, and alleges that the policy had never taken effect. It is difficult to imagine that the insurance company would take such a position in the face of the common belief of the insuring public that when the policy is delivered, in the absence of fraud or other grounds for rescission, the contract of insurance is consummated. The insured rests and acts on that faith. So does the insurance company, for that matter, for from the date of delivery of the policy it appropriates to its own use the premium paid by the insured. When the policy is issued and delivered, in the absence of fraud or other grounds for rescission,, it is plainly not within the intention of the parties that there should be any questions held in abeyance or reserved for future determination that leave the very existence of the contract in suspense and doubt. If this were not so, the entire business world which deals so voluminously in insurance would be affected by this uncertainty. Policies that have been delivered to the insured are constantly being assigned for credit and other purposes. Although such policies are not negotiable instruments and are subject to defenses for fraud, it would be a most serious handicap to business if the very existence of the contract remains in doubt even though the policy has been issued and delivered with all the formalities required by the law. It is therefore in the public interest, for the public is profoundly and generally interested in life insurance, as well as in the interest of the insurance companies themselves by giving certainty and security to their policies, that we are constrained to hold, as we do, that the delivery of the policy to the insured by an agent of the company who is authorized to make delivery or withhold delivery is the final act which binds the company (and the insured as well) in the absence of fraud or other legal ground for rescission. The fact that the agent to whom it has entrusted this duty (and corporations can only act

through agents) is derelict or negligent or even dishonest in the performance of the duty which has been entrusted to him would create a liability of the agent to the company but does not resolve the company's obligation based upon the authorized acts of the agent toward a third party who was not in collusion with the agent.

Paragraph 4 of the application to the effect "that the agent taking this application has no authority to make, modify or discharge contracts or to waive any of the company's rights or requirements" is not in point. Mendoza neither waived nor pretended to waive any right or requirement of the company. In fact, his inquiry as to the state of health of the insured discloses that he was endeavoring to assure himself that 'this requirement of the company had been satisfied. In doing so, he acted within the authority conferred on him by his agency and his acts within that authority bind the company. The company therefore having decided that all the conditions precedent to the taking effect of the policy had been complied with and having accepted the premium and delivered the policy thereafter to the insured, the company is now estopped to assert that it never intended that the policy should take effect. (Cf. *Northwestern Life Association vs. Findley*, 29 Tex. Civ. App., 494; 68 S. W., 695; *McLaurin vs. Mutual Life Insurance Co.*, 115 S. C, 59; 104 S. E., 327; 14 Gal. Jur., par. 12, pages 425-427.)

In view of the premises, we hold that the defendant company assumed the risk covered by policy No. 47710 on the life of Arturo Sindayen on January 18, 1933, the date when the policy was delivered to the insured. The judgment appealed from is therefore reversed with directions to enter judgment against the appellee in the sum of ₱1,000 together with interest at the legal rate from and after May 4, 1933, with costs in both instances against the appellee.

Malcolm, Villa-Real, Abad Santos, Hull, Vickers, Goddard, and Recto, JJ., concur.

CONCURRING
AVANCEÑA, C.J.,

I concur in the result of this decision. I agree with the conclusion arrived in the majority opinion in the sense that the contract in question was consummated. I am of the opinion, however, that this contract was consummated by the defendant due to an error regarding an essential condition, to wit: the good health of the insured. There is no doubt but that the defendant would not have consummated the contract had it known that the insured was hopelessly ill, inasmuch as this consideration is essential in this kind of contracts. It is not true that the defendant or its agent had waived this condition inasmuch as it consummated the contract in the belief that this condition had been complied with, in view of the information given to it in good faith by the agent of the insured to the effect that the latter might continue to be in good health for the reason that she had not received any information from him to the contrary. This being so, the defendant's consent is vitiated by error, and, inasmuch as it affects an essential condition of the contract, it may give rise to the nullity thereof.

However, inasmuch as the nullity of the contract has not been set up as a defense in this case, I concur with the majority in the result.

DISSENTING
IMPERIAL, J.,

The plaintiff, as beneficiary, brought this action to recover from the defendant, an insurance company, the sum of ₱1,000, the value of a life insurance policy issued in the name of Arturo Sindayen, the plaintiff's husband.

The plaintiff appealed from the judgment dismissing the complaint, without special pronouncement as to costs.

On December 26, 1932, Arturo Sindayen signed Exhibit 6 wherein he applied for life insurance in the sum of P1,000 under certain conditions, among others, the following:

"3. That the said policy shall not take effect until the first premium has been paid and the policy has been delivered to and accepted by me, while I am in good health.

"4. That the agent taking this application has no authority to make, modify or discharge contracts, or to waive any of the company's right or requirements."

On the back of the policy said conditions were endorsed as follows:

"THE CONTRACT. This Policy and the application herefor constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void the Policy unless it is contained in the written application, a copy of which is attached to this Policy. Only the President, or the Manager, acting jointly with the Secretary or Assistant Secretary (and then only in writing signed by them) have power in behalf of the Company to issue permits, or to modify this or any contract, or to extend the time for making any premium payment, and the Company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above-named officials, and by them only in writing and signed conjointly as stated."

