Head & Amory *v.* The Providence Insurance Co.

Marine insurance.—Powers of corporations.

If the insured make a proposition to the underwriters, to cancel the policy, which proposition is rejected; and the underwriters afterwards assent to the proposition, but before information of such assent reaches the insured, they have notice of the loss of the vessel insured, such proposition and assent do not in law amount to an agreement to cancel the policy.

A corporate body can act only in the manner prescribed by the act of incorporation which gives it existence. It is the mere creature of law, and derives all its powers from the act of incorporation.[1]

This was an action on the case brought by the plaintiffs in error, upon two policies of insurance, in the Circuit Court of the first circuit, holden at Providence, in the district of Rhode Island,(*a*) in which action, judgment was rendered, at April term 1802, for the plaintiffs in error, upon one of the policies only, viz., that upon the vessel.

*The declaration consisted of four counts. 1. A special count upon a policy dated September 12th, 1779, by which the defendants in error [*128 insured the plaintiffs "ten thousand dollars on merchandise, on board the Spanish brig Neuva Empressa, at and from Malaga to Vera Cruz, and at and from thence to her port of discharge in Spain; the property being shipped in the name of the Spaniards, and the assured not appearing as owners in any of the papers," "beginning the adventure upon the said merchandise, at Malaga as aforesaid, and to continue during the voyage aforesaid, and until said vessel shall be arrived and moored at anchor twenty-four hours in safety." 2. A special count on another policy dated April 5th, 1800, on the vessel, at and from Cuba, to her port of discharge in Spain, by which the defendants insured the plaintiffs the sum of six thousand dollars. 3. A count for money had and received. 4. A count for money paid, laid out and expended.

The defendants pleaded the general issue, and the defence set up at the trial was, that the first policy (viz., on the merchandise) was discharged by a subsequent agreement between the plaintiffs and defendants.

The jury returned the following verdict: "We find, on the first count of the plaintiffs' declaration, that the defendants did not promise in manner and form as set forth in the declaration. On the second count, we find the defendants did promise in manner and form as set forth in the declaration, and assess damages for the plaintiffs in the sum of $1542.05, being the sum due on said policy, after deducting the amount of the premium notes due on both said policies, with costs."

A bill of exceptions was taken by the plaintiffs, at the trial, which stated that they gave in evidence a copy of the act of incorporation of the said company, and the *two policies of insurance, which were admitted by [*129 the defendants' counsel to have been duly executed in behalf of the company. That the defendants' counsel "further agreed and confessed before the said court and jury, that the plaintiffs had interest in the said vessel,

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(*a*) Under the act of congress of February 13th, 1801, by which sixteen circuit judges were appointed.

[1] United States Bank *v.* Dandridge, 12 Wheat. 64; Bank of Augusta *v.* Earle, 13 Pet. 519; Runyan *v.* Carter, 14 Id. 122; Paine *v.* Chesapeake and Delaware Canal Co., 9 How. 172; Pearce *v.* Railroad Co., 21 Id. 444.

called the Nueva Empressa, and the cargo on board the same, to the full amount of the sums assured as aforesaid in said policies; and that the same were captured in and upon the prosecution of the voyage mentioned in said policy, on the first day of August 1800; and afterwards, on the 30th day of said month of August, were condemned by the court of vice-admiralty at St. John's, Newfoundland, as prize of war to the officers and crew of the British ship of war, called the Pluto, who captured the same as aforesaid, whereby the property insured as aforesaid was utterly lost to the plaintiffs. Whereupon, the said defendants, by their counsel, did contend and insist before the said court and jury, that the force, effect and obligation of said policy on said cargo, was settled and discharged by a subsequent agreement, which they alleged to have been made between the plaintiffs and the said Providence Insurance Company, and thereupon, read and give in evidence to the jury, on the trial aforesaid, a certain letter from the said Head & Amory to Nicholas Brown and Thomas P. Ives, merchants, doing business under the firm of Brown & Ives, bearing date the 21st of August 1800, which letter was admitted by the plaintiffs," and is as follows:

Boston, August 21, 1800.

Messrs. Brown & Ives,

Gentlemen.—We have your favor under the 18th inst. The brig Neuva Empressa is still detained at the Havana; having expected a convoy, and the place being closely watched by British cruisers, the master has thought it prudent for all concerned, not to proceed to sea; we have no direct advices from him, but we learn by an American master from thence, that the vessel *130] is very much eaten by the worms, and was so leaky, that *great repairs must be made, and perhaps, it will be necessary to reship the effects in some other Spanish bottom. We are about making the attempt to have the voyage terminated at the Havana, which can only be done by the consent of the officers of the Spanish government there, and that gained by a considerable *douceur*, but before we make this attempt, we wish to know at what rate we can settle with the underwriters on the merchandise, and if we can make it for our interest, and permission as aforesaid can be obtained, we would terminate the adventure at the Havana. Some of the concerned have made an agreement with their underwriters in this town, to return twenty-five per cent. and finish the risk, on the above conditions, the hazard of her getting safe to Spain, free from capture, being very great; we wish a conditional permission from our underwriters to end the voyage, if we can effect it, and the rate of premium they will, in such case, return. We are, &c.

Head & Amory.

The bill of exceptions then stated that the defendants' counsel further offered and gave in evidence to the jury the following papers:

1. A letter from Brown & Ives to the plaintiffs, dated August 26th, 1800, in which they say, "Your letter to us on the subject of that vessel (The Nueva Empressa) was laid before the Insurance Company, and the secretary says, 'If Messrs. Head & Amory are disposed to make a settlement and cancel the policies, the directors will agree to return 25 per cent., but they are not disposed to make any conditional agreement.'"

2. A letter from the plaintiffs to Brown & Ives, dated Boston, August 28th, 1800, as follows: "We have your favor under the 26th instant. We

note the answer of The Providence Insurance Company to our proposal; we are sorry they will not accede to our proposition for making the agreement conditional. On reflection, we conclude to accept their offer and cancel our policy, they giving up our note, on our paying one-half the *amount of the same, and the risk to cease at the Havana." [*131

3. A letter from Brown & Ives to the plaintiffs, dated Providence, September 2d, 1800, which says, "Your letter to us, saying that you would settle the policy on the Spanish brig, on a return of 25 per cent., was shown to the company, and we have received the following note:

'Providence Insurance Office, Sept. 1, 1800.

'Gentlemen.—The Providence Insurance Company will agree to settle both of the policies upon the Spanish brig Nueva Empressa, &c., at the Havana, and to return 25 per cent. upon the first, and 31, 83⅓ per cent. on the last, but they decline making a partial settlement of one without the other. The premium note for the first policy, say $5002.75, will fall due at bank, 12th instant. Yours, &c., JOHN MASON, Pres't.'

'Messrs. Brown & Ives.'

"You will please to give us your instructions. The other company will settle at the same rate, say retain 1½ per cent."

4. A letter from the plaintiffs, to Brown & Ives, dated Boston, Sept. 3d, 1800, as follows: "We have your favor under the 2d instant, handing us a copy of a note received from the president of the Providence Insurance Company. When we consented to their proposition of settling the policy by paying 25 per cent., it was not because it was most agreeable to us. We wished to make it conditional, as has been done in this town; and we had a right to suppose, when we consented to their terms, the business was settled. If we can succeed with the Spanish government, the policies *on vessel and freight will be withdrawn, of course, at the usual custom; but [*132 we do not think it right to make one the condition of the other. If we make this settlement, we shall make every effort, by money and interest, to have the adventure terminate at the Havana, and the sooner we know the better. By the last accounts, the vessel was very much eaten by the worms, and wanted very great repairs. This, we hope, will induce them to grant us the permission. The terms we acceded to were very favorable to the company, as it was paying them at the rate of 35 per cent. for the outward premium."

5. A letter from Brown & Ives to the plaintiffs, dated Providence, September 9th, 1800, as follows: "Gentlemen, your letter of the 3d instant was laid before the directors of the Providence Insurance Company, and they have returned the following note:

'September 6th, 1800.

'As there appears to have been a misunderstanding in the business as it respects the first propositions of the company, the directors are willing to accede to Messrs. Head & Amory's proposition (viz.), to settle the policy on the merchandise, at 25 per cent., although it was their intention and expectation to have both policies included in the settlement. Messrs. Head & Amory will please to forward the policy and have it cancelled immediately. Premium note due 12–15 September.

"You will please to govern yourself accordingly, and we will attend to your wishes."

6. A letter from the plaintiffs' clerk to Brown & Ives, dated Boston, Sept. 12th, 1800, viz: "Gentlemen, this is to acknowledge the receipt of your favor of the 9th instant, containing the note from the directors of the Providence Insurance Company. Mr. Head is absent on a journey, he will return on Tuesday or Wednesday next, when your letter will be delivered him."

