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DOES WAR EXCUSE THE PAYMENT OF LIFE INSURANCE PREMIUMS?

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The Problem

THE fanatic assault of Nippon at Pearl Harbor set in motion a tide of conquest that took four years of mighty effort to roll back. Engulfed in the onrush of modern war hundreds of thousands were literally isolated from civilized intercourse for months and years. American missionaries, educators, traders, businessmen, construction workers, sometimes their wives and children, were imprisoned or forced into hiding or driven into regions inaccessible to communication with the States. Similarly affected were British, Dutch, French, Philippine and Chinese nationals. On the other side of the world, but to a lesser extent, the Nazi blitzkrieg cut off American citizens from conventional channels of contact with their homeland.

Many of these individuals had life insurance policies issued by American insurers. Upon the cessation of hostilities many of the insured were dead and perhaps a majority were broken in health. If, due to the circumstances of the war, these people had been unable to make premium payments and the insurer claims the policy had lapsed, to what extent were they or their representatives entitled to recover upon these contracts? If the representative of the deceased or the beneficiary of the insured tendered to the insurer the past due premiums with interest, was the insurer obligated to pay the face amount of the policy? If the insured[1] were still alive but no longer an insurable risk, would he be entitled to reinstatement of the policy?

These are the questions which this paper will attempt to probe according to the principles of contract and insurance law and equitable considerations. At first blush it may seem surprising that no American jurisdiction appears to have been faced with this problem since the end of World War II. In the absence of any concrete fact situation and in view of the intriguing possibilities offered by the world-wide scope of the conflagration, the innumerable nationalities involved and the various degrees of hardship encountered, it will be more accurate to say that the paper will be limited to a discussion of merely a few aspects of the problem.[2]

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1. Throughout this paper the term "insured" shall refer to the person whose life is insured.

2. Therefore, it will be assumed that a valid policy of insurance exists and that there

Research for authority on the subject to be discussed reverts to the period of the American Civil War. It appears that in the *post bellum* cases of that era the courts of this country, faced with the question of the rights of an insured who was cut off by war in the Confederate States as against his insurance carrier in the Union, split in three directions: (a) allowing the insured to reinstate the policy or his representative to recover the face amount of the policy;[3] (b) disallowing any recovery;[4] and (c) by a *media via* permitting a quasi contractual recovery for the equitable value of the policy as of the time of default.[5] These three views, in the order set forth, have been conveniently termed the New York rule, the Connecticut rule and the United States rule.[6] In comparing the terms of the policies of that day with the modern life insurance contract, we will find both a point of departure from the rationale of some of the earlier decisions and a possible explanation of the dearth of litigation following the latest war, a catastrophe which affected a greater number of human beings with a tremendously higher percentage of life insurance coverage.[7]

has been compliance with the so-called "war clauses" restricting coverage in enumerated instances; in any event, probably the bulk of those affected by the problems to be considered had procured their policies prior to the practice of including such restrictive clauses in policies.

Furthermore, we restrict our inquiry to situations where the insurer is located in the United States with no branch office in the areas affected. The effect of Japanese, German or Italian seizure or operation of American branch offices or native insurance businesses is beyond the scope of this article. For the effect of the former Soviet seizure of certain American insurance businesses in Russia, see Dougherty v. Equitable Life Assur. Soc., 266 N. Y. 71, 193 N. E. 897 (1934), 4 FORD. L. REV. 333 (1935). For some enlightenment on American policy in regard to enemy alien insurers within the United States, see Fallon, *Enemy Business Enterprises and the Alien Property Custodian II*, 16 FORD. L. REV. 55 (1947).

3. New York Life Ins. Co. v. Clopton, 7 Bush. 179 (Ky. 1870); Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 444 (1874); Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610 (1872); Sands v. New York Life Ins. Co., 50 N. Y. 626 (1872); Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614 (Va. 1871).

4. Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372 (1874); Dillard v. Manhattan Life Ins. Co., 44 Ga. 119 (1871).

5. New York Life Ins. Co. v. Statham, 93 U. S. 24 (1876). Note that none of the cases cited in this note or in notes 3 and 4 *supra* was decided until at least five years after the Civil War. No cases have been found following World War I. Probably the lack of reported decisions is due to the fact that comparatively few holders of American policies were prevented by war from making premium payments. European insurers were governed by the Versailles Treaty provisions which were not binding upon the United States. See note 71 *infra*.

6. VANCE, INSURANCE 113, 114 (2d ed. 1930).

7. In 1860 a small percentage of Americans held an estimated one hundred and sixty-four million dollars of life insurance protection. By 1900, 13 per cent of the population

At the outset we may exclude from consideration members of the Armed Forces who had "government" insurance. Deductions for premium payments of National Service Life Insurance were regularly made from the monthly pay of the serviceman thereby relieving him from the burden of making payment which might well be impossible on many occasions during combat activity. Furthermore, if a member of the Armed Forces had obtained insurance as a civilian, paying the first premium at least thirty days before entering service or prior to October 6th, 1942, upon his application, the United States government protected the policy from lapsing for the non-payment of premiums until two years after military service had terminated.[8] The unpaid premiums were treated as automatic policy loans even though they exceeded the cash value of the policy. The Federal Government paid this excess and the insured of course was obligated to reimburse the United States. This beneficent legislation eliminates our problem only as to members of the Armed Forces who applied for such protection.[9]

The Civil War Cases

In *Cohen v. New York Mutual Life Ins. Co.*[10] the plaintiff in 1849 insured the life of her husband in the amount of $5000 with defendant insurer. The policy provided that should there be a default in the payment of the annual premium the policy would lapse and the premiums paid would be forfeited. Regular payments were made from 1849 until 1861. Following the outbreak of the Civil War, the plaintiff, a resident of Georgia, was unable to remit to the defendant the premiums which were due in the years of 1862, 1863 and 1864. As soon as communications were re-established after the war, plaintiff tendered the accrued premiums with interest to the defendant who refused to receive them. The plaintiff obtained judgment reinstating the policy and declaring its validity despite the failure to make timely payment.[11]

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owned life insurance amounting to eight billion, six hundred million dollars. By 1945 an estimated 50 per cent of the population owned over one hundred and fifty billion dollars of life insurance. KELSEY & DANIELS, HANDBOOK OF LIFE INSURANCE 13-14 (rev. ed. 1946); VANCE, CASES ON INSURANCE 6-11 (1940). At the end of 1947 it was estimated that seventy-five million Americans owned one hundred and ninety-one billion dollars of life insurance. New York Times, Dec. 31, 1947, p. 22, col. 6.

8. Soldiers & Sailors Civil Relief Act of 1940, 54 STAT. 1183, 50 U. S. C. §§ 540-48 (1940), as amended, 56 STAT. 773 (1942), 50 U. S. C. §§ 540-48 (Supp. 1946).

9. *Id.* §§ 511, 540 (c) expressly limiting the benefits of the Act to Army, Navy, Marine or Coast Guard personnel and officers of Public Health Service detailed to the Army or Navy.

10. 50 N. Y. 610 (1872).

11. In obtaining a declaratory judgment the plaintiff anticipated by some fifty years

In substance the New York Court of Appeals in the *Cohen* case held that the life insurance contract was not a contract from year to year but an insurance for life; that war did not render it void but merely suspended the contract; that the performance of the condition of premium payment was unlawful and an impossibility created by law, not a mere impediment or difficulty of performance, and therefore was excused; that a contrary decision would cause forfeiture of all premiums, an extreme hardship; that the later payment of premiums with interest would place the insurer in precisely the situation it would have been in, had payment been made on time. The court, therefore, reversed the judgment which had affirmed the order sustaining the demurrer to the complaint.

