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RATIFICATION AFTER LOSS IN FIRE INSURANCE

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INTRODUCTION

On the morning of January 16th an insurance broker in San Francisco, acting without authority from the property owner, secured from an insurance company "binders" on the Paramount Famous Lasky plant near Los Angeles. These binders recited that they covered the property from ten A. M. and from noon, January 16th. On January 16th at 4:30 P. M. a fire swept the plant. On January 23rd the property owner "ratified", and it was later decided that the property owner could recover on the policy.¹ Following a strictly "hunch jurisprudence" the court gives no indication that² it was dealing with a problem on which there is controversy. It cites no case on post-fire ratification. Yet the American Law Institute's Restatement of Agency has a section on the topic; and there are decisions on it, both in this country's courts and in those of England which are in disagreement with each other.

Ratification in general is not the subject of this paper. It will concern itself only with ratification after loss in insurance and then only in fire insurance cases, in which the Courts have handled the matter as an insurance problem in terms of insurance utility rather than in terms of strict agency law. In insurance the problem may present itself in several guises. A friend's kindness may raise it in behalf of an absent neighbor whose house has somehow been left uninsured. An official of a corporation who has nothing to do with insuring its property, or a stockholder, may discover that those who have to do with getting insurance on the corporation's property have not attended to the job, and seek immediate coverage in behalf of the corporation. An ex-employee, still friendly to his former employer, may recall how careless "the boss" always

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¹Norwich Union Fire Ins. Society v. Paramount Famous Lasky Corporation, 50 F. (2d) 747 (C. C. A. 9th, 1931).

²See J. C. Hutcheson Jr., *The Judgment Intuitive—The Function of the 'Hunch' in Judicial Decisions* (1929) 14 CORNELL LAW QUARTERLY 274.

was about his insurance matters and seek to do him a good turn. An insurance broker may use the high-pressure salesmanship of getting the policy issued before seeking to sell it to the property owner. The ordinary case where an insurance agent renews a policy and hands it, with the bill for it, to a client seems also to be within the spirit of the problem. Many courts find it involved in the every day instance in which a property owner simply asks an insurance agent to get him protection without specifying in what company. If the agent delivers a policy in the "A" Company and later switches the business to the "B" Company and has not notified the property owner before a fire, these courts read the property owners efforts to solve his resulting predicament in terms of ratification.

Prior to loss the property owner—in familiar symbol "P"—may ratify "A" the self appointed "agent's" act, and take the benefit of the insurance. No one disputes this.³ But have the magic words "I ratify" lost their magic after the fire has occurred? This question the writer will attempt to answer. The American Law Institute's Restatement of Agency asserts that the words "I ratify" *have* lost their magic.⁴ The decision stated at the opening of this paper says they have not. On the surface of neither pronouncement is the property owner's knowledge of the occurrence of the loss of any relevancy. But the Restatement at least makes it a part of the problem.⁵ In the following discussion the writer has satisfied himself that the courts "judgment intuitive" in the Paramount case is in accord with the American judicial authorities. With less confidence he is inclined to the belief that on the whole the American doctrine is also the preferable solution on principle.⁶

³THE RESTATEMENT OF AGENCY § 83, sets out the doctrines.

⁴See page 175 *infra* for § 116.

⁵Under § 116 is "illustration (b)": "A purporting to represent P, but without authority, makes a contract to insure P's house. The house burns to P's knowledge. P then affirms. There is no insurance."

⁶In the periodical literature on ratification as revealed by the digests of the American law reviews, the paper most thoroughly in point is that of F. T. Case, *A Question of Ratification of Insurance Law* (1907) 19 GREEN BAG 93. Mr. Case who deals with post-fire ratification, specifically, opens with the concession that insurance attorneys believe that ratification may be after loss: that the texts so state and that the courts so hold. He wrote prior to more outstanding decisions on the topic and did not mention others already on the books. A note on his paper appears in (1907) 20 HARV. L. REV. 504. Its comments are on the whole adverse to his position that no ratification should be allowed. The note concludes that "The text writers lay down the law contrary to Mr. Case's view and the language of the cases they commonly cite supports them." Notes on ratification topics applying to the cases cited herein are in the foot notes to this paper.

I. RATIFICATION AFTER FIRE LOSS—ON THE AUTHORITIES

(a) *American Decisions and Texts*

*Marqusee v. Hartford Fire Insurance Co.*⁷ in the United States Circuit Court of Appeals at New York City is the outstanding American decision.⁸ The Hartford Company issued the policy on March 16th when the self-appointed agent asked for it, and left it at the property owner's warehouse. The fire came three days later and within a week after that, the self-appointed agent tendered the premium,⁹ which the insurer refused. On April 30th the insurance company wrote to the property owner: "This is to notify you that the paper you hold purporting to be a policy . . . is not . . . a contract; . . . this company hereby specifically denies liability under such a policy."

In a suit on the policy the trial judge¹⁰ directed for the insurance company on grounds he had already taken in a prior case¹¹ on the same facts. Finding that McIntosh, the self-appointed agent, had

On ratification in general see: E. Wambaugh, *A Problem as to Ratification* (1895) 9 HARV. L. REV. 60, discussing the Boulton Partners case on which see *infra*, note 15; E. Mechem, *Effect of Ratification as Between Principal and Third Party* (1904) 4 MICH. L. REV. 269, accepting the possibility of ratification after loss. (p. 279); E. G. Goddard, *Ratification by an Undisclosed Principal* (1903) 2 MICH. L. REV. 25; Corbin, *Ratification Without Knowledge of Material Facts* (1906) 15 YALE L. J. 331.

⁷198 Fed. 475 (C. C. A. 2d, 1912) *certiorari* denied, 229 U. S. 621, 33 Sup. Ct. 1049 (1912). It was not generally noted in the law reviews, possibly because they had noted *Kline Bros. v. Royal Ins. Co.*, 192 Fed. 378 (S. D. N. Y., 1911), *infra* note 11.

⁸In 198 Fed. 1043 the circuit court of appeals in rehearing said "the trial judge, directed a verdict in favor of the defendant which the majority of this court held should be reversed, so that the plaintiff, if able to do so, could on a new trial prove that the insured had ratified the unauthorized contract made by McIntosh before the insurer withdrew.****Further examination of the record shows that no such proof was offered and that if offered, it could not have been received, because the parties had stipulated to confine the proof to the agreed statement of facts. * * As the record shows no error on this point, the mandate must be amended so as to affirm the judgment." See however *Marqusee v. Ins. Co. of North America* *infra* p. 170 and note 41.

⁹The fact that he did so without authority saved the day in the end for the insurer in another case arising out of the same facts. See *infra* page 171.

¹⁰Learned Hand, then District Judge.

¹¹In *Kline Bros. v. Royal Insurance Co.*, 192 Fed. 378 (S. D. N. Y., 1911). Judge Hand's discussion of the ratification problem will be found at page 386 *et seq.* He does not mention *Grover v. Matthews*, (1910) 2 K. B. 401, which is hereafter discussed (page 165) and which the Court of Appeals in the *Marqusee* case remarks "fully sustained the view of the court below" (198 Fed. at 477).

The case in 192 Fed. 378 was noted in (1912) 25 HARV. L. REV. 729, 735—

no authority to make the contract for Kline Brothers and Co., the property owners, he concluded that the latter could not ratify after the fire. The fact finding, the Circuit Court of Appeals accepted. It completely disagreed with the trial court's conclusion as to its legal result. Reversing the defendant's judgment, Judge Ward said:¹² "What shocks us at first blush is that one may ratify an unauthorized contract after he knows that it is to his own advantage to do so, and so bind the other party to his apparent disadvantage. Further reflection, however, causes this apparent unfairness to disappear. The other party, having agreed to be bound by this contract and not having with-drawn from it, had no ground to complain if compelled to perform; the original lack of authority having been cured." Judge Noyes concurred. But Judge Lacombe dissented:¹³ "I cannot reach the conclusion that there is no unfairness in the application of the doctrine of ratification to the case at bar . . . It certainly is a harsh rule that would allow Kline Bros. and Co. to hold this policy, it may be for weeks, without ratification, able to defend against a suit for the premium¹⁴ on the ground that it never made a contract, but with the privilege of consummating the contract by ratification as soon as a fire might break out."

Nevertheless the majority concluded: ". . . as the case was decided so far as this question (that is, *when* the Kline Bros. and Co. *had* in fact ratified) is concerned, on the ground that they could not ratify after the fire, we think there must be a new trial, at which the plaintiff will have an opportunity of showing, if he can, that they did ratify the contract before the defendant withdrew from it."¹⁵

Ratification of unauthorized contracts of insurance after occurrence of loss; and in (1912) 12 COL. L. REV. 454, 458—Relation of principal and third party on ratification of unauthorized contracts. The Harvard note is inclined to disagree with Judge Hand's result; the Columbia note to agree. Neither mentions Grover v. Matthews, but the note writers both consider that the ratification would have been possible in England, and the Columbia discussion relies on Williams v. Ins. Co., L. R. 1 C. P. Div. 757 (1876) of which more *infra* note 21.

¹²198 Fed. at 477.

¹³198 Fed. at 479.

¹⁴See, however, National Union Fire Ins. Co. v. Ehrlich, *infra* note 71.