7. A letter from the plaintiffs to Brown & Ives, dated Boston, Sept. 17th, 1800, as follows: "Gentlemen, we have this day seen your letter of
*133] the 9th instant, containing *the propositions of the Insurance Company to cancel the policy on merchandise on board the brig Nueva Empressa, at 25 per cent. Previous to our seeing this letter, intelligence had arrived of the capture of this vessel, and of course, it prevents any further negotiation on that subject. This circumstance you may suppose was quite unexpected by us, but unfortunately there is direct proof of it: a Spaniard being now in town who came from Newfoundland, and saw the brig there, being perfectly acquainted with Captain Zevallos, and he knows the vessel and cargo were condemned, and the master has gone to Lisbon. As the office is now in our debt, we presume they will not desire us to pay the note for the premium, but deduct it, when the loss is paid. You will, of course, mention this loss to the office. The news reached town a day or two before the return of our I. Head. We are," &c.

8. The note or letter of the defendants referred to in Brown & Ives's letter of 26th of August 1800, signed by William H. Mason, secretary of the company.

9. The note or letter of the defendants referred, to in Brown & Ives's of Sept. 2d, signed by John Mason, president of the company, and dated Sept. 1st, 1800.

10. The note or letter of the defendants of the 6th Sept. 1800, referred to in Brown & Ives's letter of 9th Sept. 1800, not signed, but written in the handwriting of the secretary of said company, and by him delivered at the counting-house of Brown & Ives, as the answer of the board of directors of said company; all of which notes or letters of the defendants were handed to Brown & Ives, by the secretary of the company, and were answers to the letters of the plaintiffs.

The bill of exceptions also stated, that it was proved by the testimony of Mr. Brown, of the house of Brown & Ives, that he delivered the plaintiffs' letter of the 3d of September 1800, to the secretary of said company, at their office, on the 4th of September. That the board of directors did not meet, of course, until the meeting of the 6th, when the said note bears date.
*134] That the following day (that *is, the 7th) was Sunday. That Brown went from Providence into the country, in the afternoon of the 6th, and continued absent from Providence until 10 o'clock in the forenoon of Monday the 8th; when he returned and received the same note of the 6th, which had been left at the counting-house, as before mentioned, and that he forwarded the same to the plaintiffs, on the next post-day, as is stated in Brown & Ives's letter of Sept. 9th, and that it went in the mail, and came in due course to the hands of the plaintiffs' clerk, at their usual place of doing business, on the 10th or 11th of Sept.

It further stated, that Richard Jackson, jun., of Providence, president of another marine insurance company, was also sworn as a witness and testified, "that in effecting insurance, or settling a policy, or making any adjustment or agreement about insurance, the assent of the parties to doing a thing, was in all respects as binding on the parties as the thing done, according to the usage and practice among underwriters."

The bill of exceptions then proceeded as follows: "The above correspondence was offered by the defendants as evidence of a proposal on the part of the plaintiffs, acceded to by the defendants, and it was contended by the defendants' counsel, that the effect of the said correspondence, accompanied with the testimony of the said Nicholas Brown, and of the said Richard Jackson, jun., as aforesaid, was a good defence against the plaintiffs' claim on the policy on the cargo. And the said plaintiffs did, by their counsel, object to the admittance of said papers purporting to be notes or letters from the said Providence Insurance Company as evidence of any proposal or agreement on their part; more especially to the said note of the 6th of Sept. 1800; by reason that the said Providence Insurance Company could not make any agreement but by an instrument made and signed by the president of said company, or some other person specially appointed to sign the same, according to the provisions of the act aforesaid. Also, that no evidence was given of any record or entry in the books or papers of the said Providence Insurance Company relative to the said supposed agreement.

*"The counsel for the plaintiffs did also contend and insist before the said court and jury, that the said Head & Amory were not bound [*135 or obliged, by the letters signed by them as aforesaid, to discharge the said policy on the said cargo, and that the same policy, notwithstanding the letters aforesaid, was in full force and effect.

"But the said court, notwithstanding all the objections aforesaid, did admit and allow the said notes and letters from the said Brown & Ives, and the said Providence Insurance Company, in manner aforesaid, to be given in evidence to the said jury on the trial aforesaid.

"And the said Honorable John Lowell, chief judge of said court, who alone addressed the jury in the said cause, did then and there declare and deliver, as the opinion of the court, to the jury aforesaid, that the said correspondence of the parties contained in the letters and notes aforesaid, according to the usage of merchants and underwriters, did import an agreement on the part of the plaintiffs to settle and discharge the said policy on the cargo, on the terms proposed and acceded to in said correspondence; and that, in the opinion of the court, nothing remained to be done, after the said note of the 6th of September 1800, to discharge the said policy, but that the same ought to be considered as settled and terminated, in consequence of the plaintiffs' proposal, and the subsequent agreement thereto on the part of the defendants, as contained in said correspondence.

"The said chief judge further stated to the jury, that if they concurred with the court in this opinion, above expressed, on the legal effect of said correspondence, and other evidence adduced as aforesaid, they ought to find for the defendants, on the first count in the plaintiffs' declaration, and for the plaintiffs, on the second count, for the damages therein demanded, deducting the premium notes. But if the jury were of opinion, that anything further

remained to be done, after the said note of the 6th of Sept., to close and complete the contract proposed on the part of the plaintiffs for cancelling
*136] *said policy, then they ought to find for the plaintiffs on the first and second counts in said declaration. The reduction of the said premium notes by the jury was done by consent of parties.

"And the said jury then and there gave their verdict for the plaintiffs only on the second count in said declaration, and assessed the defendants in damages $1542.05, the said jury, by the consent of parties, first deducting from the damages on the said second count, and which were not disputed, the amount of the premium notes, and which deduction was made by consent of the parties; and as to the said first count, on the said policy upon the said cargo, the jury found that the defendants did not promise; all which was in consequence of the evidence admitted as aforesaid, against the objections of the plaintiffs, and from the direction given to the jury by the honorable court aforesaid." Whereupon, the plaintiffs excepted to the said evidence, and to the opinion and direction of the court given as aforesaid.(*a*)

The case was now argued by *J. Q. Adams*, of Massachusetts, and *Mason*, attorney for the district of Columbia, on behalf of the plaintiffs in error; and by *Hunter*, of Rhode Island, and *Martin*, attorney-general of Maryland, for the defendants.

*137] *Adams*, for the plaintiffs in error.—The errors assigned are, *1. That judgment was given for the defendants, on the first count, when it ought to have been given for the plaintiffs. 2. That the evidence referred to in the bill of exceptions ought not to have been admitted. 3. That the court ought to have directed the jury that the evidence proved no contract of the plaintiffs to discharge the first policy. 4. That if the evidence did prove a contract, it should have been given, not in this, but another action. 5. That the judgment and proceedings were altogether erroneous.

The first and last of these assignments of error, being of a general nature, will be noticed only so far as to submit to the court a question arising from the face of the proceedings, and which cannot come within the purview of the three intermediate and specific assignments.

The declaration consists of four counts; two upon the policies; the third for money had and received; the fourth for money paid, laid out and expended. There is but one issue (the general issue) joined upon the four counts. The verdict finds for the defendants upon the first count; for the plaintiffs upon the second, and says nothing of the two others. A part of the issue only is, therefore, found by the verdict.

(*a*) The circuit court was holden by Lowell, Chief Judge, and Bourne, Assistant Judge. The bill of exceptions was dated April 7th, 1802, and was sealed only by Judge Bourne, who annexed to it the following certificate:

I, Benjamin Bourne, one of the afore-named justices, do hereby certify, that the exceptions contained in the foregoing bill were made at the trial of the said cause, and then substantially reduced to writing. And after the form was settled as aforesaid, and agreed to by the honorable John Lowell, chief judge of the said court, but before he put his seal thereto, he died. Witness my hand and seal, this 30th June, A. D. 1802.

Benj. Bourne, Judge of the Circuit Court. } SEAL. {

We shall not make this a subject of argument, but merely read one or two authorities in point. Trials per Pais, 63 : "If upon an issue all the matter be not fully inquired, a *venire facias de novo* shall issue." In the same book, p. 287 : "A verdict that finds part of the issue, and finding nothing for the rest, is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. 1 Inst. 227 *a*.

