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concurring judge advocates, is to ignore the overwhelming number of cases in which the general rule can be justly applied. It is certainly better to have a general rule and an exception that can be applied in an extraordinary case, with the burden upon the wife to prove that the general rule is inequitable, than to have a rule by which it is necessary for the husband each time to come in and prove his former wife's remarriage supplies sufficient reason for an abolishment of the duty to pay alimony.

INSURANCE–DELIVERY TO INSURER'S AGENT HELD SUFFICIENT WHERE POLICY REQUIRES ACCEPTANCE BY INSURED

Plaintiff made an application for insurance on February 20, 1948, through defendant's agent. After plaintiff paid the first year's premium, his application and a favorable report on his physical condition were sent to defendant. On March 16, 1948, a policy was issued and mailed to defendant's agent, at which time the plaintiff was alive and in good health. On March 17, 1948, the day the agent says the policy was delivered to him, plaintiff was found dead as a result of asphyxiation. The application provided that before the policy was to take effect, it should be "delivered to and accepted by" applicant. The Superior Court entered judgment for plaintiff and defendant appealed. The Supreme Court of Oklahoma, three justices dissenting, with a fourth dissenting in part, held that since there was an unconditional delivery to the agent, manual delivery or further acceptance was unnecessary. *Mid-Continent Life Ins. Co. v. Dees*, 269 P. 2d 322 (Okla., 1954).

The problem in the instant case revolves around the question of whether delivery to the agent of the insurer constitutes delivery to the insured. Before attempting to analyze the problem, it is important to determine how the courts define delivery. In the case of *Harris v. Regester*[1] the court defined delivery as a transfer of possession or control of the policy to the insured. This interpretation has been clarified to mean that the intention of the parties as to when delivery is to take effect controls, and not the manual possession of the policy.[2] The court in *New York Life Ins. Co. v. Smith*[3] held:

> Where there is an intention on the part of the insurer to part with the control of the policy, and to place it in the control of the insured or some person acting for him, that is sufficient to constitute delivery.[4]

[1] 70 Md. 109, 16 Atl. 386 (1889).

[2] New York Life Ins. Co. v. Smith, 129 Miss. 544, 91 So. 456 (1922).

[3] Ibid.

[4] Ibid., at 546 and 458.

Upon concluding that the intention of the parties is the controlling factor, it is apparent that the crux of the matter lies in the construction of the delivery provisions in the insurance contract. The courts must determine whether the parties intended to have a manual delivery before the policy became operative, or whether mere constructive delivery was contemplated. Be that as it may, the overwhelming weight of authority holds, regardless of what the contract provides (excepting an express provision requiring manual delivery), that where nothing remains to be done by the applicant, an "unconditional" delivery by the insurer to his agent is sufficient delivery; it evidences an intention of the insurer to put the policy out of its control and into the control of the insured.[5] Although this general rule is useful as a guide, it does not solve the problem of how to determine when an unconditional delivery exists; it merely supplies the answer once there has been such a determination. The courts are still faced with the problem of deciding whether the words "delivery," "actual delivery," or "delivery to and received by," constitute conditions precedent to the policy's taking effect. It is upon the construction of such words that the decisions of the courts differ.

In the cases to be discussed, all conditions precedent, such as the payment of the first premium, have been disposed of. The only question involved is resolving the parties' intention as to when delivery is to take effect under the provisions of the insurance contract.

The weight of authority favors the view that delivery provisions do not establish conditions precedent. In the case of *New York Life Ins. Co. v. Baker*,[6] the provision in the application required that the policy be "delivered to and received by" the applicant before the policy takes effect. Two days prior to insured's death, the insurer approved and mailed the policy to its agent. The court, in allowing recovery, held that the case fell within authorities holding that delivery is satisfied when the insurer executes and mails the policy to its agent notwithstanding the provision requiring "delivery to and receipt by" the applicant of the policy before it became effective. The decision was based on the fact that there was no condition left to be performed by the applicant. The provision in the policy under consideration in the case of *Mutual Life Ins. Co. v. Otto*[7] required that there be an "actual delivery" before insurer be bound. The policy was mailed to the insurer's agent for unconditional delivery, but before manual transmission could be made, applicant was accidently killed. The court held that there had been an "actual delivery" within the provision in the contract since the agent,

[5] New York Life Ins. Co. v. Rutherford, 284 Fed. 707 (C.A. 9th, 1922).