The insurance was secured by the defendant's agent Cristobal Mendoza in Camiling, Tarlac. The first premium to be paid by the insured amounted to P40.06 and on account of this sum he paid the agent P15 after he signed the application, with the understanding between them that the balance of P25.06 would be paid in the same town on the date the policy would be delivered. The insured designated his aunt Felicidad Estrada to act as his representative and to receive in his name the policy and to pay the balance of the premium. On January 11, 1933, the defendant issued insurance policy No. 47710, dated December 1, 1932 and sent it by registered mail to its agent in Camiling, Tarlac. On January 16th the agent got the policy from the post office and on the 18th he looked for the insured, but Felicidad Estrada informed him that the insured had returned to Manila. The agent asked her whether the insured continued to be sound and in good health, to which she replied that she believed that he was in good health inasmuch as she received no information that he was sick, whereupon the agent delivered the policy to Felicidad Estrada with instruction to hand it to the insured and, after receiving the sum of P25.06, he issued the receipt for the payment of the premium of P40.06, signing it as defendant's agent. On January 19th Felicidad Estrada came to Manila, to the home of the insured at No. 14 Teresa Street, to deliver the policy, but she found that he died a few hours before her arrival and there she saw his lifeless body. Felicidad Estrada delivered the policy to the plaintiff as beneficiary. On January 20th of the same year the agent had knowledge of the death of the insured and went to see Felicidad Estrada whom he requested to return the policy so that the defendant would decide what was to be done. On that occasion the agent conveyed to Felicidad Estrada his belief that the insured was not in good health when he delivered the policy to her. Felicidad Estrada returned the policy to the agent on the afternoon of said date. The agent gave notice to the defendant of the death of the insured and of the circumstances under which he had delivered the policy, and the defendant on February 4th of the same year returned to the plaintiff by check all the premium theretofore received, and furthermore secured from her Exhibit A (Accord, Satisfaction and Release), by virtue of which said plaintiff acknowledged having received the aforesaid premium and that in further consideration thereof she formally waived whatever right she might have, as beneficiary, in the insurance policy issued in the name of her deceased husband.

With respect to the sickness of the deceased, it appears that on January 1, 1933 he was examined by the physician of the defendant company. On the 12th of the same month he felt ill and consulted Dr. Alfredo L. Guerrero who, after an examination, found him suffering from nephritis. On the 15th he was treated for the second time by the physician, who found him seriously ill and with fever. In the afternoon of January 19, 1933, he died from

nephritis and uremia in his home in Manila.

In its answer the defendant set up two special defenses:

(1) That the plaintiff has lost any and all right to collect the value of the policy because at the time the first premium was paid and the policy was delivered to the insured, the latter was not in good health, thus violating clause 3 of the application which he signed and was made an integral part of the policy as one of the conditions thereof; and (2) that the plaintiff by means of the document known as "Accord, Satisfaction and Release" has waived whatever right she might derive from the insurance policy.

A stipulation or contract between the company and the applicant in the sense that the insurance policy will produce no effect or will not be binding on the company unless the first premium shall have been paid while the applicant is alive and in good health, is valid and will be enforced' in accordance with the terms thereof; it is a condition precedent to the liability of the company, and compliance therewith or its waiver are necessary for the enforcement and fulfillment of the insurance contract, unless the case should come under the provisions of an uncontestable clause. ([Perry vs. Security L., etc., Co., 150 N. C., 143; 63 S. E., 679; Rathbun vs. New York L. Ins. Co., 30 Ida., 34; 165 P., 997; Hawley vs. Michigan Mut. L. Ins. Co., 92 Iowa, 593; 61 N. W., 201; Whiting vs. Massachusetts Mut. L. Ins. Co., 129 Mass., 240; 37 Am. Rep., 317; Missouri State L. Ins. Co. vs. Salisbury, 279 Mo., 40; 213 S. W., 786; Ormond vs. Fidelity Life Assoc, 96 N. C., 158; 1 S. E., 796; Bowen vs. New York Mut. L. Ins. Co., 20 S. D., 103; 104 N. W., 1040; Rositer vs. Aetna L. Ins. Co., 91 Wis., 121; 64 N. W., 876; Anders vs. Life Ins. Clearing Co., 62 Neb., 585; 87 N. W., 331; Reliance L. Ins. Co. vs. Hightower, 148 Ga., 843; 98 S. E., 469; Clark vs. Mutual L. Ins. Co., 129 Ga., 571; 59 S. E., 283; Reese vs. Fidelity Mut. Life Assoc, 111 Ga., 482; 36 S. E., 637 [foil. Williams vs. Empire L. Ins. Co., 146 Ga., 246; 91 S. E., 44]; Oliver vs. New York Mut. L. Ins. Co., 97 Va., 134; 33 S. E., 526; Reese vs. Fidelity Mut. Life Assoc, 111 Ga., 482; 36 S. E., 637; Anders vs. Life Ins. Clearing Co., 62 Neb., 585; 87 N. W., 331; Perry vs. Security L. etc., Co., 150 N. C., 143; 63 S. E., 679; Strigham vs. Mutual Ins. Co., 44 Ore., 447; 75 Pac, 822; Dibble vs. Reliance L. Ins. Co., 170 Cal., 199; 149 Pac, 171.] Ann. Cas. 1917E, 34.)

In the case of Reliance Life Ins. Co. vs. Hightower, supra, the Supreme Court of Georgia, in a similar case, said the following:

"* * * An application for life insurance, signed by the applicant, contained a provision as follows:

"I hereby declare and agree that all statements and answers written in this application * * * are true, full, and complete, and are offered to the company as a consideration for the contract of insurance, which I hereby agree to accept, and which shall not take effect until the first premium shall have been actually paid while I am in good health and the policy shall have been signed by the duly authorized officers of the company and issued'

"The policy itself contained, among others, the following provisions:

"' Agents are not authorized to modify this policy or to extend the time for paying a premium * * *. All insurance provided by this policy is based upon the application therefore, a copy of which is hereto attached and made a part of this policy.'

* * * * *

"Applying to the facts above stated the principles recognized in Reese vs. Fidelity Mutual Life Association (111 Ga., 482; 36 S. E., 637), it must be ruled: (1) It was within the power of the insurance company, as between itself and its agent, to define and limit the powers of the latter. Limitations upon the power of the agent affect all third persons dealing with him, who have knowledge or notice thereof; and any notice of limitations upon the agent's power which a prudent man is bound to regard, is the equivalent of knowledge to the insured; (2) the stipulation in the signed application, that the insurance 'shall not take effect until the first

premium shall have been actually paid while I am in good health,' coupled with the words in the policy, 'Agents are not authorized to modify this policy or to extend the time for paying a premium,' were sufficient to charge the applicant with notice that he was dealing with a special agent with limited powers; (3) the actual payment of the first premium during the good health of the applicant was a condition precedent to liability under the policy, and the agent of the company could not waive such condition."

In the case of *Missouri State Life Ins. Co. vs. Salisbury*, supra, the Supreme Court of Missouri, in another similar case, said:

"The application has this clause:

" '6. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and accepted by me during my lifetime and good health.

