

# ST. LOUIS LAW REVIEW

---

Vol. XXI

APRIL, 1936

No. 3

---

## A CONSIDERATION OF THE LAW APPLICABLE TO LIFE INSURANCE AGENTS' RENEWAL COMMISSIONS

BY J. R. BURCHAM

The retirement during the depression era, either voluntarily or involuntarily, of a relatively greater number of life insurance companies than in the course of normal times<sup>1</sup>, has necessarily precipitated the wholesale termination of the agency contracts of as many companies, with some far-reaching effects.

One consequence has been that with the liquidation of the retiring company, which usually follows after the reinsurance, sale, consolidation or merger of its business, the agent, with his cancelled contract in his hand, and as a victim of circumstances, either has been deprived entirely of his covenanted renewal commissions at a time when he feels he needs them the most, or else as a child of fortune, he is left to glean the crumbs which may fall from the table of the liquidating authorities or from the succeeding company, after the interests of the policyholder have first been adequately served.<sup>2</sup>

Not infrequently the erstwhile agent, disgruntled at being stripped of his renewal commissions, sues his contracting company or its liquidating agents, or even the successor company, for an accounting of his renewals as they accrue, or more often for damages equivalent to the present value of his future renewal commissions.

As an aftermath of this recent liquidation of certain companies, resulting in a sweeping termination of their agency con-

---

<sup>1</sup> See Best, Life Insurance Reports 44-65 (1935).

<sup>2</sup> See *Daniel vs. Layton* (C. C. A. 7th, 1935) 75 F. (2d) 1935, for example of case where reinsurance plan highly favorable to policyholders was upheld, notwithstanding contentions of former agents, claiming renewal commissions, that such plan was discriminatory in that it deprived them of equal participation with policyholders in division of assets.

tracts, and the consequent dilemma of the agent with respect to his renewal commissions, both company and agent are today confronted with some paramount problems pertaining to renewal commissions, which heretofore, if existent at all, were on a relatively minute scale, were largely transitory, and soon passed away.

With one exception subsequently noted, this paper will be confined to an analysis of what may be denoted as the "major depression problems" growing out of agents' claims for renewal commissions, with which the attorney representing the agent, as well as counsel for either the liquidating company or its successor company, will most likely, sooner or later, be obliged to cope.

A consideration of the following questions may afford some basis for the solution of the more important of these problems.

I. Does the disability of a company to engage in business, whether voluntarily or involuntarily, *per se* constitute an actionable breach of the company's agreement to pay commissions on renewal premiums subsequent to the termination of the agency contract?

II. Does that stipulation of the agency agreement for the payment of renewal commissions after the termination of the agency, create a contract of such a nature as to be subject to the doctrine of anticipatory breach?

III. Does the agent, to the extent of his renewal commissions, have a vested interest in, or an equitable lien on renewal premiums collected after termination of the agency, which will enable him to follow such premiums into the hands of whomsoever may collect them, including the successor company?<sup>3</sup>

---

<sup>3</sup> Certain collateral problems arising in connection with agency renewal commissions which seemed to be less timely and to lend themselves more readily to solution by application of the fundamentals of agency and contract law, are not treated herein for want of space.

Thus on the question of rights to renewal commissions where the contract is for a fixed term, see *MacGregor v. Union Life Ins. Co.* (C. C. A. 8th, 1903) 121 F. 493; *Lewis v. Atlas Mutual Life Ins. Co.* (1876) 61 Mo. 534; *Israel v. Northwestern National Life Ins.* (1910) 111 Minn. 404, 127 N. W. 187; *Michigan Mutual Life Ins. Co. v. Coleman* (1907) 118 Tenn. 215, 100 S. W. 122.

Where the contract is terminated by the agent's death, see *Mills v. Union Central Life Ins. Co.* (1899) 77 Miss. 327, 28 So. 954.

Where the agency is terminated for the fault or misconduct of the agent, see *Chase v. New York Life* (1905) 188 Mass. 271, 74 N. E. 325; *Burleson v. Northwestern Mutual Life Ins. Co.* (1890) 86 Cal. 342, 24 Pac. 1064; *Security Mutual Life v. Frankel* (1910) 46 Ind. App. 212, 92 N. E. 183;

A perusal of the agency contracts now in use by a number of the companies reveals remarkable standardization in that their basic provisions contain in common the following pertinent articles and limitations:

1. That the contract is terminable at the will of either party, usually on 30 or 60 days notice.
2. That commissions based on first year and renewal premiums will be allowed as and when premiums are paid in cash to the company.
3. That on termination of the contract, for any reason, the company will continue to pay renewal commissions, usually subject however, to the deduction of a collection fee of a given percentage of the premium.

Therefore, in order to avoid repeated references to exceptions, and for the purposes of this paper, it will be assumed that the contracts under consideration are the customary agency contracts now in use, and that they contain in effect the provisions just enumerated.

#### I. DISABILITY OF THE COMPANY AS A BREACH OF THE AGENCY AGREEMENT TO PAY RENEWAL COMMISSIONS AFTER AGENCY TERMINATION

Of special interest is that class of cases where, by interposition of the state, the company has been declared insolvent and dissolved, or where it has been voluntarily liquidated, and the former agent sues for the present worth of his future renewal commissions on the ground that the cessation of the company's business has constituted a breach of its agreement to pay commissions on renewal premiums after the termination of the contract.

Seldom does an agency contract specifically provide that the company reserves the right to cease doing business. What then, is the effect on the agent's claim to future renewal commissions provided for in his contract, where his company is incapacitated from collecting renewal premiums by either a voluntary retire-

---

Andrews v. Travelers Ins. Co. (1902) 24 Ky. L. 844, 70 S. W. 43; Jacobson v. Connecticut Mutual (1895) 61 Minn. 330, 63 N. W. 740; Armstrong v. National Life Ins. Co. (1908) 112 S. W. 327; Barton v. Travelers Ins. Co. (1909) 84 S. C. 209, 66 S. E. 118; Aldrich v. New York Life Ins. Co. (1923) 235 N. Y. 214, 139 N. E. 245.

Where the agent was wrongfully discharged by the company, see Wells v. National Life Assn. (C. C. A. 5th, 1900) 99 F. 22; Aetna Life v. Nexsen (1882) 84 Ind. 347; Lewis v. Atlas Mutual Life (1876) 61 Mo. 534; Newcomb v. Imperial Life Ins. Co. (C. C. E. D. Mo. 1892) 51 F. 725.

ment and sale of its business to another company, or by the intervention of the state in enjoining the company from the further carrying on of business? Does the company on becoming a party to the agency contract, by implication, agree to continue in business and collect renewal premiums forever, simply to assure the agent of his renewal commissions after his contract is terminated, even though in the opinion of the company or state, it becomes unwise, unprofitable or impossible to continue doing business?<sup>4</sup>

The courts in several reported cases have been called upon to answer these questions.

