INSURANCE COMPANY *v.* COLT.

1. When the charter of an insurance company in the same clause which authorized its president and directors to make insurance against fire, and for that purpose to execute such "contracts, bargains, agreements, policies, and other instruments" as might be necessary, declared that every such contract, bargain, agreement, and policy should be in writing, or in print, and be under the seal of the corporation and be signed by the president and attested by the secretary or other officer appointed for that purpose; *Held*, that this requirement of the charter had reference only to executed contracts or policies of insurance, and not to the initial or preliminary arrangements for insurance which precede the execution of the formal instrument by the officers of the company.
2. An agent for an insurance company authorized to take and approve risks, and to insure, is by general usage also authorized to allow credit for the premium. Its allowance does not impair the validity of the preliminary contract to insure.
3. When a preliminary contract for insurance is valid it may be enforced in a court of equity against the company; and being enforced by the procurement of a policy, an action can be maintained upon the instrument; or the court in enforcing the execution of the contract may enter a decree for the amount of the insurance.
4. When an agent is authorized, after a preliminary contract for an insurance is made by him, to fill up a blank policy duly signed and attested by the officers of the company, sent to him for the purpose, he is authorized to fill up such policy after a loss has occurred. When thus filled up, the policy becomes the property of the assured, and upon a refusal of the company to surrender it two courses are open to him: either to proceed by action to recover the possession of the policy, or to sue upon the policy to recover for the loss, and in the latter case to prove its contents upon failure of the company to produce the instrument on the trial.
5. Where, at the time the preliminary contract for an insurance is made, it is expressly stipulated that the policy when filled up shall be held by the agent, in his safe, for the assured, no actual manual transfer of the policy to the assured, after its execution, is essential to perfect his title.

ERROR to the Circuit Court for the District of Connecticut; in which court Colt sued the Franklin Insurance Company, of Philadelphia, on a policy of insurance which he alleged had been executed by the company; an allegation on its part denied.

The uncontradicted case was thus:

The insurance company aforesaid was one incorporated

by Pennsylvania and having its principal office in Philadelphia. One section of its charter gave to its president and directors power to appoint such "agents" as should be necessary for conducting and executing its business elsewhere than in Philadelphia as well as in that city, and the company accordingly was doing business in Hartford, Connecticut, and had as its general agents there, for the transaction of its business of fire insurance, with power to take and approve risks and insure and countersign policies, a firm known as Nevers & Havens.

Another section of the charter, the eighth, was in these words:

"§ 8. The said president and directors shall have full powers on behalf of the said corporation, to make insurance against losses by fire, on any house, tenement, manufactory, or other building, . . . and to *make, execute*, and *perfect* such and so many *contracts, bargains, agreements, policies, and other instruments, as shall or may be necessary, and as the nature of the case shall or may require; and every such contract, bargain, agreement, and policy to be made by said corporation shall be in writing or in print, and shall be under the seal of the said corporation, signed by the president, and attested and signed by the secretary, or other officer who may be appointed by the president and directors for that purpose.*"

With this charter in force, the said Nevers & Havens, as agents of the company, on the 26th of August, 1870, made proposals to Colt to insure certain premises belonging to him. He thereupon made an application for insurance for the sum of $10,375, from August 26th, 1870, for a term of five years, to be placed in the company. And a parol contract of insurance was then completed with the said Nevers & Havens, agents as aforesaid, to insure this said property with the company for five years from the said date, the insurance to be binding on and from that date, at a premium then fixed and agreed to. Credit was given for the payment of the premium till the 1st of October then next, and it was agreed that a policy should be made, and that Nevers & Havens should keep it in their possession for Colt till the

1st of October, for his convenience, he saying that he had then no safe and convenient place in which to keep papers of that character.

The property was destroyed by fire without fault of Colt, on the 20th day of September, 1870, and proofs of loss were duly made and presented.

No policy was made until after the fire, when Nevers & Havens, upon the request of Colt, filled out a blank policy of the company, properly signed and countersigned. They declined, however, to surrender the possession of the same to Colt till they should have consulted the company.

The company had no knowledge of the said negotiations or of the contract to insure (except as the knowledge of the said agents might be the knowledge of the company) till after the fire, and no communication respecting the negotiations or contract had been made by Nevers & Havens to it till after the fire.

The policy was subsequently, after such consultation, returned by the agents to the company.

Colt tendered to the agents the premium on the 22d of September, 1870, and demanded the policy, and it not having been produced he demanded the insurance-money (again tendering the premium), and the insurance-money being refused he brought suit against the company *at law*, and on the trial, proved the contents of the policy.