¹⁵The court repudiated the "English cases (which) go so far as to hold that one may ratify even after the other has withdrawn from the contract." Boulton Partners v. Lambert, 41 Ch. Div. 295 (1888); *In re Tredeman*, (1889) 2 Q. B. D. 66; *In re Portuguese Consolidated Copper Mines Ltd.*, (1890) 62 L. T. R. 88. Relying on these cases the notes cited *supra* note 11, felt that the English courts would hold contrary to Judge Hand's Kline Bros. Co. v. Royal Ins. Co. decision. As will be shown later the English courts found a way to agree with Judge Hand (see page 165). It may well be that in a country where the insurance company could not withdraw of his own motion it was necessary to give some cut-off by operation of law. The Marqusee case doctrine permits the insurer to withdraw

This left the issue: Had the insurer withdrawn before the self-appointed agent's principal affirmed? If the answer were "No" the property owner would collect insurance. By this *Marqusee* doctrine, therefore, the fire does not cut off ratification.¹⁶

On the other hand, "The latest English case cited fully sustained the view of the court below,"¹⁷ said Judge Ward in the *Marqusee* case.¹⁸ He was speaking of *Grover and Grover Limited v. Matthews*¹⁹ tried in the Commercial Court by a single judge. The Grovers had authorized Browns in 1908 to place the insurance. By 1909 his agency had ceased, and the court held that he was not authorized in 1909 to direct the same broker to renew it for that year. Knowing that the 1908 policy was to expire on March 25th, 1909, Browns, however, wrote to the broker on March 4th about renewal and the broker on March 5th prepared a slip and at Lloyds got signatures on it including that of Matthews. The fire occurred on March 27th and the Grovers on the same day tendered the premium. Matthews declined to take it. Said Hamilton, J.,²⁰ "The ratification . . . was after the loss, and with knowledge of the loss . . . and it appears to me that the judgments in *Williams v. North China Insurance Company*²¹ . . . compel me to say that it is too late for ratification; because as it appears to me, the court of appeal . . . recognized that a rule which would permit a principal to ratify an insurance even after loss was known to him was an anomalous rule which it was not, for business reasons desirable to extend, and which according to authorities, had existed only in connection with marine insurance. No case has

at any time before ratification, and the second *Marqusee* case went in the insurer's favor, as set forth on page 170 *infra*, because it was decided there that he had withdrawn after the fire and before ratification.

¹⁶Nor does even the property owners knowledge do so. But the question of knowledge is considered later, page 183.

¹⁷It was not mentioned in the *Kline* case, *supra* note 11, and there is no report of the 198 Fed. *Marqusee* case before Judge Hand.

¹⁸198 Fed. at 477.

¹⁹(1910) 2 K. B. 401. It is not noted in the law reviews.

²⁰(1910) 2 K. B. 401, 404.

²¹L. R. I. C. P. Div. 757 (1876). It was a suit on a marine insurance but not on a "lost or not lost" policy. The policy was simply antedated to cover a ship which was existing at the time the policy attached. After the loss and with knowledge of the loss the principal party ratified. This, Cockburn, C. J. said, at page 764, the existing authorities permitted. Jessel, M. R., at page 766, simply stood on the authorities. Mellish, L. J., did not refer to the topic at all, but Pollock, B., at page 770, added "As a question of mercantile convenience, I think it very desirable that a ratification of an insurance under such circumstances should be permissible."

been cited to me which suggests that this anomalous rule ought to be extended to fire insurance."²²

This *Grover* case Judge Ward abruptly dismissed in his *Marqusee* opinion, saying: "We cannot approve this conclusion."²³ These two are the cases which the examiner of the problem of post-fire ratification meets on the most casual approach to it. The latest of the texts on insurance to discuss the topic oppose them to each other.²⁴

The *Marqusee* case was passed on by four judges—including the trial judge—who, if they divided equally, seem to have given the problem more thought than did Hamilton, J.²⁵ who sat alone. Moreover, the same Circuit Court of Appeals adhered to its views in later suits by the Kline Co. and *Marqusee* against other insurers,²⁶—suits in which Judge Lacombe did not dissent; and other Federal courts quote the case as established law. It represents, therefore, a settled line of decision in the Federal courts.

This first *Marqusee* case, was noted in 42 *L. R. A. (n. s.) 1025*, where are collected the state court authorities. They show that ratification may be either a trap or a blessing for the property owner. If he has a policy which will be voided by "other insurance" and he is declared to have "ratified" the taking of additional coverage, he is a strong opponent of his own ratification. He is an earnest contender for it in the cases where the "ratified" policy is his hope of financial salvation. Consequently, the decisions reveal him both

²²There is nothing in the opinions which makes imperative Hamilton, J.'s reading that the Williams case confines itself to marine insurance.

²³198 Fed. at 478.

²⁴VANCE, *INSURANCE* (2d ed. 1930) 92, 135, states the general doctrine of the marine cases, citing holdings by the United States Supreme Court and the New York Court of Appeals, and then discusses the two cases of the present text. He contents himself with saying that the American decision "expressly disapproves" the English "p. 92, 138". The more positive views favoring post-fire ratification of COUCH, *CYCLOPEDIA OF INSURANCE LAW* (1929), and COOLEY, *BRIEFS ON INSURANCE* (1927) are set forth in note 52 *infra*. RICHARDS *INSURANCE* (4th ed. 1932) does not mention either case and his only discussion of the topic of post-loss ratification concerns that of insurance "in trust" or "on account of" clause. See pp. 421, 342, 759-60.

²⁵Whether the Federal Supreme Court can be said to have passed even negatively upon the *Marqusee* cases is not so clear. The Supreme Court refused certiorari in 229 U. S. 621, 33 Sup. Ct. 1044 (1912) but the citators put it as from both 198 Fed. 475 and 198 Fed. 1023 (See ante Note 8). The Supreme Court insists however that denial of certiorari "imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U. S. 482, 490, 43 Sup. Ct. 181, 182 (1923); *Atl. Coast Line R. R. Co. v. Powe*, 283 U. S. 401, 51 Sup. Ct. 498 (1931).

²⁶*Marqusee v. Insurance Co. of North America*, 211 Fed. 903 (C. C. A. 2d, 1914).

denying post-fire ratification and asserting post-fire ratification. They show him, also caught in entanglements of insurance methods from which the courts should be astute to rescue him whether at the expense of logic or of consistency. In some of them the property owner simply asks a representative of several insurers for coverage and is told he is insured in Company A which later directs the common agent to cancel its policy, whereupon the agent issues a policy in Company B; and the property owner learns of the switching of policies only after the fire has occurred. Some courts read these facts in terms of antecedent authority, and hold Company B regardless of the property owners post-fire act. But many of the opinions even in such cases rely on ratification, either solely, or in combination with the theory that antecedent authority was given to place the coverage with any company including B. The common factor among them all is their willingness to arrive at the practical result of the *Marqusee* case, in holding that the property owner is protected by *some* insurance; and in many of the decisions the only question is under which of the two policies the insured can be held to be covered.

Such a case is *Aetna Insurance Co. v. Renno*²⁷ where the Mississippi Home Insurance Company, through the Lake-Lott agency, issued and actually delivered to Renno its policy which it later instructed the Lake-Lott agency to cancel. Without notifying Renno, the Agency "cancelled" it on its books and applied to the Aetna Company for a substitute policy, which the Aetna Company "issued" to the Agency. Renno remained in ignorance of these doings until after the fire occurred. When told that his first policy was "cancelled", and the second one issued, he was assured by the Lake-Lott people that the second fully protected him. Yet both companies denied liability. Renno sued both. The gist of the decision is: "Of course the Home Insurance policy was a valid subsisting insurance at the time of the fire, and that insurance company is liable." Of the Aetna Company the court simply remarked that after the fire it "was too late for Renno to ratify the unauthorized act of Lake-Lott." As the court handled the case Renno was no sufferer whatever the court thought about ratification after loss. Had the court read the facts as some courts have, the Lake-Lott Agency had Renno's antecedent authority both to accept the cancellation and to take out the new policy. As the decision actually went it protected Renno under the first rather than the second policy. On like facts these other courts would protect him under the second policy rather than the first.

²⁷93 Miss. 594, 46 So. 947 (1908).

The Mississippi Court asserted that *Johnson v. North British Insurance Company*²⁸ was "directly in point." In that case Johnson also had asked Chappel, who was also agent for two companies, for insurance in either. Chappel delivered to Johnson a Hartford policy which that company later told Chappel to cancel. Chappel then wrote out the North British policy,—the one sued on. Of this switching of policies Johnson like Renno knew nothing until after the fire. Holding that the Hartford policy was "other insurance" which voided the North British policy by the latter's terms, the court asked: "Did the election of Johnson to sue on the North British policy (the second) * * * ratify the act of Chappel in entering a cancellation of the Hartford policy on his policy ledger. . . ?" It answered that there was no ratification of the cancellation because "Chappel did not purport to act for Johnson nor assume to have authority to do so."²⁹ This left Johnson protected, presumably, under the first policy—after defeating him on the second.

The court's discussion of ratification in this case, therefore, concerns not Chappel's taking out the second policy—the North British—but his "cancelling" of the first policy. The "other insurance" clause of the North British policy, however, was immaterial unless the North British policy was otherwise in force; and it could be in force only by ratification after loss. For Chappel on July 28th entered the "cancellation" of the Hartford policy in his book and on the same day wrote out the North British policy. The fire occurred on August 4th and Chappel did not succeed in seeing Johnson about either policy until the 10th when the North British—the second policy—was delivered to Johnson. His election to sue on it apparently put the policy into effect, and by post-fire ratification, so far that its "other insurance" clause could be invoked by the insurer issuing it. Thus the Ohio case is authority for post-fire ratification rather than against it.³⁰

The Mississippi court cites no other authority, but it had, itself, some six years previously, in *Watson v. Southern Insurance Com-*

²⁸66 Ohio St. 6, 63 N. E. 610 (1909).