"Another reason why the contract was never completed was because the first premium was not paid nor tendered during the good health of Mrs. Salisbury, as required by the stipulation in the application quoted above. "A stipulation of that character, requiring the payment of a first premium in advance as a condition upon which the policy was to take effect, is always recognized and enforced by the courts. The policy, in such case, is not effective until that condition is complied with. (*Kilcullen vs. Life Ins. Co.*, 108 Mo. App., 61; 82 S. W., 966; *Wallingford vs. Homfe Mut, Fire & Marine Ins. Co.*, 30 Mo., 46; *Ormond vs. Insurance Co.*, 96 N. C., 158; 1 S. E., 796; *Boweri vs. Mutual Life Ins. Co.*, 20 S. D., 103; 104 N. W., 1040.)"

In the case of *Rathbun vs. New York Life Ins. Co.*, supra, the Supreme Court of Idaho said:

"In its answer and on the trial of the case, the main contention of the insurance company were: First, that under the terms of the contract the first premium was to be paid in cash; and, second', the policy was not to take effect unless the insured was in good health at the time it was delivered to him. Said contentions are partly based upon the stipulations above quoted from the application for said insurance.

"The court in its findings of fact, among other things, found as follows:

"The court further finds that Ernest C. Rathbun, the plaintiffs' son, applied in writing for insurance on his life, agreeing therein that the insurance thereby applied for should not take effect unless the first premium was paid and the policy was delivered to and received by him during his lifetime and good health. After applying for the policy and before its delivery, the applicant was taken with appendicitis, from which he died. While he was in the hospital, the soliciting agent at Spokane, in total ignorance of the changed condition of the applicant's health, mailed him the policy. The applicant's friends thereafter paid the first premium, which the company promptly returned when it discovered the facts.

"The evidence is clearly sufficient to sustain this finding of fact.

"Then if the parties understood and agreed that the policy should not become effective unless the first premium was paid and the policy was delivered to and received by the applicant during his lifetime and while he was in good health, and both of those conditions failed, the contract of insurance was never completed, and the policy was of no force and effect. It is a well-recognized rule that life insurance results from contract, and that the true rule is that no other or different rule is to be applied to a contract of insurance than is applied to other contracts. (*Quinlan vs. Providence-Washington Ins. Co.*, 133 N. Y., 356; 28 Am. St. Rep., 645; 31 N. E., 31.) In life insurance contracts, the assent of both parties is required as in any other contract. (*Stephens vs. Capital Ins. Co.*, 87 Iowa, 283; 54 N. W., 136; *Weidenaar vs. N. Y. Life Ins. Co.*, 36 Mont., 592; 122 Am. St., 330; 94 Pac, 1.)

"In the determination of this case, the application and the policy itself must be examined and considered in order to ascertain the true situation of the parties under the negotiations and agreements between them. (*Iowa Life Ins. Co. vs. Lewis*, 187 U. S., 335; 23 Sup. Ct, 126; 47 Law. ed., 204; *Behlmg vs. N. W. Nat. Life Ins.*

Co., 117 Wis., 24; 93 N. W., 800.)

"If we concede in this case that the first premium was paid by the payment of the \$5 and the delivery of the insured's promissory note to the agent of the company for the balance, the plaintiffs would not be entitled to recover, for the reason that the policy was not delivered to and received by the applicant while he was in good health, but when he was fatally ill. He became ill with appendicitis on the 28th of April, 1913, was operated on that day and thereafter died on the 10th day of May, 1913, five days after receiving the policy."

In the case of *Gordon vs. Prudential Insurance Company* (231 Pa., 404), the Supreme Court of Pennsylvania said:

"* * * In the case at bar, the policy was issued and handed to the agent, who delivered it to the insured before payment of the premium, and upon the insured giving a receipt, in which it was stated that the policy was 'received for the purpose of inspection only and upon the understanding that it is not to be in force until the first premium payable thereunder has been paid by me and the official receipt of the company delivered to me during my lifetime and in good health, as provided in my application upon which the above numbered policy was issued.' This, therefore, was a conditional delivery of the policy and the contract could not be consummated except upon performance of that condition, namely, payment of the premium, thereafter, while the insured was alive and in good health, as provided in both the application and receipt for the policy.

* * * * *

"It is therefore undisputed that on the day of the payment of the premium, Mr. Gordon was ill of the disease which caused his death within sixty-four hours after such payment. There was no dispute, nor contradictory testimony as to the condition of Mr. Gordon's health on the day of payment, and, therefore, nothing for the jury to pass upon in this respect.

* * * * *

"In the case at bar, there was no question of the condition of the health of the insured on the day of the payment of the premium, and no conflicting testimony as to the serious nature of his illness on that day, nor as to any other material fact in the cause. No person testified that Mr. Gordon was in 'good health' on Saturday, May 16, the day the premium was paid, but on the contrary, every witness who had knowledge of his condition and who was asked the question, including the plaintiff herself, said that he was not in 'good health' on that day. How, then, can a jury be permitted to find that he was in 'good health' at the time of the payment of the premium in the absence of any evidence to warrant or support such finding?

* * * * *

"In this case it is impossible to find from the evidence that on Saturday, May 16, the day of the payment of the premium, and¹ at the time of such payment, the applicant had no grave, important or serious disease, or that he was free from any ailment that seriously affected the general soundness and healthfulness of his system, or that he suffered a mere-temporary indisposition which did not tend to weaken or undermine his constitution at the time of paying the premium. Nor is it possible to find' that he enjoyed such health and strength as to justify a reasonable belief that he was free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and that to ordinary observation and outward appearance his health was reasonably such that he might, with ordinary safety, be insured and upon ordinary terms which only would satisfy the requirement of 'good health'. But on the contrary, the testimony conclusively shows that on Saturday, May 16, 1908, at the time of the payment of the premium, the condition of Mr. Gordon's health was both a serious and a dangerous one, and such as would preclude the possibility of any life insurance company, with knowledge of his condition, issuing its policy upon his life for anything like the ordinary premium; in other words, his condition at that time was such as to render him a hazardous and dangerous risk, which would not be assumed by any insurance company upon receipt of the ordinary premium for insurance upon the life of an ordinary risk.

