

NEW JERSEY

Court of Errors and Appeals.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY,

Plaintiffs in error,

and

HENRIETTA HILLYARD, and GEORGE M. LUMPKIN, her husband, and others,

Defendants in error.

*In Error*

*to the*

*Supreme Court.*

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· F. H. TEESE, Att'y for Plaintiffs in Error.

✓ DIXON & COLLINS, Att'ys for Defendants in Error.

*New Jersey Supreme Court, as yet of the Term of February, A. D. Eighteen hundred and seventy-one.*

ESSEX COUNTY, ss. :

The Mutual Benefit Life Insurance Company, a body corporate, of the State of New Jersey, being the defendants herein, were summoned to answer unto Henrietta Hillyard and George M. Lumpkin, her husband, Mary A. Hillyard and Michael C. Dickson, her husband, Guelda E. Hillyard, Edmo- 20  
nia Hillyard, Emma J. Hillyard, and Ella J. Hillyard and Pendleton Gaines, her husband, the plaintiffs herein, in a plea of trespass on the case, and thereupon the said plaintiffs, by Dixon and Collins, their attorneys, complain: For that whereas, heretofore, to wit, on the twenty-seventh day of December, in the year eighteen hundred and forty-nine, to wit, at Newark, in the County of Essex, and State of New Jersey,

one Frances A. Hillyard and the said plaintiffs, Henrietta, Mary, Guelda, Edmonia, Emma and Ella were daughters of, and interested in the life of one John H. Hillyard, and so being interested did afterwards, to wit, on the day last aforesaid, at the place aforesaid, by one Edwin Hillyard, their trustee and agent, make and enter into a certain agreement, commonly called a policy of insurance, with the said defendants, which agreement, in writing and signed by the President and Secretary of the said defendants, the said plaintiffs

10 now bring here into court, the same bearing date, to wit, the same day and year last aforesaid, in and by which agreement it is recited that the said defendants, in consideration of the sum of three hundred and two dollars and fifty cents to them in hand paid by Edwin Hillyard, trustee, and of the annual premium of three hundred and two dollars and fifty cents, to be paid on or before twelve o'clock, M., on the twenty-seventh day of December in every year during the continuance of that policy, do assure the life of John H. Hillyard, of Richmond, in the County of Henrico, State of Virginia,

20 (meaning thereby the father of the said last-named plaintiffs,) in the amount of five thousand dollars, for the term of life, payable in trust to Edwin Hillyard for the benefit of Frances A., Henrietta, Mary A., Guelda Eliza, Edmonia, Emma J., and Ella J., daughters of the said John H. Hillyard, (meaning thereby the said last-named plaintiffs, and the said Frances A. Hillyard,) and that the said Company, the defendants, do thereby promise and agree to and with the said assured, his executors, administrators and assigns, well and truly to pay or cause to be paid the said sum insured to the said assured, his

30 executors, administrators or assigns, within ninety days after due notice and proof of the death of the said John H. Hillyard, deducting therefrom all notes taken for premiums on that policy, unpaid at that time—provided always and it was hereby declared to be the true intent and meaning of that policy and that the same was accepted by the assured upon these express conditions, that in case the said John H. Hill-

yard should die upon the seas, or pass beyond the settled limits of the United States, without the consent of that Company previously obtained and endorsed on that policy, (excepting into the settled limits of the British Provinces of Canada, Nova Scotia or New Brunswick,) or should without such previous consent thus endorsed, visit those parts of the United States which lie south of the southern boundaries of the States of Virginia and Kentucky, or west of the settlements on the western bank of the Mississippi River, between the first of July and the first of November, or should, without such previous consent thus endorsed, enter into any military or naval service whatsoever (militia not in actual service excepted), or in case he should die by his own hand, in, or in consequence of a duel, or by means of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of any law of these States or the United States or of the said Provinces, that policy should be void, null and of no effect; and that it was also understood and agreed to be the true intent and meaning thereof, that if the declaration made by the said Edwin Hillyard, trustee, and bearing date the twenty-seventh day of December, 1849, and upon the faith of which that agreement was therein declared to be made, should be found in any respect untrue, then and in such case, that policy should be null and void, or in case the said Edwin Hillyard, trustee, should not pay the said annual premium on or before the several days therein before mentioned for the payment thereof, then and in every such case, the said Company should not be liable to the payment of the sum insured or any part thereof, and that policy should cease and determine, and that it was thereby further agreed that in every case where that policy should cease or become or be null or void, all previous payments made thereon, and all profits should be forfeited to the said Company. And whereas also, the said defendants on the said twenty-seventh day of December, A. D. eighteen hundred and forty nine, at Newark aforesaid, did in consideration of the said agreement