The counsel for the defendant requested the court to charge the jury—

1st. That the eighth section of the company's charter prescribed the manner in which every contract, bargain, and agreement of insurance should be made, and that no contract having been made in writing or print, and executed as therein required during the existence of the property claimed to have been insured, the company was not liable in the action.

2d. That under and by virtue of the charter of the company, it was not authorized to make a parol contract of insurance, and that any such contract was void at law.

3d. That under the said charter an action at law could not

be sustained against the company upon a parol agreement to insure, or a parol contract of insurance.

4th. That it being a fact, in this case admitted by the plaintiff, that the parol contract of insurance was not executed or evidenced by a written policy until after the destruction of the property by fire, the company's agent had no authority subsequent to the fire to make and execute a written policy which should be binding upon it.

The court refused thus to charge the jury, and charged contrariwise, that upon the uncontradicted case the plaintiff was entitled to their verdict. To this charge the company excepted, and verdict and judgment having gone against it, it brought the case here.

Messrs. F. Chamberlin and E. Hall, for the plaintiff in error:

When the charter of a corporation prescribes to it in terms plainly mandatory a particular mode and manner in which all its contracts shall be executed and delivered, such prescription operates as a limit upon the mode in which such contracts shall be executed and delivered, and all persons dealing with a corporation (even a foreign one) are bound to take notice of every limitation upon its powers contained in its charter.*

Now, the eighth section of this company's charter declares not only that every "policy to be made by said corporation shall be in writing or in print," but that *every* "contract, bargain, *agreement*," shall be just as much so. The only question therefore is, Was what was done by Nevers & Havens any kind of a contract, bargain, or agreement made by the corporation? The whole case of the plaintiff rests upon an assumption that it was completely a contract, bargain, and agreement made by it. He has no case whatever but on that assumption. The language of this section has an emphasis of comprehension. It is that "*every*" contract, bargain, or agreement—contracts, bargains, and agreements howsoever made—whether made by the company, at its

* See Hoyt *v.* Thompson, 19 New York, 222.

office in Philadelphia, or in other places, and by its agents—whether preliminary or final—all must be "in writing," &c. The legislature and the insurance company doubtless knew that these requirements would cause a certain amount of delay to the company in transacting the business of insurance. But they considered this to be far less injurious and far less embarrassing than continual lawsuits arising on disputes of what it was that agents had done, and whether, in what they had done, they had transcended their authority or not.

The reason of this requirement in the case of this particular company is specially obvious. The Franklin Insurance Company was chartered to do business in every State of the Union as much as in Pennsylvania; in States far from its home as well as in its home. "Agents" are part of its machinery as chartered. Now, it is notorious that the business of agents is not to "execute and perfect policies," but to "make contracts, bargains, agreements," preliminary to the "execution and perfecting of policies," and it is equally notorious that the actions of agents of insurance companies in making such preliminary "contracts, bargains, and agreements" are among the most fertile sources of litigation in insurance cases. A wise policy of the legislature of Pennsylvania therefore required *these*, as well as that which was but the executing and perfecting of them, to be in a formal shape, and signed in the way prescribed, before they should become binding.

Can it be supposed that the same legislature which requires policies to have form and to be in writing, meant to leave all the preliminary contracts, bargains, and agreements on which policies were to issue, loose and open to parol? these preliminary contracts, bargains, and agreements especially being made by mere agents, persons in distant places, and of necessity unknown to the company. The preliminary contracts, bargains, and agreements are the foundation of the policies. They are the essential and only essential portions of what is done. When *they* are clear and undisputed, the policy is but a form. Equity will regard it as executed and perfected, though not one word of it has

been written. Nay, though it be all written and printed, and sealed and attested, yet if it differ from the preliminary agreement it is nought, and will be made to conform to it. Now, did the legislature mean to sweep away all protection to the company by leaving every important thing to rest in parol, and requiring that which was but form, to be in writing and solemnly executed?

Some reliance will perhaps be placed by opposing counsel on what was said by the late Mr. Justice Grier of this court, in the case of *Constant* v. *Alleghany Insurance Company*, ruled in the Pennsylvania circuit.* There a statute of Pennsylvania empowered an insurance company

"To make, execute, and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require, and every such contract, bargain, policy, and other agreement shall be in writing or print, under the corporate seal, and signed by the president, or, in his inability, by the vice-president."

A parol preliminary contract was made through an agent, and a loss having occurred, and the company having refused to pay, the assured *filed a bill in equity* to compel the company to execute the policy and for relief. Mr. Justice Grier, indeed, said that—

"Before such instruments are attested in due form, the president or secretary, or whoever else may act as a general agent of the company, may make agreements, and even parol promises, as to the terms on which a policy shall be issued, so that *a court of equity* will compel the company to execute the contract specifically; and that where the loss had happened—to avoid circuity of action—the chancellor will enter a decree directly for the amount of the insurance for which the company ought to have delivered their policy, properly attested."

