

liable, marshaling may be enforced for the benefit of the creditors of him who is only secondarily liable. The court in *Hodges v. Hickey* 67 Miss. 715, 7 So. 404 (1890) stated the general rule that equity will marshal only where parties are creditors of the same debtor but it recognized the exception that where independent equities exist giving rise to a duty on the part of one debtor to pay in exoneration of another, the court will enforce this duty by subjecting the fund of the principal debtor.

The same principles have been applied to cases of in rem rights against land. In *Blanchard v. Naguin* 116 La. 806, 41 So. 99 (1906) a mortgage was made covering two pieces of property; the entire debt was owed by one mortgagor. The court held that the property of the other could not be made to contribute to payment unless the proceeds of the sale of the first proved insufficient to satisfy the mortgage. The mortgagee was allowed to seize both tracts but the mortgagor not owing the debt could demand the sale of the other tract if sufficient to satisfy the mortgage.

In *Ginnipiac Brewing Co. v. Fitzgibbons* 73 Conn. 196, 47 Att. 128 (1900) the holder of a judgment against a husband who had conveyed his property to his wife by a deed voidable by his creditors, was allowed to compel a mortgagee of this property and of property owned by the wife alone but covered by the same mortgage, to resort in the first instance to the land of the wife.

In the light of these cases and others slightly less in point, the unqualified statement in *Parker v. Wheeler* that both funds must belong to the same debtor appears erroneous, particularly as applied to the facts of this case. The mortgagor was a surety; he was entitled to exoneration against his principal. In the absence of the other factors in the case Rockey as a creditor of the surety would be entitled to claim this right of exoneration and compel the plaintiff to exhaust the fund of the principal. The case is clearly within the exception to the rule. The ultimate result of the case, that Rockey is not entitled to a marshaling of assets, is supportable on the major part of the court's reasoning. The plaintiff would be unreasonably delayed and inconvenienced by being required to pursue his personal remedy against Charles E. Wheeler instead of his easier in rem right against the mortgaged property. Under the doctrine of marshaling assets there are not two funds to which plaintiff has recourse. For that doctrine there must be tangible property of some kind; a mere chose in action such as the personal liability of a debtor is not such a fund. 26 Ohio Jur. 103. But the general rule that both funds must belong to the same debtor has no application to the case.

ANGUS M. HOLMES.

### INSURANCE COMPANY'S RIGHT TO TERMINATE NON-EXCLUSIVE AGENCY CONTRACT

Weisant had been an agent for the defendant insurance company in the city of Youngstown for several years and on November 17, 1929, was appointed district agent. The contract between the parties provided that the company might terminate the agency upon Weisant's failure to write \$150,000 worth of paid-for insurance annually; also that Weisant should receive renewal

commissions on renewal premiums provided he succeeded in writing \$100,000 worth of paid-for new insurance each year.

About the first of January, 1930, the defendant company appointed another agent in Youngstown. A year later, January 16, 1931, the company wrote to Weisant terminating the contract of agency, assigning as reason that the plaintiff had not, during the calendar year prior thereto, sold \$150,000 worth of insurance. It was later found that Weisant had written \$93,553 worth of insurance, while the new agency wrote \$30,553 during the same period.

Weisant denied the company's right to terminate the contract and brought an action for an accounting in April, 1932. He claimed, among other things, a right to commissions on renewal premiums, paid on the insurance he had written, up to the time of bringing this action.

*Held*, that Weisant was entitled to the renewal commissions up to the time of the termination of the contract by the company, on the ground of substantial performance; that the company had a right to terminate the agency contract as it did on January 16, 1931, and that the effect was to terminate all rights of Weisant to commissions on renewal premiums thereafter. The judgment of the common pleas court was reversed and judgment entered for the defendant company on its counterclaim, for the sum of \$507.59, with interest. *Weisant v. The Indianapolis Life Insurance Company*, 16 Ohio Abstract 93 (Ohio Court of Appeals, 7th District, Mahoning County; decided October 20, 1933).

In granting Weisant commissions on renewal premiums up to the time the contract was terminated, the court was well supported by authority. The Ohio Supreme Court adopted the same rule in *Ohio Farmer's Insurance Company v Cochran*, 104 Ohio St. 427, 135 N. E. 537 (1922). In the syllabus of that case the court said: "The long and uniformly settled rule as to contracts requires only a substantial performance in order to recover upon such a contract. Merely nominal, trifling or technical departures are not sufficient to breach the contract."

There is some doubt, however, as to whether the court can be upheld in its decision that Weisant was not entitled to commissions on renewal premiums from the time of the termination of the contract to the time of bringing this action.