Thus, in the leading case of *Moore v. Security Trust & Life Insurance Company*,<sup>5</sup> the company conveyed all of its assets to another company and ceased to do business. Suit was brought by the agent against the selling company for damages equivalent to the alleged present value of his renewal commissions under a contract which provided for the payment of renewals accruing after its termination, but made no specific reservation of the right to cease to do business. The Eighth Circuit Court of Appeals held in no uncertain language that the possibility of the company disabling itself from collecting future renewal premiums and continuing in the insurance business, was a chance

---

<sup>4</sup> According to the weight of authority, unless the contract expressly provides for commissions on renewals to be paid after employment termination, the agent will not be entitled to commissions on renewal premiums paid after the termination of his agency. *Federal; Stagg v. Insurance Co.* (1871) 10 Wall. 589, 19 L. Ed. 1038; *Fabian v. Provident Life & Accident Ins. Co.* (D. C. D. Minn. 1935) 5 F. Supp. 806; *Fidelity & Deposit Co. v. Washington Life Ins. Co.* (D. C. D. Md., 1912) 193 F. 512. *Burleson v. Northwestern Mutual Ins. Co.* (1890) 86 Cal. 342, 24 Pac. 1064; *Phoenix Mutual Life Ins. Co. v. Holloway* (1883) 51 Conn. 310, 50 Am. Rep. 21; *Scott v. Travelers Ins. Co.*, (1906) 103 Md. 69, 63 Atl. 377; *Chase v. New York Life* (1905) 188 Mass. 271, 74 N. E. 325; *Jacobson v. Connecticut Mutual Life* (1895) 61 Minn. 330, 63 N. W. 740; *Bone v. New York Life* (1925) 165 Minn. 327, 206 N. W. 452; *Mills v. Union Central Life Ins. Co.* (1899) 77 Miss. 327, 28 So. 954; *Arensmeyer v. Metropolitan* (1914) 254 Mo. 363, 162 S. W. 261; *King v. Raleigh* (1902) 100 Mo. App. 1, 70 S. W. 251; *North Carolina Ins. Co. v. Williams* (1884) 91 N. C. 69; *Ballard v. Insurance Co.* (1896) 119 N. C. 187, 25 S. E. 956; *Wagner v. Land* (1931) 152 Okla. 225, 4 Pac. (2d) 81.

*Contra: Schrimplin v. Farmers Life Assn.* (1904) 123 Iowa 102, 98 N. W. 613; *Hercules Mutual Life Ins. Co. v. Brinker* (1879) 77 N. Y. 435; *Heyn v. New York Life Ins. Co.* (1907) 118 App. Div. 194, 103 N. Y. S. 20; *Michigan Mutual Life Ins. Co. v. Coleman* (1907) 118 Tenn. 215, 100 S. W. 122.

<sup>5</sup> *Moore v. Security Trust & Life Ins. Co.* (C. C. A. 8th, 1909) 168 F. 496, *Certiorari denied by United States Supreme Court* (1910), 219 U. S. 583, 55 L. Ed. 346.

to which the agent subjected himself in entering the agency agreement, and that since the contract was terminable at will, the company was at liberty to terminate it by sale of its business without liability to the agent for the present worth of commissions on future renewal premiums which would have been collected by the company had it continued in business. In reaching this conclusion, the court said:

"It (the company) reserved to itself under the contract of agency the corporate power and the right to determine its own business policy, and . . . whether or not, and when, if at all, it would reinsure its risks, turn over its business to another company, and cease to carry it on, free from any liability to the plaintiffs for damages on account of the exercise of that right, and the plaintiffs took the chances of that exercise when they signed the agreement."<sup>6</sup>

Where the declaration of insolvency and dissolution of the company by the sovereign power of the state is the *vis major* which disables the company from performance of its agency contract and prohibits the future prosecution of its business, it is interesting to note that the New York Court of Appeals has held that the agent has no valid claim against funds in the hands of the receiver, for damages resulting from the alleged breach of the contract in causing a discontinuance of his employment, and assigns the following reason for its decision:

". . . the agreement of the company to pay commissions on renewals was impliedly conditioned upon the continued existence of the company and its ability to renew policies and receive premiums thereon, and was terminated by its dissolution."<sup>7</sup>

In fact, it seems well settled that an adjudication of insolvency operates in legal effect as a cancellation of all outstanding insur-

---

<sup>6</sup> For other cases holding to the same effect, see particularly, *Wheeler v. Hartford Life Insurance Company* (C. C. A. 8th, 1915) 227 F. 369, and *People v. Security Life Insurance Company* (1879) 78 N. Y. 114.

In re: *English & Scottish Marine Insurance Co.* (1870) 5 L. R. Chan. App. 737, the English Court of Appeals in Chancery where the agency contract was terminated by the company's voluntary retirement from business, held that the agent had no cause of action against the company for renewal commissions, which would have accrued to the agent's account had the company continued in business, since the agent had no "right to determine what the extent of the business was to be," and that by entering into the contract "he simply took the chance of the company finding it a profitable business and carrying on."

<sup>7</sup> *Hepburn v. Montgomery* (1884) 97 N. Y. 617.

ance policies,<sup>7a</sup> with the result that, the power of the company to receive premiums having been destroyed by the lawful action of the state, no renewal commissions on such premiums could thereafter become due the agent. In other words, the subject matter of the contract has ceased to exist.

In the claim of an agent against a receiver for the prospective value of renewal commissions, based on a charge that the company itself because of mismanagement and misconduct by its officers was the responsible cause of the act of the state in dissolving it, and therefore that the dissolution was to be deemed the company's own act (not to be pleaded as an excuse), the New York Court of Appeals<sup>8</sup> also has held that whatever may have provoked or induced the corporate death, the dissolution proceedings must be deemed to be the act of the state and not that of the company producing its own death, since although the company may have been insolvent, dissolution was not the necessary consequence, but was made to depend upon the discretion of the State Superintendent. The possibility of company dissolution was held to belong to the contract as an inevitable condition and a risk which the agent assumed.

While the reported authorities are limited, it is interesting to note from those just discussed and others cited in the footnotes, that the courts with remarkable uniformity, have held that the disability or incapacity of the company to engage in business does not of itself constitute an actionable breach of the contract to pay renewals after the agency termination. It is equally significant that the courts in the better reasoned of these opinions seem to predicate their decisions squarely on the fact that the agency agreement by its express provisions is a contract terminable at the will and pleasure of either party.<sup>9</sup> This reason undoubtedly has its origin in a conception fundamental to the law

---

<sup>7a</sup> *People v. Metropolitan Surety Co.* (1912) 205 N. Y. 135 98 N. E. 412; *Fuller v. Wright* (1917) 147 Ga. 70, 92 S. E. 873; *Kate v. American Bonding & Casualty Co.* (1928) 206 Ia. 988, 221 N. W. 585; *Evans v. Illinois Surety Co.* (1921) 298 Ill. 101, 131 N. E. 262.