"With the question of good faith on the part of the insured at the time of paying the premium, we have nothing to do. The fact is that his physical condition was not disclosed to the company or its agent at the time of the

payment of the premium; and that his condition was not at that time such as, in his application for insurance, he stated it to be. This being true, it is no legal hardship upon the beneficiary in the policy to say that the premium paid under such conditions does not entitle her to recover the amount of the insurance from the defendant company."

In the case of *Powell vs. Prudential Insurance Co. of America* (153 Ala., 611), the Supreme Court of Alabama, in a similar cause, said:

"On June 22, 1904, Claude D. Powell applied¹ to the defendant company for insurance on his life for \$1,000. In his application for insurance, he stated: 'I am in good health, * * * and all the statements and answers to the above questions are complete and true, and that the foregoing, together with this declaration, shall constitute the application, and become a part of the contract for insurance hereby applied for. And it is agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in this application.'

* * * * *

"Here we find that two absolute conditions precedent of the contract of insurance, were set aside or annulled, in what the friends of the deceased attempted to do, in that, the first premium was never paid by the assured nor any one for him, and if, by any possible construction, it could be held that it was paid, it is not pretended that the assured was not fatally sick at the time, of which fact the company was ignorant; and further, it is not denied that the policy was never delivered—if what was done could possibly amount to a delivery—until after the death of the assured. To hold that the policy was good under such circumstances, would¹ be to abrogate and set aside the contract of insurance, and hold the company liable for a payment of the policy against the very terms of its contract."

The same principle controls and applies when, as in the instant case, it is stipulated that the policy shall be of no effect if at the time of its delivery to the insured he is not in good health. The condition is valid and binding when it refers only to the payment of the first premium as well as to the delivery of the policy, or to both.

In the case of *Nyman vs. Manufacturers' & Merchants' Life Ass'n.* (104 N. E., 653), the Supreme Court of Illinois said:

"* * * The proof is direct and positive that on the last-named" date she was not in good health, and that two months and three days later she died from the disease the proof showed she was suffering from on that day. If there had been no proof of the condition of Mrs. Nyman's health on the day the certificate was delivered, then there would be some force in plaintiff's contention that the inference might be indulged that, if she was in good health on April 11th, she so continued until the 19th. But no such inference can be indulged, when the uncontradicted proof shows she was in bad health the day the certificate was delivered, and so continued until her death. Defendant proved its third special plea, and, in our opinion,, plaintiff offered no evidence that legitimately tended to rebut defendant's evidence. The trial court therefore erred in refusing to direct a verdict in favor of defendant under the issue made by the third special plea. (*Libby, McNeill & Libby vs. Cook*, 222 111., 206; 78 N. E., 599.)"

In the case of *American Bankers' Ins. Co. vs. Thomas.* (53 Okla. Rep., 11), the Supreme Court of Oklahoma said:

"That part of the policy which provides that the same shall not take effect until it is delivered by the company while the insured is in good health prescribes a condition precedent to the attachment of the risk under the policy. (1 Cooley's Briefs on the Law of Insurance, p. 451.) Recognizing it to be such, plaintiff properly pleaded a waiver thereof by setting up the facts as stated. (*Western, etc., Ins. Co. vs. Coon*, 38 Okla., 453; 134 Pac, 22; *Anders vs. Life Ins. Clearing Co.*, 62 Neb., 585; 87 N. W., 331.)"

In the case of *Steinsultz vs. Illinois Bankers Life Association* (229 111. App. Rep., 199), the third district of the

Appellate Courts, in a similar cause, said:

"The policy of insurance contains the following clause:

"I agree to accept the Policy issued hereon and that the same shall not take effect until the first payment shall have been made and the Policy issued and actually delivered to me during my continuance in good health.

"The main question in this case, in the opinion of this court, is the question as to whether a valid and legal policy ever was issued and actually delivered to the insured, Myrtle May Steinsultz. It is argued that the clause in question is a condition precedent and requires that the insured shall be in good health at the time of the payment of the first premium and the actual delivery of the policy to her, otherwise that the policy never became operative and for the purposes of this suit is void. It will be noticed that plaintiff in representing his main case made no effort to submit or show anything as to the health of the insured prior to the claimed delivery of the policy. If the clause in question is a condition precedent to recovery, which we shall discuss later, the general issue filed by the defendant denied the existence of a valid policy and raised this question and required proof on the part of the plaintiff to show that the insured was in good health at the time of the claimed delivery of the policy. No such proof was shown and the defendant, appellant, at the close of plaintiff's case, moved the court to instruct the jury, under the pleadings and evidence in the case, to find a verdict for the defendant and a form of verdict was submitted with the motion. This motion the court overruled, to which ruling appellant duly excepted and this issue is therefore squarely raised by the proceedings as to the existence of a legal and binding policy in the case under the terms of said contract.

"In *Ellis vs. State Mut. Life Assur. Co. of Worcester* (206 Ill. App., 226), the appellant insurance company filed a plea of the general issue with notice of special matter of defense, the special matter being that the policy was not to be in effect until actually delivered and the first premium paid during the lifetime of the assured, and while he was in the same condition of health as when his application was signed, and that the policy was not so delivered. There was a trial, verdict and judgment in favor of appellee, being the amount of the policy and interest. To reverse said judgment the appellant prosecuted appeal. In this case the application, signed by Ellis, contained, among other things, the following provision: 'That the contract or policy applied for shall not take effect until the first premium thereon shall have been actually paid and the policy delivered to me during my lifetime and the present condition of health.

"The policy issued thereon contained this provision: 'This policy shall not take effect until actually delivered and the first premium paid thereon during the lifetime of the insured.'

"Said policy contained the further provisions: 'This policy and the application therefor shall constitute the entire contract between the parties hereto.'