In a companion case, *Sands v. New York Life Ins. Co.*,[12] the Court of Appeals, allowing a recovery to the assignee of a life insurance policy where the war had interrupted premium payments, emphasized that the payment of premiums was a condition subsequent, not a condition precedent. The condition was held analogous to a lease or grant in fee, reserving rent, to become void if the rent were not paid, *i.e.*, if the condition subsequent were not complied with. Reliance was placed upon a case holding that war excused the condition that suit be brought upon a policy of insurance within the period set forth in the policy.[13] The Court of Appeals indicated that contracts insuring property of the enemy are void because inconsistent with the policy of the government to destroy and cripple enemy property and commerce but "it is not the purpose or policy of government to destroy mere non-combatants in the enemy's country—civilians, not belonging to the army. It is the rule of all civilized warfare to protect such persons—to shield them from injury."[14]

The "Connecticut Rule" finds expression in *Worthington v. The Charter Oak Life Ins. Co.*[15] The plaintiff in this case was the wife and sole beneficiary of the policy of insured, a resident of South Carolina, who had obtained a policy of life insurance from the de-

legislation permitting this remedy. N. Y. CIV. PRAC. ACT § 473. In granting the relief as within its inherent equity jurisdiction, the court's language is apt today and its liberality would satisfy even so zealous a champion of declaratory relief as Professor Borchard. See BORCHARD, DECLARATORY JUDGMENTS (2d ed. 1941).

12. 50 N. Y. 626 (1872).

13. Semmes v. Hartford Ins. Co., 13 Wall. 158 (U. S. 1871).

14. Sands v. New York Life Ins. Co., 50 N. Y. 626, 635 (1872). This, of course, was written at a time prior to the scientific advancements of mankind expressed in the heavy bomber, the atom bomb and the more refined elements of total war; in a period when warfare could with some propriety at least be termed "civilized."

15. 41 Conn. 372 (1874).

fendant insurer in 1854. This policy also by its terms provided that upon non-payment of premiums the policy would lapse and that all payments were to become forfeited. Payments were regularly made until 1861 but because of the Civil War the insured was prevented from making premium payments from 1861 to 1865 inclusive. After peace was declared the defendant company refused the tender of the back premiums and of current premiums which were téndered each year thereafter until the insured's death in 1869. The court, in a three-to-two decision, sustained a demurrer to the plaintiff's complaint, rejecting the reasoning of the *Cohen* and *Sands* cases. The life insurance contract, the court held, is not for life and is unique.

> "An ordinary life policy, like the one in suit, requiring the payment of annual premiums, consists of two parts, and is divisible. The applicant, upon the payment of the first premium, effects an insurance upon his life for one year, and purchases a right to continue that insurance from year to year, during life, at the same rate. . . . The rate of insurance for a single year is less than the annual premiums on a life policy. The difference, continued, as it is supposed it will be, from year to year through life, may be regarded as the consideration for the right to continue the insurance."[16]

By failing to pay the premium the insured was apparently considered by the court as having failed to exercise the option to continue the insurance for another year; in effect failing to accept the offer of the insurer. Furthermore, the court termed the premium payment a condition precedent not excused by impossibility or unlawfulness. The war, it was said, abrogated the contract completely since timely payment was of the essence of the agreement. If a forfeiture resulted it was due to the express agreement of the parties and could not be attributed to the court. Reinstatement forced by the court would be inequitable since only the representatives of the dead or those in impaired health seek reinstatement and the insurance company would be forced only to receive the worst risks.

The "United States Rule" was voiced in *New York Life Ins. Co. v. Statham*[17] which effected a compromise between the divergent views of New York and Connecticut. Plaintiff brought a bill in equity seeking to recover upon a policy of life insurance issued by the insurer in 1851 upon the life of a Mississippi resident. The policy, which contained the then usual forfeiture clause, had been maintained in force until 1861 when war prevented the insured from continuing payments. The insurer depended upon the *Worthington* case and the principles

16. *Id.* at 399.
17. 93 U. S. 24 (1876).

forming the foundation for that decision. The plaintiff relied in great measure upon the decisions in the *Cohen* and *Sands* cases. Justice Bradley delivered the opinion of the court, making the following points:

1. The contract of life insurance is an entire contract for life subject to discontinuance and forfeiture for non-payment of premiums. There is no proper relation between the annual premium and the risk for the year wherein it was paid. (This accorded with the New York view.)
2. Nevertheless, timely payment is of the essence of the contract since the very scheme of the business of life insurance is based upon mathematical computations dependent upon prompt payments and average mortality.[18] (This accorded with the Connecticut view.)
3. The contract of life insurance is suspended by war but is not revived by a tender of back premiums since time is of the essence and revival would be inequitable.
4. Plaintiff, however, is entitled to recover the "equitable value" of the policy, *i.e.*, the excess of premiums over actual risk, otherwise the insurer would be unjustly enriched. Chief Justice Waite and Justice Strong believed no recovery at all should be permitted while Justice Clifford and Justice Hunt dissented on the theory that the contract was temporarily suspended and should be revived thus favoring full recovery.

These cases display a lack of unanimity not only among the several jurisdictions, but even within the courts of a particular jurisdiction the judges differed[19] as to the nature of the life insurance contract and expressed conflicting views as to the relative weight of the equities in favor of insured and insurer. Later authorities have added but little information or suggestion as to the nature of the contract. Undoubtedly the bulk of insurance litigation, and the resulting comment, is concerned with interpretation of statutory provisions and particular policy provisions which are generally foreign to the essential nature of the contractual relationship between the parties. The courts have sometimes adverted to the peculiarity of the contract and its unique character.[20] Such an approach is to be deprecated when we reflect that

18. Upon this point Mr. Justice Bradley had first-hand information, having been a mathematician and an insurance actuary before becoming a judge. 2 DICTIONARY OF AMERICAN BIOGRAPHY 571 (1929).

19. In the *Cohen* case four judges concurred, three did not vote; in the *Sands* case four judges concurred, one did not vote and one did not sit; in the *Worthington* case the court split three to two; in the *Statham* case the court split five to two with two separate concurring opinions; in the *Hillyard* case seven concurred and two (including the Chancellor) dissented.

20. See, *e.g.*, Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372, 399 (1874); Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 444, 469 (1874).

the life insurance contract is probably more frequently entered into than any other contract having such serious consequences to the financial well-being of the insured's family.[21] The problem posed in this article requires analysis of the contract itself and it is to be hoped that when and if American courts are faced with the question a full and enlightening discussion will be forthcoming.

The Nature of the Contract

1. Is it Unilateral?

The commonly accepted theory is that the applicant for a policy of life insurance makes the offer which is embodied in the application.[22] The insurer accepts by issuing a policy in conformity with the application[23] but usually providing that acceptance is to be effective only upon delivery of the policy to the insured in good health and upon payment of the first premium.[24] The insurer promises to pay the face amount of the policy upon the death of the person whose life is insured. This promise is conditional, the principal condition being the prompt payment of premiums according to the schedule set forth in the policy.[25] The insurance company secures the continued payment of annual premiums not by exacting a promise from the insured to make payment but by making its own promise to pay the face amount of the policy dependent upon performance of the condition. The contract is thus unilateral;[26] the offeror-insured giving the act of payment

21. See note 7 *supra*.

22. VANCE, INSURANCE 174 (2d ed. 1930); Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 199 (1919); 29 AM. JUR., Insurance, § 137 (1940). But see VANCE, CASES ON INSURANCE 100 (3d ed. 1940).

23. A non-conforming policy acts as a counter-offer. MacKelvie v. Mutual Benefit Life Ins. Co., 287 Fed. 660 (C. C. A. 2d 1923). See also 50 HARV. L. REV. 699, 700 (1937).