<sup>8</sup> *People v. Globe Mutual Life Ins. Co.* (1883) 91 N. Y. 174, at pages 182 and 183.

<sup>9</sup> That, aside from its contractual obligations, the company possesses the inherent power and corporate right to voluntarily withdraw from business whenever it so wills, which is an additional reason sometimes ascribed by the courts in support of the proposition that the company may cease to do business free from liability for agency renewals, is submitted as being un-

of agency, that the principal may revoke and the agent may renounce the appointment at will without committing any breach of the contract of agency, unless the power to revoke is restricted by express covenant.<sup>10</sup>

It seems to follow, therefore, that the parties in making the agency contract expressly terminable at will, have explicitly reserved to the company the corporate power and right, vital to its success and existence, to determine whether and for how long it will continue to do business, to decide to cease doing business altogether if it deems it necessary or advisable, or to reinsure its risks, free from liability to its agents, and without the exercise of such right constituting a breach of that stipulation in the contract to pay commissions on future premiums after its termination. The contract being made terminable at the pleasure of the parties, is certainly contemplated by them to be of a temporary nature and to carry with it no agreement by the company, implied or otherwise, that it will unequivocally continue its business, though deemed unwise and unprofitable to do so, nor that it will refrain from going out of business after the agency terminates.

The soundness of the foregoing conclusion seems further evi-

---

tenable and unsound. See *Hepburn v. Montgomery*, supra, footnote 7; *In re English & Scottish Marine Insurance Co.*, supra, footnote 6; *People v. Security Life Insurance Co.*, supra, footnote 6.

If the company may retire from business, irrespective of its contractual undertakings, then it would follow that under a contract of agency for a fixed term the company could voluntarily disable itself during the term, thereby stripping itself of the power to perform its contract, yet escape liability to the agent for renewal commissions, contrary to the weight of authority. See *United States v. Behan* (1884) 110 U. S. 338, 28 L. Ed. 168; *Lewis v. Atlas Mutual Life Ins. Co.* (1876) 61 Mo. 534; *Wells v. National Life Assn.* (C. C. A. 5th, 1900) 99 Fed. 222; *Israel v. Northwestern National Life Ins. Co.* (1910) 111 Minn. 404, 127 N. W. 187; *Michigan Mutual Life Ins. Co. v. Coleman* (1907) 118 Tenn. 215, 100 S. W. 122.

By the same token the company might deliberately abandon its business and incur no liability to the policyholder for the value of his policy, contrary to the opinion of the United States Supreme Court in *Lovell vs. St. Louis Mutual Life Ins. Co.* (1884) 28 L. Ed. 423, 111 U. S. 264, and *Central Trust Co. v. Chicago Auditorium Assn.* (1916) 60 L. Ed. 815, 240 U. S. 581. Also see *Gilbert v. Washington Beneficial Endowment Assn.* (1897) 10 App. D. C. 316; *Federal Life Ins. Co. v. Kerr* (1909) 173 Ind. 613, 89 N. E. 398; *Chicago Life v. Robertson* (1917) 165 Ky. 217, 176 S. W. 1012; *Crowell v. Northwestern Life & Savings Co.* (1906) 99 Minn. 214, 108 N. W. 962.

<sup>10</sup> See *Moore v. Security Trust & Life Ins. Co.* (C. C. A. 8th, 1909) 168 F. 406; *Stier v. Imperial Life Ins. Co.* (C. C. W. P. Mo., 1893) 58 F. 843; *North Carolina State Life Ins. Co. v. Williams* (1884) 91 N. C. 69.

dent when we bear in mind two distinct characteristics of the renewal commissions with which we are concerned:

(1) That they are the renewals which under the terms of the contract accrue and are allowable only after the contract has been terminated, and,

(2) That under the terms of the agency contracts of most companies such renewals become payable to the agent *only upon payment of the renewal premiums to the company.*

A rational interpretation seems to be that the company is bound to pay renewal commissions only on the renewal premiums paid to it, and only when they are paid. Where, therefore, the company either voluntarily or involuntarily has ceased to do business, that act has merely wrought a disability to receive payment of such premiums; a contract right, which as hereinbefore indicated, the parties reserved to the company in making the contract terminable at will, and a hazard which the agent risked.

In the opinion of the writer, it is not sufficient to say that the company may cease to do business without incurring liability to the agent for renewals simply because the contract is found to be terminable at will, or even more specifically, when this conclusion is made to rest upon the further premise that if the company is deprived of its power to receive renewal premiums by reason of its cessation from business, the agent is likewise stripped of his right to receive renewal commissions, since, as previously noted, under the standard provisions of most agency contracts, renewal commissions are payable to the agent only as and when renewal premiums are paid in cash to the company.

Therefore, even though an agency contract may be terminated properly under a provision making it terminable at will, so long as the company is not actually incapacitated from receiving premiums, but remains in business and continues to receive the payment of renewal premiums, its contract obligation to pay the former agent renewal commissions on the basis of such renewal premiums paid, remains intact.

Thus for example, in the case of *Newcomb v. Imperial Life Insurance Co.*,<sup>11</sup> the agent's contract said to be terminable at will, had been cancelled and the agent was being paid his renewal commissions after deduction of a collection fee, under that provision

---

<sup>11</sup> *Supra*, note 3.

of his contract providing for the payment of renewals subsequent to the agency termination. While the former agent was thus receiving his renewals, the company entered upon a scheme to induce people whom the agent had insured on a "natural premium plan" to give up and abandon their policies for "level premium policies." The Federal Court held that the company had no right to interpose such obstacles in the way of the renewal of the policies so as to deprive the agent of his renewal commissions on such policies, and that such action could not be justified on the grounds that the company may have reserved the right to terminate the contract at will, but that so long as the company had the capacity to receive renewal premiums, it was, subject to the time limitations of the contract, obligated to pay the former agent his renewals.

It is suggested, therefore, that the fact that the contract is made expressly terminable at will, properly should be available to the company or its successors as a defense to a claim for renewals after the agency termination, only where there is a concurrence of two facts: first, the destruction of the power to receive renewal premiums, precipitated by, secondly, the disability of the company to do business.