[6] 33 F. 2d 434 (C.A. 7th, 1929). [7] 153 Md. 179, 138 Atl. 16 (1927).

having completed his duty for the insurer, was acting on behalf of the applicant. In the case of *Glover v. New York Life Ins. Co.*,[8] the policy required a "delivery" during the lifetime and good health of the applicant. The insurer accepted and mailed the policy to its agent for unconditional delivery to applicant. While the policy was at the post office of the agent, applicant took sick and died. The court held that there was a delivery even though the policy was never "received" by the insured during his lifetime and good health since manual delivery was not intended.

In the majority of cases which hold that delivery has not been complied with by mere transfer of the policy to the agent of the insurer, it appears that some condition precedent, other than that of delivery of the policy, existed which was not satisfied. However, there are a number of cases which hold that "delivery" or "actual delivery" are conditions precedent which cannot be complied with by mere constructive delivery.[9]

The policy, in the case of *Ellis v. State Mutual Life Assurance Co.*,[10] required that it be "actually delivered" to applicant during his lifetime and good health. The court held that a policy, which was received by the local agent on the evening before, or the morning of the day of the applicant's death from an accident, was not delivered to the applicant where the agent was instructed not to deliver the policy until he had ascertained whether the applicant was alive and in good health. The requirement of "actual delivery" was held to be a condition precedent to any liability on the part of the insurer. Here then is a case where the court held that delivery was not complied with, not merely because of the "delivery" provision in the policy, but because something remained to be done by insurer's agent.

In *Carpenter v. St. Joseph Life Ins. Co.*[11] the applicant was accidentally killed a few hours after the insurer's agent received the policy. Relying on a provision in the contract requiring a "delivery" the court held that delivery to the agent was not delivery of the policy, and therefore no completed contract existed. This case is a perfect example of those holding that "delivery" of itself is a condition precedent requiring a manual delivery as fulfillment of the contract.

The contention has often been made that the insurer's agent has no capacity to receive delivery for the insured. Courts have found several ways of dismissing this contention as is pointed out in the *Otto* case, where the court said that delivery to the agent is delivery to the insured

[8] 27 Ga. App. 615, 109 S.E. 546 (1921).

[9] Young v. Intersouthern Life Ins. Co., 74 Ind. App. 329, 128 N.E. 940 (1920); De Hann v. Marvin, 331 Mich. 231, 49 N.W. 2d 148 (1951); Farris v. Allstate Inc., 265 S.W. 2d 178 (Tex. Civ. App., 1954).

[10] 206 Ill. App. 226 (1917).

[11] 212 Mo. App. 336, 246 S.W. 623 (1923).

. . . because in such a case the agent is but a minister or vehicle to transmit the written evidence of the contract just as the mails or any other public messenger would be. Whether he be called a trustee, a custodian, or an agent, and in a sense he is all three, is immaterial. . . .[12]

In the instant case, the fact that distinguishes it from the great multitude of similar cases is the additional requirement that the policy be "accepted" by the applicant before the contract takes effect. The exact provision in the application states:

. . . That the Company shall not incur any liability upon this application until the policy has been issued by the Company and the first premium has actually been paid to and accepted by the Company or its authorized agent and the policy has been delivered to and accepted by me during my lifetime and good health.

The majority of the court dealt lightly with this question and passed over it quickly by merely stating that the mailing of the policy to the agent unconditionally while insured was in good health and alive, constituted delivery in law, manual delivery, or further acceptance being unnecessary. The majority reiterated the general rule and stated that though it was the court's first occasion to apply it, the rule has been applied many times in other jurisdictions.[13] The only case reviewed by the majority was *Republic National Life Ins. Co. v. Merkley*.[14] In that case there was an application for insurance on June 21. The premium was paid on July 1, and the policy approved and mailed on July 3. On July 4, the applicant died. The provision in the policy required that the policy be "delivered to and received by" the insured. The court held that a policy is "constructively delivered" when it is mailed to an agent unconditionally and for the sole purpose of delivering it to insured, even though the agent does not actually deliver the policy to the insured, and notwithstanding a stipulation that insurance should not take effect unless the policy was "delivered to and received by" insured during his lifetime. The majority concluded with the statement that it would be a waste of time to further discuss the authorities so holding.

The dissent, however, was not as anxious to dispose of the question. It is their opinion that something remained to be done before the policy became effective, that something being acceptance by the assured. Their reason for so concluding is based on a literal interpretation of the contract. To justify this conclusion, the dissent quoted a statement from

[12] 153 Md. 179, 181, 138 Atl. 16, 18 (1927).

[13] Republic Natl. Life Ins. Co. v. Merkley, 59 Ariz. 125, 124 P. 2d 313 (1942); Acacia Mut. Life Ass'n. v. Berry, 54 Ariz. 208, 94 P. 2d 770 (1939); Unterharnscheidt v. Missouri State Life Ins. Co., 160 Iowa 223, 138 N.W. 459 (1912).