²⁹*Supra* note 28, at 17, 63 N. E. at 611.

³⁰We are not, necessarily, concerned with Johnson's ultimate fortunes but 5 COUCH, CYCLOPEDIA OF INSURANCE LAW, at § 1049, discusses the topic of other insurance of which the owner does not know. Some courts give him the benefit of the original policy, in Johnson's case that of the Hartford Company on the theory that the loss fixes his right in it and that ratification of the second does not defeat his right. Others hold that if he ratifies the second he does lose the protection of the first policy. See VANCE INSURANCE 2d. ed. 1930 p. 729 for a discussion of the "hopeless variance."

pany,³¹ permitted ratification after loss. Mrs. Watson was the owner of a farm which a Mrs. Stewart rented from her.³² Mrs. Stewart's manager, on Nov. 12, 1900, secured a policy on the crops for Mrs. Stewart and also on the buildings for Mrs. Watson. Mrs. Watson did not know "that the policy had been issued in her favor until after the fire occurred." But she made proof of loss and sued on the policy. The court simply said "She ratified by suing. The appellee dealt with her after the fire on the theory that she had the right to the insurance." It cited no cases.

In *Todd v. German American Insurance Co.*,³³ after the fire, Todd discovered that two of the three policies were in a company which had become insolvent. Turpin, the agent to whom Todd had applied for insurance in the first place, then told Todd that he had rewritten these two policies in the German American Insurance Company on its consent; and that he had the German American policies in his vault. Todd did not then ask for the policies and the German American Company later told Turpin not to deliver them, although before the fire Turpin's clerk had been sent with them to Todd's store for delivery but had brought them back as Todd was away. Todd sued on these German American policies and won.

Of the court's reasons the first is sufficient to cover any case where the property owner applies for insurance to a representative of several companies: "It is to draw no strained inference to say that Todd's expression to Turpin of his desire that his agency should carry \$6,000, of his insurance was authority in the event that any portion of the insurance originally written should become cancelled. . . to replace it with a policy in some other company represented in that agency." This view, by itself, has satisfied some courts. But the Georgia opinion put the case on broader grounds. For it added that "if Turpin, assuming to act for Todd, but without any real authority to bind him procured (the policy), and paid the premium, or by an arrangement with the company substituted his promise to pay for the actual payment, Todd could, after the fire, upon discovery of the fact that Turpin had assumed to act for him, ratify the contract and hold the company upon it."³⁴ This Todd decision is much relied on for the permissibility of post-fire ratification and is frequently cited. The opinion, however, made much of the necessity that consideration be paid or promised by Turpin, the "agent" party, of which

³¹31 So. 904 (Miss 1902).

³²See *Southern Ins. Co. v. Stewart*, 30 So. 755 (Miss. 1901).

³³2 Ga. App. 789, 59 S. E. 94 (1907).

³⁴*Supra* note 33, at 798, 59 S. E. at 98.

point the *Marqusee* case made little.³⁵ And its facts discount it as an authority for the situation where the property owner has no dealings with a representative of plural insurers.

The 42 *L. R. A.* note also cites as permitting ratification after loss *Watson v. Southern Insurance Company* (which had already been stated) and *Hughes v. Insurance Company of North America*³⁶ where Hughes, like Johnson, disavowed a second policy in order to meet the defense by the first insurer, whom he was suing here, that there was other insurance. The property was a store in charge of one Hyams who, although he had no authority, secured a second policy for Hughes with the Phoenix Company. Of this Hughes did not learn until after the fire, but he made claim under this second policy upon the Phoenix Company, which obligingly paid him. Said the court: "Here, then, was a ratification by Hughes of the act of Hyams." Thus the court did in fact permit ratification after loss, and Hughes lost against the original insurer because he had taken other insurance.³⁷ The *L. R. A.* note states that *Larsen v. Thuringia etc. Insurance Company*,³⁸ and *Motley v. Manufacturers Insurance Co.*³⁹ also permit ratification after loss.

There was thus a considerable body of existing case law to support the *Marqusee* view. It had since been further collected by the indefatigable Mr. Couch⁴⁰ in his *Cyclopedia of Insurance Law* and it is clear that the *Marqusee* case was no new departure in the current of American thought on the topic.

The *Marqusee-Kline* insurance was again in litigation in the same court in 1914,⁴¹ in suits on policies issued under the same facts by other insurers. The court said "so far as his (the "agent" party McIntosh's) authority to make the contract is concerned this case is

³⁵Judge Ward in 198 Fed. at 477 said: "The circumstance that the premium had not been paid is immaterial, because the delivery of the policy before receiving it amounted to a giving of credit."

³⁶40 Neb. 626, 59 N. W. 112 (1894).

³⁷See note 30 *ante*.

³⁸208 Ill. 166, 70 N. E. 31 (1904). It arose on a question of prorating among several insurers. The insured himself argued that he could not ratify after loss. But the court without much discussion said "We see no reason" why he could not. The insurer on the ratified policy made no objection.

³⁹29 Me. 337, 50 Am. Dec. 591 (1849). A lessee from a mortgagor took out a policy which he caused to be made payable to "E. Motley, mortgagee." The court said that Motley's "bringing this action is a sufficient ratification of the acts of the lessees in procuring the insurance for his benefit." The case is discounted by the fact that the lessee had agreed with his lessor "to keep the premises fully insured."

⁴⁰COUCH, CYCLOPEDIA OF INSURANCE LAW. See *infra* note 52.

⁴¹*Marqusee v. Ins. Co. of North America*, 211 Fed. 903 (C. C. A. 2d, 1914).

not different in its material facts from that in *Marqusee v. Hartford Fire Insurance Co.*, 198 Fed. 475.⁴² As McIntosh had no authority . . . we must inquire whether the unauthorized contract subsequently became effective by ratification."⁴³ Placing on "the party who sets up the contract" the burden of proving the ratification, the court unanimously⁴⁴ affirmed a direction for the insurance company which had been given on the ground that a tender of the premiums by McIntosh, who was then still acting without authority, did not amount to a ratification by Kline Bros. "But an officer who makes an unauthorized contract has no more right to ratify it than he has to make it."⁴⁵ The insurers' withdrawal was found to have occurred before the Kline Company ratified McIntosh's tender, so that the question left for trial by the Hartford case was answered adversely to the would-be ratification. Thus the court adhered to the theory previously laid down and simply applied it to the new fact. The second *Marqusee* case is therefore a direct affirmation of the principle of the first.

In *National City Bank v. Wagner*,⁴⁶ Judge Mack for the Circuit Court of Appeals for the Seventh Circuit states: "That no consideration was paid for the ratification (there in question) . . . is likewise immaterial"⁴⁷ adding "It has been held that ratification after loss by fire is sufficient to render an insurance company liable on a policy issued without payment of the premium and on the request of an unauthorized agent. *Marqusee v. Insurance Co.*, 198 Fed. 475."⁴⁸

In *Palmetto Fire Insurance Co. v. Beha*⁴⁹ one of the much noted Chrysler automobile insurance cases⁵⁰ our present interest is not with the fate of the praiseworthy efficient Chrysler scheme for making installment selling safer for Chrysler, but with the standing in 1926 of the *Marqusee* doctrine in the same Circuit Court of Appeals which had stated in 1911 and affirmed it in 1914. Said A. N. Hand, C. J.,

⁴²*Supra* note 41, at 905.

⁴³*Ibid.* at 906.

⁴⁴Judge Lacombe was still a member.

⁴⁵*Supra* note 41, at 906.

⁴⁶216 Fed. 473 (C. C. A. 7th, 1914).

⁴⁷*Ibid.*, at 479.

⁴⁸*Ibid.*, at 479.

⁴⁹13 F. (2d) 500 (S. D. N. Y., 1925).

⁵⁰The Chrysler Corporation evolved a scheme whereby the Palmetto Insurance Company "immediately and automatically" insured every car sold "for account of whom it may concern", effective however only when a car is sold to a retail purchaser. A master policy was issued to the Chrysler Company and a "certificate" was issued to each retail buyer by the dealer from whom he purchased. It fell foul of legislation in various states. See *Palmetto Fire Ins. Co. v. Conn.*, 272 U. S. 295, 47 Sup. Ct. 88 (1926). See (1926) 35 YALE L. J. 989; (1927) 36 *ibid.* 419; (1927) 25 MICH. L. REV. 777.

in 1926: "Insurance may be taken out for whom it may concern. This has been common enough in marine risks. . . The doctrine has been extended to inland fire risks. (*Marqusee v. Hartford Fire Ins. Co.*, 198 F. 475) though the English courts do not seem to have gone that far. (*Grover v. Matthews*, (1910) 2 K. B. 401)". Although this passage indicates a fusion of ideas which Judge Learned Hand carefully had "differentiated" in the *Kline* case,⁵¹ it shows that the *Marqusee* case has survived a complete change of personnel in the court which decided it. Thus the doctrine of the *Marqusee* decision has remained unshaken in subsequent re-examination of the topic in the Federal Courts.