of the said plaintiffs last named and the said Frances, and in consideration of the payment to the said defendants of the sum of three hundred and two dollars and fifty cents, make and enter into the said agreement herein before recited with the said plaintiffs last named and the said Frances, as by reference thereto will more fully appear.

And whereas also, the said Edwin Hillyard, trustee or the said plaintiffs did pay or cause to be paid to the said defendants the said annual premium at the times and in the manner  
 10 required by said agreement in policy up to and until a certain day, to wit, the twenty-sixth day of December, in the year eighteen hundred and sixty-one, to wit, at Newark aforesaid.

And whereas also, on the said twenty-sixth day of December, A. D. eighteen hundred and sixty-one, and for a long time, to wit: one year before that day, and for a long time, to wit: one year after that day, the said plaintiffs and the said Frances, and the said Edwin, and the said John H. Hillyard, were inhabitants and citizens of a certain State of the United States, to wit, the State of Virginia, and the said de-  
 20 fendants were citizens and inhabitants of a certain other State of the United States, to wit, the State of New Jersey.

And whereas, before the day last aforesaid, to wit, on the first day of December, A. D. eighteen hundred and sixty-one, the President of the United States, by virtue of the power and authority in him vested and according to the statute in such case made and provided, had, by his proclamation, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, declared that the inhabitants of the said State so as aforesaid, then inhabited by the said  
 30 plaintiffs and the said Frances, and the said Edwin and John H. Hillyard, and the section or part of said State so inhabited by them, were in a state of insurrection against the United States. And whereas, the said proclamation did remain in force, and the state of insurrection and condition of hostility therein declared to exist, did continue for a long space of time, to wit, one year after the date thereof, by reason whereof

all commercial intercourse by and between the said plaintiffs, and the said Frances, Edwin and John, or any of them, on the one part, and the said defendants on the other part, ceased and became and for a long time, to wit, all the time last aforesaid, continued to be unlawful and impossible, and for that and no other cause, the said plaintiffs, and Frances and Edwin were necessarily prevented and hindered from paying the said annual premium to the said defendants, on the twenty-seventh day of December, A. D. eighteen hundred and sixty-one, according to the words of said agreement in policy of 10 insurance, and for so long a time as the said proclamation remained in force and the said condition of hostility continued. And whereas, afterwards and as soon as the said condition of hostility ceased, to wit: on the first day of December, A. D. eighteen hundred and sixty-two, the said plaintiffs tendered and offered to pay unto the said defendants the said last mentioned annual premium and lawful interest thereon, to wit, at the city of Newark aforesaid, and the said defendants then and there refused to receive the same, and the said plaintiffs have ever since been and now are ready and willing to pay 20 the same to the said defendants, and the said defendants have ever since been unwilling and refused, and still are unwilling and refuse to receive the same.

And whereas, while the said proclamation remained in force, and the said condition of hostility continued, and after the said twenty-seventh day of December, A. D. eighteen hundred and sixty-one, the day on which an annual premium came due and payable according to the words of said agreement, and before the twenty-seventh day of December, A. D. eighteen hundred and sixty-two, the day on which another 30 annual premium would have come due and payable, according to the words of said agreement, in case the said John H. Hillyard had continued to live until that day, the said John H. Hillyard died, to wit, on the first day of June, A. D. eighteen hundred and sixty-two, at Richmond, in the State of Virginia, of which the said defendants then had due notice

and proof, to wit, at Newark, aforesaid. And the plaintiffs aver that the said John H. Hillyard did not, after the making of said contract, pass into or visit any place or places provided against in the proviso contained in said agreement, and did not enter any military or naval service, and did not die in any place or manner or by any means or cause provided against in said proviso, and that the defendants had due notice and proof of his death more than ninety days before the commencement of this suit. And whereas also, the said