"In this case, likewise, the appellant at the close of appellee's evidence and then again at the close of all the evidence, moved the court to direct a verdict in its favor. Appellant objected to the admission of the policy, sued upon, in evidence. In this case on December 14, 1914, the insured was injured and was carried to his home and died between 4.30 and 5 p. m. on that day, and it appears that the policy of insurance had been returned to the office of the agent of the insurance company the evening before but had not been delivered personally to the insured at the time of his death. In this case the contention was made by the holders of the policy that the delivery to the agent was a delivery to the insured.

"The court goes into the question in the *Ellis* case very exhaustively, quoting from a great many cases and quoting from *Devine vs. Federal Life Ins. Co.* (250 Ill., 203), in which the Supreme Court in discussing the question of the delivery of an insurance policy, at page 206, says:

"The application may or may not provide that the insurance shall take effect only upon the delivery of the policy to the insured. Unless expressly made so by the contract itself, an actual delivery of a policy of insurance to the insured is not essential to the validity of the contract, and the rule under such circumstances is

that a policy becomes binding upon the insurer when signed and forwarded to the insurance broker to whom the application for insurance was made, to be delivered to the insured

"And quoting 25 Cyc, 718, 719, it is stated with reference to the delivery of insurance policies that: 'The placing of the completed policy in the hands of the agent for delivery, without condition, to the insured completes the contract, though the actual delivery by the agent to the insured is not made before the death of the insured. But if the delivery to the agent of the company is with the understanding that it is to be delivered by the agent to the insured only after the performance of some condition, then, until the condition is performed and it becomes the duty of the agent to deliver the policy to the insured, the contract is not complete. * * * It is a usual condition of a life insurance policy that the delivery shall not be effectual to create a binding contract unless the insured is alive and in good health when the policy is delivered and the first premium paid, and under such conditions the death of the insured before the delivery of the policy will prevent its becoming effectual.

"It was held in the Ellis case that in view of the foregoing authorities, numerous of which we have not cited here, that the policy sued on was never delivered and that the court erred in not directing a verdict in favor of appellant and reversed the judgment with a finding of fact.

"The language in the policy in question, 'I agree to accept the Policy issued hereon and that the same shall not take effect until the first payment shall have been made and the Policy issued and actually delivered to me during my continuance in good health is a condition precedent to the existence of any binding legal contract of insurance upon the appellant. It means just what it says and it was entered into and signed by the insured. The statement was a warranty that the insured was in good health at the time she signed said application and further was a binding obligation that she should continue in good health and should be in good health at the time the policy was delivered to her, otherwise the policy never should become binding and obligatory. It is condition that goes to the very existence of the policy and its validity, and under the facts in this case it is insisted strenuously that no binding policy was ever issued and' delivered by the appellant."

And in the case of Federal Life Ins. Co. vs. Wright (230 S. W., 795), the Civil Appellate Court of Texas said:

"* * * The application and the policy contain the entire contract between the parties, and it is not only agreed in the application that all of the statements therein 'are full, true, and' complete,' but it is stipulated therein, as above shown, that the policy of insurance applied for shall not take effect until the policy shall have been actually delivered to the insured and the first premium paid during his life and while he was in good health. The purpose and meaning of this provision, standing alone or taken in connection with any or all other provisions of the contract, is clear, without ambiguity, and not open to construction. It unquestionably means that the policy should not take effect as a contract of insurance unless actually delivered to the applicant therefor while he was in good health. This being the meaning of the provision, and the appellee having admitted in her pleadings and in open court at the trial that the applicant or insured was afflicted with tuberculosis of the lungs at the time the policy was delivered' to him, and that such disease caused his death, the policy by its terms never became an obligation of the appellant.

"Applications for policies of life insurance frequently provide, as in the present instance, that the policy shall not take effect unless it is delivered to the insured and the first premium paid while he is in good health, and the great weight of authority is to the effect that such provision is valid, and that if the insured was not in fact in good health on the date the policy was delivered the company is not liable. (Gallant vs. Metropolitan L. Ins. Co., 167 Mass., 79 j 44 N. E., 1073; Murphy vs. Metropolitan Life Ins. Co., 106 Minn., 112; 118 N. W., 355; Logan vs. New York L. Insurance Co., 107 Wash., 253; 181 Pac, 906; Metropolitan L. Insurance Co. vs. Willis, 37 Ind. App., 48; 76 N. E., 560; Gallop vs. Royal Neighbors of America, 167 Mo. App., 85; 150 S. W., 1118; Metropolitan L. Insurance Co. vs. Betz, 44 Tex. Civ. App., 557; 99 S. W., 1140; American Nat. Insurance Co. vs. Anderson, 179 S. W., 66; Security Mut. L. Ins. Co. vs. Calvert, 39 Tex, Civ. App., 382; 87 S. W., 889; Seaback vs. Metropolitan L. Ins. Co., 274 111., 516; 113 N. E., 862; Mutual L. Insurance Co. vs.

Wiley, 133 Md., 665; 106 Atl., 163.) It is also held that it is immaterial that the condition of the insured[^] health has changed since his application was made, or that he was ignorant of his condition. (Carmichael vs. Hancock Mut. Ins. Co., 116 App. Div., 291; 101 N. Y. Supp., 602; Metropolitan L. Ins. Co. vs. Howie, 62 Ohio, 204; 56 N. E., 908; Id., 68 Ohio, 614; 68 N. E., 4; Oliver vs. Mutual L. Ins. Co., 97 Va., 134; 33 3. E., 536; Packard vs. Metropolitan L. Ins. Co., 72 N. H., 1; 54 Atl., 287.)

"This defense, as we now view it, is separate and distinct from the defense that misrepresentations were made in the application for the policy, and our conclusion is that the failure of the appellant to give notice to the insured or beneficiary, within a reasonable time after discovering that the insured had tuberculosis of the lungs, that it would not be bound by the contract of insurance did not render unavailing the provision that unless the policy was delivered while the insured was in good health the contract should not take effect. Under article 4948 of the statute, it was necessary for the appellant, in order to avail itself of the defense based upon misrepresentations made in the application to secure the policy, to show that it gave the insured or beneficiary notice within a reasonable time after discovering the falsity of such representations that it would not be bound by the contract of insurance; but in order to sustain the first-mentioned defense, the same having been asserted within the contestable period, it was necessary only to show that the insured was not in good health when the policy was delivered. We do not agree With the contention to the effect that by pleading and proving that the first premium was paid and received when the application for the policy was made, which was a few days prior to the delivery of the policy, the appellee showed an express waiver of the provision in the application making the assumption of any liability on the part of appellant dependent upon the good health of the insured at the time the policy was delivered.