24. Whether mere silence, *i.e.*, undue delay in acting upon the offer, can amount to an acceptance is a much litigated question. Most courts hold that silence does not amount to acceptance and find no contractual liability. However, some courts on the theory that insurance is *quasi* public in nature, hold undue delay to be a breach of duty; such courts therefore hold the insurer liable in tort. The conflicting cases are gathered in Zayc v. John Hancock Mut. Life Ins. Co., 338 Pa. 426, 13 A. 2d 34 (1940), denying recovery in contract or tort. See also Prosser, *Delay in Acting on an Application for Insurance*, 3 U. OF CHI. L. REV. 39 (1935).

25. For the sake of simplicity we shall consider the policy as requiring annual premium payment although monthly, quarterly or semi-annual payments might be the case. We ignore such defenses as breach of warranty, misrepresentation or concealment and consider only breach of the condition of premium payment which defense is not barred by the incontestability clause. N. Y. INS. LAW § 155, (1)(b).

26. Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480 (1878); *see* Dulberg v. Equitable Life Assur. Co., 277 N. Y. 17, 23, 12 N. E. 2d 557, 560 (1938); 2 COOLEY, BRIEFS

of the first premium in return for the promise of the offeree-insurer.[27]

The failure of the *Cohen* and *Sands* cases to accept the position that the insured is normally not obligated to pay premiums[28]—of course, the insured might expressly make such a promise but it is highly unusual[29]—makes the New York rule vulnerable. Since the insured is under no duty to pay premiums, the insurance company has no correlative right to enforce payment. Permitting the insured to reinstate the policy by court action[30] will, therefore, result in enforced acceptance

ON INSURANCE 1625 (2d ed. 1927); RICHARDS, INSURANCE § 70 (3d ed. 1918); VANCE, INSURANCE 260 2d ed. (1930); 3 WILLISTON, CONTRACTS § 673 (rev. ed. 1936); Corbin, *Conditions in the Law of Contracts,* 28 YALE L. J. 739, 746 (1919); Patterson, *Supervening Impossibility of Performing Conditions in Insurance Policies,* 22 COL. L. REV. 613 (1922).

27. The "act for a promise" unilateral contract has given rise to heated controversy. The Restatement of Contracts § 24 (1932) defines an offer as "a promise which is in its terms conditional upon an act, forbearance or return promise or its performance." Section 57 of the Restatement of Contracts admits the existence of a unilateral contract in which the act is that of the offeror and the promise is that of the offeree. If an offer is a promise, would not this be a bilateral contract, a promise for a promise? This seeming inconsistency was pointed out by Prof. Goble, 22 ILL. L. REV. 567 (1928), and denied by Prof. Williston, 22 ILL. L. REV. 788 (1928). Prof. Green joined Prof. Goble, 23 ILL. L. REV. 95 (1928), with Prof. Williston replying, 23 ILL. L. REV. 100 (1928), and Prof. Green rejoinding, 23 ILL. L. REV. 301 (1928). This verbal vendetta is reprinted in SELECTED READINGS, LAW OF CONTRACTS 203-20 (1931).

At the risk of oversimplification the gist of Prof. Williston's defense seems to be that once the offer is accepted the promise of the offer ceases and the offeree's promise is the only promise of the contract. Prof. Corbin's definition of an offer seems more accurate and less troublesome. "An offer is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract." Corbin, *Offer and Acceptance,* 26 YALE L. J. 169, 171 (1917). Throughout this discussion of the "act for a promise" unilateral contract which is considered a *rara avis* many weird (literally) examples are offered but no reference is made to the life insurance contract which traditional concepts of offer and acceptance would seem to dictate must fall in this category.

28. Allen, J., in Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610, 625 (1872), indicated in a *dictum* that there was a duty to pay premiums. Peckham, J., in Sands v. New York Life Ins. Co., 50 N. Y. 626, 633 (1872), stated that whether the payments were optional or obligatory was of no moment. In Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480 (1878), New York accepted the view that there was no duty to pay premiums, dispelling any doubt raised by the *Cohen* and *Sands* cases.

29. The policy generally does not contain any such promise. The insured may of course give a premium note for payment. However, non-payment of the premium note does not constitute a breach of the condition of premium payment in the absence of express provision to that effect. VANCE, INSURANCE 309-13 (2d ed. 1930). For the reasoning behind this rule, see FULLER, BASIC CONTRACT LAW 891-93 (1947); 3 WILLISTON, CONTRACTS § 888 (rev. ed. 1936).

30. Today modern life insurance policies usually contain clauses permitting an insured to reinstate a policy lapsed for non-payment of premiums. Generally reinstatement is required by the policy within a short period after lapse (usually five years) and invariably there is insistence upon production of evidence of insurability, including good health. Sec-

of the poor risks and those who have died, with no right to compel a compensatory reinstatement of the healthy risks who may prefer to obtain new insurance rather than to pay back premiums with interest.[31]

It seems elementary that the promise of the insurer must be supported by consideration.[32] The consideration for the promise is usually said to be the premium payments.[33] This statement has been criticised

tion 155 (1)(i) of the New York Insurance Law requires a reinstatement clause in a whole life policy delivered or issued in New York permitting reinstatement within at least three years from date of default but requires evidence of insurability, including good health.

31. The argument that new insurance is cheaper than reinstatement made in disputing the *Cohen* and *Sands* decisions (See Patterson, *supra* note 26, at 615) is difficult of demonstration. Many variable factors enter the problem, *viz.*, age of the insured, length of default, type of policy, period it was kept in force and rate of interest. Modern nonforfeiture benefits add further difficulties. Regardless of comparative ultimate costs, it might well be that new insurance would be financially more convenient than reinstatement. Comparative premium rates per $1000 of ordinary life insurance are as follows:

Age:	*25*	*30*	*35*	*40*	*45*
Co. *A*	$21.49	24.38	28.11	33.01	39.55
Co. *B*	$21.51	24.42	28.17	33.10	39.70
Co. *C*	$20.14	22.85	26.35	30.94	37.08

(The rates given are for the period prior to January 1, 1948. See note 88 *infra*).

32. Ollendorff Watch Co. v. Pink, 279 N. Y. 32, 17 N. E. 2d 676 (1938). The most widely applied definition of insurance, *e.g.*, the Massachusetts statutory definition (Massachusetts Annotated Laws c. 175, § 2 (1933)), expressly includes the necessity of consideration for the promise. Representative statutory definitions appear in PATTERSON, CASES ON INSURANCE 18, 19 (2d ed. 1947). New York's first statutory definition of an insurance contract appeared in 1939. N. Y. INS. LAW § 41. The necessity for consideration is implied at least. Section 41 (1) states in part that it is an agreement "whereby the insurer is *obligated. . . .*" (Italics added). Section 41 (4) states that the fact that no separate or direct consideration is received shall not be deemed conclusively to show that there is no insurance contract. This was obviously designed to cover situations such as appeared in the *Ollendorff* case, *supra,* where a watch seller, who made agreements to replace any watch stolen or lost within a year of purchase, was held to be making contracts of insurance despite his claim that there was no consideration and therefore no insurance since the price for the watches was the same with or without the alleged guaranty. The court held that the price paid for the watch included everything obtained. The price paid was the inducement for the insurance just as the certificate of insurance was the inducement for the purchase. *Accord,* Attorney Gen'l v. C. E. Osgood, 249 Mass. 473, 144 N. E. 371 (1924). Prof. Langdell believed that no consideration was necessary to support the insurance contract, a specialty. LANGDELL, SUMMARY, LAW OF CONTRACTS § 51 (2d ed. 1880).