10 Edwin, heretofore, to wit: on the first day of May, A. D. eighteen hundred and sixty-two, at Richmond aforesaid, died, and the said Frances heretofore, to wit: on the first day of July, A. D. eighteen hundred and sixty-two, at Richmond aforesaid, died, and the rights of each of them have survived and do survive to the plaintiffs last aforesaid. And whereas afterwards, to wit: on the first day of December, in the year last aforesaid, at Richmond aforesaid, the said Henrietta Hillyard intermarried with the said George M. Lumpkin, and the said Mary A. Hillyard intermarried with the said Michael C.

20 Dickson, and the said Ella J. Hillyard intermarried with the said Pendleton Gaines.

And the plaintiffs aver that they have performed all the conditions precedent to be performed under said agreement, to wit, at Newark aforesaid, of all which and of all the premises the said defendants had notice, to wit, at Newark aforesaid. And by means of the premises the said defendants heretofore, to wit: on the first day of September, A. D. eighteen hundred and sixty-two, at Newark aforesaid, became indebted to the said plaintiffs, Henrietta, while sole and un-

30 married, Mary A., while sole and unmarried, Ella J., while sole and unmarried, Gueldā E., Edmonia and Emma J., in the sum of five thousand dollars, and being so indebted, then and there undertook and faithfully promised the said last named plaintiffs to pay them the said sum of money when thereunto afterwards requested. Yet the said defendants, not regarding their said promise, have not as yet paid the said

sum of money or any part thereof to the plaintiffs or any of them, or to any person, for the benefit of the plaintiffs or any of them, but so to do, have hitherto wholly refused and still do refuse, to the damage of the plaintiffs of ten thousand dollars, and therefore they bring their suit, &c.

DIXON & COLLINS,

*Attorneys.* ✓

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To which declaration the plaintiffs in error filed a general demurrer. Joinder in demurrer by defendants in error.

The demurrer was argued at the February term, 1872, of 10 the Supreme Court, before the Honorable, the Chief Justice and Justices Van Syckel and Scudder.

At the term of June, 1872, judgment was entered in the said Supreme Court upon the demurrer, for the plaintiffs below against the defendants below for the sum of \$6,526.54 damages, and \$35.00 costs of suit.

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### SYLLABUS.

All commercial or amicable intercourse between citizens whose governments are at war, is illegal.

Contracts made before a war, and which have been 20 partly executed, are not dissolved by a war between the governments of the contracting parties, although such contracts be of a continuing character, unless they require acts of intercourse to keep them alive.

A stipulation in a policy of life insurance that the insurance shall be void if the annual premiums shall not be paid at the time designated, does not apply to a contingency determined by the act of God or of the law, rendering such payment impossible.

The effect of a war between the governments of the assurer and the assured, is to excuse the non-payment of such premiums on the contract days.

Such war will have no effect on the continued existence of  
10 such life policy.

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### OPINION.

BEASLEY, Chief Justice.

This suit is on a policy of life insurance, made by the defendants, a corporation created by the laws of this State, in favor of the plaintiffs, who were residents of the State of Virginia.

The person whose life was insured was also a resident of this latter State. The payments of the annual premiums was intermitted during the recent civil war, and the life insured  
20 terminated during such intermission. The policy contained the usual clause: that in case the annual premiums should not be paid on or before the days designated, the Company should not be liable to the payment of the sum insured, and that the policy should cease and determine.

It was this last provision which gave rise to the first objection to the present action, taken on the argument before this Court.

The declaration admits that the premiums were not paid

according to the terms of this stipulation, and that the death occurred during the period of such non-payment, the existence of the civil war, is relied upon as an excuse for this default.