Those American writers on insurance law whose works are sufficiently late to include a discussion of the topic in the light of the more recent decisions, accept the *Marqusee* case. Mr. Couch,⁵² writing in 1929 considers post-fire ratification permissible, as does Mr. Cooley⁵³

⁵¹192 Fed. 378 (S. D. N. Y. 1911). But is there a differentiation? It seems curious to say that one sort of volunteer agent by adding "for whom it may concern" or like words may create a ratifiable situation which power is denied to another sort of volunteer agent. If it be said that the language indicates to the insurer that the applicant may be or is a volunteer agent this explanation would make ratification possible in any cases where the self-appointed agent was known by the insurer to be such. See p. 182 *infra*. At § 232, COUCH, CYCLOPEDIA OF INSURANCE LAW collects the cases which permit ratification after loss where the policy is taken as interest may appear by carriers or warehousemen. In *Ferguson v. Parish Council* (1916) S. C. 715, the Scottish court however applied the doctrine of the *Grover* Case to bar recovery by an employee of a poor house who lived on the premises which with their contents the employer had insured, apparently making the same fusion that A. N. Hand did, and using to the plaintiff's detriment.

⁵²2 COUCH, CYCLOPEDIA OF INSURANCE LAW, (1929) 1361, § 480, *Ratification of agent's acts*. Mr. Couch says: "If a party insures for another as principal without the latter's prior authority or consent, the intended principal may . . . adopt and ratify . . . , in which case the ratification is equivalent to a prior authority, and this, according to the weight of authority even after loss¹ or payment of the loss to the agent² in which case the agent receiving the money holds it for the owner's benefit³ and notwithstanding that the premium was not paid prior to loss⁴ although the contrary also has been held as to the latter point."⁵ The numbers refer to Mr. Couch's footnotes collecting the cases.

⁵³Mr. Cooley's seven volumes of BRIEFS ON INSURANCE (1927), have no table of cases. But in Volume 1, at page 846, under the heading "Policy procured without knowledge of insured" he says that life policies taken out without the consent of the insured are void as against public policy. He adds, however, "But where one though not duly authorized, assumes to act as agent for another and in his name procures a policy on property which is subsequently burned, the person in whose name the policy has been issued may ratify the assumed agency and assert liability against the insurer to the same extent as if authority had been originally conferred."

writing in 1927. Mr. Vance writing in 1930 states that the Marqusee case "expressly disapproves" the Grover decision, but does not go further into the topic. Mr. Richards in 1932 has little or nothing on the subject.^{53a}

Mr. Cooley cites no cases not already discussed. But Mr. Couch cites twenty-five favoring ratification after loss. Some deal with insurance placed by a custodian of goods on "intrust" policies, as to which post-fire ratification by the owners of the goods is accepted.⁵⁴ Others of his cases have already been discussed herein. But Mr. Couch adds *Ferrar v. Western Assurance Co.*⁵⁵ where the facts were similar to those of the Todd case⁵⁶ and where the court took the same double ground in the plaintiff's favor saying: "But if Coleman were not the general agent for the assured * * his action * * was ratified. * * The authorities seem to hold that a ratification, though made subsequent to loss, is valid." This language was repeated in *Kleiber Motor Truck Co. v. International Indemnity Co.*, a California case,^{56a} in 1929.

The only recent decision denying post-fire ratification is *Alliance Insurance Co. v. Continental Gin Co.* which is a case with a judicial history. The facts involved the familiar set up of the property owners application to the common agent of two companies, the issuing of a policy in the Providence Company, its later "cancellation" on that company's orders and its "replacement" with that of Alliance Company. The insured had no notice of these doings until after

For this he cites simply *Todd v. Insurance Co.*, 2 Ga. App. 789, 59 S. E. 94 (1907), and *Marqusee v. Hartford Fire Ins. Co.* 198 Fed. 475, 198 Fed. 1023 (1912).

^{53a}See *ante* note 24.

⁵⁴*Durand v. Thuron*, 1 Porter (Ala.) 238 (1834), where Durand who had deposited laces with Thuron for sale recovered from Thuron part of the proceeds of Thuron's policy on "goods in his store". *Wakins v. Durand*, 1 Porter (Ala.) 251 (1834) was a similar case where the court stressed the immateriality of the fact that the "adoption" was after the loss. *Snow v. Carr*, 61 Ala. 363 (1878), 32 Am. Rep. 3 was a similar case involving Mrs. Carr's piano left with Mr. Snow "for sale or rent". Mrs. Carr's interest was held to be covered because Snow's policy described the property as "his own or held in trust", and this notwithstanding that Mrs. Carr herself testified that she had not asked Snow to insure and had no knowledge of any insurance till "long after the fire." In *Miltonberger v. Beacom*, 9 Pa. St. 198 (1848) these earlier Alabama cases are relied on in a case where a landlord re-entered premises and insured them. As in the Alabama cases the dispute concerned the distribution of money paid to the landlord and did not directly involve the insurance company.

⁵⁵30 Cal. App. 489, 159 Pac. 609 (1916); rehearing denied 30 Cal. App. 494, 159 Pac. 611 (1916).

⁵⁶*Ante* note 33.

^{56a}289 Pac. 865 (Calif. App.).

the fire, when the Providence Company blandly declared its policy out of the picture while the Alliance Company assured him that it was too late to ratify. He sued both. The trial court found for him against the Alliance Company and the Texas Court of Civil Appeals in 1925 held⁵⁷ "On principle we know no reason why an effective ratification cannot be * * after loss", citing the state court authorities heretofore set out in this paper, but not mentioning any of the *Kline-Marqusee* cases or *Grover v. Matthews*. In 1926 the Texas Commission of Appeals reversed the decision.⁵⁸ In denying ratification it relied solely on *Kline Bros. v. Royal Insurance Co.*⁵⁹ which the Marqusee case had overruled, and *Grover v. Matthews* which the Marqusee case had repudiated. It did not mention the Marqusee case or any of the decisions heretofore stated in this paper. But in 1919 the Commission itself had held, apparently on the theory of antecedent authority, that under like facts the property owner was covered by the second policy without having to "ratify" at all,^{59a} that is, without any post-fire acts on his part. Aside from this Texas case the current of American decision in favor of post-fire ratification is otherwise undeflected.^{59b}

Recently New York has sharply diverged from the Texas final result under similar facts and has done so without resorting to ratification at all as Texas itself had previously done. In this New York case, *Rose Inn Corporation v. National Union Fire Insurance Co. and Importers and Exporters Insurance Co.*,⁶⁰ the property owner simply told the Van Voast Agency, representing twenty-five insurers, to keep him insured for a stated sum. When insuring companies notified the Van Voast Agency to cancel, the Agency wrote new policies in other companies. At the time of the fire the "new policies had not been exchanged" as the Appellate Division put it, but⁶¹ they had been "mailed * * together with notices of cancellation of the old" to the property owner but had not been received by him. The Court of Appeals said⁶² that under the circumstances "It is a principle of almost

⁵⁷_____ Tex. _____ (1925); 274 S. W. 299.

⁵⁸_____ Tex. _____ (1926); 285 S. W. 257. _____ rehearing denied _____ Tex. (1916) 287 S. W. 244.

⁵⁹See *supra* note 11.

^{59a}*Dalton v. Norwich Fire Ins. Soc. Tex.* (1919) 213, S. W. 230, reversing the Court of Civil Appeals 175 S. W. 459 (1915) where post-loss ratification was much discussed.

^{59b}See *Nat. F. Ins. Co. v. Oliver* 204 S. W. 367 (Tex. Civ. App. 1918:); *Clawer v. Fid. Phenix F. I. Co.* 296 S. W. 257 (5th Ct. App. Mo. 1927).

⁶⁰258 N. Y. 51 (1932).

⁶¹228 App. Div. 351 (1932).

⁶²258 N. Y. 54 (1932).

universal acceptance that the (Van Voast Agency) has power to waive for the assured the five day period of cancellation, to cancel the policies at once and immediately to write new policies * * so that the new policies become at once effective."

Under similar facts the Circuit Court of Appeals for the Second Circuit, said in *May v. Hartford Fire Insurance Co.*⁶³ "When the insured applies directly to an agent of several companies, and gets from him a promise of general and continuous protection against fire, it is indeed abundantly settled that the agent acts for both sides, and the courts have been at some pains to show that the apparent opposition of interest will not invalidate any substitutions he may make."

Many of the decisions cited under "ratification" are double agency cases but handled by the court in terms of ratification. Without such facts, however, in 1931 in the *Norwich Union* case⁶⁴ with which this paper started, the court stated the issue to be: "whether or not James and Co. insurance brokers by whom said insurance was placed were authorized and, if not, whether the ratification of their act after the fire was sufficient to obligate the appellant companies under the binder procured by James and Co?" The trial court denied a motion for judgment in favor of the defendants and the ruling was assigned as error. Without citing the *Marqusee* case the Circuit Court of Appeals followed its doctrine and adhered, as if instinctively, to the American view, that even if no antecedent authority can be worked out there may be post-fire ratification.

(b) *The English Authorities*

What of the *Grover* case in England? There is no mention of it in the lists of English "cases judicially noticed". It stands alone so far as appears. In *Halsbury's Laws of England*, Insurance, Section 1099 reads: "The doctrine in marine insurance that the contract of insurance may be ratified after knowledge of the loss does not apply to life insurance, nor indeed to any other contract of insurance." The note to this section cites simply *Grover v. Matthews*; and the cross reference to a note on the marine insurance cases again cites only the *Grover* case.

(c) *The American Law Institute's Restatement*

Under the heading "At what time ratification may be effected," the Restatement of Agency reads: "*Section 116*, except as to contracts of marine insurance, the act of affirmance must occur before such a

⁶³297 Fed. 997 (1923). The court adopted an opinion by L. Hand, D. J.