33. New York Life Ins. Co. v. Statham, 93 U. S. 24, 30 (1876). The policy itself invariably recites that the consideration is the premium payments and the representations made in the application. But it has been held that the representations are not properly part of the consideration and do not have to be pleaded as such. Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183 (1887). However, the payment of a sum of money is not essential to constitute the consideration of an insurance contract. People v. Roschli, 275 N. Y. 26, 9 N. E. 2d 763 (1937).

on the theory that the consideration is past consideration and ineffective since the first premium has generally been paid to the company before it makes the promise or hears of the offer. Therefore it has been suggested that in the "act for a promise" unilateral contract, the consideration is properly the substitution of rights, *i.e.*, when the insurer's promise is given, the insured's rights *in rem* to the return of the premium is extinguished in exchange for the right *in personam* created by the promise.[34] On the other hand, it has been argued that in this type of contract title to personal property passes upon acceptance by the offeree; this transfer of title is the act which is the consideration for the acceptor's promise.[35] In the case of the insurance contract, therefore, it would appear that title to the premium payment would pass upon acceptance by the insurer and thus would be valid consideration. In those cases where a binding receipt[36] effects a present contract of temporary insurance, the act of premium payment would seem contemporaneous with the promise of the insurer and thus would seem to be valid consideration under either of the above views.

A more vital problem exists: Is the payment of the first premium consideration for a promise to insure for a single year or is the promise really to insure for life, with future premiums in the category of conditions modifying the insurer's duty to continue the protection as distinguished from consideration for the promise?

2. *Is the Promise for Life or for A Year?*

The question as to the duration of the contract is academic in most cases since the contract by its terms provides for lapsing in the event of non-payment.[37] But when impossibility prevents payment, the distinc-

34. Corbin, *supra* note 27, at 175, 176. See also Patterson, *supra* note 22, at 199.

35. 1 WILLISTON, CONTRACTS § 25 (rev. ed. 1936). In New York by recent statute past consideration would not render the contract invalid where that consideration is expressed in a writing signed by the promisor. N. Y. PERS. PROP. LAW § 33 (3).

36. Because an offer can be withdrawn before acceptance, the insurance companies customarily issue a "binding receipt" effecting in some cases a binding contract of temporary insurance. The legal complexities occasioned by this device and the esoteric language employed therein is beyond the scope of this article. See Havighurst, *Life Insurance Binding Receipt*, 33 ILL. L. REV. 180 (1938); 44 YALE L. J. 1223 (1935). The doubtful state of the law in New York on the character of the receipt and the legal relationships it creates was recently commented on by Judge Learned Hand in Gaunt v. John Hancock Mut. Life Ins. Co., 160 F. 2d 599 (C. C. A. 2d 1947).

37. Thus in People v. Security Life Ins. & Annuity Co., 78 N. Y. 114 (1879), where the court had to determine the rights of policy holders to the assets of an insolvent life insurance company, it was held that the insurer was obligated to receive annual premiums whether on the theory that the contract was for life or on the theory that it was an insurance for a year coupled with a right to continue from year to year. "Whichever of

tion becomes important. While impossibility may in some cases excuse the performance of a condition, it cannot excuse the necessity for an acceptance of an offer according to its terms. In setting forth the Connecticut Rule in the *Worthington* case, the court interpreted the contract as an insurance for a year plus an option in the insured to accept a continuing offer made by the insurer to extend protection for a second year, and so on. This offer was to be accepted by payment of the second and succeeding premiums on the dates specified. The consideration for the option is the excess amount of the premium over and above the actual cost to the insurer of the coverage for the year the premium was paid. Under this view the transaction is a chain or series of separate yearly contracts. If the insured fails to pay one of the succeeding annual premiums, he has not accepted the offer and under no theory of contract law could the offeror be bound if his offer were not accepted according to its terms, no matter what the excuse. This theory of the agreement accounted in large measure for the *Worthington* decision. The court spoke of the premium payments as both conditions precedent and consideration.[38] Modern contract terminology would designate the premium payment as consideration under the Connecticut view and not properly a condition precedent except in the sense that acceptance of an offer must always precede the existence of a contract.[39]

This premise of the Connecticut Rule seems to be unsound. The interpretation of the *Statham* and *Sands* cases, construing the contract of life insurance as a single contract for life with payment of premiums a condition[40] as distinguished from a year to year arrangement, is favored by most commentators[41] and supported by sound reason. The intention of the parties to the contract is the controlling element and recourse must be had to the policy to ascertain such intent. It is to some extent difficult to generalize inasmuch as the policies of the com-

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these be the true theory, the agreement is necessarily implied that the company will receive the premiums and keep the policy in life. . . ." *Id.* at 125.

38. Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372, 401 (1874). See also opinion of Strong, J., New York Life Ins. Co. v. Statham, 93 U. S. 24, 36, 37 (1876).

39. "In its proper sense the word condition means some operative fact subsequent to acceptance and prior to discharge." Corbin, *supra* note 26, at 743. See also 3 WILLISTON, CONTRACTS § 666 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 250, comment *a* (1932).

40. The language of the *Statham* case (93 U. S. 24, 30 (1876)) that: "Each installment is, in fact, part consideration of the entire insurance for life" is inaccurate according to the theory which the case propounds unless consideration be used in the loose sense of an equivalent or *quid pro quo* of the promise.

41. *See* Burnet v. Wells, 289 U. S. 670, 679 (1933); Whitehead v. New York Life Ins. Co., 102 N. Y. 143, 152, 6 N. E. 267, 269 (1886); 29 AM. JUR., Insurance, 205; 2 JOYCE, INSURANCE § 1102 (2d ed. 1917); VANCE, INSURANCE 262 (2d ed. 1930).

panies are variform. Nevertheless the following are recognized types of life insurance.

a. *Term Insurance*—in which, as its name implies, the benefits become effective only in the event of death within the specified term. There may be a renewal clause giving the insured the right to renew at the end of the original term for an additional period. Patently, the intent of the parties is to pay the benefit only in the event that the policyholder dies within the term. If the policy explicitly provides that death must occur within a year of the effective date of the policy, with further provision for annual renewals, then the policy is properly construed as a contract from year to year or a series of yearly contracts.[42] The policies involved in the *Cohen, Sands, Worthington* and *Statham* cases were apparently not term policies but whole life policies.

b. *Whole Life Insurance*—sometimes called straight life or ordinary life, as the very names suggest, is intended to cover the insured for the term of his natural life no matter how long it may be. Of course the promise to insure is conditioned upon premium payments but the promise is not broken into yearly segments and is to be performed but once, *viz.*, upon the death of the insured whenever that occurs. The premium is usually level, *i.e.*, in a fixed amount throughout life, not a graduated sum. The risk becomes greater with advanced age but the premium remains constant indicating it bears no relation to the year it was paid. To argue that the excess of the premium of the earlier year is consideration for an option to continue for a further year,[43] is specious. There is nothing to indicate that the parties intended this excess to be such consideration; the excess will gradually diminish as the insured grows older and the insurance becomes more valuable.[44] If the insured survives long enough the excess will evanesce and there will be no consideration to support the so-called continuing offer; to be consistent, therefore, it would follow that the insurer could arbitrarily withdraw the offer

42. Thus in Rosenplanter v. Provident Life Assur. Soc., 96 Fed. 721 (C. C. A. 6th 1899), the policy was issued April 1, 1889, and by its terms the insurer agreed to pay the beneficiary $10,000 if the insured died before April 1, 1890. It also provided for renewal by the payment of annual *renewal* premiums. The court, distinguishing the policy in the *Statham* case, which was a whole life policy, correctly interpreted the policy to be for a year and not for life. Similarly in McDougall v. Provident Savings Life Assur. Soc., 135 N. Y. 551, 32 N. E. 251 (1892), a policy issued July 23, 1884, by its terms promising to pay $10,000 *provided* the insured die before noon on July 23, 1885, but permitting annual renewals, was construed to be for the term of a year only.

43. Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372, 399 (1874).

44. For a graphic illustration of the comparative rates of annual level premiums and the net natural or step rate premiums see RIEGEL AND MILLER, INSURANCE PRINCIPLES AND PRACTICES 146 (3d ed. 1947).

when the insured became advanced in years and terminate the insurance. But the contrary has been held,[45] and with obvious propriety. If the policy is a "limited payment" life, *i.e.*, one giving lifetime protection but requiring payments for a limited time of ten, twenty or thirty years, there is clearly no relationship between the intervals of payment and the intervals of coverage. With modern policies having endowment features the theory becomes completely unworkable.

As above indicated the language of whole life policies is not uniform. Nevertheless, a usual phrase in many policies is: ". . . the payment of the annual premium keeps the policy in force for a period of twelve months." This language is not inconsistent with the theory that premium payment is a condition limiting the insurer's promise, as distinguished from the acceptance of an offer to contract for another year. The language appears to lack legal significance. There is generally no mention in such policies of renewal premiums nor is there any language indicating that the insured is only protected if he dies on or before a certain date.[46] The use of the level premium and the very term "Whole Life" indicates that the contract contemplates a single promise for life and the basic premise of the *Worthington* case must be rejected.

3. Is the Condition Precedent or Subsequent?

Accepting the theory of the New York and United States courts that the promise of the insurer is for life with the payment of premiums a condition qualifying the insurer's obligation, does it follow that we must also accept the holding of those jurisdictions that the condition is subsequent?[47] The contract authorities seem unanimous in holding

45. People v. Security Life Ins. & Annuity Co., 78 N. Y. 114 (1879). Although New York does not permit an action for anticipatory breach of the contract of life insurance, the policyholder's right in equity to enforce reinstatement (Kelly v. Security Mut. Life Ins. Co., 186 N. Y. 16, 78 N. E. 584 (1906)), or to rescind and recover the consideration if the insurer wrongfully refuses to accept premiums (Dougherty v. Equitable Life Assur. Soc., 144 Misc. 363, 259 N. Y. Supp. 146 (Sup. Ct. 1932), *rev'd in part,* 238 App. Div. 696, 265 N. Y. Supp. 714 (1st Dep't 1933), *rev'd on other grounds,* 266 N. Y. 71, 193 N. E. 897 (1934)), is recognized. The principal difficulty is the ascertainment of the proper measure of recovery. Some courts permit the insured to recover his premiums with no deductions for the value of the protection he has received on the theory that the contract is entire, not divisible, and the insurer is entitled to no benefit for its part performance. The cases are collected in Notes, 48 A. L. R. 107 (1927) and 107 A. L. R. 1228, 1233 (1937).

46. See note 42 *supra.*

47. Sands v. New York Life Ins. Co., 50 N. Y. 626, 632 (1872), expressly designated the condition of premium payment as subsequent and not precedent. *But see* Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160, 164 (1875), characterizing the condition as precedent. In New York Life Ins. Co. v. Statham, 93 U. S. 24, 30 (1876), it is implied

that the condition is precedent.[48] The determination of the matter is important. Professor Williston concedes that the condition is subsequent in form, but for the purpose of pleading and proof only.[49] It seems that the burden of proving non-payment rests upon the insurer.[50] More vital to the problem is the effect of impossibility of performance of a condition precedent as distinguished from a condition subsequent. It was argued in the *Sands* case by analogy to the law of property that if a condition be subsequent, the estate having vested, the condition being impossible of fulfillment, the estate remains undisturbed.[51] Similarly, if the rights of the insured have vested under the contract, the divesting condition never occurring, the insured retains his rights and the insurer is liable. As indicated above, the *Sands* case and also *Mutual Benefit Life Ins. Co. v. Hillyard*[52] rely on *Semmes v. Hartford Ins. Co.*[53] wherein the Supreme Court of the United States held that the war excused the condition subsequent requiring suit to be brought within two years of loss.[54]

The policy provision that suit be commenced within a certain time after loss can be distinguished from the provision for premium payment. It is generally accepted that the former is a true condition subsequent; the fortuitous event, *i.e.*, the death of the insured, occurs while the policy is in effect and the duty to pay the face amount of the policy arises at once, but said duty is extinguished if not enforced by action

that the condition is subsequent. That Court later expressly termed the condition as subsequent and not precedent in Thompson v. Insurance Co., 104 U. S. 252, 260 (1881).

48. 3 WILLISTON, CONTRACTS § 667 (rev. ed. 1936); Corbin, *supra* note 26, at 746; Patterson, *supra* note 26, at 614. See also Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160 (1875). Professor Vance says that while "not strictly conditions precedent, they are yet of that nature." VANCE, INSURANCE 116 (2d ed. 1930); *cf.* Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 444, 470 (1874), to the effect that the condition is neither precedent or subsequent!

49. 3 WILLISTON, CONTRACTS § 667 (rev. ed. 1936).

50. Liesny v. Metropolitan Life Ins. Co., 147 App. Div. 253, 131 N. Y. Supp. 1087 (4th Dep't 1911); Rybczymski v. Chicago Fraternal Life, 131 Misc. 228, 227 N. Y. Supp. 366 (Sup. Ct. 1928), *aff'd without opinion*, 224 App. Div. 777, 230 N. Y. Supp. 903 (4th Dep't 1928); Raab v. National Slavonic Soc., 93 Misc. 67, 156 N. Y. Supp. 301 (App. Term 1st Dep't 1915). *Contra:* Brassell v. John Hancock Mut. Life Ins. Co., 134 Misc. 274, 235 N. Y. Supp. 195 (App. Term, 1st Dep't 1929). In Rodgers v. United States, 66 F. Supp. 663 (E. D. Pa. 1946), it was held that the government had the burden of proving the affirmative defense of non payment of National Service Life Insurance.

51. "If a *true* condition subsequent may be found in the law of contracts the rule should be the same. . . ." 3 WILLISTON, CONTRACTS § 809 (rev. ed. 1936) (italics supplied).

52. 37 N. J. L. 444 (1874).

53. 13 Wall. 158 (U. S. 1871).

54. *But cf.* Nathan v. Equitable Trust Co., 250 N. Y. 250, 165 N. E. 282 (1929).

brought within the stated time.[55] Of course in some cases impossibility may render a condition subsequent inoperative[56] or the condition may be waived.[57] But the condition requiring payment of premiums must, by the very terms of the contract, occur before the primary, immediate duty of payment of the face amount of the policy becomes incumbent upon the insurer. Thus it appears to be a condition precedent.[58]

Conceiving the condition of premium payment to be precedent does not conflict with the theory that the contract is for life. It is a *conditional* contract for life. The insurer promises to pay upon the death of the insured whenever that event occurs, in consideration of the payment of the first premium and upon the condition of continued payments. Where the condition is not fulfilled, there is no immediate duty to perform the primary promise, not because there is no contract or because of failure of consideration, but because of the non-happening of the condition precedent, which may be subsequently waived[59] or excused by impossibility in certain instances.[60]

A further distinction must be observed between the condition of premium payment and the condition of prompt suit, namely, the materality of the condition. Modern contract theory does not seem to emphasize the touchstone of the priority or subsequence of the condition to the duty, but rather inquires whether the condition is a material part of the exchange for the duty.[61] If the condition forms a *substantial* part of the agreed exchange the promisor should not be obligated to perform even though non-performance is due to supervening impossi-

55. It has been argued that even this condition is precedent in that it must precede a particular action to recover. HOLMES, THE COMMON LAW 316, 317 (1881). That the condition is subsequent see COSTIGAN, PERFORMANCE OF CONTRACTS 16 (2d ed. 1927); FULLER, BASIC CONTRACT LAW 766-770 (1947); 3 WILLISTON, CONTRACTS § 809 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 307, Illustration 1 (1932); Ashley, *Conditions in Contract*, 14 YALE L. J. 424, 429-30 (1905); Corbin, *supra* note 26, at 747 n. 19.