No one, at the present day, can doubt that a war, either foreign or domestic, puts an end during its continuation to all amicable intercourse between the citizens of the respective belligerent powers. In this respect, all the judicial decisions, as well in England as in this country, agree with the opinions expressed by the publicity and with the practice of all civilized nations. 10

The interdiction extends to every species of friendly communication. All contracts made with an enemy during war are void, and all payments of debts or remission of funds, under similar circumstances, are illegal and forbidden. As the doctrine is expressed by the English jurists, there cannot exist, at the same time, a war for arms and a peace for commerce, the principle being that the belligerent condition places every individual of the respective governments, as well as the governments themselves, in a state of hostility. 20

By force of this rule, the payment of those premiums, at the stipulated times, became legally impossible. If they had been tendered, the defendants could not, without doing an unlawful act, have received them. Both the payment and the receipt of the moneys would have been a breach of duty and of law. The question is, whether the act of payment having become thus illegal, the performance of such act was not excused?

The exact performance of this contract, on the part of the assured, has been rendered impossible by the act of the law, 30 and as such occurrence was not a contingency which can reasonably be supposed to have been within the contemplation of the contracting parties at the time they bargained, I think this failure, in a strict compliance, is not a legal breach of the agreement, the reasonable and true doctrine seems to be that express terms are necessary to create an obligation which will

include a liability, in case of an unanticipated prevention, by the act of God or of the law, of the fulfillment of a stipulation. In the absence of such an expressed intention there is always an implied understanding that the doing of the act agreed to be done shall not become absolutely impracticable from a remote and unexpected event occasioned by a natural or legal agency.

This rule, as well as its conditions and limitations, is clearly marked in the judicial decisions, and as an ancient illustration  
 10 I refer to the case of *Lawrence vs Tuentiman*, 1 Roll. Abridg. 450, Conditions G. pl. 10, where it was ruled, that if a man covenant to build a house before a certain day, and the plague breaks out in the place where the house is to be built, before the day and continues until after the day, the covenantor is excused from the performance of the covenant at the day, for the law, it is said, will not compel him to venture his life, but he may do it after.

Another example occurs in *Williams vs. Floyd*, W. Jones Rep. 179, in which the declaration stated that the plaintiff  
 20 delivered a horse to the defendant, which the defendant promised to redeliver on request, and a defence was sustained which set up that the horse died before a request to redeliver him.—Ld. Coke 1 Inst. 206, ab, expresses the same rule, saying that where the conditions of a bond or recognizance becomes impossible by the act of God or of the law, or of the obligee, there the obligation is saved; as if a man be bound by recognizance or bond with condition that he appear at the next term of such Court, and before the day he dieth, the recognizance or obligation is saved.

30 This rule, as thus expounded, was applied and enforced by the Supreme Court of New York, in the case of the *People vs. Manning & Condit*, 8 Cowen 297, and its existence is very pointedly recognized by Ld. Ellenborough, in *Barker vs. Hodson*, 3 Mau. & Sel., 271. The doctrine was much discussed and considered in the modern case of *Hall vs. Wright*, El. B. & El. 746 (97 E. C. L. R.), which was an action for

breach of promise of marriage, and in the several opinions read in the case, it seems to be either expressly stated, or impliedly assumed, that if the performance of the promise had become impossible by the act of God, as by a visitation of greivous sickness, it would have been an excuse for non-performance.

It is true that in judicial dicta and in the works of some of the text writers it is affirmed, as a general rule or principle of law, that whenever a party enters into an unqualified agreement to do some particular act, that the impossibility of performance, occasioned by inevitable accident or an unforeseen occurrence, over which he had no control, will not release him from his contract. Mr. Addison, in his treatise on contracts, thus declares the law, but an examination of the cases cited will show that the deduction made by him is not warranted. The examples adduced are all cases of difficulty and not of impossibility of performance. This erroneous statement of the rule, erroneous on account of its universality, seems to have proceeded from the leading case of *Paradine vs. Jane, Aley*, 26, in which the distinction is drawn between such duties as the law charges upon a party, and those which he voluntarily assumes. The difference being that it is only in the former class of cases that non-performance will be excused when it arises from inevitable necessity. The reason given for this discrimination is, that in instances of self-assumed obligations, provisions should be made for the contingency set up as an excuse for non-compliance with the express stipulation.