As a conclusion, therefore, it is submitted that the contractual right of the agent to renewal commissions after the termination of his agency ceases upon the disability of the company to engage in business, whether by voluntary retirement or by sovereign compulsion. The soundness of this conclusion, however, in the opinion of the writer, rests, not on the premise intimated by some of the courts that aside from its contracts a company possesses the inherent right to discontinue business when it wills, but upon the more feasible and convincing precept that the parties, in making their contract expressly terminable at will, have anticipated the possible disability of the company to continue in business, and its consequent inability to receive payment of the premiums upon which the renewal commissions are measured and based.

The foregoing conclusions are to be understood as being not necessarily inconsistent with, but rather distinguishable from, that further line of cases which holds that where an insurance company makes an express agreement to employ an agent for a fixed term, the contract is essentially mutually obligatory and

the company breaks its part of the agreement and subjects itself to all the damages which naturally flow from that breach by abandoning its business during the agreed term.<sup>12</sup>

## II. ANTICIPATORY BREACH

As previously indicated, most agency contracts provide for payment, subsequent to the termination of the agency agreement, of renewal commissions as and when renewal premiums are paid to and collected by the company. It is the loss of these renewal commissions on the withdrawal of a company from business that frequently prompts the agent to file suit against his original company, or its successor, for the present worth of estimated future renewal commissions, before the renewal premiums actually have become due or have been collected. These actions are usually brought on the theory that since the company, by its dissolution or voluntary cessation from business, has prevented the payment of renewal commissions before the time for performance, the agent may sue immediately for damages on the theory of anticipatory breach.<sup>13</sup>

With the problem thus stated, let us consider and apply the two elements necessary to sustain a suit for anticipatory breach.

1. The absolute and unequivocal renunciation of the contract, covering its entire performance, is an essential factor to an action for anticipatory breach.<sup>14</sup>

Suffice it to say, therefore, that the theory of anticipatory breach can be invoked in a demand for renewal commissions only in case the contract purported to be repudiated by the company, is a mutual executory contract for a fixed period, and under the terms of which the company is unequivocally bound to continue in business and to receive payment of the future renewal premiums on which renewal commissions are based.

But as previously indicated, the great majority of agency contracts are expressly terminable at will, with the result that

---

<sup>12</sup> *MacGregor v. Union Life Insurance Co.* (C. C. A. 8th, 1903) 121 F. 403; *Lewis v. Insurance Co.* (1876) 61 Mo. 534; *Israel v. Northwestern National Life Ins. Co.* (1910) 111 Minn. 404, 127 N. W. 187.

<sup>13</sup> *MacGregor v. Union Life Insurance Co.* (C. C. A. 8th, 1903) 121 F. 493; *Lewis v. Insurance Co.* (1876) 61 Mo. 534; *Lovell v. St. Louis Mutual Life Ins. Co.* (1884) 111 U. S. 264, 28 L. Ed. 423; *Roehm v. Horst* (1900) 178 U. S. 1, 44 L. Ed. 953.

<sup>14</sup> *McNamarra v. Cerf* (C. C. A. 2d, 1924) 4 F. (2d) 997; *Roehm v. Horst* (1900) 178 U. S. 1; *Dingley v. Olar* (1886) 117 U. S. 490, 29 L. Ed. 984; *Mobley v. New York Life Insurance Co.* (1934) 79 L. Ed. 936.

their termination through liquidation or reinsurance of the company and its subsequent inability to collect premiums and to pay commissions on them, does not constitute a repudiation of the contract by the company thus giving rise to a demand for anticipatory breach; but to the contrary, termination of the agency contract is but the exercise of a right by the company, reserved to it under its contract.<sup>15</sup>

There is said, however, to be another reason why the termination of the customary agency contract providing for payment of renewals subsequent to its termination, will not support an action for anticipatory breach, and this leads us to a consideration of the second attribute essential to a demand for anticipatory breach.

2. The authorities as far back as the old English case of *Hochster v. De La Tour*,<sup>16</sup> adhere to the doctrine that a breach of the contract before the time of performance arrives, justifies an immediate action for damages only on contracts which are bilateral and mutually executory, such as contracts for the rendition of services, or marriage, where the undertakings of the parties are interdependent and to be simultaneously performed.<sup>17</sup> This rule, however, does not seem to govern actions to pay money at times specified, such as on bonds and notes, where the consideration has passed, and where, as a consequence the contract is only executory as to one party.<sup>18</sup>

---

<sup>15</sup> *Moore v. Security Trust & Life Co.* (C. C. A. 8th, 1909) 168 F. 496; *Pellet v. Manufacturers' and Merchants' Insurance Co.* (C. C. A. 7th, 1900) 104 F. 502; *Stier v. Imperial Life Ins. Co.* (C. C. W. D. Mo., 1893) 58 F. 843; *Wheeler v. Hartford Life Ins. Co.* (C. C. A. 8th, 1915) 227 F. 369; *E. I. Dupont & Co. v. Clairborne-Reno Co.* (C. C. A. 8th, 1933) 64 Fed. (2d) 224; 3 Couch *Cyclopedia of Insurance Law* (1929), sec. 561, pages 1805 and 1806.

<sup>16</sup> (1853) 2 El. and Bl. 678.

<sup>17</sup> *Hochster v. De La Tour* (1853) 2 El. and Bl. 678; *Roehm v. Horst* (1900) 178 U. S. 1, 44 L. Ed. 953; *Nichols v. Steel Co.* (1893) 137 N. Y. 471, 33 N. E. 561; *Frost v. Knight* (1871) L. R. 7 Ex. 111.

<sup>18</sup> The repudiation by one party, it is said, must have been accepted or "acted upon" by the other party to his detriment, to give rise to a present action for anticipatory breach. The contract must necessarily, therefore, be mutually executory, since the party accepting the repudiation cannot act upon it unless there remains something for him to do under the contract. *Roehm v. Horst* (1900) 178 U. S. 1, 44 L. Ed. 953; *Nichols v. Steel Co.* (1893) 137 N. Y. 471, 33 N. E. 561; *Washington County v. Williams* (C. C. A. 8th, 1901) 111 F. 801; *Kimmel v. Missouri State Life Ins. Co.* (C. C. A. 10th, 1934) 71 F. (2d) 921; *Kitchcort v. Metropolitan Life Ins. Co.*, (D. C. W. D. Mo., 1932) 1 F. Supp. 719; *Moore v. Security Trust & Life Co.* (C. C. A. 8th, 1909) 168 F. 496; *Parks v. Maryland Casualty Co.* (D. C. W. D. Mo., 1932) 59 F. (2d) 736.

Where, therefore, the agency contract has been terminated, it has been held, though subject to considerable controversy, that the agent has completely performed his part of the contract, having fully earned his commissions, so that nothing remains executory but the agreement of the company to pay commissions, usually subject to a collection fee, as and when renewal premiums are collected by it in the future.<sup>19</sup>

It is submitted, therefore, that under a contract stipulation for the payment of renewal commissions after agency termination, the disability of the company to collect premiums and to pay renewal commissions thereon, does not accelerate the due date of said renewal commissions, and creates no cause of action for their present worth on the theory of anticipatory breach.

