

be impaired by attaching any condition stated in this telegram. If this telegram meant anything more than the usual acceptance of policies after inspection by the company, it cannot be made a condition precedent to the attaching of the risk assumed by the insurance company in the contract made by its offer by telegram of September 3, 1891, and its acceptance by Moore & Co. for insurance by the respondent in the sum of \$10,000 at 90 cents. The agents of the insurance company had no power to change this contract from one of absolute insurance to one of conditional insurance; nor had the agents of the assured such power.

The doctrine as to when a risk attaches is thus stated:

"When the risk is accepted upon the terms designated in the application, whether the same is made by writing or parol, the contract is complete, and neither can recede therefrom; and, whether a policy has been executed or not, the risk attaches at the date of the application or at the time designated therein, and the insurer is liable for any loss that occurred after the time when the risk, by the contract, commenced, even though it occurred before its acceptance thereof." 1 Wood, Ins. § 20.

It is the opinion of the court that the evidence establishes the contract sought to be enforced by the complainant, and that the risk assumed in said contract of insurance was in force at the time the loss by fire occurred. It comes clearly within the doctrine laid down in *Tayloe v. Insurance Co.*, 9 How. 390,—a case which has been followed by numerous decisions, and has never been questioned by any of them. In that case the supreme court says:

"An offer by underwriters to insure property on certain terms, sent to the owner by mail, cannot be revoked after it has been received by him, and accepted by a letter deposited in the post office the next day, and addressed to the underwriters. Such acceptance makes a complete contract to insure, which a court of equity will enforce by compelling the underwriters to pay the amount agreed to be insured."

The court has disposed of all questions properly presented by the pleadings. A number of questions were discussed in the oral and written arguments of counsel which the court cannot consider, because they are not set up as defenses in the answer. A decree will be entered in accordance with the prayer of the bill.

HUNTINGTON v. SAUNDERS.

(Circuit Court of Appeals, First Circuit. October 9, 1896.)

No. 142.

On Motion for Rehearing. For former opinions, see 18 C. C. A. 409, 72 Fed. 10; 16 Sup. Ct. 1120.

Before COLT, Circuit Judge, and WEBB, District Judge.

PER CURIAM. Since this cause was decided by the court of appeals, one of the judges who took part in the hearing and decision has deceased. The survivors have presented to them this petition for a rehearing, and must act upon it without his counsel and aid. The original decision was without any diversity of opin-

ion among the judges, Judge Carpenter delivering the opinion of the court. Neither of the survivors personally desires a rehearing, and although, if they had encountered any hesitation of their deceased associate in the decision of the case, they might now feel disposed to grant a rehearing, they do not feel it to be their duty, contrary to their own views, to allow the petition. Petition for a rehearing is denied; mandate to issue forthwith.

MUTUAL LIFE INS. CO. v. RICHARDSON.

(Circuit Court, W. D. Pennsylvania. November 9, 1896.)

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — CANCELLATION OF MORTGAGES.

On July 30, 1878, B. gave to a New York insurance company a mortgage on land in Washington county, Pa., to secure payment at the company's office in New York City of \$5,500 with 7 per centum interest, the then legal rate in the state of New York. On May 19, 1896, the administrator of B. instituted a proceeding in the court of common pleas of said county of Washington, under the Pennsylvania act of June 20, 1883, for the satisfaction of the mortgage; and after constructive notice to the insurance company by newspaper publication in said county, upon an ex parte hearing (the company not appearing), the court decreed satisfaction of the mortgage upon payment into court of the balance due as claimed by the petitioner, such balance being ascertained by computing interest at the yearly rate of six per centum. *Held*: (1) That said act of June 20, 1883, could not be construed as applicable to this mortgage, for to give it such retrospective effect would be to impair the obligation of the contract by changing the place of payment. (2) That the decree, being beyond the power conferred by the act, and not within the jurisdiction of the court, was void, and furnished no ground of defense to a scire facias on the mortgage from the circuit court of the United States.

Sur Rule for Judgment for Want of a Sufficient Affidavit of Defense.

J. W. Collins, for plaintiff.

Crumrine & Patterson, for defendant.

ACHESON, Circuit Judge. This suit is a scire facias by the Mutual Life Insurance Company of New York against S. C. Richardson, administrator of James Britton, deceased, with notice to the Carrie Furnace Company, terre-tenant, upon a mortgage from Britton to the plaintiff, dated and given on July 30, 1878, on a tract of land in Washington county, Pa., to secure the payment by Britton to the insurance company, at its office in the city of New York, of a debt (evidenced by his bond of even date) of \$5,500, on December 1, 1879, and also interest at the rate of 7 per centum per annum, payable half-yearly, on the 1st day of every June and December, until the principal should be paid. The plaintiff's affidavit of claim admits a credit of \$600 paid upon the principal of the debt, and also the payment of interest up to June 1, 1896, at the stipulated rate of 7 per centum per annum, which was the legal rate of interest in the state of New York at the date of the mortgage and accompanying bond. The defendant sets up in bar of the suit a proceeding in the court of