*The 2d error assigned is, that the evidence referred to in the bill of exceptions ought not to have been admitted. The grounds upon [*138 which we support this allegation depend in some degree upon the state of the cause when this evidence was offered. It appears from the bill of exceptions, that the plaintiffs had then substantially proved their demand upon both the policies. The contract, the interest, the loss, were all proved, and the claim of the plaintiffs was in the same condition upon both. The evidence of the defendants, excepted to, was produced to prove a subsequent agreement of the parties to discharge the obligation of the policy upon the cargo.

This evidence ought not to have been admitted. 1. Because it was all evidence of a supposed parol agreement. 2. Because part of it was given as proof of the acts of a corporation. 3. Because another part was testimony to a point of law.

The whole mass of this evidence consisting, 1st. Of letters from the plaintiffs to Messrs. Brown & Ives ; 2d. Of notes purporting to be acts of the defendants ; 3d. Of the testimony of Mr. Brown ; and 4th. Of that of Richard Jackson, president of another insurance company in Providence, was combined together, to prove one point ; a contract of the plaintiffs to discharge the contested policy. If, therefore, any part of it was improper, the whole was so.

1. Parol evidence. It is not denied, that there are cases in which evidence of a parol agreement may be admitted to discharge the obligations of a written contract ; but as this is a deviation from a very general and important principle of *law, it has never been done, but where it was [*139 necessary to prevent fraud on the part of the party claiming the benefit of the written contract, and where the parol agreement has been executed. There is no instance, where an executory parol contract, or mere mutual promises, have been allowed to discharge the obligation of a written executed contract.

2. Acts of the corporation. By the rules of the common law, the acts of a corporation can be proved only by instruments under their seal. By the charter and constitution of the Providence Insurance Company, they are authorized to make policies and other instruments, under the signature of their president, countersigned by their secretary. In the evidence excepted against, there are three letters or notes which were admitted as proofs of the company's acts, neither of which is authenticated, either by their seal, which alone could make them valid at common law, or by the double signature of the president and secretary, as required by the charter and constitution of the company. One of them is signed by the president alone ; one by the secretary alone, and the third is not signed at all. The reasons upon which these rules are founded, appear in 1 Bl. Com. 475 ; 6 Viner 268, 287, 288 ; Kyd on Corporations, 1, 449, 450, 259, 268.

3. As to Richard Jackson's testimony. This was the most exceptionable

testimony admitted, because it was evidently to a point of law, and not to fact. Usage is, in its nature, matter of fact. But whether the fact of usage be binding is, in its nature, a point of law. This testimony seems to have been the hinge upon which the whole cause turned; and it is the more important, as it was the ground upon which the court below adopted it as law; it is all abstract proposition; large and liberal indeed; but altogether principle, without reference to any fact. Among underwriters, says he, promise is in all respects as binding as performance. 1 Bl. Com. 75, 76.

*140] *The third assignment of error is, that the court should have directed the jury that the evidence proved no contract of the plaintiffs. As this point embraces most essentially the merits of the controversy, it is proper to examine the particular nature of the transaction.

What was the ultimate object of the parties? On the part of the plaintiffs, it was to cancel the policy, on certain conditions. On the part of the defendants, the intention was different in every one of their notes; but still the ultimate object of cancelling was contained in all. From the tenor of the whole correspondence, there is no evidence of an intention by either of the parties to make a contract for cancelling the policies. On both sides, it was meant to consummate the thing, and not to make a new bargain for discharging that which existed.

In the first letter of the plaintiffs, there is, indeed, an inquiry, whether the defendants would make a conditional contract, to depend upon the contingency of their obtaining leave from the Spanish government at the Havana to terminate the adventure there; where they supposed the vessel still to be. But this was explicitly denied by the defendants; and this denial itself serves strongly to show, that they were determined not to leave the business in the unsettled state of a new contract; but either to adhere to that which existed, or to finish the business in the usual and obvious way, by cancelling the instrument in which it was contained. The whole transaction, therefore, must be considered in the light of a negotiation; mere communications between the parties, which could be consummated on one side only by cancelling the policy; and on the other, by giving up the premium notes.

A circumstance which further corroborates this view of the thing is, that neither of the parties ever indicated a time for finishing the business. Had

*141] it been in the *contemplation of either, to make a bargain for discharging the existing obligations between them, this would naturally have been one of the most important points to be settled. For until they had agreed upon the time when their new reciprocal obligations should commence, what would have been their situation? The policy was in the hands of the plaintiffs; the note was in possession of the defendants; and both were negotiable instruments. It is expressly laid down in the books, that mutual promises must be made at the same time. Until the new bargain was completed, the defendants were bound by the risks of the policy; and it would have been very material to both parties, to fix the moment when their obligation to these risks should cease.

Let us go further, and inquire, if these papers can be construed into a mutual engagement, *when* they became so. The first letter of the plaintiffs contained only an inquiry, and manifested a desire to settle conditionally one of the policies. The note of the defendants in answer, contained in the

letter of Brown & Ives, of 26th August, refuses to make a conditional settlement; but offers to cancel the policies, retaining 25 per cent. of the premium upon both.

Let it here be remarked, that although the defendants made this offer, supposing it bottomed on the intimations of the plaintiff's first letter, yet it was founded upon a gross mistake of the insurance company, not only as to those intimations, but as to the state of the two policies at that time. They have, in their third note, expressly declared, that their intention and expectation in the first was, to cancel both the policies; and on the same terms.

The first policy was for $10,000, on the cargo of the vessel, on a double voyage, from Malaga to Vera Cruz, and from thence back to Spain; at a premium of 50 per cent. The outward voyage insured by this instrument had been safely performed. The return-voyage had commenced; and in its progress, the vessel had been *driven into the Havana, where the plaintiffs supposed she still remained. The second policy was for [*142 $6000, on the vessel, made after the plaintiffs knew she was at the Havana. It was for a single voyage at and from the Havana to Europe, and the premium was at 33 1-3 per cent.

On the first policy, the outward voyage was completed, and the homeward voyage had commenced: no apportionment of the premium was possible. The plaintiffs could not cancel the contract, but with the consent of the defendants; and the terms upon which they naturally and reasonably wished to settle were, to give the defendants one-half of the amount of the premium as a compensation for the risk they had incurred. On the second policy, the risk had barely commenced, as they supposed. Their intention was, if they could obtain permission from the government at the Havana, to break up the voyage, and terminate the adventure there. Had they done so, they might have withdrawn the policy, and obtained a restoration of the whole premium, with the customary deduction of half per cent. For this, they did not want the consent of the defendants; it was their right so to do.

This circumstance is important in two points of view. First. It laid the foundation of the mistake of the plaintiffs, in their answer to this offer of the defendants; and of all the subsequent mistakes and differences between the parties. It is impossible to suppose, that the defendants meant to trifle with the plaintiffs. They intended to make a serious offer; and the fairest construction is, that they made it, without attending to the subject-matter; without looking into their own records, to see the different situation of the two policies; and without adverting to the plaintiff's letter, which expressly limited the negotiation to the policy on the cargo.

*In the second place, it furnishes a violent presumption, that the [*143 defendants had, at the time, no idea that they were engaged in the serious and deliberate employment of making a contract; a contract, too, which they now contend, must dissolve an instrument so serious in its nature, so forcible in its operation, so various in its details, so precise and specific in all its conditions, and so minute and discriminative in the effect of all its stipulations, as a policy of insurance. An individual underwriter, when he pledges himself by his signature to indemnify a merchant for the numerous and deplorable calamities to which navigation is liable, must feel himself bound, by all the ties of duty to himself and his fellow-creature, to act

with caution, and with a knowledge of the right he acquires, and of the duty he incurs. A corporation, by their essential character and constitution, are under obligations of a still higher nature, to do nothing inconsiderately. They are a deliberative body: the members who act in their behalf, bind not only themselves but their associates. They are responsible not only to themselves and their families, but to the public, to the legislature under whose sanction their proceedings are regulated, and to their country, which is interested in the accuracy of their transactions. Is it, then, possible, to suppose, that such a body should have conceived themselves performing solemnly one of the acts for which they were intrusted with all the powers and attributes of a corporation, when they accomplished it with such utter ignorance of the whole subject upon which they were engaged; with such gross negligence as, in the eye of the law, is equivalent to fraud? For the honor of the defendants, we hope not.

But the present inquiry is, at what time this supposed solemn contract to discharge a perfect claim to indemnity took place; and certainly, if the defendants did consider themselves as contracting, this, at least, is not the time when the obligation of the parties took effect. The real offer to settle both policies on the same terms was certainly such as the defendants ought not to have made; and such as the plaintiffs could not accept. Indeed, its absurdity furnishes a full apology for the mistake of the plaintiffs, which appears in their reply of the 28th of August, and in which they manifes' *144] their acceptance of *what they supposed the offer to be. That is, to settle one policy; the policy on the merchandise. But in accepting it, the plaintiffs add conditions, and there is no evidence that these conditions were ever assented to by the defendants. It is clear, therefore, that no agreement, binding upon the parties, can be found at the date of this letter of the plaintiffs. Here was a mere mistake.