As to the agent's right, on termination of his contract, to recover the worth of his renewal commissions by suit based on *quantum meruit* or *quantum valebat* for services rendered, the adjudications are few.

However, where the contract is terminable at will, *quantum meruit* or *quantum valebat* seemingly will not lie, for as said in the *Newcomb* case,<sup>20</sup>

"It goes without saying that an agent working under such a contract cannot sue his principal upon a *quantum valebat* for services rendered, if the agency is lawfully terminated by the principal in pursuance of a power reserved in the contract to terminate it."

Recovery on a *quantum meruit* is said to be based upon an implied promise to pay for the rendition of services,<sup>21</sup> but where there exists an express contract there can of course be no such implied agreement as to the same subject matter.<sup>22</sup> Where, therefore, the right to terminate the contract and the right of the agent to renewal commissions on the basis of premiums collected, are expressly fixed by the agency contract, the required implied

---

<sup>19</sup> *Moore v. Security Trust & Life Co.* (C. C. A. 8th, 1909) 168 F. 496; *Parks v. Maryland Casualty Co.* (D. C. W. D. Mo., 1932) 59 F. (2d) 736; *Mellon v. Fed. Ins. Co.* (D. C. S. D. N. Y., 1926) 14 F. (2d) 997.

<sup>20</sup> *Newcomb v. Imperial Life Ins. Co.* (C. C. E. D. Mo., 1892) 51 F. 725.

<sup>21</sup> 71 C. J. 37; *Sargent v. Foland* (1922) 104 Ore. 296, 207 Pac. 349; *In re Walton's Estate* (1931) 213 Iowa 104, 238 N. W. 577; *Callaway v. Milligan* (1911) 25 Del. 383, 80 Atl. 630.

<sup>22</sup> 13 C. J. 243—and cases cited.

contract essential to support a *quantum meruit* does not appear to exist.<sup>23</sup>

### III. CLAIM OF AGENT TO VESTED INTEREST IN RENEWAL PREMIUMS TO THE EXTENT OF RENEWAL COMMISSIONS

In the foregoing discussion our concern has been primarily with actions by the agent for renewal commissions against the original contracting company or its liquidating agents, where that company has been incapacitated from performance of the agency contract by virtue of its withdrawal from business, whether voluntary or involuntary.

However, the retirement from business of a number of legal reserve life companies in recent years, and the consequent wholesale purchase or reinsurance of their businesses by succeeding companies, has caused an increasing number of actions by the former agent of the retiring company against the purchasing company, for renewal commissions to which, under the terms of the basic contract of the original company, the agent would have been entitled, had the original company remained in business and continued to collect renewal premiums.

What can be the basis of liability, if any, of the successor company to the former agent of the original company? In the absence of an express undertaking by the successor company in its contract of purchase or reinsurance, to pay the former agent all or a part of the renewals which would accrue to him had his agency contract with the original company not been terminated, does the purchasing company by virtue alone of its collection, under its purchase agreement, of renewal premiums on business written by the former agent of the old company, incur any liability to such agent for renewal commissions on such premiums?

If, as previously concluded, no liability on the grounds of breach of contract to pay renewals, attaches against the original

---

<sup>23</sup> It is said, however, that if the express contract has been completely executed, the agent may recover as upon an implied contract, the price of his services, "but the contract must regulate the amount of the recovery"; *Kelso v. Lincoln National Life Ins. Co.* (1932) 227 Mo. App. 184, 51 S. W. (2d) 203; *Hoyt v. Buder* (1928) 318 Mo. 1155, 6 S. W. (2d) 947; *Oaks v. Short*, (Mo. App., 1927) 292 S. W. 738; 13 C. J. 244. Even so, in view of the fact that the express contract still regulates the amount of the recovery, a *quantum meruit* apparently would not lie since there could be no recovery of any amount on the basis of the express contract, it having terminated, with the result that the company is incapable of receiving premiums, upon the payment of which commissions under the contract are made to depend.

company when it is incapacitated from performance of its agency contract, then certainly, as against the successor company, the former agent can find himself in no better position.

It necessarily follows, therefore, that any such claim against the purchasing company must be predicated upon the premise that the agent has a vested interest, a property right, or an equitable lien on renewal premiums paid, to the extent of his commissions, which enables him to follow said premiums into the hands of whomsoever may collect them, and to claim his commission interest therein.

To ascertain whether the agent has such a vested interest in renewal premiums collected by the successor company, it is first necessary to determine whether as against the original company, the agent had ever acquired an interest in renewal premiums which vested with the collection of such premiums.

The fundamental rule that an agency terminable at will may be revoked by the principal without committing a breach of the contract of agency, is said to admit of one exception. Where the agent acquires an interest, not in the profits of the thing but in the subject matter of the agency itself, that is, where there exists a power coupled with an interest, the customary option of the principal to terminate the agency, is said to be taken away.<sup>24</sup>

Chief Justice Marshall, with characteristic aptness, defined a power coupled with an interest as "an interest in the thing itself," saying further, that "if the power ceases where the interest commences" the power cannot be said to be coupled with an interest, and that

"the interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power . . ."<sup>25</sup>

Tested by this rule it seems manifest that the power which is accorded the agent under his contract to solicit and service insurance risks, is not such a power as is coupled with an interest in the subject matter, that is, in the premiums themselves; but rather, is it not a case in which "the power ceases where the in-

---

<sup>24</sup> *Steir v. Imperial Life Ins. Co.* (C. C. W. D. Mo., 1893) 58 F. 843; *Hunt v. Rousmanier* (1923) 8 Wheat, 174, 5 L. Ed. 589; *Locher v. New York Life Ins. Co.* (1918) 200 Mo. App. 659, 208 S. W. 862; *North Carolina State Life Ins. Co. v. Williams* (1884) 91 N. C. 69; *Kansas Union Life v. Burman*, (C. C. A. 8th, 1905) 141 F. 835.

<sup>25</sup> *Hunt v. Rousmanier* (1823) 8 Wheat. 174, 5 L. Ed. 589.

terest commences?" The company by contract confers upon the agent only the power to write and service business, whereupon the power of the agent ceases. As compensation for his services in exercising this power, the company does not purport to convey to the agent an actual interest in the premiums themselves, but instead, the company contracts to use the premiums as and when collected as simply a medium for the measurement of the commissions to be paid.