Whether this position is correct we need not inquire further than we have done. Conceding it to be correct, the case does not touch ours. The case before Grier, J., was a

* 3 Wallace, Jr. 316.

proceeding in equity. Our case is at law, and though the reverend justice, of whom we speak, abhorred every sort of technicality that sought to entangle justice in its meshes, he yet noted how different the case would have been had the suit been like this, one at law. He says:

"By its act of incorporation, this company could make insurance which would be *legally* valid, only by a policy attested by the president, secretary, and the seal of the corporation."

The case, therefore, is in our favor, not against us.

Messrs. H. C. Robinson and R. D. Hubbard, contra.

Mr. Justice FIELD delivered the opinion of the court.

The charter of the company defendant in the same clause which authorizes its president and directors to make insurance against fire, and for that purpose to execute such "contracts, bargains, agreements, policies, and other instruments" as may be necessary, declares that every such contract, bargain, agreement, and policy shall be in writing, or in print, and be under the seal of the corporation, and be signed by the president and attested by the secretary or other officer appointed for that purpose.

Where similar language as to the form of the contract or policy was used in connection with a like grant of power to insure, in a general statute of Pennsylvania respecting insurance companies, it was held by the late Mr. Justice Grier, in a case before the Circuit Court of the United States, that a company to which the law applied, could make an insurance, which would be legally valid, only by a policy attested by the officers and seal of the corporation.* The learned justice undoubtedly considered that the mode in which the contract or policy could be made was so associated with the grant of power as to be essential to a valid exercise of the power. And such appears to be the natural import of the language of the clause of the charter of the defendant under

* Constant *v.* The Insurance Company, 3 Wallace C. C. 316.

consideration in this case, when the whole clause, that which confers the power and that which prescribes the mode of its exercise, is read.

But the learned justice at the same time very justly observed, that before the policy was attested in due form the president or secretary, or whoever else might act as general agent of the company, might make agreements and parol promises as to the terms on which a policy should be issued, so that a court of equity would compel the company to execute the contract specifically; and that where a loss had happened, to avoid circuity of action, the chancellor would enter a decree directly for the amount of the insurance for which the company ought to have delivered its policy properly attested.

The requirement of the charter in this case has reference, in our judgment, only to executed contracts or policies of insurance, by which the company is legally bound to indemnify against loss, and not to those initial or preliminary arrangements which necessarily precede the execution of the formal instrument by the officers of the company. The preliminary arrangements for the amount and conditions of insurance are in a great majority of instances made by agents. It is always so where the insurance is effected out of the State where the company is incorporated and has its principal place of business. The charter of the company in this case authorized the president and directors to appoint officers and agents for conducting its business in other places than the city of Philadelphia. And it would be impracticable to carry on its business in other cities and States, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law distinguishes between the preliminary contract to make insurance or issue a policy and the executed contract or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should

be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies.

In a recent case in the Court of Appeals of Kentucky this precise question was considered, and its determination was in accordance with the views we have expressed.* There the suit was to enforce a parol contract of insurance made by the agent of the company, whose charter provided that all policies or contracts of insurance made by the corporation should be "subscribed by the president, or president *pro tem.*, and signed and attested by the secretary, and being so signed and attested," should be binding and obligatory upon the corporation without its seal, according to the tenor, extent, and meaning of the policies or contracts. And the court held that this clause did not require an executory contract for an insurance to be in writing, and said that it knew of no American charter which did so require, observing that whilst a policy as an executed contract of insurance was defined to be documentary and authenticated by the underwriter's signature, yet a contract to issue a policy as an executory agreement to insure might be binding without a written memorial of it; that no statute of frauds applied, and that the common law did not require writing.

There is no suggestion that the preliminary contract in this case was not made in perfect good faith on both sides, with full knowledge by the agents of the condition, character, and value of the property insured. The credit allowed for the payment of the premium was an indulgence which the agents were authorized by general usage to give. Its allowance did not impair the preliminary contract; that, being valid, could have been enforced in a court of equity against the company; and having been enforced by the procurement of a policy, an action could have been maintained upon the instrument; or the court in enforcing the execution of the contract might have entered a decree for the

* The Security Fire Insurance Co. of New York *v.* The Kentucky Marine and Fire Insurance Co., 7 Bush, 81.