"The provision, as before stated, is clear and unambiguous and susceptible of but one construction. By its plain and unmistakable terms the insured agrees that all the statements and answers contained in the application are full, true, and complete in every respect, and are offered to the insurance company as a consideration for a contract of insurance, which shall not take effect unless the policy shall have been actually delivered to him while he was in good health. Nor shall it take effect unless the first premium shall have been actually paid during his life and paid while he was in good health. In other words, if the insured was not in good health at the time the policy was delivered to him, or if he was dead or in bad health when the first premium was paid, then, in either event, no obligation on the part of the insurance company was assumed, and, of course, there was no contract of insurance. It was as much a condition precedent to the taking effect of the contract that the first premium be paid during the life of the insured and while he was in good health as that the policy be delivered while he was in good health, and the fact that the premium was paid when the application was made, and a few days in advance of the delivery of the policy, can furnish no basis for the holding that thereby the other condition was abrogated or waived. We can see no good reason for saying that the provision relative to good health at the time of the payment of the first premium of the policy was inserted to cover cases 'when the first premium was collected at a time subsequent to the issuance of the policy, either at or prior to the delivery thereof.' The provision under consideration is not one which the insurance company may avail itself of to avoid an executed contract, or one which in the ordinary sense constitutes a warranty of the good health of the insured, but its effect was to prevent the taking effect of the contemplated contract, unless there was a compliance with the conditions precedent named therein. Differently stated, with such a provision in the application for the policy the contract is not a completed one, is not absolute but conditional, and in this case it is the fact of sound' health, etc., in the insured on the date of the delivery of the policy that determines the liability of the appellant.

"In her motion for a rehearing the appellee asserts that our holding on the appellant's motion for rehearing, to the effect that since the application for the policy sued on, which was a part of the contract of insurance, stipulated that the policy should not take effect until the same was actually delivered to the insured and the first premium paid during his life and while he was in good health, and since it was admitted by the appellee and conclusively shown that the insured had tuberculosis of the lungs at the time the policy was delivered to him and the first premium paid, the policy by its terms never became an obligation of the appellant, is different

from or in conflict with the decision in the cases of 'American National Life Insurance Co. vs. Rowell (175 S. W., 170); American National Insurance Co. vs. Burnside (175 S. W., 169); American National Life Insurance Co. vs. Fawcett (162 S. W., 10); National Fire Ins. Co. vs. Carter (199 S. W., 507); and Mecca Fire Insurance Co. vs. Strieker (136 S. W., 599).

"The first three of the cases mentioned were decided by this court, the fourth by the Court of Civil Appeals for the First District, and the fifth by the Court of Civil Appeals for the Third District. Our conclusion is that neither of these cases is in conflict with the decision in the first case referred to and the present case, but it seems manifest, from a careful examination and analysis of the opinion in that case, that the court did not have in mind the precise question here involved, and did not there expressly pass on it. There it was urged that the trial court erred in overruling the insurance company's demurrers to Rowell's petition, because it was not alleged that the insured was in sound health at the time the policy sued on was issued, and this court held that there was no error in overruling the demurrers, since, if the insured was not, in fact, in sound health at that time, such fact was a matter of defense to be pleaded by the company. It was further there held that while the defendant averred that the insured was not in sound health when the policy was issued, such defense was not sufficiently pleaded to justify the admission of testimony to establish it. The opinion also indicates that the insurance company in its pleadings and assignments of error treated the provision in the policy, that no obligation was assumed by it unless on the date of issuance the insured was in good health, as a representation or warranty, and that this court, discussing the matter as presented, after stating in substance the provisions of article 4948 of the statute said that the failure to give the notice prescribed in that statute absolutely barred the insurance company from defending an action on the policy because of alleged misrepresentations. We also declared that said statute applied to covenants of warranty as well as to statements in the application not made warranties by the contract, citing Mecca Fire Ins. Co. vs. Strieker, supra."

Moreover, the stipulation that the insurance contract shall produce no effect unless the payment of the first premium and the delivery of the policy be made when the insured is in good health, is not in conflict with any provision of the Insurance Law now in force, nor with any other law of a general character; neither is said stipulation contrary to morals or public order, and therefore the same is valid and binding upon the parties. (Articles 1255, 1257 and 1258, Civil Code.)

The majority opinion states that the delivery of the policy by the agent after he has made use of the discretion conferred upon him by the defendant to deliver or to withhold said policy, is binding upon the defendant and the latter cannot evade the consequences thereof. This same legal question has been raised before various appellate courts of several states of the Union, which made a distinction between agents whose only power consisted in soliciting insurance and in delivering policies and those who, in addition to such power, were authorized to issue policies and accept risks on behalf of insurance companies. In the first case the doctrine is uniform that the acts of agents with limited powers are not binding upon the insurance companies, whereas in the second case the acts of the agents bind and prejudice the insurance companies represented by them. This legal question has been extensively considered and squarely decided in the case of American Bankers' Ins. Co. vs. Thomas, supra, as follows:

"Favoring liability, she contends that the knowledge of Martin of the ill health of the insured at the time the policies were delivered was the knowledge of the company and a waiver of the condition. Not so. Assuming that Martin was the agent of the company at that time, with authority to deliver the policies, it failing to appear that he had anything to do with the execution thereof or the acceptance of the risk, his knowledge was not that of the company. In Merchants' & Planters' Ins. Co. vs. Marsh (34 Okla., 453; 125 Pac., 1100), we held that the knowledge of the agent was the knowledge of the company only where the authority of such agent, derived from the company, was to solicit applications and execute and deliver contracts of insurance as an alter ego of the company, and that it was only in such case that he had power to waive the conditions of the policy.