It is submitted, therefore, that the contract provisions for payment of renewal commissions do not vest the agent with an inherent interest in the premiums by whomsoever collected, but can only be understood as fixing a basis of remuneration, a yardstick for measuring the compensation which the company undertakes to make the agent when and if premiums are paid to the company, and not otherwise.<sup>26</sup> In other words, the company becomes liable to the agent for his renewals only in the capacity of debtor, not taking the renewal premiums impressed with the trust for the benefit of the agent.<sup>27</sup> Only so long as the contracting company continues in business and to collect premiums, can the agent, after the agency termination, recover his renewals as they accrue, and then only in the capacity of a creditor of the company under a promise to pay money for services rendered.

Therefore, though the subject be approached from a different aspect, are we not impelled to the same conclusion previously announced in Part I, that upon a company's discontinuance from business, which works a disability to collect renewal premiums, the agency contract, if terminable at will, ends, and all rights of the agent thereupon expire, notwithstanding that subsequent premiums on the former agent's business may be paid to and received by a succeeding company under a contract of purchase or reinsurance?

As a general rule, both the federal and state courts have held that the right to renewal commissions is an unaccrued, prospective, contingent right which must be derived from the contract

---

<sup>26</sup> *Locher v. New York Life* (1918) 200 Mo. App. 659, 208 S. W. 862; *Kansas Union Life v. Burman* (C. C. A. 8th, 1905) 141 F. 835; *North Carolina State Life Ins. Co. v. Williams* (1884) 91 N. C. 69.

<sup>27</sup> *North Carolina State Life Ins. Co. v. Williams*, supra, note 26; *Kansas Union Life v. Burman*, supra, note 26; *Gooding v. Northwestern Mutual Life Ins. Co.* (1912) 110 Me. 69, 85 Atl. 391.

itself,<sup>28</sup> and is in no sense a vested right of the agent either as against the original company or as against the succeeding company.

Thus in the case of *Michigan Mutual Life Insurance Co. v. Thompson*,<sup>29</sup> the plaintiff had taken over the company's agency at Rochester, New York under a contract to allow him a 7½% collection fee on renewal premiums. Subsequently the company discontinued the agency and notified policyholders to remit directly to the company's home office. The Second Circuit Court of Appeals stated the question as follows:

"The question of law is presented whether under the original contract Thompson had, as he claimed, a *vested interest for* commissions on renewal premiums on policies obtained by the Rochester agency . . .

and held,

"Thompson had no vested interest but only a right to a collection fee on premiums collected by him in cash . . .

saying further,

"the general rule is that contracts not expressly made for fixed periods are terminable at the will of either party. . . . the table of premiums and commissions must be understood as fixing commissions payable in accordance with the terms of the contract."

Previously, the Federal Circuit Court,<sup>30</sup> after quoting Chief Justice Marshall's definition of a power coupled with an interest, had held that the contract right of an insurance agent to renewal commissions does not make his agency coupled with an interest so as to prevent the company from terminating it at will.

So in the case of *Locher v. New York Life Insurance Co.*,<sup>31</sup> the St. Louis (Missouri) Court of Appeals held, where the agent was claiming renewals after the termination of his agency under a contract terminable at will, that he

<sup>28</sup> *Masden v. Travelers Ins. Co.* (C. C. A. 8th, 1931) 52 F. (2d) 75; *Chicago Life Insurance Co. v. Tiernan* (C. C. A. 8th, 1920) 263 F. 325; *Travelers Ins. Co. v. Hermann* (1928) 154 Md. 171, 140 Atl. 64; *Chase v. New York Life Ins. Co.* (1905) 138 Mass. 271, 74 N. E. 325; *Sutherland v. Connecticut Mutual Life* (1914) 149 N. Y. S. 1008.

<sup>29</sup> (C. C. A. 2d, 1920) 266 F. 873.

<sup>30</sup> *Stier v. Imperial Life Ins. Co.* (C. C. W. D. Mo., 1893) 58 F. 843.

<sup>31</sup> (1918) 200 Mo. App. 659, 208 S. W. 862.

"has acquired no interest in renewals on policies written by him which become vested at the time of writing the policies."

The court went on to say that

"this claim was long ago disposed of by the Supreme Court of the United States in *Hunt v. Rousmanier*,"

and also quoted Chief Justice Marshall's familiar definition of a power coupled with an interest.

In *Wilkinson v. Inter-Southern Life Insurance Co.*,<sup>32</sup> the agent had a contract with the Citizens National Life Insurance Company. While the contract was in force the company merged with another company and formed the Inter-Southern Life Insurance Co. The agent sued the Inter-Southern Life Insurance Company for the present cash value of renewal commissions which would have accrued to the plaintiff had the consolidation not occurred. In finding for the company, the Georgia Supreme Court held that since the agency contract made no provision for its duration for a fixed term, but was expressly terminable at will,

"the fact that the Citizens National Life Insurance Company entered into a consolidation with the Inter-Southern Life Insurance Company did not constitute a breach of the contract of agency for which Wilkinson could recover damages."

Without minimizing the effects of other decisions holding that the agent's interest in renewals is contingent and not vested, such additional authorities, for the sake of brevity, are referred to in the footnotes.<sup>33</sup>

Assuming as a conclusion therefore, that the right of the agent to renewal commissions is by its nature not a vested right but rests expressly upon the contract, which creates only a debtor and creditor relationship under a contingent promise to pay for

<sup>32</sup> (1917) 147 Ga. 283, 93 S. E. 406.

<sup>33</sup> *Madsen v. Travelers Ins. Co.* (C. C. A. 8th, 1931) 52 F. (2d) 75; *McPherrin v. Sun Life Assurance Co.* (Iowa, 1934) 257 N. W. 316; *Thurman v. Rodman* (1924) 206 Ky. 180, 266 S. W. 1047; *Gooding v. Northwestern Mutual Life Ins. Co.* (1912) 110 Me. 69, 85 Atl. 391; *Scott v. Travelers Ins. Co.* (1906) 103 Md. 69, 63 Atl. 377; *King v. Raleigh* (1902) 100 Mo. App. 1, 70 S. W. 251; *North Carolina State Life Ins. Co. v. Williams* (1884) 91 N. C. 69; *Ballard v. Travelers Ins. Co.*, 119 N. C. 187, local citation 191, 25 S. E. 956; *Fass v. South Atlantic Life Ins. Co.* (1916) 105 S. C. 107, 89 S. E. 558.

But for cases distinguishable, not *Contra* see: *Hercules Mutual Life Assurance Society v. Brinker*, 77 N. Y. 435; *Heyn v. New York Life* (1908) 192 N. Y. 1, 84 N. E. 725; *Michigan Mutual Life Ins. Co. v. Coleman* (1907) 118 Tenn. 215, 100 S. W. 122.

services rendered, can it be said that the agent has any sort of an equitable lien on renewal premiums, or an equitable assignment thereto for his commissions, which will enable him to follow the premiums after termination of his contract, into the hands of a third person who was not a party to the basic agency contract?