⁶⁴See *supra* note 1.

change in conditions that it is a reasonable inference that the third person would not after such a change enter into a transaction similar to the one in question."^{64a}

Although the judicial sources of the Restatement are not revealed in any of the Institute's publications^{64b} it seems reasonably obvious that the inspiration for its Section 116, is this English case, *Grover v. Matthews*.^{64c}

The illustration under § 116 which makes the property owner's knowledge of the fire the touchstone of his disqualification leads to the same inference, for the court's language in the *Grover* case is such that it may be that their knowledge of the loss rather than the fact of the loss was what defeated the Grovers.

(d) *Comment on the Authorities as Set Forth*

Considering the American decisions and commentators on the one side, we find them opposed, on the other side, by the English case and the Restatement; and the two latter advancing views which the outstanding American case expressly rejects. Aside from any other considerations the American view makes no distinction between its handling of post loss ratification in marine and in fire insurance. It disposes of both harmoniously in favor of the ratification. The opposite view accepts the variance in treatment by rejecting the possibility of post loss ratification if the peril is that of fire. But if ratification is to be denied it would seem that the denial should be of ratification *per se*; of ratification after loss on some principle of general scope, rather than of ratification merely according to the peril involved. Why there should be any difference on this ground the writer does not see and there is no enlightenment in the opinions. Hamilton, J.'s opinion in the *Grover* case set forth no justification. He merely remarked that it did not seem "for business reasons

^{64a}§ 116, inferentially, denies ratification in any case where the subject matter of the transaction has changed in value since the third person's dealing with the self-appointed agent. If the former had agreed with the "agent" to buy stocks of the principal at pre-depression prices, the break in the market would apparently make ratification impossible; if the third party had agreed to sell goods on a rising market, the rise would put ratification out of the question.

^{64b}The commentary which accompanies the *Restatement* gives no citation of cases. Nor was the section considered at any meeting of the Institute's membership. The discussions appear to begin only with Part II, § 156, *See 5 Proceedings of the American Law Institute (1927) 284.*

^{64c}The purpose of the American Law Institute has been set forth by one who has had a large part in it, to be "the preparation of restatements in concrete form the existing common law of the United States". G. W. Wickersham in address as President of the Institute at the Fifth Annual Meeting, May 12-14, 1927.

desirable to extend" the marine rule to the fire case he was dealing with. His "hunch" was the reverse of the court's "hunch" in the Paramount Lasky case at the opening of the paper. But while it may well be that many a legal doctrine is first floated in some mental jump of a judge, the American "hunch" is fortified by the showing that other judicial minds have jumped the same way. After this discussion of the authorities the writer now turns to the further task of examining their common jump on principle.

II. POST-LOSS RATIFICATION—ON PRINCIPLE

What can be said of post-loss ratification on principle? It invites what might be called moralistic consideration. To Judge Lacombe it appeared the property owner sought to reap where he has not sown.⁶⁵ But in the insurance field the reaper who has not sown is not new. All the courts accept it if the insurance peril is marine in character even on the very point under discussion. In other fields of insurance there are other examples of it. In behalf of the buyer of insured property which burns after he signs the contract but before the deed day, judicial ingenuity in this country joins with legislative largesse in England to give him the benefit of insurance which he did not take and which the seller did not take on his behalf.⁶⁶ If a creditor insures the life of a debtor and the debtor dies too promptly, the debtor's estate reaps where it has not sown, getting benefits of insurance not taken in its behalf.⁶⁷ Where bailees or custodians insure the whole bulk of the various articles entrusted to them the owners thankfully reap, even under the permission of courts which deny ratification after loss.⁶⁸ Judge Lacombe's words are "unfairness" and "wicked"—unfair to the insurer, wicked on the part of the ratifier. A cynic view of the judicial and legislative treatment of the insurer in this country indicates that short shrift has been accorded his defenses based on such epithets. That the managers of insurance accumulations have fallen under such opprobrium in defending the funds entrusted to them is one of the curiosities of our national psychology. Other custodians of the small contributions of the many do not meet it. A plaintiff against a savings bank, for instance, has no such merit as a plaintiff against an insurance company!

But the writer believes it unnecessary to resort to cynicism in

⁶⁵198 Fed. at 477. ⁶⁶On this point, see VANCE, INSURANCE (2d ed. 1930) 660.

⁶⁷VANCE, *ibid* shows the various solutions of the puzzle. Instead of voiding the policy and letting nobody recover one line of cases makes the insurer pay the face of the policy, and gives the windfall in excess of the debt and costs to the debtor's family.

⁶⁸See *supra* note 51.

dealing with post-loss ratification. The American decisions favoring it are not simply more instances of openhandedness for an insurance plaintiff with a hardluck story. Viewed in the light of the ordinary practices of the insurers themselves the facts scarcely indict the ratification-seeking property owner; not even when he knows of the fire.

In *Grover v. Matthews*, the English case denying ratification, the Grovers offered to pay premiums, a few hours after the fire, on a policy renewed at the instance of one no longer their employee. Measured against the methods of doing business which the insurers themselves adopt, the reprehensibility of the Grovers is not obvious. Insurers can scarcely expect to have only the benefits and not the other consequences of their own methods; and on this side of the water, at least, the insurer, as a matter of course, renews an expiring policy and forwards the new policy with a bill for the premium. In so doing he might himself be called for self-appointed "agent" of the property owner, who may "ratify" by paying the bill. The latter may hold open the matter as long as the insurance people do not notify him to the contrary.⁶⁹ That a fire may occur in the meantime is a risk covered at the rates they bill for.⁷⁰ A New York case⁷¹

⁶⁹The RESTATEMENT OF CONTRACTS reads, § 35 that "An offer may be terminated by (c) death or destruction of a person or thing essential for the performance of the proposed contract." Section 49 reads: "Where a proposed contract requires for its performance the existence of a specific person or thing, and before acceptance the person or thing is destroyed, the offer is terminated unless the offeror assumes the risk of such mischance". The "Explanatory Notes" issued by the Reporter do not discuss sections 35 or 49. Nor is the topic adverted to in WILLISTON CONTRACTS (1920) c. IV on *Duration and termination of offers* except as to death of persons. In the same work at Volume 3. § 1559 et seq. 2763, the author deals with *Errors in regard to an object to which the contract relates* and *Nonexistence of goods sold*. In the latter discussion he says that the result,—that the sale is void,—is put sometimes "upon the ground of impossibility, sometimes upon the ground of mistake, and sometimes on the lack of mutual assent owing to mistake" and that the cases are few.

In the CORNELL LAW QUARTERLY, Vol. XIV Supplement annotation to 35, 49 Mr. Whiteside remarks, p. 43, that "there is no direct authority in New York supporting these propositions", and no insurance cases are cited. See however note 74 *infra*. The ratification may be fitted in under the last phrase of § 49, however, without doing violence to the argument set forth in the text of the present paper at p. 180.

⁷⁰In *Williams v. No. China Ins. Co.*, *supra* note 21, Cockburn, C. J., after the statement *supra* note 21, added, at page 764: "Where an agent effects insurance subject to ratification the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract." He was speaking of a merely antedated policy.

⁷¹In *National Union Fire Ins. Co. v. Ehrlich*, 122 Misc. 682, 203 N. Y. Supp. 434 (Sup. Ct., App. Term 1924) a broker who had for sometime procured fire in-

has held the property owner liable for premiums for the 60 day period during which he delayed his repudiation of the insurance company's act. The court said: "If a fire had occurred under these circumstances plaintiff would not have been heard to say that the defendant had not accepted the insurance, and defendant should pay the premium for the time he unreasonably retained the policy."⁷²

If the wickedness of post-fire ratification is that the property owner holds matters in suspension until after the fire, these renewal practices of the insurers invite just that "wickedness". *Volenti non fit injuria.* In the ordinary renewal eases the insurer is self starting. The Grovers tendered premiums on a renewal which the insurer had offered them at the instigation of the Grover's self-appointed "agent". It could just as well have been inspired by the insurer's own routine overhauling of his card index. The Grovers were, morally speaking, merely in the position of one who seeks by paying the bill after the loss to accept insurance extended by his renewing insurer on credit.

Are the property owners in the *Marqusee* case more wicked or unfair? If they were placing insurance *de novo* at the time when they seek to ratify, it is true that a host of insurance authorities rise up against them. If they knew of the fire and did not tell, their duty to disclose known and material facts upsets them.⁷³ If they did not

insurance policies for Ehrlich, on an expiry day sent a renewal policy in the plaintiff's company and a bill for the premium. Ehrlich retained the policy for two months and then replied to a dun for the premium by returning the policy, whereupon the insurance company brought suit for two months' premium, and got judgment.

⁷²*Supra* note 71, at 683. There is no other report of the case. But it was noted in (1925) 10 CORNELL LAW QUARTERLY 250. This note states that by the majority holdings in this country the company is liable for losses occurring during the period of suspension, and this even if the policy expressly recites that it does not attach until the premium is paid. This, it says, "is a necessary result from the nature of the business; all the convenience is in favor of the insured, who could and naturally would take advantage of (the situation) if a loss ever occurred." *Westchester F. I. Co. v. Gurian*, 115 App. Div. 610, 101 N. Y. Supp. 50 (2nd Dept. 1906) was authority for the holding of the Ehrlich case. See also *Fire Assn. v. Bonds*, 171 Ark. 1066, 287 S. W. 587 (1926). A note in (1913) 21 YALE L. J. 626 collects authorities on the waiver of the prepayment clause.