56. RESTATEMENT, CONTRACTS § 307 (1932).

57. *Id.* § 308.

58. *Id.* § 250(a), defining a condition precedent as one which must exist or occur before a duty of immediate performance of a promise arises.

59. RESTATEMENT, CONTRACTS § 297 (1932).

60. *Id.* § 301.

61. See, *e.g.*, § 301 of the Restatement of Contracts stating that impossibility excuses a condition precedent if its occurrence is no *material* part of the exchange. Section 307 of the Restatement of Contracts states that the happening of a condition subsequent which by its terms is to terminate a promisor's duty, does not operate as a termination if the happening of the condition is caused by events without the promisee's fault, not within contemplation of parties, unless continuance of the duty subjects the promisor to a *materially increased burden.*

bility.[62] The condition as to prompt suit forms no material (*i.e.*, substantial) part of the agreed exchange; it is purely extrinsic and procedural. The insurance company does not primarily bargain for prompt suit but for prompt premium payment, the only benefit it obtains from the contract. The liberality of the *Cohen* and *Sands* cases in dispensing with prompt premium payment stands in sharp contrast with the refusal of the New York courts to permit a recovery where impossibility prevented the happening of a condition of much less importance. Thus in *Whiteside v. North American Acc. Ins. Co.*[63] the Court of Appeals denied a recovery for sick benefits under an accident and health policy which required notice of an illness to be given within ten days of its commencement, on the ground that the condition of notice was not excused by reason of the delirium of the insured who remembered nothing of the policy. Other courts have permitted a recovery on the theory that the condition as to notice formed no integral part of the agreed exchange.[64] In *Howell v. Knickerbocker Life Ins. Co.*[65] the New York Court of Appeals denied a recovery where illness prevented premium payment, and in *Wheeler v. Connecticut Mutual Life Ins. Co.*[66] recovery was denied where insanity prevented premium payment.

4. *Does War Excuse the Condition?*

The distinction suggested by the New York Courts for the apparently inconsistent holdings just noted, is that the failure of payment in the Civil War cases was due not only to impossibility but also to illegality created by the state of war between North and South. "There is a manifest distinction between impediments and difficulties in the way

62. Corbin, *Supervening Impossibility of Performing Conditions Precedent*, 22 COL. L. REV. 421, 427 (1922).

63. 200 N. Y. 316, 93 N. E. 931 (1911) (two judges dissenting).

64. Schlintz v. Equitable Life Ins. Co., 226 Wis. 255, 276 N. W. 336 (1937). Conflicting cases are gathered in Mutual Life Ins. Co. v. Johnson, 293 U. S. 335 (1934), and in Note, 142 A. L. R. 852 (1942). Restatement, Contracts § 301, Illustration 4 permits recovery. The *Whiteside* decision has been changed by statute in New York permitting notice of injury or sickness to be given as soon as reasonably possible. N. Y. INS. LAW § 164, 3(e) 5.

65. 44 N. Y. 276 (1871). Here recovery was denied where the insured was struck with apoplexy and paralysis on the due day preventing a payment he was apparently about to make. (But note that the contract was apparently for the term of one year with a renewal privilege and thus may be justified in any event on the theory of non-acceptance of the offer.)

66. 82 N. Y. 543 (1880). In both the *Howell* and *Wheeler* cases the court calls the condition of premium payment precedent and urges that others than the named insured could have made payment.

of performance of a condition and an impossibility created by law on the act of government."[67]

If this be the sole distinction between the cases, New York might well be in the anomalous position of reinstating the contract of an enemy alien whose premium payment is prevented by "illegality" on authority of the *Cohen* and *Sands* cases, while an American citizen or neutral subject could be denied similar relief on the basis of the *Howell* and *Wheeler* cases, where physical impossibility alone prevented communication with the insurer. The distinction profered by the New York courts is not tenable. War *per se* is not generally placed in a separate category as an excuse for non-performance of a condition but is simply another cause of impossibility in so far as citizens or neutral aliens are concerned.[68] Where war supervenes after the formation of a contract between a citizen of the United States and the citizen of a country which becomes an enemy, communication becomes illegal and if prolonged delay is likely to change the burden or nature of the performance, the contract is discharged.[69] This is in accord with the *Statham* case representing the modern contract view that the doctrine of revival of contracts suspended by war is based upon equity and justice.[70]

If the insured be an enemy alien, the problem of reinstatement might be avoided by treaty provision. After World War I the Versailles Treaty obviated the question by providing:

"Where the contract of life insurance has lapsed owing to non-payment of premiums, the payment of which has been prevented by the enforcement of

67. Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610, 621-2 (1872). *See* also Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543, 551-2 (1880).

68. RESTATEMENT, CONTRACTS § 307, Illustration 1 (1932); 3 WILLISTON, CONTRACTS § 808 (rev. ed. 1936); Blair, *Breach of Contract Due to War*, 20 COL. L. REV. 413, 414 (1920).

69. Neumond v. Farmers Feed Co., 244 N. Y. 202, 155 N. E. 100 (1926); RESTATEMENT, CONTRACTS § 596 (1932); 6 WILLISTON, CONTRACTS § 1748 (rev. ed. 1936).

70. Neumond v. Farmers Feed Co., *supra* note 69 at 207, 155 N. E. at 101. In a recent article (Diamond, *The Effect of War on Pre-Existing Contracts Involving Enemy Nationals*, 53 YALE L. J. 700 (1944)) the author indicates that a contract will be terminated by war only if suspension for the period of the war would involve a substantial alteration of the terms of the contract, materially increasing the burden of performance. "The problem is actually one of temporary supervening impossibility. . . ." *Id.* at 700. In the case of life insurance he reports that the overwhelming weight of authority refuses to treat the contract as dissolved by war, citing the *Hillyard, Sands* and *Cohen* cases. These cases, however, do not rest upon the proper rationale suggested by the author of the article, *viz.*, that the problem is one of supervening impossibility, but indicate rather that the performance of the condition of premium payment is illegal and is thus distinguished from a case of impossibility. The *Statham* case which is cited as contra to the weight of authority, is the one case clearly applying the test of the author.

measures of war, the assured or his representatives or the person entitled shall have the right to restore the contract on payment of premiums with interest at 5% per annum within three months from coming into force of the present Treaty."[71]

The possibility of incorporation of similar legislation in pending peace treaties has been anticipated by insurance companies. They reject the suggestion of enforced reinstatement which they allege will impair the actuarial basis of the business and cause a serious drain upon the financial structure of the life insurance companies.[72] In the Philippine Islands, which are probably most seriously affected by this problem, the Report of Louis Pink (former Superintendent of Insurance of New York) as special adviser to President Osmena, advised against possible legislation forcing reinstatement.[73] The author is unaware of any provision similar to the Versailles Treaty section in peace treaties thus far concluded.

Prescinding from possible legislative solution, it would seem therefore that upon contract principles the distinction suggested by the New York courts between an illegal condition and an impossible condition cannot be supported. In each case modern contract authority would require performance of the condition, be it illegal or impossible, so long as it formed an essential, material equivalent of the promise. To require the promisor to act without receiving the benefit of the condition of this nature would be a hardship and inequitable.