This mistake on the part of the plaintiffs was very natural. They either did not perceive the *s* at the end of the word policy, in the answer of the defendants, communicated in the letter of Brown & Ives; or if they did, they might well suppose it was an error in the copy, especially, as that is not the usual orthography of the plural of the word policy. They might have taken it for a comma, or a careless stroke of the pen, but could not suppose that it contained the whole substance of the defendants' offer. Hitherto, then, there is nothing like a contract. There was nothing but mistake on both sides.

The next of these papers is the second letter signed by the president of the Insurance Company, dated September 1st, directed to Brown & Ives, and enclosed by them in their letter to the plaintiffs of 2d September. This makes a proposal entirely new. That the company will agree to settle both the policies at the Havana, and return 25 per cent. on the first, and 31, 83⅓ per cent. on the last, but they decline making a partial settlement of one without the other. This note, as well as the former, evidently shows that the company had no idea of having agreed to anything. In both, they say they will agree, necessarily implying a further act on their part to complete the settlement, even if their offers had been accepted.

We come now to the plaintiffs' letter of September 3d, which, in the opinion of the learned and lamented judge who tried the cause, contained a proposal to the defendants, which, by their acceptance on the 6th, became a

complete contract between the parties, and by the custom of merchants and underwriters, sufficient of itself to dissolve the policy. With the utmost deference for his opinion, and the highest respect for his memory, we apprehend, *there was error both in regard to his idea of this letter, and of the operation of the laws of insurance in this particular. In the [*145 first part of this letter, it is true, the expressions imply a strong degree of disappointment on the part of the plaintiffs, at finding the directors had receded from what the plaintiffs had supposed was their first offer. But in the second part, they explicitly decline the last offer of the company. They say, that if they can succeed with the Spanish government, the policys on vessel and freight will, of course, be withdrawn at the usual custom ; but they will not make one the condition of the other. And in the next sentence, they most unequivocally show that they had abandoned all idea of holding the defendants to their supposed offer, and were only desirous of having it made in reality. "If we make this settlement," "the sooner we know the better." "The terms we acceded to were very favorable to the company." Each of these expressions indicates that they considered the former transactions as given up ; and that they had no idea of binding themselves to a settlement, before they could know whether the defendants would agree to make one.

Let us now consider the force and effect of the unsigned note of the 6th of September. The opinion of the court below, as expressed in the bill of exceptions is, that after this note, nothing remained to be done ; but that the policy was settled and discharged. What says the note ? It begins, by acknowledging that there had been a misunderstanding in the business, as respected the first propositions of the company, and by admitting that this misunderstanding was justly imputable to them ; for it makes that the inducement upon which the directors express their willingness to accede to the plaintiffs' propositions. It does not say, the directors have acceded, nor even that they do accede, but they are willing to accede. And to what proposition ? To settle the policy on the merchandise at 25 per cent. Nothing is said about when or where the risk should cease ; nor about taking up the note on the payment of one-half. Is this the language proper for the final completion of a solemn bargain? They were willing to accede to a proposition ; they go on to specify that proposition, *and in specifying it, they leave out half the particulars, especially, that important one which the proposition contained, the [*146 cessation of the risk.

It may be said, this is scrutinizing with hypercritical nicety, the expressions of a loose note, the terms of which were not so accurately weighed ; and which was not drawn up by a special pleader. But it may be asked, is it just, rational or proper, that such unguarded, immature notes as this should, by the solemn sanction of law, be adjudged to be of a force and obligation paramount to that of a policy of insurance; an instrument, in the printed parts of which, there is scarcely the cross of a *t*, or the dot of an *i*, but has had its comment and its adjudication. Lord MANSFIELD has observed, that the merchants seldom introduce a written clause into a policy, but it ends in a lawsuit. And we are now told by Mr. Jackson, that a succession of blunders, under the name of an assent of parties, is to overthrow the whole force and effect of an

important instrument, which has gone through the crucible of three hundred years' experience.

The parties never could intend that these inconsiderate, shapeless approximations to a settlement, should of themselves operate as a final settlement. At the close of this note, it is said, "Messrs. Head & Amory will please to send the policy immediately to be cancelled," and after it, "premium note due 12–15 September." If nothing remained to be done, why were the directors so anxious to have the policy sent immediately to be settled? Why were they so accurate and precise in noting both the day and the day of grace, when the note would become due? Why, but because they were sensible, that the most important part of the business still remained to be done? Why, but because they were conscious, that the plaintiffs still had their option, either to send the policy to be cancelled, or to pay the note at its day of payment? Loose as these notes are; hasty and inartificial as their language is, some meaning must be given to their contents; and when we see the defendants so solicitous to have the policy cancelled, and so punctilious to mark the days of payment for the note, we can give their words no possible construction, importing on their part that the policy was settled; that nothing remained to be done.

*147] *We are still seeking for the time when this supposed contract of dissolution took effect. By all the laws in the world, but those of Mr. Jackson, mutual promises are considerations of each other. Both parties must be bound to the performance of their respective promises. One promise cannot be binding, and the other remain invalid. To find this time, we have sought in vain through the whole correspondence of the parties. It is equally vain, to seek it in the opinion of the court, which is, that nothing remained to be done, after the said note of the 6th September 1800. Here also is a want of precision in conveying the idea of time, and it is a defect which lies in the nature of the thing. The words "after the said note of the 6th of September," are not a designation of time. Had the court said, after the signing of the note (and, as we conceive, all the promises of the company ought by their charter to be signed), the time would have been fixed at the date of the signature. But this they could not say; the note is unsigned. Had the court said, after the writing of the note; then the engagement of the company would have been contracted, not by the note of the directors, but by the handwriting of the clerk. Had the court said, after the delivery of this note, the question would recur, delivery to whom? And to whom could it be, but to the plaintiffs? This would, doubtless, have altered the state of the question; for if the reciprocal engagements were binding only from the time of delivery, or notice of this note, then they were dissolved by an external event, before they were formed. The whole superstructure had crumbled to atoms: for the plaintiffs had received information of the loss of the vessel and cargo. I say dissolved, before they were formed; and the absurdity of the expression, is only the genuine mirror of the impossibility of the thing.

The meaning of the court must have been, that the note of the directors, on the 6th of September, constituted the assent of the company, as they considered the plaintiffs' letter of the 3d September as proof of their assent. The plaintiffs, then, must be considered as having made their promise on

the 3d, when they wrote their letter ; and the correspondent promise of the defendants as having been made on the 6th, by the note of the directors. If so, the plaintiffs were bound from the 3d, and the defendants from the 6th of September.

*The promises were not made at the same time ; both parties were not equally bound ; for one was bound three days sooner than the other. Will it be said, that the offer and the acceptance must be considered as one transaction, because it was impossible it should be completed at once, the parties residing more than forty miles distant from each other? This is an additional proof that the consummation of the thing, the cancelling of the policy, and the taking up of the note, was, and alone could be, the intent of the parties, and until that was effected, the original instruments must, in the nature of things, retain all their validity. [*148

Consider how unequal the situation of the parties was, if the plaintiffs were bound on the 3d, and the defendants only on the 6th. From the moment the plaintiffs became obligated by the new engagement, the risk of the policy was transferred from the defendants to them ; yet their obligation to pay the whole premium note had not ceased ; nor could it cease, until the defendants had decided whether they would accept or reject the offer On the other hand, the defendants, from the 3d of September, must have been *de facto* released from all the risks of the policy, and at the same time entitled to recover the whole of the premium note from the plaintiffs During all this interval, the plaintiffs must have been at once liable to all the risks of the policy, and to the payment of the whole premium, while the defendants were discharged from the risk and entitled to the premium. Is there any measure of equal justice, or common equity, which can sanction such a state of things as this?

But this is not all. From the moment when the plaintiffs sent their letter of the 3d September to the post-office, their promise was out of their power. According to this system of justice, they had no longer the right or the power to retract from this offer. Their word and their property were pledged ; yet the defendants retained the right of adhering to the policy and the premium, or of dissolving them on the terms of the offer : the plaintiffs were entirely at their mercy. The policy, it is true, remained in their hands uncancelled, but it had lost all its force and effect. The unsigned note of the secretary, like the ghost of paper money in McFingal, had turned it back to rags again. But this was unknown to the *plaintiffs ; and before they knew it, they had received information of the loss, and had acquired a perfect right to indemnity. [*149

Hitherto, the argument has proceeded upon the supposition that the plaintiffs' letter did really contain a certain proposal, and the unsigned note an acceptance of that proposal. It has been endeavored to prove that, even admitting this, they did not constitute an agreement sufficient to dissolve the policy. The necessity of fixing a time when the mutual engagements of the parties could take effect, must be obvious. The necessity of notice to both parties, that the new engagement had superseded that of the policy, must be equally clear. But neither the time nor the notice can be found, until after the perfect right to the indemnity secured by the policy was vested in the plaintiffs.