In that case the agent was, as here, a local or soliciting agent, and there the policy sued on was, as here, a 'home office policy', or one issued direct by the president and secretary of the company as distinguished from one issued by the local agent. There, in the syllabus, we said:

" 'A local agent of an insurance company, whose only power is to solicit applications for insurance, and forward them to the company for approval, when, if approved, the company issues the policy and causes it to be delivered to the insured, has no power to waive any of the provisions of the policy so delivered' * * *

"Also in keeping with this rule is *Des Moines Ins. Co. vs. Moon* (33 Okla., 437; 126 Pac, 753). There we said:

" '* * * Where the local agent has the power to accept a risk and deliver a policy of insurance, and is advised and has full knowledge, at the time of the delivery of the policy, that certain conditions of the policy, which may be waived, are violated, such policy is binding upon the company, notwithstanding the fact that it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing, indorsed upon the policy. This case (referring to *Western National Ins. Co. vs. Marsh*, 34 Okla., 414; 125 Pac, 1094), unanimously concurred in by the members of the courts, settles the rule in this jurisdiction as to contracts of insurance written after the admission of the state: * * *'

"Of course, if the local agent had not power, as here, to accept the risk, he had no power to waive the condition precedent in the policy. Cases relied on by plaintiff which hold the contrary practically under the same state of facts fail to draw this distinction, and seem to hold that the knowledge of a mere soliciting agent of the company of the ill health of the insured at the time of the delivery of the policy is the knowledge of the company, and hence a delivery with such knowledge constitutes a waiver of the condition under consideration. They are *Roe vs. National Life, etc. Co.* (137 Iowa, 696; 115 N. W., 500; 17 L. R. A. [N. S.], 1144); *Connecticut, etc. Ins. Co. vs. Grogan* ([Ky.] 52 S. W., 959); *N. W. life Ins. Co. vs. Findley* (29 Tex. Civ. App., 494; 68 S. W., 695); *National Life Ins. Co. vs. Twiddel* ([Ky.], 58 S. W., 699) ; *Home Forum Ben. Order vs. Varnado* ([Tex. Civ. App.], 55 S. W., 364), and others. But the distinction is referred to in *Bell vs. Ins. Co.* (166 Mo. App., 390; 149 S. W., 33). In that case the insured, who was plaintiff's brother, died at Nogales, Ariz., as a result of injuries received while working as a telegraph lineman. On July 17, 1909, he made application to defendant for a policy of life insurance, payable in event of his death to plaintiff. He made it to defendants soliciting agents at that place, and paid the first annual premium cash in hand. The application was forwarded to defendant by mail, and duly received in St. Louis, Mo., on July 23, 1909. The policy was conditioned the same as here. On July 27, the application was duly accepted, and the policy issued and was mailed August 4, 1909, to the soliciting agents for delivery to the insured. Upon its arrival on August 8, 1909, pursuant to instructions, the policy was deposited for him in the safe of the soliciting agents, along with other private papers of the insured kept there by him. Two days before that time the insured received a fatal injury, from which he died on the night of August 10th. On August 6th, one of the soliciting agents visited the insured and knew of his injury. The court said:

""There can be no doubt that it is competent for the parties to stipulate in the application for insurance, as here, that the policy shall not be effective or binding until delivered to, and accepted by, the insured while in good health and the payment of the first premium is made. It is said that a contract of life insurance is not complete until the last act necessary to be done by the insured, under the conditions of the contract, after acceptance of the application by the company, has been done by him, and the courts, therefore, in proper cases, sustain such agreements which operate to postpone the taking effect of the policy until the delivery and premium payment while the insured is in good health. (See 1 Bacon, *Life Ins.* [3d ed.], sec. 272; *Kilcullen vs. Met. Life Ins. Co.*, 108 Mo. App., 61; 82 S. W., 966; *Misselhorn vs. Mutual Reserve, etc., Life Ins. Co.*, 30 Mo. App., 589; *McGregor vs. Met. Life Ins. Co.* [143 Ky., 488], 136 S. W., 889.) But though such be true, the provision for thus suspending the policy, as an effective contract, until the first premium is paid and its delivery, while the insured is in good health, is for the benefit of the insurer, and obviously may be waived by it or by its agent possessing authority with respect to that matter. (See *Rhodus vs. Kansas City, etc., Ins. Co.*, 156 Mo. App., 281; 137 S. W., 907.) * * * But it is insisted that a mere soliciting agent, such as Cummings, is without

authority to waive the condition in the policy here relied upon, and, for the purpose of the case, the proposition may be conceded as true.

"Whereupon the court proceeded to consider whether the company, under the facts in that case, had waived the condition in the policy relied upon. We are therefore of opinion that Martin was without authority to waive the condition relied on, and that plaintiff cannot recover unless defendant is estopped to deny that liability attached by reason of receiving and retaining the premiums as alleged in the petition. Joining issue on these allegations, defendant by answer in effect admitted accepting the premiums as stated, but pleaded in avoidance that it tendered them back to a representative of the assured and demanded a return of the policies, which was refused, and for that reason, it is urged, defendant is not estopped to assert that no liability attached under the policies."

It is clear, therefore, that the delivery of the policy by Mendoza does not bind the defendant, nor is the defendant estopped from alleging its defense, for the simple reason that Mendoza was not an agent with authority to issue policies or to accept risks in the name of his principal.