It is fundamental that to constitute an equitable lien on a fund the debtor must irrevocably appropriate the subject matter to the creditor by order or assignment in such a manner that the holder of the fund is authorized to pay the amount directly to the creditor without intervention of the debtor,<sup>34</sup> and that a mere expectation or agreement to pay a debt out of a particular fund when the fund arises, does not establish an equitable lien upon the fund.<sup>35</sup>

It would be virtually inconceivable and certainly opposed to all recognized practices and basic principles of insurance, for the parties to an agency contract to contemplate that the agent should have the right to hold or to look to the policyholder for a given renewal commission on a premium about to be paid, or that the policyholder under ordinary circumstances could be required to pay any part of the renewal premiums to the agent, or that the company should intend expressly to appropriate or assign a certain percentage of the renewal premium to the agent as his renewal commission, all of which would be necessary incidents in the event of an equitable lien or assignment.<sup>36</sup>

Thus the Massachusetts Supreme Court has held that the insurance company is entitled exclusively to the premium, and that, as against the insured, the agent can claim no lien on the premium for his commissions.<sup>37</sup>

In a recent Federal case<sup>38</sup> an auditor contracted with a com-

---

<sup>34</sup>Jones on *Liens*, Volume 1, paragraph 52; *Wright v. Ellison* (1864) 1 Wall. 16, 17 L. Ed. 555; *Franklin v. Browning* (C. C. A. 8th, 1902) 117 F. 226; 19 Am. and Eng. Enc. of Law (1901) 2d ed. 16.

<sup>35</sup>*Christmas v. Russel* (1871) 114 Wall. 69, 20 L. Ed. 792; Jones on *Liens* Volume 1, paragraph 48; *Great Northern State Bank v. Ryan* (C. C. A. 8th, 1923) 292 Fed. 10.

<sup>36</sup>In *Machette v. Hodges*, 6 Philadelphia (Pa.) 296 (1867) it was held that an insurance agent whose agency has been terminated cannot enjoin the company from receiving premiums although he may be entitled to a commission thereon.

<sup>37</sup>*Ide v. Aetna Insurance Co., et al.* (1919) 232 Mass. 523, 122 N. E. 654.

<sup>38</sup>*Goddes v. Reeves Coal & Dock Co.* (C. C. A. 8th, 1927) 20 F. (2d) 48.

pany to audit its freight bills for overcharges, the consideration for this work to be 50% of the refunds. Plaintiff made the audit and filed claim for refunds, but prior to the time the refunds were actually made by the carrier, the company was adjudged a bankrupt. The Eighth Circuit Court of Appeals held that the auditor had an equitable lien in the refund and was therefore a preferred creditor, for the following reason, however:

*"The contract was that the dock company should pay him 50% of any refunds received by it, not a 50% commission on them, or a sum equal to 50% of them, but 50%, one-half, of the very refunds the dock company received."*

Consistent with the tenor of this case, if agency contracts were to provide that the agent is to receive a certain percentage of the renewal premium itself, there would be grounds for a possible equitable lien. The distinction is insignificant, however, when it is borne in mind that the average agency contract provides for payment to the agent, not of a percentage of the renewal premium itself, but *only commissions in terms of sums measured by and equal to a certain percentage of the renewal premium paid.*

It is submitted as a conclusion, therefore, that the agent has neither a vested interest in, nor an equitable lien or assignment to, renewal premiums paid either to the contracting or successor company, and that a rational interpretation of the usual agency contract insofar as it relates to renewal commissions, may be said to be something as follows:

The company agrees to pay the agent as the consideration for his services in negotiating the policy and in servicing the risk after procurement, a first year commission measured by a certain percentage of the first year's premium, and also renewal commissions measured by a smaller percentage of a limited number of renewal premiums, only however, when, as and if such premiums are paid to the contracting company in cash.

Aside from the foregoing treatment of the effects of company liquidation on the agent's rights to renewal commissions, there is another question in the realm of agency renewal commissions, which, whether the contract is terminated or not, is frequently a cause of concern to some of the companies.

IV. IS THE AGENT ENTITLED TO RENEWAL COMMISSIONS ON PREMIUMS WAIVED UNDER THE TOTAL AND PERMANENT DISABILITY FEATURE OF A POLICY?

While the agency contracts of a number of companies expressly stipulate that renewal commissions will not be paid on premiums waived because of total and permanent disability, the question becomes a problem in connection with those agency contracts which are silent on the subject.

As previously indicated, an express provision that the renewal commission will be paid only as and when the renewal premium is paid in cash to the company, is common to the agency contracts of practically all companies.

It is contended by the agent that while it is conceded that the premium must be paid before the commission is allowable, the contract does not provide that the insured necessarily must pay such premium, that after approval of a disability claim the premium is technically being paid by the company from a disability reserve fund set aside by the company for such purposes out of the additional disability premium; that therefore the agent is entitled to renewal commissions on premiums so paid, and that to deprive him of such commissions is to penalize him for his additional effort in inducing the insured to take the disability coverage with its extra premium.

However, it is contended for the company that the parties intend, in stipulating that renewal commissions are to be paid only on renewal premiums paid in cash to the company, that renewal premiums on which renewal commissions are expected to be paid, are only those premiums which are actually paid in cash by the insured to the company; that the waiver of premiums on account of disability is in no sense the payment of premiums by the company to itself, but is only an intra-office bookkeeping transaction, necessitated by actuarial considerations in order to make the premium waiver effective.

A survey of the authorities reveals only two reported cases dealing directly with this situation.

One is that of *Handshoe v. The Equitable Life Assurance Society of the United States*.<sup>39</sup> There the agent's contract provided

---

<sup>39</sup> Opinion of Municipal Court of City of New York was originally reported at 277 N. Y. S. 117 (1934). Per Curiam opinion of New York Su-

for commissions only on "premiums as paid in cash" to the company. Suit was brought to recover renewal commissions on two premiums waived by the company on account of the insured's total and permanent disability. The company contended that premiums waived by reason of disability were not premiums paid in cash to the company. It was stipulated between the parties that it was a practice of the company, when a gross premium was paid, to allocate it to the renewal premium life account, and to the renewal premium disability account, and when a claim for disability benefits was allowed involving the waiver of a premium, it was the custom to compute the net annual life premiums under the policy, to total all such net annual life premiums falling due in that month on disability cases, to debit this total to a separate account known as the "premiums waived on account of disability," and at the same time to credit it to an account known as the "renewal premiums life account." Judgment for the plaintiff by a New York City Municipal Court, apparently on the grounds that such a bookkeeping transaction did actually constitute a payment of the premium in cash by the company, was in April, 1933, reversed by the New York Supreme Court. That court in only a per curiam opinion said:

"Under the terms of the agency contract the plaintiff's assignor was not entitled to commissions on premiums waived by the company pursuant to the policy during the period of disability."