⁷³The concealment, or, more accurately, non-disclosure doctrine still functions. A neat illustration from recent litigation is *Sebring v. Fidelity-Phoenix Fire Ins. Co.*, 255 N. Y. 382, 174 N. E. 761 (1931), where the insurer offered to prove that the plaintiff "as attorney had represented Hubbard (his tenant on the premises at the fire) in various actions against insurance companies. . . that Hubbard had been convicted in Pennsylvania of conspiracy to defraud insurance companies and that plaintiff had defended him", and defended that plaintiff had not disclosed these facts. The New York Court of Appeals held that it was error to bar the evidence. See also *Stipcich v. Metropolitan L. I. Co.* 277 U. S. 311, 48

know of the fire they are defeated by the familiar presumption that the coverage is only of those risks which may arise after the contract⁷⁴ takes effect. This last is however, only a presumption of intention. It is possible that the intention can be otherwise. It is otherwise in the "lost or not lost" policy; and it is otherwise in these ratification cases, as an analysis of the statistical elements in the insurer's arrangement with the self appointed "agent" of the property owner shows.

In the *Marqusee* cases the coverage purported to be from the time when the "agent" and insurer acted on March 16th. At that time the property existed. As of that time, on a known risk, and at a then accurately calculable rate, the insurer issued and delivered his policy, looking to the future for his premium. When later offered that premium, he was, actuarially speaking, and notwithstanding the fire, just where he would have been had he dealt directly with the property owner at the issuance of the policy, and on credit. On the morning of the nineteenth of March—the day of the fire—he would have taken the premium; and if he had he would have been where he had figured himself to be even though the fire occurred that afternoon. The coverage was from March 16th and the premium was calculated from that day. Fire after March sixteenth therefore is the accepted risk within the intention of the insurer. This is clear enough if the insurer deals directly with the property owner. Whether the insurer deals directly with the property owner or with his self-appointed "agent" does not however make the risk any less definable in terms of time or of the insurers intentions. Whether the premium is tendered before or after the fire cannot change the arithmetical basis, in terms of time and identified property, of the insurer's calculations of the risk he has in mind.⁷⁵ His transaction with the agent party may be treated as an offer to the property owner, made by the insurer through the "agent", to sell a coverage which is intended to date from the offer day, for a stated sum to be paid if the property owner chooses to close with it, and paid by him at any time before the offer is revoked, precisely as in the renewal cases. Judge Ward substantially so treated it and he decided the *Marqusee* case accordingly. His view

Sup. Ct. 512 (1928), per Stone, J., and note (1928) 14 CORNELL LAW QUARTERLY 91.

⁷⁴The property to be covered is presumed to be in existence, not as a matter of law, but rather of the intention of the parties. See 3 WILLISTON, CONTRACTS (1920) 2765. A recent case dealing with the topic is *Rose Co. v. Globe and R. Co.*, 262 Mass. 469, 160 N. E. 306 (1928). The court reads it as a matter of intention that property already on fire was not to be covered. See 2 COOLEY, BRIEFS ON INSURANCE (1927) 1367, 1372. A "lost or not lost" policy indicates an intention contrary to that ordinarily implied.

⁷⁵See *supra* note 70.

of the matter negated wickedness on the property owner's part as effectively as it negated unfairness to the insurer.

Beside these renewal practices, there are additional analogies in the customs of the insurance men themselves which bear on the ratification topic. In antedated policies insurer and property owner agree, today, that the former cover property from a day last week. Under "lost or not lost" policies they may agree to do it even as to property which may not in fact be in existence on the day selected for the policy to attach. But the "lost or not lost" policies are not the analogues for the ratification problem, and confusion follows the attempt to confine ratification to "lost or not lost" marine cases. The *Williams* case⁷⁶ was not one, it will be remembered. The analogy for the post-fire ratification case is that of the antedated policy written on property which exists in fact and in contemplation on the antecedent date at which the policy recites it will attach. The premium figure in each case assumes the property to be in existence at the date stated for the insurance to attach. It is no such amount, in either case, as it is in a "lost or not lost" insurance. Such antedated policy transactions the insurers not only arrange, but they arrange them on credit, and the decisions permit the insured to pay the premium after loss and with knowledge of the loss.

*El Dia Insurance Company v. Sinclair*⁷⁷ is an example. Under a policy, signed on May 10th purporting by its terms to cover property from April 28th, it was there held that the owner could collect for a fire which occurred on April 29th. The insurance company fought on many grounds, but it made no point of these time sequences, notwithstanding that it issued the policy on credit, and the premium was not paid until July seventh when the property owner was certain—as the case was decided—of collecting up to the face in return for the amount he then paid. As a New Jersey judge⁷⁸ put it, "The question, therefore, really is: is a contract to insure against fire from a time past void in law? **It is every day's practice both in marine and fire insurance.**" Many cases will be found recognizing the validity of such contracts."

So far therefore as principle be read in terms of the would-be-

⁷⁶*Supra* note 21.

⁷⁷228 Fed. 833 (C. C. A. 2d, 1915) noted in (1916) 16 COL. L. REV. 257, (1916) 29 HARV. L. REV. 554. Neither note, however, is on the point discussed in the present text.

⁷⁸Vredenburgh, J., in *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268, 275 (1857). Since 1857 the authorities have been uniformly in accord: see them collected in a note to the *Marqusee* case (198 Fed. 475) in (1913) 42 L. R. A. (N. S.) 1025 and COOLEY, BRIEFS ON INSURANCE (2nd ed. 1927) 149.

ratifier's "wickedness", it seems that the judicial holdings upon the insurance analogies; and the practices prevailing among the insurance people themselves, make for the *Marqusee* case rather than the *Grover* case.

Unfairness to the insurer has already been considered in the actuarial argument, but if it be urged that the *Marqusee* doctrine subjects the insurer to an adverse selection in that the fire-suffering property owner will surely ratify, while the others may or may not do so, one answer is that the insurance companies are willing apparently to venture this possibility. If they actually know that the property owner's "agent" party is self-appointed this is clear. If they themselves choose to use a representative who also represents other companies and to whom owners simply apply for insurance not specifying any company to carry it, they act with knowledge of the methods used by Chappel and Todd and Coleman and the Van Voast Agency in the cases heretofore stated. Another make-weight concerns their recession from the arrangement with the "agent". If the American doctrine leaves the insurers subject to ratification after loss it also grants them, as English views do not, the protection of withdrawal before ratification^{78a}. This saved the insurers in the final outcome of the *Marqusee* cases.

The race between ratification on the property owner's side and cancellation on the insurer's, is reminiscent of the similar race between the offeree's acceptance of an offer and the offeror's notification to the offeree of its withdrawal. So far as appears in the cases there would be nothing to object to if in issuing a binder to a known self-appointed "agent"—as in the *Paramount Lasky* case—the insurer incorporated a clause that the occurrence of the loss should be deemed to be a withdrawal of the "offer". If so, the property owner could scarcely be deemed able to select how much of the agent party's act he would adopt; all or nothing should be the rule for him. So long as the insurers do not insert such provisions they must be considered willing to chance whatever adverse selection the *Marqusee* doctrine may contain.

If "public policy" be appealed to, rather than "wickedness" and "unfairness", the *Marqusee* doctrine, while leaving the insurer, statistically, where it meant to be when it figured its premium, operates to spread losses. The general social argument for insurance as an institution speaks for the American result; and if we make the price of ratification the actual cash payment of the premium we conclude the injustice-to-the-insurer argument. He then has had all

^{78a} See *ante* note 15.

that his own arrangement entitles him to. The public policy theme indeed makes for allowing post-fire ratification rather than against it. Denying the possibility of ratification makes it possible for insurers to raise the technical point of the agent's authority in practically any instance where the property owner has not been himself directly dealt with. The English doctrine, particularly, invites the insurer to agitate the question of the agent's authority if a fire happens to occur during a credit period. Under it attack on an agent's authority may be made, indeed, even though the agent pays the premiums on the spot. As a final make-weight against the English view, on the public policy side it makes ineffective a neighbor's act of informal goodwill. Inferentially it makes impossible the very useful practice of unsolicited renewals in behalf of forgetful customers, to which the insurance men themselves have habituated the American people. The writer concludes that on the whole there is no argument on principle sufficient to warrant the abandonment of the American rule.

III. THE PROPERTY OWNERS KNOWLEDGE OF THE OCCURRENCE OF THE LOSS

What of the compromise rule that it is not the occurrence of the fire, but the property owner's knowledge of the fire which cuts off ratification? If the refusal to permit ratification is based on fairness to the insurer it is just as unfair to let the ignorant principal ratify as it is to permit the knowledgeable one to do so. The impact on the insurer's pocket nerve is identical in either case. This is as clear, as it is clear that the property owner when he learns of the fire, will, joyfully and with fervor, cry, "Thank God *A* has arranged insurance." Nothing will end with a sharper jerk his willingness "to let things ride". If *A* has not paid up *P* will hasten to do so. The human nature factor in the problem makes so infallibly for the attempt at ratification that no discussion of the general topic can omit this particular topic of *P*'s knowledge.