The rule in the case cited is expressed in too general terms, but limiting it, as it should be limited, by its application to the facts to which it belongs, it is correct. The action was in debt for rent, and the defendant pleaded that he had been expelled from the premises demised and from the profits by the public enemy; obviously this was not a case of impossibility of performance, for it was simply a hardship for the tenant to pay rent when no benefit had accrued to him from the property.

There could be no reasonable inference from the conditions of the case, that the parties intended that the rent was not to be exacted in the event of the possession of the premises being lost to the tenant.

Whether a contract is to be operative, in the event of performance becoming impossible, is a question as to the intention of the parties. There are few contracts, if any, which express in terms the full meaning of the contractors under all possible circumstances, and hence the limitations and incidents which the law so often supplies. It is not intended  
10 to be questioned that when a contract is made in intelligible terms which are sufficiently specific, the law will neither add to nor take anything from it, but when general terms only are found and remote contingencies arise, rendering a strict compliance impossible, it then becomes obvious that to give full effect to such general terms would often be to lend them a force which might lead to injustice and to results quite aside from what was contemplated. For example, if a man promise, in an unqualified form, that he will write a certain treatise, or paint a certain picture, within a given time,  
20 would hardly be denied that his death before the lapse of the period would excuse his non-compliance with the very terms of his agreement. This limitation of the language used would be deduced from the nature of the undertaking, which required for its performance the personal services of the promisee, and from the consequently well founded inference that it could not have been intended to regard the contract as broken if death intervened. Such promise is unconditioned and absolute, but its generality is restrained by an implication which belongs to the very substance of the transaction. On  
30 the other hand, as an illustration of the opposite class of cases, when a tenant agrees, in an unrestricted form, to pay a certain rent, he will not be released by a destruction of the premises from natural causes, the reason being that such casualty is not unusual, and was therefore probably within the contemplation of the contracting parties, and performance,

though a hardship, is not impracticable. The distinction is, I think, a plain one, and establishes a rule which is indispensable, if Courts are to enforce the real design and will of those who impose duties on each other through the medium of agreements. It is so seldom that persons would be willing to bind themselves for the consequences of a breach of contract occasioned by the act of God or that of the law, that I think that it is safe to lay down the rule, that such an objection will not be deduced from general terms, but that a specific stipulation is necessary to produce such a result. A strong case in favor of controlling a stipulation couched in general 10 language, is afforded by the decision of *Ld. Ellenborough*, in *Brandon vs. Curling*, 4 East. 417. The suit was on a marine policy, containing the usual clause of indemnification against all captures and detention of princes. The vessel had been taken by the government of the underwriter, and the decision was to the effect that the insurance, though general, must be considered as containing an exception against a loss happening during the existence of hostilities between the respective countries by the assured and assurer. I cannot find that it has ever been ruled, that if the performance of a 20 promise turns out to be impossible, without the fault of the promissor, that the performance will not be excused, unless the contract, in express and specific terms provided for the event occasioning the impossibility.

Applying this rule to the facts now under judgment, I conclude that the intermission of these payments was excused on the ground of necessity, and because the parties did not contemplate the occurrence of such necessity, and consequently did not provide for it. It is very unreasonable to infer that it was the intention that a forfeiture should be incurred if the 30 insured, by no fault of his, but from the intervention of the law, failed to fulfill his contract with respect to punctuality of payment. According the view of the defendants, and regarding this stipulation as unqualified, if the assured, on one of the days for annual payment, being on his way to settle the

premium, had been taken with a sudden sickness, and had remained in a state of insensibility until the time for payment had passed, all his interest in this policy would have been irretrievably forfeited. So unreasonable a force should not be given to this provision. In my opinion, the payment of these several premiums on the contract days, was excused from the fact that such payment was rendered impossible by the war. The true meaning of the agreement, read in the light of its necessary implication, is that the premiums were to be paid at the time specified, unless prevented by the act of God or of the law.