Let us now consider the subject, in another point of view. One of the

principal reasons which must always give a contract, written and signed with deliberate solemnity, a more powerful sanction than a verbal agreement, is its superior certainty. There is no instrument reduced to a greater degree of certainty, than a policy of insurance. It is a general maxim of law, as well as an obvious dictate of reason, that every contract requires the same power to effect its dissolution, as to effect its creation. The whole system of law, founded upon the statute of frauds, is built upon the principle, that a contract in writing, and signed by the party contracting the engagement, is more forcible and binding in its nature, than an engagement verbally made, or agreed to, without being reduced to that form. The circuit court seems to have been of opinion, that this supposed agreement of the parties was something more than a parol agreement; and indeed, it did pass, whatever it was, in the form of letters and notes. But if certainty is one of the characters of a written contract, this was far from possessing that requisite.

A written agreement, in contemplation of law, as well as in the common understanding of mankind, must be a paper containing the whole meaning of the parties, and signed by them, or, at least, by one of them. When the contract is altogether executory, containing merely promise for promise, it seems equally to require the signature *of both. A policy of insurance, *150] for instance, is signed only by one of the parties, but that is because its existence depends upon performance by the other: it commences only by the payment of the premium. It is difficult to conceive, how a contract which must be picked out piecemeal from nine or ten letters and notes, and spliced by the verbal testimony of two witnesses in open court, can be considered as a written agreement.

If, however, these papers could be grappled and dovetailed into an agreement, as between individuals, we ask, whether this can be done, when one of the parties is a corporation aggregate? By the principles of the common law, the promises of a corporation can be authenticated only by a record, or by their seal. By the charter of the Providence Insurance Company, the signature of their president and secretary are necessary to give validity to their policies, and other instruments. The act of the company, which constituted, as we are told, their assent to the propositions of the plaintiffs, was done at a weekly meeting of the directors. Yet of this act (in their own view, higher in its nature than the act of making a policy), no record was made; no instruments delivered to the plaintiffs, or even drawn up, excepting this note of the secretary, unsigned, undirected, and not even indicative of the subject to which it relates, otherwise than in the general terms of "the business."

If the intelligence received by the plaintiffs on the 14th of September had been, not that the vessel was lost, but that she had arrived safe in Spain; would the defendants have been contented with half the premium? They must now say so, to support their present ground; but they would then have discovered, that while the policy remained uncancelled, and the premium note in their hands, something did remain to be done. They would have called upon the plaintiffs for payment of the whole note, and if payment had been refused, would have sued them. What defence could the present plaintiffs have had against their action? Could they have produced all this mass of evidence on their side? Would not the company

then have said, we never meant to consider these as the final transactions, and you knew it; we never entered so much as a minute of them on our records; we never did an act to authenticate them, as all our acts must be authenticated; we considered *ourselves bound, until the policy [*151 should be cancelled. You knew we could not be bound by a written agreement, unless signed and countersigned as our charter requires, and you shall not produce in evidence, to discharge the debt you justly owe us, these notes, which we purposely made irregular, to prevent your supposing they could dissolve the force of a previous contract. Surely, the court would have admitted the weight of these objections. They would not have suffered such shapeless nothings as these notes, to be shown as the formal release of a corporation.

The defendants might have added, that the notes themselves did not fully meet the propositions of the plaintiffs. It is true, they agreed to settle the policy at 25 per cent., but they had not promised to deliver up the note. The plaintiffs, therefore, could not have produced those papers, to prove the promise of the defendants, and of course, there was no consideration for the bargain; and the defendants would have said it was little less than fraud, if the plaintiffs, after the arrival of their vessel, had attempted by such means to evade the payment of half the premium note. The subject has been presented in this light, to enforce the objection against these papers, as evidence of the acts of a corporation. In point of equity, the case is infinitely stronger on the side of the plaintiffs, than it would have been on the side of the defendants. If it was an agreement at all, the defendants were not bound by it, until three days later than the plaintiffs, and when the company bound themselves, it was with the full knowledge that the plaintiffs were bound too. The defendants did not remain from the 3d to the 17th of September, without knowing whether the agreement was made or not.

It has thus been endeavored to prove that this transaction was not, and could not possibly be, an agreement between the parties, of force and effect, to dissolve the obligations of the policy. 1. Because the object of the negotiation was to act, and not to promise; to cancel, and not to make an agreement for cancelling. 2. Because the business was transacted much too loosely on both sides, and especially, on that of the company, to show any intention to make a bargain, paramount in force to the policy. *3. [*152 Because it is impossible to fix any one time, or even any one day, upon which the agreement became binding on both parties. 4. Because, if understood as an agreement, its operation was altogether unequal upon the two parties; all the benefit being on one side, and all the burden on the other. 5. Because, in point of form, it could not be an agreement; one of the parties being a corporation; and no authentication of its assent being given.

In opposition to all this, what is said? That in agreements about insurance, the assent of the parties to the doing of a thing, is, in all respects, as binding as the thing done. As we apprehend the fallacy, upon which the defendants prevailed in this cause, before the circuit court, lies in this opinion of Mr. Jackson, we shall examine it with some attention, and hope to show that, in its only possible application to this cause, it is a great mistake; that in the most punctilious court of honor, it would not be true; and

that, instead of according with the usage and practice of underwriters, it is in direct opposition to the whole system of insurance law.

In the first place, the assent of the parties to the doing of a thing must be founded upon a certain state of things and relations between the parties, at the time when the assent is given. If, before the thing is done, that state of things is totally changed by external events, the basis of the agreement has failed, and the assent of parties cannot bind them as much as the thing done.

I write to Mr. Jackson, "Sir, your word is as good as your deed; so is mine. I have a ship at Newport, that I wish to sell for ten thousand dollars, will you buy it? If so, I will execute the bill of sale, and you shall pay me the money." Mr. Jackson answers me, "I will buy your ship, on the terms you propose." After Mr. Jackson has written this letter, and before I receive it, my ship is burnt. Is there any court of honor which will say, because his word is as good as his deed, that he is bound to take my
*153] bill of sale of a ship which no longer *exists, when he gave me his word to take my bill of sale of a ship which did exist. Is there any court of equity which would decree that I should make the conveyance, and that he should pay me the money? Examine, to this point, 5 Viner 509, 505, 514, 517, 526.

Let us now apply the principle to cases of insurance. Mr. Jackson's testimony is, that this assent of parties to the doing of a thing is as binding as the thing done, in effecting insurance, as much as in discharging a policy. Let us suppose, that this whole negotiation between the parties had been, not to cancel, but to make a policy.

The plaintiffs' first letter to Brown & Ives would have said, we want insurance for $10,000 done on the brig, at and from the Havana to Spain. The same risk has been insured here at 25 per cent.; what can you do it for, at the Providence Insurance Company? They say, "we will insure on the brig and cargo at 25 per cent. but not conditionally." The plaintiffs mistake this for an offer to insure on the brig alone, and write, "we accept this offer, and will send a premium note in due time." On receiving this, the defendants find there has been a mistake. They make a new offer to insure the brig at 25 per cent. and the cargo at another premium. The plaintiffs, on receiving this, say, "we thought the matter settled; we have insured on the cargo elsewhere; we say again, we want insurance on the brig. If we make this insurance, we shall order the brig to sail at once, and the sooner we know, the better." This is exactly their letter of the 3d September, only supposing it was a policy to be made, and not a policy to be discharged.

On the 6th of September, the directors say, "as there appears to have been a misunderstanding, we are willing to make insurance on the brig alone, at 25 per cent., though we meant, and expected, to insure both brig and cargo. Messrs. H. & A. will please to send their premium note immediately, and we will have the policy made."

*154] Now, put the case on both sides. Before the plaintiffs *receive this note, they have had information that their vessel, which they supposed at the Havana, had sailed, and was safely arrived in Spain. Before that insurance, to which both parties had assented, could be done, there was no insurance to do. Will any one say, that the defendants could, in

such a case, have recovered from the plaintiffs, the premium of a policy never made, merely because it had been agreed to be made? In what form of action, either at law or in equity, could they have called upon the plaintiffs to pay a premium, upon an adventure known to be terminated before the risk could be incurred?