Admittedly if the self-appointed agent has actually paid the premium the argument is more plausible that he had purchased for the property owner an option, on coverage from the option day, with which the owner may close after the fire. If he is conceived to be closing with an option purchased for him and paid for, it is not so hard to concede that he may ratify despite his knowledge. If, however, the agent has paid nothing the situation is more difficult. Concededly there is less shock to our sense of fair play if the ratification seeker when tendering the premium is ignorant of the occurrence of the fire than when he knows of it. Nevertheless and not-

withstanding his knowledge the writer's previous argument that there is nothing actuarially inequitable in the credit situation commits him to permitting the property owner to take up the credit even after the fire. At most, the ratifier should actually produce and pay or tender cash in order to close with the insurer. This he did in the *Grover* case. And in the second *Marquess* case the court not only required the tender but required it to be substantially from *him*. Concerning the credit point a remark of the court in the *El Dia* case is apt. There, at the time the owner paid up he knew that the fire had occurred.⁷⁹ Yet Judge Rogers said⁸⁰ * * "the policy took effect by relation from the day of its date. By antedating the policy the defendant assumed the retrospective risk * * in the same manner as if it had been issued on the day it bore date." To him the case, though a credit transaction, presented nothing inequitable. Thus in the antedated insurance on learning of a fire, the property owner may pay up and close a credit. He may also pay up after knowledge in the renewal cases already discussed. The *Marquess* doctrine permits him to do the same thing and under the same circumstances in a ratification case. The *Norwich Union*^{80a} case made ratification out of post-loss tender after knowledge.⁸¹ The property owner's knowledge of the fire therefore fades out of the picture if the *Marquess* doctrine is accepted. Under it the property owner may ratify despite the fire and notwithstanding his knowledge of the fire, unless and until the insurer has withdrawn from the arrangement he made with the "agent." In Judge Ward's view^{81a} the insurer is left where he put himself even as against this prospect of sure ratification. Anything less than this holding would greatly discount the value to the property owner of the American views permitting post-fire ratification. If the owner who knows is disqualified ratification would be seldom possible in fact and in practice, since, as things go, the owner is the one who knows soonest.

The American Law Institute *Agency Restatement* although it is hostile to post-fire ratification injects a saving "illustration" to §116

⁷⁹It was nearly ten weeks after loss before the owner paid. The insurer accepted the money though it, too, knew of the fire. The litigation was on other points. If it be thought that the acceptance of the money was a waiver—of which nothing is said—it at least shows that the insurance people felt no injustice to themselves in the offer.

⁸⁰228 Fed. at 481.

^{80a}*Supra* note 1.

⁸¹This is not altogether clear on the facts. But a note in (1932) 32 COL. L. REV. 139 concludes: "The instant case . . . appears to permit ratification even though the premium has not been paid. This extension of the American doctrine is supported by the decided cases."

^{81a}See *ante* p. 164.

of its text: "The house burns to *P*'s knowledge; there is no insurance".^{81b} Inferentially the property owner who is ignorant may ratify: the one who knows may not. Possibly this is the precise meaning of the Grover-Matthews case—as has already been remarked. Conceding that knowledge of the loss does not disqualify the ratification in the marine cases Hamilton, J., may have intended to separate the fire cases off from them merely to the extent of denying ratification, *only after knowledge*, in the fire cases. What is meant by "*P*'s knowledge"? The Restatement obviously intends that what he actually knows shall bar him. By imputation, however, he may have "knowledge" when he does not "know" at all in any personal sense.⁸² If the ignorant owner may ratify and the knowledgeable one may not, is the disqualifying "knowledge" to be that of the personal variety, merely, or will it be what his agents know? The injection of the knowledge factor makes necessary an examination of this question.

Nothing in the Restatements *Section 116*, or in its illustration, furnishes an answer. But under a general heading *time when knowledge is effective*, *Section 503*, reads: "The *P* is affected by the knowledge which the agent has when acting for him, or if it is the duty of the *A* to communicate the information and not to act, the *P* is affected after the lapse of such time as is reasonable for its communication."⁸³ The accompanying "illustration" reads "A, agent for *P*, who has the duty of reporting to *P* the condition of *P*'s ships learns that one of them has sunk. He telegraphs this information to *P*, but the telegram is delayed and before receiving it *P* insures the vessel "lost or not lost". *P* is not affected by A's knowledge."⁸⁴ This is from the marine insurance law to which the Restatements anti-ratification section, *116*, by its terms and its illustration does not apply. *Section 503* which is a rough summary of several marine insurance decisions,⁸⁵ seems in-

^{81b} See *supra* note p. 5.

⁸² See RESTATEMENT OF AGENCY (Am. L. Inst. 1930) 491 *et seq.*

⁸³ No cases are cited; nor was *Section 503* taken up in the meeting of the Institute which discussed the part of the Restatement in which it is included. See 8 PROCEEDINGS OF AMERICAN LAW INSTITUTE (1930).

⁸⁴ If this means that the "ship is *thereafter* lost" the problem is not the same as it is if it means the "ship is lost at the time *A* acts." If *A* secures for *P* a "lost or not lost" promise at the rate appropriate to such a policy, he pays or lets *P* in for payment of a premium vastly larger than in the case of a policy not so worded. The ordinary policy at the usual rate cannot attach unless the ship is in existence at the time of the *A-P* dealing. If it is then in existence, *Section 116* itself permits the ratification. What the Restatement would do with an unauthorized "lost or not lost" policy which the shipowner sought to ratify to known loss is not stated.

⁸⁵ Although they do not (not expressly, at any rate), put upon the insurer the hazards of defects in communication agencies which are operated by third parties—as the *Restatement* does. See note 98 *infra*.

tended in its first part to cover the situation when the agent, presumably an authorized person, who secures insurance for a principal, has knowledge which the principal has not: the second part apparently concerns the agents who have custody of the property—in the marine cases, either the ship's master or some local agent to whom he reports the disaster.

If an agent to procure insurance does not personally know a disqualifying something which the principal knows, we have the same problem as in the case where the agent in charge of the property knows something which his principal, who is placing insurance, does not yet personally know. Shall we impute knowledge, and if so, as of what time? If *P*'s uninsured ship is wrecked, its master, Captain *A*, of course knows this at once, and if *P* therefore knows it at once, *P* can get no insurance. Even should the policy be written "lost or not lost", if *P* knows that the ship is sunk he is disqualified for material non-disclosure, indeed for actual fraud, in so far as he is applying for insurance *de novo*.

There is some history on this. In *General Interest Insurance Co. v. Ruggles*⁸⁶ the "lost or not lost" policy, dated the 9th of February, covered the ship from the twelfth of January. She had in fact been lost on the 19th. of January, but of this the owner, who himself placed the insurance, knew nothing because "the master * * for the purpose and with the design that the owner not hearing of the loss of the vessel might effect insurance thereon, did * * not write to the owner and took measures to prevent the fact of loss being known," and the owner's ignorance was due to the delay.

Story, J., at trial charged, in favor of the insured, that "If the owner * * had not knowledge but acted in entire good faith," he was not precluded from a recovery,⁸⁷ thus seeming to make the owner's personal status the test. The Supreme Court affirmed, but the ship master bothered it. "If", it said, "the owner is presumed to know whatever is known to the master there could be no valid policy effected upon a vessel when she was in point of fact lost."⁸⁸ From this tacit assumption that imputation is instantaneous the court recoiled. "But when the subject matter of the agency became extinct * * there might be a moral duty resting on the master to communicate information of the loss to his owner. But how could there be any legal obligation binding upon him to do it?"⁸⁹ Thus total

⁸⁶12 Wheat. 408 (U. S. 1827).

⁸⁷This is from 12 Wheaton, at 410. Judge Story's opinion is in 4 Mason 74 (1825) but his language is as quoted.

⁸⁸12 Wheaton, at 411.

⁸⁹12 Wheaton, at 413.

loss ends the agency. In partial loss disasters, said the court, "The policy * * related back * * and the master, although the agent of the owner until the loss occurred became, upon the abandonment, the agent of the underwriters."⁹⁰ Picture the later meeting! The owner asks, "Captain, whatever became of that ship of mine which you took out last year?" Captain Hardluck, who has lost the ship entirely, replies: "You have no right to any information from me about her!" The partial loss argument fares no better. The master's duty is before the court as part of the question of the validity of the policy. Abandonment to underwriters arises only when and if the policy is valid.

However ineptly, the *Ruggles* case was decided on the purely personal status of the owner. But to ignore imputation entirely is no longer possible. The *Ruggles* case has not stood the test of time. A property owner securing insurance is not free of the peril of having imputed to him the disqualifying knowledge of his agents. In *Proudfoot v. Montefiore*⁹¹ the lost or not lost policy, placed in England by the cargo owner, covered cargo from Smyrna to Liverpool; and was dated Jan. 31st, 1861. But there had been a total loss by the 23rd of January, as Rees, the owner's factor in Smyrna, knew on the 24th. On the 26th, the first mail out, he wrote the news adding "I hope to goodness you are fully insured * * Lloyds' agents have telegraphed (the wreck). I did not dare telegraph you, for once you had intelligence in hand you were prevented from insuring."⁹² Although the telegraphed information was published by Lloyds in England on January 29th, the court expressly stated that "There was, no fraud or undue concealment by the plaintiff of a material fact within his personal knowledge."⁹³ Yet the English ship owner failed where Mr. Ruggles succeeded. "Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of opinion that the case of *Fitzherbert v. Mather*⁹⁴ and *Gladstone v. King*⁹⁵ were well decided; and that if an agent whose duty it is * * to communicate * * as to the state of a ship and cargo omits to discharge such duty * *"⁹⁶ the owner's insurance is of no effect. This duty survived the disaster.

⁹⁰12 Wheaton, at 414.