A legal interdict was temporarily imposed on such payments, and the effect was to suspend the obligation to pay; but such suspension did not affect the obligations of the defendants. To hold that the liability of the defendants was suspended, would be to declare a forfeiture *pro tanto*. When the subject-matter of the contract does not become unlawful, and it has been in some degree executed, so that the parties cannot be restored to their original condition, the contract, although for the time being some of its terms are not capable of performance, is not in a posture to be rescinded, either in whole or in part. When such a result is not absolutely inevitable, and when it would lead to injustice, it does not take place. Whenever the law interferes with the contract, it should be held that such interference will disturb the intentions of the contracting parties to the least degree practicable. Judge Washington, in a case in which it was held that an embargo temporarily preventing the performance of a contract, did not destroy its obligations, recognized the principle to which I refer. He says: "Where the rule applies, that if the law forbids the performance of a contract in part only, he who is bound by it, must still perform what he lawfully may. In the case of an embargo, for example, the ship-owner is disabled from commencing his voyage at the specified time; but he is bound to go when the prohibition is removed. A strict performance is prevented by the law, and the law ex-

causes it." *Catin v. Insurance Co.*, 2 Wash. C. C. R., 317. There can be no question but that it is, in some degree, a hardship on these defendants to have their responsibility kept alive during the time the benefits of the contract were not fully enjoyed by them; but it is to be remembered that whenever the law intervenes and ties up a party from performance, some hardship is the inevitable result. Postponement of performance on the one side will generally be injurious to the other. Such results cannot be avoided. They are not uncommon. It has been repeatedly decided that when the payment of a debt is suspended during a war, the interest of 10 the debt is lost to the creditor. Such losses are within the scope of the contracts with which they are connected, construing them by these express terms and their legal implications.

In fine, I think the tender of these premiums was, in legal effect, a compliance with the plaintiffs' stipulation in that respect.

But there is also a narrower ground upon the first point which will preclude this objection resting on the alleged default of the plaintiffs. It is this: The declaration shows 20 that the defendants by the interdict of their own government were disqualified during the period in question from receiving the several premiums remaining unpaid. Under such circumstances it would be strange if the defendants could set up that the plaintiffs have lost all their rights under this policy, because they omitted to do an act which would have been confessedly nugatory, that is, to tender these moneys which, of necessity, must have been rejected by the defendants.

I do not know of any thing analagous to such a pretension having a place among legal principles. The defendants can- 30 not be permitted to impute a result occurring from their own incapacity, as a breach of agreement on the part of the plaintiffs.

The second exception, taken at the argument to this action, was that this contract of insurance was a *continuing contract*,

and was on this account, *ipso facto*, avoided by the occurrence of the war.

This contract clearly could not have been originated during the prevalence of hostilities. To insure the life or the property of an enemy, while war was being waged, would be an illegal act. Such a contract involves an act of intercourse, and in a state of war, as has been already remarked, all intercourse of a commercial or amicable nature is prohibited. But the contract in question was made while peace prevailed, and was, consequently, lawful in its inception, and as the payment  
 10 of the premiums was suspended, its continuance was not dependent on the doing of any act on the part of the company or of the assured. It has been repeatedly said that a *continuing contract* is dissolved by a condition of hostility, but I have not any where found that a contract which has been partly performed, and which will remain in force from its own intrinsic quality, without the doing of any thing by any party to it, is thus destroyed. Nor can I conceive why a continuing contract in part executed, should be annulled from this cause, except on the ground that it calls for some kind of  
 20 intercourse which is inconsistent with the duty of citizenship. The question has not, as yet, received any decision which is to be regarded as entirely authoritative. It is still open, and is to be settled by a reference to general considerations, and by the application of analagous principles.

Whether a State has a right, according to the established rules of modern national law, to confiscate the property of an enemy found in its own dominion, is a question about which the most eminent of the writers on public law are not agreed.

Those among them who construe the rules of war with  
 30 severity maintain the existence of such a right, but the number and weight of authority is opposed to such view. But in this country the question is at rest, for there are several adjudications of the Supreme Court of the United States in favor of the more rigorous rule.

