We conclude, therefore, that the trial court was warranted in declaring, as a matter of law, in directing a verdict for the insurance company, that there was no competent evidence, which the jury had the right to accept as true, to the effect that the premium had ever been paid. The plan for paying the premium had been defeated by the insured's own act before his death, and the policy had therefore ceased to be effective as a contract of insurance.

The judgment of the court below must therefore be affirmed, and it is so ordered.

SMITH *v.* CONTINENTAL CASUALTY COMPANY.

Opinion delivered June 23, 1930.

INSURANCE—ACCIDENT INSURANCE—LIABILITY.—Decedent, a railway employee, applied for a policy of accident insurance and gave an order on the railway paymaster for payment of the first premium out of wages then due him, and on the same day he was killed in a train wreck, the agent's memorandum showed that the policy was to be issued on the same day, but no receipt or policy was ever issued, and no premium was collected. *Held* that insurer was not liable.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant brought this suit to collect the amount of insurance designated in an alleged contract of insurance against accidental injury wherein the father of insured was named beneficiary.

The facts briefly are that on the morning of June 29, 1928, about 7:30 A. M. the soliciting agent of appellee company procured a written application from Samuel A. Smith for accident insurance in the sum of $2,000 with an order on the paymaster of his employer, the Missouri Pacific Railroad Company, for payment of the premium out of wages due him. No policy of insurance was issued.

On the evening of that day at about 10 o'clock the insured was killed by the wrecking of a train in the railroad yards. The agent's memorandum of the transaction showed among other things that the policy was to be issued effective as of the day the application was dated, June 29, 1928. There was no testimony showing that a receipt was issued to the insured upon his application for the order on the paymaster for the premium reciting the date for the issuance of the policy nor was there any testimony tending to show that a copy of the agent's memorandum of the transaction signed by him was given to the applicant.

Appellee company denied all the allegations of the complaint, that any contract of insurance had been effected or policy issued, and that the agent had authority to bind the company by an oral contract of insurance or agreement therefor or had made any such agreement.

The agent who solicited the application for insurance died before the trial of the case, and the beneficiary of the alleged insurance had no knowledge of any application made for the policy by the insured until sometime after the death of such applicant.

There was testimony tending to show that there was due by the railroad company to the applicant for insurance at the time the application was made, and the order on the paymaster given, more than enough money to pay the premium on the policy, and also that insurance policies were usually issued by the company effective as of the date specified in the application therefor. There was no testimony tending to show that the soliciting agent had authority to issue policies of insurance, and there was direct testimony that he had no such authority. There was also testimony tending to show that the agent, after soliciting the application for the policy that morning and explaining its provisions and procuring the order on the paymaster for the payment of the premium, did not understand that the matter was concluded until after he should see the insured again in the evening on

his return, and that the wreck occurred and the applicant for the insurance was killed on his return and before seeing the agent. The testimony tended also to show that the agent reported the application to the company by mail that day or the next, but this was denied by the officials at the home office who said it was not reported until July afterwards. It was not shown that the order on the paymaster had ever been presented to and accepted by him, or that any amount of the premium had been paid thereon, although the testimony showed that there was more than enough earned wages of the deceased in the paymaster's hands to pay the amount of the premium in accordance with the order.

The court refused to give many instructions requested by appellant and instructed the jury over his objection, and from its verdict in appellee's favor the appeal is prosecuted.

Oscar H. Winn, for appellant.

Cockrill & Armistead, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in refusing to give numerous instructions requested by him, but they are not sufficiently identified in the motion for a new trial with objections thereto to constitute assignments of error entitled to review here. A careful examination of the instructions given by the court discloses that the charge fully declared the law, correctly directing the jury in the proper consideration of the questions and issues submitted for their determination. The jury having found upon conflicting evidence, against appellant, upon whom the burden of proof rested to show a contract or agreement made entitling him to recover, its verdict cannot be disturbed here.

The case is unlike that of *Gibson* v. *Continental Casualty Co.,* 178 Ark. 1090, upon which appellant relies, the facts being altogether different. In that case the insurance company furnished its agent with forms of receipts containing blanks for stating dates when the insurance

should become effective, apparently authorizing him to fill in these dates and bind the company on the delivery of such receipt from the agent to the applicant for insurance. No policy was issued herein nor was any showing attempted to be made that a receipt containing any such provisions about the effective date of the policy when issued was given the applicant or any receipt at all issued to him. The burden to show the making of a contract of insurance or agreement therefor binding the insurance company to pay the amount designated was in no wise relieved against because of the difficulty thereof on account of the death of the applicant for insurance on the day his application was made, and of the agent soliciting the risk before the trial of the cause and the jury having found against appellant on conflicting evidence and the record disclosing no reversible error, the judgment must be and it is accordingly affirmed.