⁹¹L. R. 2 Q. B. 511 (1867).

⁹²*Supra* note 91, at 518.

⁹³*Ibid.*

⁹⁴1 T. R. 12 (1785) where an agent was employed to ship cargo and to notify another agent who was to effect the insurance. The failure of the first, who had written that the vessel had sailed, to communicate the fact that she had later grounded—which he might have done by the same post—was held to be fatal to the insurance.

⁹⁵1 M. & S. 35 (1813). Master failed to notify the owner of a stranding.

⁹⁶*Supra* note 91, at 521.

By this English view the principal may "know" by imputation⁹⁷ and he "knows" apparently, as of the time when he would know if a diligent agent had used the best available means of informing him promptly.⁹⁸ Had the policy been issued before the arrival in England of the Lloyds telegram—taking its time as a measure for the time of the telegram which Rees should have sent—the insurance would have been valid. That these few days of grace are not dependent on how or why the agent fails to inform the principal seems clear; and this grace time does not depend upon the character of the agent's acts. They were "wilful" in the *Proudfoot* case, as they were in the *Ruggles* case, although in each the agent was a faithful servant to his master.

By insisting upon some degree of imputation of knowledge England thus definitely repudiates the *Ruggles* result. American writers also repudiate it. After discussing it as maintaining a view contrary to the *Proudfoot* decision, W. R. Vance, in 1930, writes that "the doctrine of the English *Proudfoot* case seems to have received practically universal approval from subsequent authorities."⁹⁹ In 1932, Mr. Richards accepts it.^{99a} And its doctrine has been made part of the

⁹⁷A New York case made a similar holding in 1812. See note 99 *infra*. This is far from an assertion that by the imputation doctrine Proudfoot, in England, knew instantaneously what Rees, in Smyrna, knew. To the bare question: "Does the principal's actual personal ignorance protect him?" the Proudfoot decision answers no. "The insurer is entitled to assume as a basis of the contract . . . that the [insured] will communicate . . . every material fact of which the assured has, or in the ordinary course of business ought to have knowledge." It also makes some answer as to when he "knows". "We think it clear . . . that it was [Rees'] duty to communicate . . . and, looking to the now general use of the electric telegraph . . . we think it the duty of the agent to communicate by this speedier means of communication."

⁹⁸If the agent acts properly both in time and in method of notification, whether or not defects in communication machinery are to be charged to the property owner or principal is not discussed. If the news is sent on by his or his agent's private messenger a delay in transit should not extend the period of the principal's ignorance. A delay or loss of a mail ship if mail were used, or breakdown or misdelivery in the telegraph or cable service would furnish a new phase of the whole problem. The *Restatement* puts it that if the telegram is delayed and before receiving it *P* insures the vessel lost or not lost, *P* is not affected by *A*'s knowledge. This is from the illustration to Section 503 and there are no supporting citations. But if this means that the Montefiore case is to be confined to the agent's *wilful* silence, it is discounted by what the Montefiore opinion itself says about the agent's negligence.

⁹⁹HANDBOOK OF THE LAW OF INSURANCE (2nd ed 1930) 356. Mr. Vance cites JOYCE, INSURANCE (2d ed. 1917) 646, 647; I ARNOULD, MARINE INSURANCE (11th ed.) § 582; PHILLIPS, INSURANCE. § 549.

^{99a}Richards Insurance 4th ed. 1932 p. 129.

The *Ruggles* case was attacked in America in 1845 by Judge Duer, who in 2 DUER, INSURANCE, 419 takes a position adverse to Judge Story. Duer, Mr.

present Marine Insurance Act in England.¹⁰⁰ The most recent American decision repudiates the view that the disqualifying knowledge is merely personal. In *Pendergast v. Globe and Rutgers Fire Insurance Co.*¹⁰¹ the New York Court of Appeals recently accepted the possibility of imputation, and conceded that it was not instantaneous¹⁰² but depended on "diligence in communicating the fact of loss." Although these imputation cases concern "lost or not lost" policies the court in dealing with an antedated fire policy in the *El Dia* case considered the imputation problem on substantially the same aspects.

Where the insuring property owner stands or falls on "his knowledge" his knowledge is not, therefore, so far as the modern views go, a matter of what he personally does or does not know—at least in the marine cases. Since Section 503 of the Agency Restatement was not discussed¹⁰³ by the Institute the writer has no authority for stating its intended scope. But he is willing to assume these marine cases to be applicable in any inquiry as to when a principal "knows" what his agent knows¹⁰⁴ and that Section 503 is not intended to be read merely in the light of the illustrations under it. Section 116 and Section 503,

Vance quotes. T. Parsons, in Vol. I, page 458 of his MARINE INSURANCE, published in 1868, also expressed his dissatisfaction with the Ruggles case. Duer, a New York lawyer, was familiar with *Andrews v. The Marine Ins. Co.*, 9 Johns. 32 (N. Y. 1812), where the court, assuming the point that the owner, when placing insurance in New York City might be affected by what the captain knew, put the case on the captain's diligence in communicating news of the wreck. The stranding occurred on March 26th. The insurance was placed on April 9th, and the captain brought in his news on the 11th. But the court gave judgment on the policy.

¹⁰⁰6 Edw. VII c. 41, § 18.

¹⁰¹246 N. Y. 396, 159 N. E. 183 (1927). The vessel was lost at the time the insurance was written but the agent applying for it had not been informed though the master was diligent. The owner recovered on the policy. See a note in (1928) 37 YALE L. J. 1159 which discusses the imputation problem very fully and cites the cases. A discussion of them would lengthen this paper unduly, and the subject is merely incidental to its main purpose anyway.

¹⁰²*Supra* note 101, at 399, 159 N. E. at 184. The court cited *M'Lanahan v. Universal Ins. Co.*, 26 U. S. 170 (1828); *Snow v. Merc. Mut. Ins. Co.*, 61 N. Y. 160 (1874). In the first case the owner was actually on board the vessel when it was lost at sea. In the second the failure to use the telegraph cable when the cable was new in the world was held not to void the policy.

¹⁰³See *supra* note 83.

¹⁰⁴COUCH, CYCLOPEDIA OF INSURANCE deals generally with *Agents of the Insured* in Vol. I, ch. VIII. At page 1359 in that chapter he discusses the topic of Section 503 in general terms applicable to all types of insurance. Yet he there cites the marine cases—of which he prefers the English. He also discusses these cases as part of his handling of marine insurance, at his pages 2568, and 2595.

together, seem to mean, therefore that if the ratifying property owner benefits by his personal ignorance of the fire he does so only during the interval within which a diligent agent in charge of the property could not have got information of the loss to him. As section 503 puts it he "is affected after the lapse of such time as is reasonable for its (the information's) communication".

If knowledge is to be a factor in the ratification cases, the knowledge of the self-appointed agent himself offers a neat problem all its own. If he knows of the fire when he seeks the policy we cannot make the problem at all. For certainly any ratification would adopt the "agent's" knowledge. But conceding the property to be existing and undamaged at the time the "agent" seeks the protection, it is possible that the self-appointed one, either on his own observation or by report made to him by those in charge of the property, may learn of the subsequent fire before the property owner does, and before the latter seeks to ratify. Is the principal then, at once, subject to the "agent's" knowledge? If we say yes to this, the ratification dies a boring. Further, does the doctrine of the *Restatement* give the property owner the benefit of a communication period during which his personal ignorance permits ratification when the self-appointed "agent" is a direct observer of the fire? Does it mean that if the man in charge of the property, who could have given notice directly to the owner, sends it, instead, to the self-appointed "agent", who, in his turn, relays it to the principal, the principal's ratifying time has been extended?

CONCLUSION

From these intricacies the writer returns to the doctrine of the *Marqusee Case*, permitting ratification after loss and with knowledge, even personal, of the loss. He has not found it so difficult to believe that ratification after loss—that is, merely after the fact that loss has occurred,—is inequitable to the insurer. That the ratification may be after knowledge has been much more of a tax upon the explaining processes. Certainly, however, the *Marqusee* rule makes no such difficulties of application as does the English view. This much can be said for it. It is a workable rule. It is followed by American courts. Aside from the point of the property owner's knowledge, it can be sufficiently rationalized to meet objection on principle. And on the point of permitting the ratification even after the knowledge it meets the instinctive reaction of the layman to the question. Every colleague to whom I put the problem has felt that it was a case where the insurer should pay; and in insurance law the layman's point of view has been progressively prevailing over legalistic logic. In this

same connection it can be said that if it is at war with the general doctrines of agency in permitting ratification after known loss, the answer is that nothing can obscure the fact that insurance law is a thing apart.¹⁰⁵ In it more than one "general principle" of contract¹⁰⁶ is sacrificed to the realities of the insurance concept as a social device. To the writer it is not therefore odd that a general principle of agency should be called upon for the same sacrifice in the American decisions.

¹⁰⁵Preface to WOODRUFF, *CASES ON INSURANCE*, (2nd ed. 1924) p. V.

¹⁰⁶See for the discussion of delivery, Patterson, *The Delivery of an Insurance Policy* (1920) 33 HARV. L. REV. 198. For the judicial devices by which a non-acceptance of an offer results in substantial contract, see Funk, *Duty of an Insurer to Act Promptly on Applications* (1927) 75 U. OF PA. L. REV. 207. For legislative devices, see *Wanberg v. National etc. Co.*, 260 U. S. 71, 43 Sup. Ct. 32 (1923) and comment (1921) 19 MICH. L. REV. 340.