[14] 59 Ariz. 125, 124 P. 2d 313 (1942).

Corpus Juris Secundum[15] to the effect that provisions in the policy requiring delivery are reasonable, binding and enforceable. It is further illustrated that such provisions are for the benefit of the insurer,[16] and since the insurer has the right to say when its liability will commence, their risk should not be enlarged contrary to such provision.

There are two cases relied on by the dissent in support of its conclusion. In the case of *Klein v. Farmers' and Bankers' Life Ins. Co.*,[17] the application provided that no liability should attach to the company until the policy was "delivered to and received by" the applicant while in good health. The agent refused to deliver the policy when he learned that applicant was suffering from a disease which evidently was contracted subsequent to the medical examination. The court refused recovery on the grounds that the provision requiring delivery was never complied with. The other case relied on by the dissent was *Pruitt v. Great Southern Life Ins. Co.*[18] In that case the agent had received the executed policy on the day before the applicant died. The application provided that the contract should not take effect until the printed policy had been "actually delivered to and accepted by" the applicant while in good health. In denying recovery, the court held:

> It seems obvious to us that it was the intention of the parties to reserve unto themselves the right to repudiate the contract up until the moment of its consummation. The insured could repudiate the contract even after the policy was physically placed in his hands by merely refusing to accept it. The insurer could repudiate the contract at any time up until it was delivered to the insured, and even then if he was found to be in ill health at any time since he made his application for insurance.[19]

The concluding remark in the dissent was to the effect that to allow recovery would necessitate a disregard of plain words and the making of a new and different contract for the parties.

This case illustrates just how far the courts are willing to go to "balance the equities." Although the majority of courts are apparently of the opinion that delivery provisions in insurance contracts border on being against public policy because of the unfair advantage assumed by the insurance companies, this consideration has not been strong enough to induce the courts to make a direct frontal attack.

[15] 44 C.J.S., Insurance § 265 (1945).

[16] Mid-Continent Life Ins. Co. v. Trumbly, 170 Okla. 639, 41 P. 2d 913 (1935); Mid-Continent Life Ins. Co. v. House, 156 Okla. 285, 10 P. 2d 718 (1932).

[17] 132 Kan. 748, 297 Pac. 730 (1931).

[18] 202 La. 527, 12 So. 2d 261 (1942).

[19] Ibid., at 529 and 263.

By refusing to declare such provisions void as against public policy, courts have left it within their power to decide each case on the equities involved. If the equities favor the insurance company, a literal interpretation of the provision will be deduced, thereby requiring manual delivery. Otherwise, the provision will be interpreted liberally and constructive delivery will suffice.

NEGLIGENCE–UNQUALIFIED DUTY REASONABLY TO INSPECT BEFORE SALE IMPOSED ON USED CAR DEALERS

The defendant, a seller of used cars, sold an automobile with defective brakes. The auto went out of control because of this defect, while being driven by the buyer. Plaintiff, a third party, sustained injuries from the accident, for which he brings this action against the vendor. Verdict was rendered for the seller; plaintiff moved for a new trial which was granted; on retrial, a judgment was rendered for the plaintiff, and seller appealed. The Supreme Court upheld the verdict of the trial court. In affirming the lower court, the Court of Appeals of Kentucky, with three justices dissenting, held that a dealer in used automobiles must exercise reasonable care in inspecting an automobile before sale; also, the tort liability of a dealer in used automobiles is based on foreseeability of injury to others, arising from his actions or failure to act, and does not depend on the dealer's representations, or knowledge of the defective condition. *Gaidry Motors, Inc. v. Brannon,* 268 S.W. 2d 627 (Ky., 1954).

The liability of a supplier of chattels to a third person not in privity of contract for damages resulting from defects in the chattel has been a field of much adjudication. Initially, it was held that the breach of a contract gave no cause of action for damages to a party not in privity.[1] This rule was extended to actions in tort, and the general rule developed, that the original seller is not liable for damages caused by defects to anyone except to his immediate buyer.[2] Although some exceptions to the rule developed, it was the general rule until 1916 when Judge Cardozo laid down the modern rule in the leading case of *McPherson v. Buick Motor Company.*[3] This decision placed the duty upon a manufacturer to exercise reasonable care in the manufacture of chattels which, if negligently made, became dangerous instrumentalities. The majority of the courts have adopted this rule to impose a duty of reasonable care

[1] Winterbottom v. Wright, 10 M. & W. 109, 11 L. J. Ex. 415 (1842).

[2] Prosser, Torts § 83 (1941).

[3] 217 N.Y. 382, 111 N.E. 1050 (1916).