The Equitable Considerations

We have already adverted to the fact that the insurer has no right to compel the defaulting policy holder to reinstate. Moreover, among those who will seek such favor will certainly be the representatives of the deceased insured and the lame, the sick and the halt. The continued operation of a successful life insurance business would seem to require that the insurer have some measure of control and selection of the risks whenever there is a question of reinstatement.[74] Furthermore, it is in

71. Treaty of Versailles, § V, Part X, Annex III, par. 12.

72. Report of Valentine Howell, WAR SETTLEMENTS COMMITTEE, PROCEEDINGS OF AMERICAN LIFE CONVENTION (1944).

73. Report of Louis Pink, Special Adviser to President Osmena, August 17, 1945.

74. In Kallman v. Equitable Life Assur. Soc. of U. S., 248 App. Div. 146, 288 N. Y. Supp. 1032 (1st Dep't 1936), *aff'd without opinion*, 272 N. Y. 648, 5 N. E. 2d 375 (1936), it was held that upon an application for reinstatement the insurer was not limited to an inquiry as to the physical health of the applicant but could refuse reinstatement where he was overinsured and of doubtful financial stability. As to the necessity for evidence of insurability see MACLEAN, LIFE INSURANCE 194-95 (6th ed. 1945).

the nature of the insurance business that *timely* payment be made in order that proper reserves be maintained. Time is of the essence of the condition of premium payment.[75] Computation of premium rates seems to depend upon the certainty of obtaining prompt payment.[76] The argument made in the *Cohen* case[77] that the addition of interest will compensate for the timely payment seems justly characterized by Professor Patterson as "naive."[78] The precise extent of the naiveté is, however, properly an actuarial problem.

The life insurance policies of the Civil War era, including those in the *Cohen, Sands, Worthington* and *Statham* cases, provided that upon default in payment, the policy would lapse and all premiums would be forfeited. Aside from the quasi-contractual escape from the problem, the courts were placed in an unenviable dilemma. The equities of the insurer might well be submerged in the patent hardship inflicted upon the insured, albeit created by the terms of the contract he accepted. The apparent injustice which would deny a recovery to an insured who had faithfully paid his premiums through many years (in the *Cohen* case 12 years; *Worthington,* 7 years; *Statham,* 10 years), and possibly in an amount exceeding the face value of the policy, is shocking to the layman and must have weighed heavily in the mind of a jurist[79] although some in the common law tradition professed to be unimpressed by the hardship aspect of the case.[80] The tendency of the courts to look with jaundiced eye upon the insurer who insists upon literal compliance with the terms of a contract, which is rarely read by the insured and to which he "adheres" rather than bargains for, is perhaps salutary. But the very minimum compliance which the insured contemplates is

75. RICHARDS, INSURANCE 495-96 (3d ed. 1918); VANCE, INSURANCE 266 (2d ed. 1930); 29 AM. JUR., Insurance, § 386 (1940).

76. See comment that enforced reinstatement is "actuarially unsound." PROCEEDINGS, LEGAL SECTION, AMERICAN LIFE CONFERENCE 117, 119 (1943). See also MACLEAN, LIFE INSURANCE 99 (6th ed. 1945).

77. Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610 (1872). See also Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 444, 469 (1874).

78. Patterson, *supra* note 26, at 615 n. 8.

79. *Cf.* Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610 (1872).

80. Chancellor Runyon, dissenting in Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 444, 483 (1874), opined: "If the assured fall dead with the money in his hand on his way to the office of the insurer to pay the annual premium, and so it remain unpaid beyond the time limited, the company is discharged from all liability under the policy. Though he may have paid annual premiums greater in their aggregate amount than the sum insured nevertheless there is no remedy. . . . Hard as is this judgment, yet it is the dictate of that stern justice which regards with equal eye, the obligations of each of the parties, giving to each the advantage for which he has stipulated but only on the terms on which alone he is entitled to it."

that he must pay for his insurance. Moreover, upon his failure to pay, the modern policy dictated by either a more humane attitude on the part of the insurer or prodding by State Insurance Commissioners or legislative bodies, includes provisions which erase the choice of all or nothing and obliterate the equities of the insured in large measure. It is usual today to grant the insured a period of grace of at least one month during which payment may be made;[81] no termination or lapse will occur in less than a year after default unless the insurer has duly addressed and mailed written notice of the due premium to the named insured or the person designated by him to receive such notice, or an assignee, if the insurer has had written notice of such designation or assignment.[82] Recalling the suggestion in the *Howell* and *Wheeler* cases[83] that persons other than the named insured might make payment, it might be asked whether such notice, if given, would obviate the excuse of impossibility, if the insured had designated a person within this country who knew that the insured could make no payment and also knew that payment was due. It is generally held that the payment need not be made by the insured.[84]

More important, modern policies provide that upon default in premium payment after premiums have been paid for a certain period (usually 3 years) the insured is entitled to either, (a) the *cash surrender value* of the policy (somewhat less than the 'equitable' value recovered in the *Statham* case[85]) or (b) *extended term insurance* which

81. N. Y. INS. LAW § 155 (1) (a) requires that a policy of life insurance, delivered or issued in this state, provide a period of grace of at least thirty days or one month within which payment of any premium after the first may be made. The benefits of the statute cannot be waived by the policyholder. Salzman v. Prudential Ins. Co., 296 N. Y. 273, 72 N. E. 2d 891 (1947). Similar statutory requirements are widespread. See 3 COUCH, INSURANCE § 633 (a) (1929).

82. This in substance is a required provision in the New York Insurance Law § 151. Other states have similar provisions. See 3 COUCH, INSURANCE § 666 (1929). Section 92 of the New York Insurance Law of 1909 did not require that notice be given to an insured living in another state (Kaplan v. Equitable Life Assur. Soc., 177 Misc. 792, 31 N. Y. S. 2d 972 (Sup. Ct. 1940), *aff'd*, 261 App. Div. 1067, 27 N. Y. S. 2d 780 (1st Dep't 1940)). The present statute contains no such limitation. N. Y. INS. LAW § 151. However, the present section does not by its terms require that such notice be received. Actual receipt of the notice by the insured was held unnecessary under former § 92, Insurance Law of 1909, Goeller v. Equitable Life Assur. Soc., 251 App. Div. 371, 296 N. Y. Supp. 854 (1st Dep't 1937), and under former § 92, Insurance Law of 1892, Wolarsky v. New York Life Ins. Co., 120 App. Div. 99, 104 N. Y. Supp. 1047 (1st Dep't 1907). It would seem, therefore, that mailing of the notice would be sufficient.

83. Note 65 *supra*.

84. See cases cited note 65 *supra;* 3 COUCH, INSURANCE § 606 (1929); VANCE, INSURANCE 266 (2d ed. 1930); 29 AM. JUR., Insurance, § 421.

85. VANCE, INSURANCE 55, 56, 115 (2d ed. 1930). The cash surrender value is less than

gives the insured protection in an amount equalling the full face value of the policy and extending for such period of time as the cash value will purchase when applied as a single premium at the attained age, or (c) *paid up insurance* which gives the insured a paid up policy in a reduced amount for life without further premium payments.[86]

These provisions refute the contention that denial of recovery to the insured will result in a forfeiture. The policy permits the insured to select whichever mode of settlement he prefers. If he makes no choice —and we assume the isolated policyholder can make none—the extended term provision becomes effective in New York.[87] The operation of this clause will tend to prevent much litigation on the problem presented in this paper. In most cases, depending upon the age of the insured and the length of time his policy has been in effect, the extended term will include the time of his death.[88]

But the problem is still presented in the following situations: 1—Where the insured has survived the war and although in broken health may well outlive the term of extended insurance. 2—The policy may not have been in effect long enough to give extended term protection.[89] 3—The options do not appear usually in term policies of

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the excess of premiums over actual cost to the insurer since the insurer could before 1948 deduct a flat surrender charge under § 208,2 New York Insurance Law, of $25.00 per $1000 insurance. Since January 1, 1948, the method of computing the cash surrender value in policies issued after that date in New York has been changed. N. Y. Laws 1947, c. 311, §§ 205, 208, 208-a, 208-b. For an explanation of the new method of computing cash surrender values, see MACLEAN, LIFE INSURANCE 183-89 (6th ed. 1945).