Again, suppose, that before the plaintiffs receive this note, they have had information that the vessel had sailed and was lost, what would the defendants have said, if the plaintiffs had written them thus: "Gentlemen, the vessel you have agreed to insure is lost; we have never paid you the premium, nor even given a note for it; but the assent of the parties to the doing a thing is as binding as the thing done; pay us $10,000 for our loss." would not the defendants have justly replied, "you have never paid or secured to us our premium; before the transaction could be completed you knew your vessel to be lost: how can you call upon us for an indemnity we never undertook?"

The assent of the parties is so far from placing an agreement about insurance out of the reach of external events, that it does not, even in numerous instances, prevent the parties themselves from retracting. The contract of insurance is, perhaps, of all others, that of which the obligation most forcibly depends upon performance, in contradistinction to mere assent. To evince this, I will refer to a very ingenious writer upon the subject. Millar 110, 383, 434, 534.

I have dwelt so entirely upon this third assignment of error, which appears to me to embrace the vitals of the cause, that I have nothing left to say upon the fourth, which is, that if the evidence did prove a contract, it ought not to have been produced in this, but another action.

*As to the objections of form, the incomplete verdict of the jury, the inadmissibility of the evidence, the incapacity of a corporation to [*155 contract, but by instruments peculiarly authenticated, and the insufficiency of this defence to meet this action—without feeling myself authorized to abandon them, I hope, I have wasted no time in maintaining them. But the plaintiffs in this action are not only my clients, they are my friends. Their letters subsequent to the time when the dispute arose, very explicitely declare, that they considered the whole proceedings as mere communications, and, that they never considered themselves, or the company, as discharged from the obligations of the policy, and of the premium note. I have, therefore, been anxious to show, that upon principles of law, of justice, of equity and of honor, their opinion was well founded; that the policy was not discharged; that they were and still are entitled to the indemnity, which they had purchased with so heavy a premium; and of course, that there was error in the proceedings and judgment of the circuit court. If the object of the parties, to cancel conditionally the policy, was never completed, if the company, by their egregious mistake in the first instance, and by their dilatory proceedings in the last, were the real cause why it was never completed, it seems to me, they have no reason to pretend, that the plaintiffs ought to be bound by an unfinished project of settlement which cannot be carried into effect, without discarding the most established rules of law, and the most unequivocal dictates of equity.

Hunter, contrà.—The question is, was there a bargain made? Does the correspondence prove an agreement?

The objection to the form of the verdict is cured by the act of congress of 24th September 1789. (1 U. S. Stat. 91, § 32.)

1. It is objected, that there can be no contract, because it is not under the corporate seal, nor signed by the president, and countersigned by the secretary. If the intention of the parties is clear, and the substance of the agreement has been reduced to writing, it is sufficient.

*156] *The doctrine that a corporation cannot act but by its seal, may answer for the transactions of bishops, deans and chapters, abbots and monks, but according to modern decisions, does not apply to mercantile corporations, and mercantile transactions. 2 Bac. Abr. 13 (Gwillim's edition). The bank of England, the East India company, and similar corporations may, by an agent, make promissory notes, draw and accept bills of exchange, and make all kinds of contracts and promises, like natural persons. It will be presumed, that the authority so given to the agent is matter of record, or under the corporate seal.

The Providence Insurance Company are, by their charter, empowered to make policies, and other instruments, without seal. The second section declared "that all policies of assurance and other instruments made and signed by the president of said company, or any other officer thereof, according to the ordinances, by-laws, and regulations of said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof in manner as set forth in the constitution of said company hereinafter recited and ratified."

The 5th article of their constitution provides, that "the directors shall meet statedly, once in every week, and at such other times as the president, or board of directors shall think necessary. The president, with two directors in rotation, shall assemble daily at the insurance office, for the dispatch of business, agreeably to the rules and regulations of the general meeting of stockholders, and of the board of directors." "The president, with the two directors in rotation, shall have full power and authority, in behalf of the company, to make insurances upon vessels and property laden therein." "And all policies thereon shall be subscribed by the president, as president of the Providence Insurance Company, and countersigned by the secretary; and the president and committee of attending directors shall ascertain and agree for the premiums, and the security of the payment thereof, as they shall think proper." "All losses arising on any policy, subscribed as aforesaid, shall be adjusted by the president and board of directors."

*157] *If the great object of their institution may be accomplished without seal, *à fortiori*, may the means for attaining that object; *omne majus continet in se minus*. The provision in the charter that they might make policies and other instruments, without seal, was introduced for their ease and benefit; but it would be of no advantage to them, if all their preliminary acts must still be under the corporate seal.

2. As to the rule *eo ligamine*, &c., it does not always apply to mercantile instruments. A charter-party may be dissolved by parol. Abbott on Shipping 260. And less solemnity is required in dissolving, than in completing a mercantile contract. However strict the rule may be at law, in other cases, yet it does not prevail in equity; and in questions of insurance, which is a contract founded upon broad, equitable principles, courts of common law are bound by the same rules of decision as courts of equity. Park 3.

But in the present case, the agreement to dissolve the policy was made by the same authority which made the policy. By the constitution of the company, the president and two directors have power to make insurance; and the agreement to dissolve was also by the president and directors. The note of the 6th of September was in the handwriting of the secretary, who was acknowledged by both parties as the authorized agent of the company, to signify their assent, and was by him delivered to Brown & Ives, the authorized agents of the plaintiffs. It contains the names of the directors, and purports to be by their authority; and although the authority of the secretary does not appear to be under the corporate seal, or on record, yet it is to be presumed, that he was so appointed. Thus, in the case of *Rex* v. *Bigg*, 3 P. Wms. 419, which was an indictment for erasing an indorsement from a note of the bank of England, signed by one Adams, their cashier, it was contended, that it was not a note of the bank, because not under the corporate seal, and the jury found that Adams was not authorized by the bank, under their seal, to sign notes for them, but was intrusted and employed by them for that purpose. Upon that indictment, the prisoner was convicted; which shows that, even in a capital case, it *was held, that a corporation aggregate may act by an agent, although not authorized under the corporate seal. [*158

But the plaintiffs have, by their bill of exceptions, admitted the note of the 6th of September to be the answer of the company to their letter of the 3d, and therefore, cannot now deny the authority of the secretary. *Neal* v. *Irving*, 1 Esp. 61.

If the defendants had insisted upon the whole premium, this correspondence would have been a complete defence for the plaintiffs.

It is not necessary, that the note should have been signed. Their charter authorizes the company to contract, without signature. Signature is required only to policies and other instruments. It is not contended, that this correspondence can be called an instrument, and yet it may be evidence of a contract. Even under the statute of frauds, which requires a note in writing, signed by the party charged, it is not necessary that the signature should be at the bottom of the note. It is sufficient, if the name of the party be written by him in any part of it. 1 Powell on Contracts 286.

It has been said, that mutual promises must be made at the same time, or both will be *nuda pacta*. This is true, but not applicable to the case. In making an agreement, it is not necessary that the proposition on one part, and the assent on the other, should be both made at the same time. The assent may be either precedent, concomitant or subsequent. 1 Powell 131.

3. It is objected, that the intention of the parties was not to contract, but to act; that there was no agreement, and that the correspondence amounts only to an incomplete negotiation for cancelling the policy. Nothing more is necessary to make an agreement or contract, than the assent of both parties. In this case, the plaintiffs requested, and the defendants gave their assent. The assent of the plaintiffs was precedent, and required nothing more to be done on their part. When the defendants assented to the proposition of the plaintiffs, the *bargain was closed, and neither could retract. Nothing more was necessary to be done: or if anything remained, it was only what ought to be done, according to the agreement, and therefore, it is to be considered as if done. If notice was necessary, it was given to Brown [*159

& Ives, the agents of the plaintiffs, and from that time, at least, the bargain was finished.

There is no objection in the record to the testimony of Mr. Jackson. It was only evidence of the usage and custom of underwriters in this country; and it is every day's practice, to produce witnesses as to the custom of merchants, and the usages of trade. *Stanley* v. *Ayles*, 3 Keb. 444; *Lumley* v. *Palmer*, 2 Str. 1000; Abbott 133, 140. As to the citations from Millar, they apply only to the commencement of a contract of insurance, not to its dissolution; and we hope our case is to be decided by English law, and not by Scotch metaphysics. But even if we go to the civil law, here was the precise form of a Roman stipulation. *Promittis?* promitto. *Spondes?* spondeo.