The one other case found on the subject is that of *Pick v. State Mutual Life Assurance Company*, decided by the Illinois Appellate Court, First District, on appeal from the Municipal Court of Chicago.<sup>40</sup> There the agency contract differed from that in the *Handshoe* case in that it provided only for the payment of renewal commissions as the premiums were paid, without the additional requirement that the premiums must be paid in cash to the Company. The appellate court in affirming the judgment for the agent, declared, as contended by the agent, that where a premium is waived by the company it is paid from a special fund set up by the company to take care of disability claims, and disagreed with the company's position that the waiver of the premium was

---

preme Court reversing judgment of Municipal Court, is not found to be officially reported.

<sup>40</sup> (1933) 272 Ill. App. 602.

but a bookkeeping transaction in which the company simply took money out of one pocket and put it in another.<sup>41</sup>

However, in the opinion of the writer, an analysis of agency commissions both first year and renewal, that is, as to their inherent character and nature, their purpose and functions, as seemingly understood by the parties, will afford a solution of this problem of liability for renewal commissions on premiums waived by disability, on an additional basis, different somewhat from that employed in the *Handshoe* and *Pick* cases.

Agency contract commissions are compensation for what? Is the negotiation and initial procurement of the risk alone the singular consideration for the payment of both first year and renewal commissions, with no intent by the parties that the renewal commissions are to be the fruit of the agent's labor in seeing that the policy is continued in force and renewal premiums paid? Or, on the other hand, is it not the intention of the parties that the first year commission is to fully and completely compensate the agent for his services in originally procuring the risk, and that payment of renewal commissions is associated with a continuance of the risk, that is, a form of year to year remuneration to the agent for his services, after negotiation of the risk, in seeing that the policy is maintained in force?

It is the view of the writer, that renewal commissions are basically *intended as compensation for influence*; that they are conceived as remuneration to the agent for his diligent efforts and his influence after procurement of the risk in "keeping the policyholder sold," in seeing that the policy does not lapse nor is surrendered, and in either himself collecting the renewal premium for the company or in seeing that it is paid to the company. Thus, as was said in the case of *King v. Raleigh*,<sup>42</sup>

"The courts . . . proceed on the notion that the compensation to be received by the agent . . . on renewal premiums, is associated with the continuance of his agency . . . the

---

<sup>41</sup> The writer is indebted to Mr. Sterling Pierson, and Messrs. Alexander & Green, General Solicitor and General Counsel, respectively, for the Equitable Life Assurance Society of the United States, through whom copies of the record and briefs in the *Handshoe* case were made available for use; also to Mr. Irving T. F. Ring, General Counsel for the State Mutual Life Assurance Company, who furnished for perusal, copies of opinions, briefs et cetera in the *Pick* Case.

<sup>42</sup> See *supra* footnote 3.

purpose being to bind him to steady work in behalf of the company."<sup>43</sup>

To be sure, if the agent's contract is terminated, a collection fee is ordinarily imposed against his renewals, which represents the cost of the company of servicing the collection of premiums previously collected through the agent. But even though his contract has been terminated and renewal premiums are being collected directly by the company, the renewal commission less collection fee, is nevertheless held out as an inducement to the former agent to exert his influence in seeing that policy is maintained in force, in occasionally calling on the policyholder, or in reminding Bill Smith that he has a renewal premium due next week. The company realizes that the agent is the dominant force in bringing company and policy holder together, that he is the motivating influence with the policyholder, and that without the renewal commissions there would be no inducement to the agent to seek the yearly renewal of the policy.

But the value of influence can be measured only in terms of results. The agent's influence with the policyholder during a given year is of commercial value to the company only in proportion to whether or not the renewal premium for that year is actually paid in cash, and that such is the intention of the parties seems evident from the fact that they have seen fit by contract to make the payment of the premium in cash a condition precedent to the payment of the renewal commission. Where, therefore, the premium is no longer actually paid by the insured, but is being waived by the company on account of disability, the agent's influence on the policyholder to pay a renewal premium is no longer a thing of value to the company, since the policy during disability automatically continues in force without the payment of premiums, agent or no agent. Does it not follow, therefore, that where the need for the agent's influence has ceased, it is intended by the parties that the consideration for such influence, that is, the payment of renewal commissions, shall also cease?

For two reasons, therefore, it is suggested that the agent by

---

<sup>43</sup> Also see *Andrews v. Public Savings Insurance Co.*, 141 N. E. 646, in which it was said "It is to the interest of an insurance company to have contracts which will induce its agents to continue with their work," and see *Walker v. John Hancock Mutual Life Insurance Co.*, 79 Atl. 355, in which it was held that renewals were not a part of compensation for writing the policy, but only for collecting future renewal premiums.

right is not entitled to renewal commissions on premiums waived by disability:

(1) because such waiver of premium neither in fact or theory constitutes a "payment of the premium in cash to the company" as required by most agency contracts, and

(2) because the agent, as apparently intended by the parties, is to be paid a renewal commission only when his efforts result in the payment by the insured of a given renewal premium, so that where the necessity for the payment of such renewal premium ceases, the right of the agent to a renewal commission thereon likewise ceases.

Where, however, a premium is advanced by the company, through the exercise of the automatic premium loan privilege of the policy, there appears a greater justification for the agent's claim to a renewal commission on a premium so advanced, than in the case of a premium waived on account of disability.

This seems true, first, because a premium advanced by the automatic premium loan is necessarily a charge against the policy, ultimately to be paid or accounted for in one form or another by the insured, and therefore, might be classified literally as a "premium paid to the company," as required by the agency contract for the payment of renewal commissions.

Secondly, in the case of an automatic premium loan, unlike a waiver of the premium by disability, the influence of the agent on the policyholder often has a distinct value to the company, in that frequently the policyholder, when in financial straits, would no doubt surrender or abandon his policy except for the influence of the agent in showing him the wisdom of permitting an operation of the automatic premium loan to save the policy. If, therefore, it can be said that the effect of the agent's influence is being felt by the company when the policy is kept in force by the automatic premium loan, such influence is a thing of value to the company, and the self same considerations exist for the payment of a renewal commission as when a premium is actually paid to the company in cash by the insured.

In the absence of substantial judicial precedent to follow, the foregoing views on the rights of the agent to renewal commissions where the premium is waived by disability or advanced by the automatic premium loan, are based necessarily upon a consideration of the purposes which the parties seemingly intend that a renewal commission shall serve.