86. These three options are required in New York, Insurance Law § 208, 1. Although not required in New York, some companies have provided a fourth mode of settlement, the automatic premium loan, by which the company automatically pays overdue premiums until the total indebtedness equals the cash surrender value.

87. N. Y. INS. LAW § 208, 1.

88. The following chart illustrates the approximate length of the extended term from time of default for an ordinary life policy procured at ages 25 and 35. These figures are based upon policies issued prior to January 1, 1948, which would cover the time interval we are interested in. Since January 1, 1948, the Guertin Report has been adopted, discarding the obsolete American Experience Table of Mortality and liberalizing non-forfeiture values. (N. Y. Laws 1947, c. 311 adding §§ 208-a and 208-b to the Insurance Law and amending §§ 154, 155, 159, 163, 205, 208 and 217.)

Age: 25	*5th year*	*10th year*
Co. *A*	4 yrs., 178 days	11 yrs., 58 days
Co. *B*	4 yrs., 222 days	11 yrs., 120 days
Co. *C*	4 yrs., 214 days	12 yrs., 245 days
Age: 35	*5th year*	*10th year*
Co. *A*	5 yrs., 326 days	11 yrs., 300 days
Co. *B*	5 yrs., 357 days	11 yrs., 330 days
Co. *C*	6 yrs., 132 days	13 yrs., 21 days

89. New York Insurance Law § 208 requires the option only after three annual payments have been paid.

twenty years or less.[90] 4—If the original policy contained double indemnity provisions for accidental death, or permanent and total disability benefits, these will not usually be included in the extended term insurance.[91] Therefore, even though death has occurred within the period of the extended term, it will be to the advantage of the representatives of the deceased, to seek reinstatement of the original policy.[92]

While rejecting mandatory reinstatement by legislative or treaty fiat, spokesmen for the American insurers have indicated a disposition to allow individual insurers to reinstate in their discretion, with the suggested criteria being hardship and the loyalty of the insured to the cause of the Allied Nations.[93] This may again account partially for the lack of recently reported decisions.[94] Hardship should be pertinent to a court only to the extent that the term coincides with impossibility as defined in contract law.[95] If war made payment merely inconvenient it would clearly not be excused. Loyalty would not seem to be a proper

90. *Ibid.*

91. *E.g.*, New York Insurance Law § 208 provides that extended term insurance may exclude benefits due to accidental death or total and permanent disability benefits.

92. See Salzman v. Prudential Ins. Co., 296 N. Y. 273, 72 N. E. 2d 891 (1947).

93. REPORT OF WAR SETTLEMENTS COMMITTEE, PROCEEDINGS AMERICAN LIFE CONVENTION (1944).

94. The author has been informed that it is the practice of at least one large American life insurance company to permit reinstatement in those cases where hardship prevented premium payments. The companies in the Philippine Islands apparently have not been so liberal. In the cases of Paz Lopez de Constantino v. Asia Life Ins. Co. (1947) and Peralta v. Asia Life Ins. Co. (1947) (citations unknown) the Court of First Instance of Manila dismissed complaints seeking to recover upon policies upon the lives of deceased policyholders who were unable to make premium payments due to the Japanese occupation. The author is informed that the Supreme Court of the Philippine Islands has not yet decided the appeals from these decisions which represent test cases. In the *Peralta* case, *supra*, the policy was issued in 1938 and the last premium was paid on November 1, 1941. Automatic loan provisions in the policy kept it alive until September 7, 1942. The insured died thereafter. In the *Constantino* case, *supra*, the policy was procured and the first annual premium was paid on September 27, 1941. By its terms the policy expired October 27, 1942 (allowing for a period of grace). The insured died two years later. The policy provided that the first year's insurance was term insurance. The lower court depended upon the *Statham* case in dismissing the complaint. In the case of Gubagaras v. West Coast Life Ins. Co. (1947) (Civil Case No. 423) the Court of First Instance of Iloilo permitted recovery of the face amount of a policy issued in 1940, less premiums which had been unpaid since 1942 until the death of insured in 1945. In De Enriquez v. West Coast Life Ins. Co. (1947) (Civil Case No. 72602) the Court of First Instance of Manila dismissed a complaint seeking to recover upon a twenty-year endowment policy issued in 1939. Two annual premiums were paid before Japanese occupation. The insured died in 1945. Space limitations prevent a fuller discussion of these Philippine decisions which have recently been received by the author.

95. See RESTATEMENT, CONTRACTS § 454 (1932).

subject for inquiry in a civil court. Aside from the difficulty of accurate estimation and the quantum of proof, the "unclean hands" of the assured would only be fatal under general equity principles when directly concerned with the subject matter of the controversy.[96]

Conclusions

First: The contract of life insurance is unilateral. The insured has not made any promise to pay the annual premiums. If there is a default in payment, the insurer has no right to obtain reinstatement or to recover premiums. The only sanction which the insurer can invoke is the lapsing of the policy except to the extent of the non-forfeiture provisions. To permit the insured to reinstate and force payment on the company against its will is unjust in view of the lack of a corresponding right in the insurer. Moreover, there is an unwarranted interference with the insurer's selection of the risks. The poor risks are most likely to seek the favor of reinstatement; the good risks may obtain other insurance. The cases adhering to the New York view failed to take these elementary factors into account.

Second: The consideration for the contract is the first premium payment, the later premium payments being simply conditions precedent to the immediate performance of the insurer's promise to pay the face amount of the policy upon the death of the insured whenever it may occur. The theory of the Connecticut view, that the transaction is in reality a series of unilateral contracts, is unsound. The insured does not fail to accept an offer to continue for a year but rather breaches a condition. The distinction is important since impossibility preventing the acceptance of an offer can not result in a contract, but in some cases impossibility may excuse the performance of a condition.

Third: The condition of prompt premium payment is essential to the insurance business. The premium is the only benefit the insurer obtains. The timely payment of the premium is a necessary factor in the insurance scheme which is based on mathematical computations which depend upon the regular contributions of the group still alive to pay the claims of those dying. Just as it is important to estimate the average mortality and promptly to pay the claims of those dying each year, so is it necessary to be assured of the prompt payments of those living each year. The condition of prompt premium payment, therefore, is essential and is not excused by supervening impossibility whether due to war or other catastrophe.

96. See generally World's D. M. Ass'n v. Pierce, 203 N. Y. 419, 96 N. E. 738 (1911); Glenn & Redden, Cases on Equity 526-27 (1946); McClintock, Equity 34 (1936).

Fourth: The insured suffers no forfeiture today by virtue of the non-forfeiture benefits of the modern life insurance policy. The quasi-contractual solution of the *Statham* case, therefore, is not necessary since no unjust enrichment of the insurer results, unless of course the non-forfeiture benefits are computed in a fashion which is clearly inequitable.

The fact that the insured has no opportunity to bargain as to the terms of the insurance contract should not in this case lead the courts to torture the contract or the principles of contract law to a solution in favor of the insured. The one clause which insured does understand is the requirement for premium payment. The layman as well as the lawyer knows that you can't get something for nothing. It is true that insurance is affected with a public interest; however, any legislative solution of the problem is beyond the scope of this article.

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