Martin, on the same side.—The question is, what was excepted to on the trial. The letter of 21st of August, which was the beginning of the correspondence, was admitted by the plaintiffs to be read. The other letters were in answer, and were only a continuation of the correspondence, and therefore, were properly admitted by the court. There is no objection, in the bill of exceptions, to Mr. Jackson's testimony. He was examined only to the usage of insurance companies, and as to the manner in which such agreements are considered among underwriters. That this is usual, appears from the case of *Henkle* v. *Royal Exchange Assurance Company*, 1 Ves. 317, which case also states the principle, that equity will consider that as done which ought to be done. In mercantile cases the rule of law is the same as that of equity. *Tooke* v. *Hollingworth*, 5 T. R. 229, Buller's opinion.

*160] *Brown & Ives were the agents of the plaintiffs, and are to be considered as the plaintiffs themselves.

The words of the note of September 6th are not in the future tense, as has been alleged, but in the present. They are, "the directors are willing."

The last words of the note, mentioning the time when the premium note would become due, are relied upon. But they prove nothing, because, at all events, the plaintiffs were bound to provide for half of that note, and therefore, it was proper to give them that information.

The words of the learned judge who tried the cause, are, that "nothing remained to be done, after the said note of the 6th of September 1800, to discharge said policy: but that the same ought to be considered as settled and terminated, in consequence of the plaintiffs' proposal, and subsequent agreement thereto on the part of the defendants, as contained in said correspondence."

We admit, that notice of accepting a contract must be in reasonable time. But the rule respecting bills of exchange, as to the shortest possible time, does not apply. It was the duty of Brown & Ives to have had some person at their counting-house, to receive the answer and transmit it to the plaintiffs; and the absence of Mr. Brown cannot be imputed as *laches* to the defendants. The time when the contract was complete was, when the note of the 6th was delivered at the counting-house of Brown & Ives. The effect of that note was to discharge the plaintiffs from one-half of the premium note, and if the vessel had arrived safe, the defendants could have recovered only the other half.

Pothier, in his Treatise on Obligations, vol. 1, p. 4, 5, defines an agreement to be "the assent of two or more persons, to form an engagement be-

tween them, or to dissolve or modify one already formed. *Duorum vel plurium in diem placitum consensus.*" "A contract *includes a concurrence of the will of two persons, at least, one of whom makes, and [*161 the other accepts, the promise." In the present case, the assent of the plaintiffs is proved by their continued anxiety and wish to have that done, which the defendants at length agreed to do.

Mason, in reply.—The question upon the merits of this case is very simple. Does the evidence prove a contract to cancel this policy; or does it only prove a negotiation on foot, with a view to that subject, not terminated? We hold the latter.

Brown & Ives were not the agents of the plaintiffs, but only the instruments of communication. They had no power to contract, and the defendants knew it. As well may the postman who carries the letter be called an agent.

The plaintiffs' letter of 21st of August contains no proposition; but merely asks for one. The first offer is made in the note of 26th of August, signed by the secretary. The letter of the plaintiffs of the 28th accepts what they mistook for the real offer. But the reply of the president, of September 1st, corrects the mistake and makes a new offer, and rejects the terms contemplated by the plaintiffs. Here, then, the thing ends. Did the plaintiffs' letter of the 3d renew the proposition? It contains no proposition; nor does it authorize Brown & Ives to make one. It is merely a letter of complaint. They say, "if we make this settlement," thereby clearly showing that they reserved to themselves an option to renew the negotiation or not, as they should judge proper. The worm-eaten state of the ship is alleged as the reason for their hope that the Spanish government would permit them to terminate the voyage at the Havana; *not that the defendants [*162 would permit them to cancel the policy.

Suppose, then, the letter of the 3d of September as out of the question, would the note of the 6th make a contract, the former negotiation having ended? The renewal, or acceding by the defendants to a proposition which they had before refused, and which the plaintiffs considered as rejected, did not revive the proposition of the plaintiffs (if such it may be called), contained in their letter of the 28th of August; and that they could not be bound, without a new assent.

The case is analogous to that of *Cooke* v. *Oxley*, 3 T. R. 653, where Oxley having proposed to sell to Cooke 266 hogsheads of tobacco, at a certain price, gave him a certain time, at his request, to determine whether he would buy them or not. Cooke, within the time, determined to buy them, and gave notice thereof to Oxley; yet Oxley was held not liable, in an action for not delivering them; for Cooke not being bound by the original contract, there was no consideration to bind Oxley.

Thus far, on the effect of these communications as between man and man. We shall now endeavor to show, that the defendants have done nothing in the course of this negotiation, which was binding on them, and therefore, the plaintiffs cannot be bound on their part.

It is not pretended, that a simple contract cannot be dissolved by a parol agreement; but we say, it must be such a parol agreement as will bind both parties. The note of the 6th is neither an act, nor a declaration of the com-

pany. All the powers of a corporation aggregate are derived either from the common law, or from statute law. By the statute, the seal is dispensed with, but other solemnities are substituted, with which they must comply. They can act as a corporate body only in the mode prescribed. There is no law or by-law which gives authenticity to such a note. The president and directors may speak as natural persons, and say what they will do in their corporate capacity, but they cannot bind the corporation but by the means provided *163] *by law. They may make preliminary arrangements, but they can conclude nothing. That this was their own understanding, is evident by their not having made any record of these transactions upon their books, and leaving everything upon this loose, unsigned note of their secretary.

It has been said, that there was no exception to the testimony of Mr. Jackson; but the fact is not so. The words of the bill of exceptions are, "whereupon, the counsel for the said Head & Amory did except to the aforesaid evidence," which includes the whole evidence offered on the part of the defendants.

Customs are of two kinds; general and special. The latter only are the proper subject of oral proof; but then they must be proved by facts, and not by opinions. In this case, the testimony was not as to fact or opinion, but as to the law. *Edie* v. *East India Company*, 2 Burr. 1216, 1220.

February 25th, 1804. Marshall, Ch. J., delivered the opinion of the court.—This is a declaration on a policy of insurance, and the only question in the case is, whether the policy was vacated by a subsequent agreement between the parties. This question depends entirely on the legal operation of certain written communications between them, which appear in the record.

Messrs. Head & Amory, of Boston, had obtained insurance, through their correspondents, Messrs. Brown & Ives, of Providence, on the cargo of the Spanish brig, the Nueva Empressa, at and from Malaga to Vera Cruz, and at and for thence to her port of discharge in Spain. An insurance was afterwards obtained on the brig, at and from Cuba (she having been chased into the Havana by British cruisers), to her port of delivery in Spain.

The vessel having been detained in port, closely watched by cruisers, until she was worm-eaten, Head & Amory became desirous of terminating *164] their risk at the Havana, *which could only be effected by permission of the government at that place, which was not to be obtained but with considerable expense. They, therefore, applied to the insurance company, through their correspondents, Brown & Ives, by a letter, dated Boston, the 21st August 1800, to know whether a conditional permission could be obtained from the underwriters, to terminate the voyage at the Havana, provided the consent of the government could be obtained; and if so, on what terms that conditional permission would be granted. The underwriters refused to make any conditional agreement, but offered to vacate both policies on terms mentioned in a letter signed by their president.

Misunderstanding the letter as a proposition for vacating the policy on the cargo only, the terms proposed were acceded to, and a letter was written from Head & Amory to Brown & Ives, declaring their acceptance of the proposition, understood to be made by the insurance company, in such a manner as very clearly to show the mistake under which it was written. On

seeing this letter, the misapprehension of the parties was discovered and explained, and the agreement considered as not being made; at the same time, a new proposition was made for settling both policies. To this letter, declining absolutely any agreement respecting either policy singly, and proposing specific terms on which they would settle both, Head & Amory returned an answer, dated the 3d of September 1800, which was addressed to Brown & Ives, and is in these words. (See *ante*, p. 131.) This letter was laid by Brown & Ives before the company, and their secretary returned the following note without a signature. (See the note of September 6th, 1800, *ante*, p. 132.) This note was forwarded by Brown & Ives to Messrs. Head & Amory, but before they received it, intelligence came to hand, that the Nueva Empressa had sailed from the Havana, and had been captured, and was condemned as a prize, late in the month of August. Head & Amory, therefore, insisted on their policy.

*Everything respecting the delays in the communications, is laid out of the case, because they do not appear to the court in any manner to affect it. [*165

Richard Jackson, the president of another Insurance Company, was also examined, and testified, that in effecting insurance, or settling a policy, or making any adjustment or agreement about insurance, the assent of the parties to doing a thing was in all respects as binding on the parties, as the thing done, according to the usage and practice among underwriters. Upon this testimony, the court instructed the jury that the agreement to cancel the policy for the cargo was fully proved, and they ought to find for the defendants on that count. The jury accordingly found for the defendants, and the plaintiffs have sued out a writ of error to bring the cause into this court. The opinion and instructions of the judges of the circuit court to the jury are said to be erroneous, because, the communications which have been cited do not import a contract. They were negotiations preparatory to an agreement, but not an agreement itself.