But whilst this harsh doctrine has been established, it is

attended with this qualification, that to effect such confiscation an act of Congress is requisite. The result is, that an enemy's property found in this country on the breaking out of hostilities, is, in the absence of all action of the National legislature, not liable to forfeiture. Debts due from a citizen to an enemy stand in the same ground; they can be seized at the legislative pleasure, but are not confiscated by mere belligerency. "We may, therefore, lay it down," says Chancellor Kent, "as a principle of public law, so far as the same is understood and declared by the highest judicial authority in this country, that it rests in the discretion of the legislature 10 of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens and due to the enemy; but as it is asserted by the same authority, this right is contrary to universal practice, and it may therefore well be considered as a naked and impolitic right condemned by the enlightened conscience and judgment of modern times."

A just appreciation of this principle and a proper application of it, seems to me to lead very plainly to a result adverse to the position taken by the counsel of the defendants. If tangible property and debts are not confiscated by a condition of war, for the benefit of the public, how can it be plausibly 20 urged that a vested right, such as arises out of the present policy, is to be forfeited by the operation of the same cause, for the benefit of one of the contracting parties? To properly understand the exorbitance of such a claim we have but to consider the character of the right thus sought to be seized. An insurance company agrees to pay a stated sum of money on an event that is certain to happen. In consideration of this promise annual payments are made, which, in the progress of time, often exceed the sum of which the life is insured. Each day as it passes, adds to the value of the inter- 30 est which the assured has in the policy. When the life insured is nearly spent, the value of such interest approaches its maximum, and there is not much less than the interest which a man has in a debt just falling due. To illustrate

this: A life of thirty years standing is insured for fifty thousand dollars; premiums are annually paid, and at the age of eighty or ninety, no one will doubt that the assured has an interest in the fifty thousand dollars, which falls little short of a present ownership.

And it is such an interest as this, which it is claimed a state of war, *proprio vigore*, rests indefensibly in the insurance company. It is admitted that if the life had fallen in before the war, and the liability of the Company had thus become fixed as a debt, the effect of the war would have been merely to  
 10 suspend the payment of such debt.

A discrimination between a vested interest of this kind which is maturing, and a debt growing due, is altogether too artificial and imaginary to be legal. The rights of the assured should not be thus sacrificed, nor should an insurance company be allowed to seize to itself this property, unless it can be shown that such consequence is inexorably demanded from motives of public policy.

Reflection upon the subject has satisfied me that a continuance during the progress of a war of insurance on the life  
 20 of an enemy is not inconsistent with the welfare of either of the belligerents. What effect can the existence of such a contract have upon the public interest of the one or of the other? If money for a past consideration fall due after a declaration of hostilities, the debt is not cancelled, but the payment of it is suspended until peace is proclaimed. The reason why the debt is allowed to be preserved is, that the existence of such debt does not work any injury to the government of the debtor; and the reason why the payment is suspended is, that the receipt of the money would be a direct  
 30 contribution to the pecuniary resources, for hostile uses, of the government of the creditor.

And so clearly has this principle been acted upon, that it has on many occasions been decided that the payment of a debt due to an enemy is allowable if made to an agent of the creditor residing under the dominion of the government of

the debtor ; the money, in such case not being withdrawn beyond the control of the latter government ; for it would be clearly illegal for the agent receiving such payment to transmit the funds to his principal until the restoration of peace. It is incontestably plain, therefore, that the state of debtor and creditor, resulting from transactions anterior to the war, is not interdicted by the rules of national law, and as the continuance of the efficacy of a life policy can have no greater effect than to produce a state of debtor and creditor, how can such continuance be pronounced illegitimate? It was urged on the argument that the policy if held valid might be enforced 10 even though the life insured was lost in the war ; but such a deduction is unfounded, for the agreement can, by no reasonable construction, be so extended. It has already been shown that the English Courts have long since declared that there was an implied condition in every marine policy that the promised indemnification should not be extended to losses occasioned by a capture made by the government of the underwriter. A stipulation that the money should be payable even though the life insured should be lost in a war which might arise between the states of the assured and the 20 insurer would be clearly illegal and void ; and the consequence is no such provision, which if present would vitiate the whole agreement, can be understood to be comprehended in the general expressions which are in common use in these policies. An exception is invariably implied embracing every case of a loss of life by any means concerning which it would be immoral or incompatible with the law or against the public interest to stipulate a bargain.