There is another ground upon which the majority opinion is based, namely, that the defendant waived the defense it now invokes, by reason of the delivery of the policy by its agent. It is admitted that if the delivery of the policy was due to fraud, legally there could have been no waiver. In view of the facts established and admitted, there is no doubt as to the existence of the fraud. A restatement of the facts will show such existence. It will be remembered that before the delivery of the policy Mendoza asked Estrada whether the insured continued enjoying good health, to which she answered that she thought he was in good health because she had had no information that he was sick. It will likewise be noted that the information, far from being correct or truthful, was incorrect and misleading because, in reality, on that occasion the insured was seriously ill from nephritis and! uremia, almost in a moribund state. Estrada, as a representative of the insured was not only bound to give a truthful information on the state of health of the insured, but it was her duty to find out his true state of health in order to give a true and correct information. When she gave Mendoza an incorrect information tending to create the impression that the insured was well when in fact he was seriously ill, there is no doubt that she committed fraud and imparted a deceitful information to the defendant's agent. It matters not that the fraud was involuntary and not chargeable to Estrada; the truth is that it existed and that by reason of such fraud the policy was delivered, and both the agent and the defendant were misled into believing that the insured was enjoying good health. In the case of *Cable vs. United States Life Ins. Co.* (Ill Fed. Rep., 19), the seventh circuit of the United States Circuit Courts of Appeals, in deciding the same question of waiver, said:

"It is, however, urged that sufficient information was disclosed by Lord to McCabe to put the company upon inquiry, and that, with such notice, McCabe delivered the policy and received the premium; that McCabe was the agent of the company, and notice to him was notice to the company, and the delivery of the policy constituted a waiver of the condition and warranty. Upon the assumption that McCabe was such agent of the company, and that his action must be treated as the action of the company, questions which we do not determine,—it becomes us to inquire of the sufficiency of the notice given, and whether the act of delivery of the policy involved a waiver of the warranty.

"* * * The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the assured being in extremis, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the company the same effect as though no concealment were made, would tend to sanction fraud on the part of the policy holder, instead of protecting him against the commission of one by the company. (*Insurance Co. vs. Wolff*, 95 U. S., 326, 333; 24 Law. ed., 387, 390.)

"It cannot here be doubted that if the insurance company, or McCabe as its agent, had been, informed of the

fact, within the personal knowledge of Lord, that Cable was seriously ill with acute pneumonia, the policy would not have been delivered. It is difficult for us to believe that Lord, with that knowledge, could think he had a right to accept this policy; but, whether so or not, the concealment of the fact was a fraud upon the company. The statement made was deceptive and misleading, whatever were the intentions of Lord, and a court of equity ought not to permit the completion of the wrong. Courts of equity cannot sustain an insurance upon the life of a dying man, when the nature of his malady and the seriousness of his illness are concealed from the insurer."

The same doctrine has been applied when there is an attempt to show that the waiver or estoppel arises from the payment of the premium. In the case of *Nyman vs. Manufacturers' & Merchants' Life Assn.*, supra, the court said:

"It is further insisted by plaintiff that defendant, by accepting and retaining premiums or assessments from the insured, is estopped from denying the validity of the certificate. The first premium was paid on the day the policy was delivered, and the last one two days before the insured's death. There is no proof whatever that defendant or its agent knew, before the death of Mrs. Nyman, that, at the time the policy was delivered and the first premium paid, she was not in good health. Receiving premiums subsequently, with knowledge that she was then ill, could have no significance, if defendant was ignorant of the fact that the insured was in bad health when the policy was delivered and the first premium paid. If Mrs. Nyman had been in good health when she received the policy and paid the first premium, defendant would not have been justified in refusing to accept premiums if she afterwards became ill. The knowledge that would estop defendant from denying liability in this case must be knowledge that the insured was not in good health when the policy was delivered."

The case presents another aspect, namely, the waiver made by the plaintiff of any and all benefits accruing from the policy, which waiver expressly appears in document Exhibit A, known as "Accord, Satisfaction and Release".

The pertinent clauses of the document read as follows:

"Whereas, the Insular Life Assce. Co., Ltd., claims that the delivery of the said policy No. 47710 was not valid because said delivery was made while the said Arturo Sindayen was not in good health;

"Whereas, the undersigned, Fortunata Lucero Sindayen, widow of the said Arturo Sindayen, is named as beneficiary in the said policy of life insurance; and

"Whereas, it is the desire of the Insular Life Assce. Co., Ltd., and of the beneficiary, Fortunata Lucero Sindayen that all differences, controversies and disputes that may grow out of the issuance of the said policy of life insurance and out of the claims that the said beneficiary may make under the said policy of life insurance be settled and compromised; and

"Whereas, the said Insular Life Assce. Co., Ltd. has at the date hereof paid Fortunata Lucero Sindayen, the beneficiary named in said policy of life insurance, the sum of Forty Pesos and Six Centavos (P40.06), lawful money of the Philippine Islands, the receipt whereof is hereby acknowledged;

"Now, therefore, in consideration of the promises and of the sum of Forty Pesos and Six Centavos (P40.06), said Fortunata Lucero Sindayen, for herself, her heirs, executors, administrators and assigns, release and forever discharge said Insular Life Assurance Co., Ltd., its successors, and assigns, of all claims, obligation or indebtedness which she, as such beneficiary ever had or now has, hereafter can, shall, or may have, for, upon, or by reason of said policy of life insurance numbered 47710 upon the life of said Arturo Sindayen, the latter now deceased, or arising therefrom or connected therewith in any manner."

There is no dispute that the aforesaid document was signed by the plaintiff. There was irregularity in its execution because it was authenticated by the notary public in the absence of the plaintiff. It is admitted that due to this irregularity the document is not a public instrument, but there is no doubt that it is an authentic private instrument whose evidentiary value cannot be disregarded. Its terms are binding upon the plaintiff, who understood the same

notwithstanding her denial.

However, it is said that the defendant likewise waived the defense which has hereinbefore been extensively considered, because it failed to return the first premium collected, and this alleged failure is predicated upon the statement contained in the penultimate paragraph of the instrument stating that the check for P40.06 was returned to the plaintiff in consideration of her waiver of any claim whatsoever. A careful reading of the instrument will convince the mind that what was really meant is that the delivery of the check was another consideration of the plaintiff's waiver, it being self-evident that said check constituted, in effect, a refund of the first premium paid by the insured and received by the insurer. It is ridiculous to think that such a negligible amount has been the only consideration of the plaintiff's waiver of any right or benefit accruing to her from the policy. A careful perusal of the instrument will show that the real consideration of the plaintiff's waiver was the unenforceability of the policy due to her husband's illness and the mutual desire of the plaintiff and the insurer to settle amicably the case instead of resorting to courts.

In conclusion it is my opinion: (1) That the policy has not produced any effect from which the plaintiff may derive any right, and (2) that she has expressly waived any and all rights accruing from the policy; and for these reasons I dissent from the majority opinion.

Judgment reversed and case remmdded with directions.

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