The letter of the 3d of September certainly manifests some degree of disappointment, at finding that the agreement supposed to have been concluded had not really been made; and also proves their opinion, that the negotiation was not absolutely broken off, but was yet pending. "If we make this settlement," say they, "we shall make every effort, by money and interest, to have the adventure terminated at the Havana, and the sooner we know the better." "The terms we acceded to were very favorable to the company, as it was paying them at the rate of 35 per cent. for the outward premium." Yet the letter contains no direction to make any specific proposition to the company, and may be construed either as a mere inquiry, whether the company would cancel the policy for the insurance on the cargo singly, on the terms which had before been understood to have been offered, or as a new and positive proposition, the acceptance of which would complete the contract.

*It is also very questionable, whether the unsigned note delivered by the secretary is such an acceptance as to form, when taken with the letter of the 3d of September, an absolute agreement obligatory on the company. It is a general rule, that a corporation can only act in the manner prescribed by law. When its agents do not clothe their proceedings with those solemnities which are required by the incorporating act, to enable [*166

them to bind the company, the informality of the transaction, as has been very properly urged at the bar, is itself conducive to the opinion, that such act was rather considered as manifesting the terms on which they were willing to bind the company, as negotiations preparatory to a conclusive agreement, than as a contract obligatory on both parties.

The communications stated in the record, lead to an event, which might have been so readily completed, that it might have been, and probably was, supposed unnecessary to pass through the previous solemnities of a contract binding themselves to do that which, if really the wish of both parties, might so speedily be accomplished ; so short a space of time was requisite to have the policy delivered up and cancelled, that the forms of completing a contract to cancel it, might have been deemed useless. On this account, and on account of the known incapacities of a body corporate to act or speak but in the manner prescribed by law, it may well be doubted, whether communications which, between individuals, would really constitute an agremeent, were viewed by the parties before the court in any other light, than as ascertaining the terms on which a contract might be formed.

This course of reasoning relative to the intent of the parties, is plainly founded on the idea that the note of the 6th of September is, in its legal operation, a mere informal paper, which may, perhaps, amount to notice of an act, if such act was really performed, but which is not, in itself, an act of any legal obligation on the company. That if the proposition contained in the letter of the 3d of September had been regularly accepted, this note might possibly have been considered as notice *of that ac-
*167] ceptance, but is not in itself an acceptance. If this idea be incorrect, so is the reasoning founded on it. If it be correct, then it follows, that no contract was made, because the proposition of the 3d of September, if it really was one, was not accepted by the company, before it was withdrawn by Head & Amory.

This leads us to inquire, whether the unsigned note of the 6th of September be a corporate act obligatory on the company ? Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur, to ascertain its powers, and to determine whether it can complete a contract, by such communications as are in this record.

The act, after incorporating the stockholders, by the name of The Providence Insurance Company, and enabling them to perform, by that name, those things which are necessary for a corporate body, proceeds to define the manner in which those things are to be performed. Their manner of acting is thus defined: " Be it further enacted, that all policies of assurance and other instruments, made and signed by the president of the said company, or any other officer thereof, according to the ordinances, by-laws and regulations of the said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof, in manner as set forth in the constitution of the said company, hereinafter recited and ratified."

An instrument, then, to bind the company must be signed by the president, or some other officer, according to the ordinances, by-laws and regulations of the company or board of directors.

*A contract varying a policy is as much an instrument as the policy itself, and therefore, can only be executed in the manner prescribed by law. The force of the policy might indeed have been terminated by actually cancelling it, but a contract to cancel it, is as solemn an act, as a contract to make it, and to become the act of the company must be executed according to the forms in which by-law they are enabled to act. The original constitution of the company, which is engrafted into the act of incorporation, does not aid the defendants. That agreement does not appear to dispense with the solemnities which the law is supposed to require. It demands the additional circumstance that a policy should be countersigned by the secretary. It appears to the court, that an act not performed according to the requisites of the law, cannot be considered as the act of the company, in a case relating to the formation or dissolution of a policy. [*168

If the testimony of Mr. Jackson is to be understood as stating, that an assent to the formation or dissolution of a policy, if manifested according to the forms required by law, is as binding as the actual performance of the act agreed to be done, it is probable, that the practice he alludes to is correct. But if he means to say, that this assent may be manifested by parol, the practice cannot receive the sanction of this court. It would be to dispense with the formalities required by law, for valuable purposes, and to enable these artificial bodies to act, and to contract, in a manner essentially different from that prescribed for them by the legislature.

Nor do the cases which have been cited by the gentlemen of the bar appear to the court to apply in principle to this. An individual has an original capacity to contract and bind himself, in such manner as he pleases. For the general security of society, however, from frauds and perjuries, this general power is restricted, and he is disabled from making certain contracts by parol. This disabling act has received constructions which take *out of its operation several cases not within the mischief, but which might very possibly be deemed within the strict letter of the law. He who acts by another, acts for himself: he who authorizes another to make a writing for him, makes it himself. But with these bodies which have only a legal existence, it is otherwise: the act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated. [*169

It is, then, the opinion of this court, that the circuit court erred in directing the jury, that the communications contained in the record in this case, amounted to a contract obligatory on the parties, and therefore, the judgment must be reversed, and the cause remanded for a new trial.

Chase, J.—I concur with my brethren as to the operation of the testimony given by the Providence Insurance Company in evidence to the jury, and that it created no legal obligation on the company; but I am also of opinion, that the testimony given by them in evidence was inadmissible, and

that the circuit court ought not to have permitted the same to have been given in evidence to the jury.

The judgment of reversal was as follows, viz.: This cause came on to be heard, on the transcript of the record of the circuit court, and was argued by counsel; on consideration whereof, the court is of opinion, that there is error in the proceedings and judgment of the said circuit court, in this, that the court gave it in charge to the jury, that the several written papers in the record contained, and the testimony of Richard Jackson, in the said record also stated, did in law amount to full proof of a contract entered into between the plaintiffs and defendants, which was obligatory on both parties; whereas, it is the opinion of this court, that the instruments of writing and testimony aforesaid, do not in law amount to a contract. It
*170] is, therefore, considered *by the court, that the judgment aforesaid be, for this cause, reversed and annulled, and that the cause be remanded to the said circuit court to be again tried, with direction, that the testimony, in the said record contained, does not amount to evidence of a contract concluded between the parties; and that the defendants do pay to the plaintiffs their costs.[1]

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[1] A contract is only complete and binding, when a proposition made by one party is met by an acceptance on the part of the other, which corresponds with it entirely and adequately. Insurance Co. *v.* Lyman, 15 Wall. 664; McCotter *v.* New York, 37 N. Y. 325; Sourwine *v.* Truscott, 17 Hun 432. An application for insurance, by mail, is not a binding contract, unless accepted. Bentley *v.* Columbia Ins. Co., 17 N. Y. 421. Where parties treat by letter and telegraph, there must be a distinct offer on the one hand, and an acceptance of it on the other, showing a concurrence of the minds of both parties, before either is bound. Deshon *v.* Fosdick, 1 Woods 286. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation. Snow *v.* Miles, 3 Cliff. 608. Thus, an offer to sell at a fixed price, may be revoked, at any time prior to its acceptance; a conditional acceptance does not make it binding as a contract. Stitt *v.* Huidekoper, 17 Wall. 384; Dox *v.* Shaver, 14 Hun 392; Hochster *v.* Baruch, 5 Daly 440. But where one party proposes, by mail, a contract with another, residing at a distance, and the latter accepts it, and deposits its acceptance in the post-office, addressed to the former, it is, from that moment, a complete and binding contract, though the letter of acceptance be never received. Vassar *v.* Camp, 11 N. Y. 441. Provided such acceptance be put in a course of transmission, within a reasonable time. Chicago and Great Eastern Railway Co. *v.* Dane, 43 N. Y. 240. So, a contract negotiated by telegraph, is deemed completed, when an unqualified acceptance of the proposal is furnished to the telegraph-office, for transmission, if done within a reasonable time, considering the nature of the contract. Minnesota Oil Co. *v.* Collier Lead Co., 4 Dill. 431. And this, though the acceptance be not received in time to enable the party to comply with his proposal, in consequence of a derangement of the line of telegraph. Trevor *v.* Wood, 36 N. Y. 307. And see Howard *v.* Daly, 61 Id. 362.