amount of the insurance. But no resort to a court of equity for specific performance was necessary in this case by reason of the action of the agents in filling up the blank policy, which was duly attested, as they should have done immediately after the preliminary arrangement with the assured. The agents were authorized to do after the fire that which they had previously stipulated to do on behalf of the company. The original neglect to fill up the blank policy at once constituted no valid reason for further delay. If the policy filled up at once would have bound the company, so must the policy subsequently filled up. The relations of the parties and the obligations of the company were not changed by the neglect of the agents. The filling up of the policy was a voluntary specific performance of the preliminary agreement. And, when filled up, the policy was by express stipulation to be held by the agents in their safe for the assured, and no actual manual transfer was, under these circumstances, essential to perfect the latter's title. It then became his property, and upon a refusal of the defendant to surrender it two courses were open to him: either to proceed by action to recover the possession of the policy, or to sue upon the policy to recover for the loss, and in the latter case to prove its contents upon failure of the company to produce the instrument on the trial.

In *Kohne* v. *The Insurance Company*,* the terms of insurance upon a vessel were agreed upon between the agent of the plaintiff and the company. For the premium a note was to be received with approved security. A policy was accordingly filled up by the president in conformity with the agreement, and notice thereof given to the agent. Three days afterwards the agent called at the office of the company to deliver the note and receive the policy. The company had in the meantime heard of the loss of the property insured, a fact which was unknown to either party when the agreement was made, and refused to deliver the policy, asserting that the agreement for the insurance was inchoate,

* 1 Washington's Circuit Court, 93.

which it had a right to retract. The assured then brought trover for the policy, and Mr. Justice Washington, presiding in the Circuit Court, sustained the action, holding that the contract was perfected when the policy was executed, and, of course, that the possession of the instrument by the company, after giving notice of its execution, did not impair the title of the assured.*

In *Lightbody* v. *The North American Insurance Company*,† the agent of the plaintiff made a contract of insurance of certain buildings with the agent of the defendant on the 30th of March, and paid the required premium. On the following morning the buildings were destroyed by fire. The policy was made out and delivered by the agent on the 21st of April following, after the company had refused to pay the loss; and the court held that the policy took effect by relation from the day of its date, which was the day the premium was paid and the contract concluded; that it was the manifest intent of the parties that the contract should operate from its date, so as to give the plaintiff the same legal remedy which he would have had if the policy had been then delivered; that the agent pursued his authority in delivering the policy after the loss, and that the delivery bound the defendants.

In the case of *The City of Davenport* v. *The Peoria Marine and Fire Insurance Company*,‡ the power of an agent to issue a policy after a loss, pursuant to his agreement, was very fully and ably considered with reference to the principal decisions on the subject. There the agreement for insurance was made between the parties by their agents on the 20th of March; on the night of the same day the property was destroyed by fire; on the following morning the policy was executed and delivered in accordance with the agreement, both parties at the time being ignorant of the loss. The court held that the policy was valid and binding; that the doctrine that an act done at one time may take effect as of a

* See also Sheldon *v.* Connecticut Mutual Insurance Co., 25 Connecticut, 207.

† 23 Wendell, 18.

‡ 17 Iowa, 277.

prior time, by relation back, was applicable to contracts of insurance; that the agreement to insure was the principal act, and that the formal execution of the policy might be concurrent therewith, or subsequent thereto, and when subsequent, and made as of the date of the principal act, took effect by relation as of that date.

Numerous other authorities to the same purport were cited on the argument, but we do not deem it necessary to pursue the subject further. We see no error in the ruling of the court below, and its judgment must, therefore, be affirmed; and it is so ordered.

JUDGMENT AFFIRMED.

GILLETTE *v.* BULLARD.

In an action on the bond given on appeal from the District Court to the Supreme Court of the Territory of Montana, the plea was that the defendant had prosecuted a writ of error from the judgment of the Territorial court to the Supreme Court of the United States, and had had executed his bond which operated as a supersedeas of that judgment, and that no remittitur or mandate had issued from the latter court, and that the judgment of the Supreme Court of the Territory still remained in the court so stayed by the supersedeas bond and the order thereon.

This plea is insufficient in that it does not aver that at the commencement of this action the appeal was then pending in this court or had ever been perfected. Nor is the case altered by the Practice Act of Montana, which enacts, in its seventy-eighth section, that "in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice."

ERROR to the Supreme Court of the Territory of Montana.

Bullard, assignee of Marden, sued Gillette upon an appeal bond. The action was commenced on the 30th of January, 1872. The complaint alleged that on the 15th June, 1868, Marden recovered a judgment in the District Court of the Territory against Plaisted & Wheelock, which yet remained in full force, unreversed and unsatisfied except as thereinafter