I cannot see that there is any thing in either of the grounds thus taken which should be permitted to defeat this action. 30

The adjudications heretofore made on this subject, although the precise point of the present case does not appear to have been present in any of them, exhibit a decided tendency to reject the doctrine that a policy of life insurance is avoided by a state of war, or by the non-payment of premiums during

its continuance. *The Manhattan L. Ins. Co. v. Warwick*, 20 Gratt., 614; *Robinson v. International L. A. Co.*, 42 N. Y., 54; *The New York L. Ins. Co. v. Clopton*, 7 Bush., 179.

With respect to the formal exception that this action has not been brought in the name of the party to whom the promise was made, I do not think it should prevail. The general rule is that the suit may be brought on these policies, when in the form of simple contracts, in the name of the party having the beneficial interest. It is true, that the agent who effected the insurance is styled in it a trustee, but that  
10 does not make him such, as his powers and capacities appear to be those simply of an agent. The declaration would have been more consistent with correct theory, if it had laid the promise, according to the legal inference, to have been made to the plaintiffs, but this is a defect of form which is cured by our statute, at least when the exception is raised on demurrer.

It was likewise urged, that by virtue of the incorporation of the defendants, the plaintiffs, as holders of a policy, became partners with the other corporators, and that the war  
20 dissolved such partnership. It does not seem to me that a state of war would, for reason already given on another branch of the case, dissolve a partnership of this character; nor does it appear how such a demolition, even if it took place, would affect the obligation of the policy: but it is enough, at present, to say that the pleading demurred to does not disclose the existence of such a relationship, and that consequently the point is not now raised.

30 The plaintiffs are entitled to judgment.

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A WRIT OF ERROR on the said judgment from the Court of Errors and Appeals, was issued on the      th day of July, 1872, served on the same day, and made returnable to the 9th day of July, as yet of the term of June, 1872, of said Court.

NEW JERSEY COURT OF ERRORS AND APPEALS,  
OF THE TERM OF JUNE, 1872.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY,  
Plaintiffs in Error,

*v.*

HENRIETTA HILLYARD and GEORGE M. LUMPKIN, her husband, and others,  
Defendants in Error.

In Error to the  
Supreme Court.

10

Assignment  
of Errors.

Afterwards, to wit, at the term aforesaid, before the Court aforesaid, at Trenton, come the plaintiffs in error, by Frederick H. Teese, their attorney, and say, that, in the record and proceedings aforesaid, and in giving the judgment aforesaid, 20 there is manifest error in this,

That the said Supreme Court held that the said action was well brought in the names of the plaintiffs Henrietta Hillyard and George M. Lumpkin, her husband, Mary A. Hillyard and Michael C. Dixon, her husband, Guelda E. Hillyard, Edmonia Hillyard, Emma J. Hillyard and Ella J. Hillyard, and Pendleton Gaines, her husband, whereas the said action ought to have been brought in the names of the legal representatives of Edwin Hillyard, deceased, the trustee of the said 30 plaintiffs ;

And also there is error in this, that the declaration aforesaid and the matters therein contained are not sufficient in law for the above-named plaintiffs below to have or maintain their aforesaid action thereof against the said Mutual Benefit Life Insurance Company.

And also there is error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said above-named plaintiffs against the said Mutual Benefit Life Insurance Company, whereas by the law of the land the said judgment ought to have been given for the said Mutual Benefit Life Insurance Company against the said Henrietta and George, Mary and Michael, Guelda, Edmonia, Emma and Ella and Pendleton.

And the said Mutual Benefit Life Insurance Company pray  
10 that the judgment aforesaid for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for nought, and that they may be restored to all things which they have lost, by occasion of the said judgment, etc.

F. H. TEESE,

*Attorney for and of Counsel with the Plaintiffs in Error.*