The rule has been definitely established in Ohio that an insurance agent is not entitled to commissions on renewal premiums paid after the proper termination of the agency, unless the contract expressly so provides. *Trumble v. Connecticut Mutual Life Ins. Co.*, 9 O. D. Rep. 414, 10 O. D. Rep. 533 (1885)—affirmed by the supreme court without report, Jan. 29, 1889. Other jurisdictions have adopted the same rule: *Aldrich v. New York Life Ins. Co.*, 105 N. Y. Sup. 493 (1907), *Farmer v. Aetna Life Ins. Co.*, 270 Mass. 395, 170 N. E. (1930), *Fidelity and Deposit Co. of Maryland v. Washington Life Ins. Co. of New York*, 193 Fed. 512 (1912).

Although Weisant was not entitled to renewal commissions, as such, the commissions he would have received up to the time of bringing this action might well have been considered as an element of damages, had the court decided the company's termination of the agency was wrongful. An agent or employee wrongfully discharged may treat the contract of employment as

continuing, although broken by the principal, and recover damages for the breach. Mechem, Agency (2nd Ed.) 1554. The measure of damages is the loss or injury occasioned by the breach, such as loss of wages or commissions. *James v. Allen County*, 44 Ohio St. 226 (1886).

The present discussion is narrowed down, then, to the problem of whether or not the insurance company's act of terminating the agency contract constituted such a breach as to entitle Weisant to damages.

The mere act of appointing another agent in the same territory would not amount to a breach of the contract by the company. It was not claimed that Weisant had an exclusive right of agency, and it is generally held that in such a case the insurance company has a right to put other agents in the same territory: *Southern States Life Insurance Co. v. Hodges*, 118 S. C. 407, 110 S. E. 406 (1921), *Lester v. New York Life Insurance Co.*, 84 Tex. 37, 19 S. W. 356 (1892). In the case of *Bryson-Bedwell-Brubacher Co. v. Archer*, 18 O. C. C. N. S. 437, 25 O. C. D. 266 (1914), the plaintiff agent purchased of a Columbus, Ohio, agency its policy expirations, business, books and good-will, with a covenant the vendors would not enter into competitive business for 5 years. The insurance company was not a party to the contract. The plaintiff tried to stop interference by other agents attempting to secure renewals, appointed to the same territory *Held*, that the insurance company could not be bound by custom to refrain from disclosing information with reference to expiration of policies to other agents in the same territory.

The fact remains, however, that the insurance company was under a duty to cooperate with Weisant in every way possible and not to act so as to hinder him in the performance of the contract. The relation of principal and agent is regarded by the courts as a fiduciary one, implying trust and confidence. *Topper Bros. v. Bohn*, 12 O. N. P. N. S. 177, 22 O. D. N. P. 537 (1911), 1 O. Jur. 82. As between principal and agent, the law requires the utmost good faith in all transactions between the parties. 1 Story, Equity Jur. 218, *Hemeway v. Abbott*, 8 Cal. App. 450, 97 Pac. 190, 195 (1908). The rule applies with equal force to both parties, agent and principal, in order to avoid discrimination. 1 O. Jur. 83. Good faith on the part of the insurance company would require that it should not appoint other general agents to occupy ground previously occupied by Weisant, and so materially and injuriously interfere with his interests under the contract. *Myers v. The Knickerbocker Insurance Co.*, 3 O. D. Rep. 490, 9 Am. L. Reg. N. S. 82 (1870).

The facts of the Knickerbocker case were similar to those of the present case. The plaintiff was made general agent for the state of Ohio, with the right to renewal premiums, and no provision for an exclusive agency. Action was brought for breach of the contract in depriving the plaintiff of the collection of renewal premiums by the appointment of another agent in the same territory. The court instructed the jury that where the contract of appointment does not give the agent an exclusive right to represent the insurance company, the latter may appoint other agents, but appointment of another agent in the same place, whose operations materially lessen the advantages of the contract to the first agent, is a breach of contract by the insurance company and the agent may terminate it, or have an action for damages.

To strengthen the present case, on June 25, 1930, the insurance com-

pany's secretary wrote a letter to all its policy holders in Mahoning county which read, in part, as follows: "The Indianapolis Life Insurance Co. announces the appointment of Mr. Ford Flood as manager of our Youngstown, Ohio, agency. A branch office of the company has been opened at 817 First National Bank Bldg., in charge of Mr. Flood. By means of this branch office the company desires to keep in close touch with its policy holders so that their needs and inquiries may receive careful and prompt attention."

The court of appeals felt that while this letter was not treating Weisant with the same consideration as it was treating its new agent, yet it was not violating any contractual relation. It may be that the letter itself did not amount to a breach of the contract, but coupled with the other fact of the appointment of a new agent in the same city, it seems to be evidence of a lack of good faith on the part of the company. Such acts, when they operate to deprive the agent of his benefit under the contract, as was the result in the present case, amount to a breach of the contract, under authority of the *Knuckerbocker* case. But Weisant failed to take advantage of this breach by the company.

There remains the possibility that the termination of the contract by the company was wrongful and therefore a breach.

By failing to write \$150,000 worth of insurance during the year prior to his discharge, Weisant failed to perform a condition precedent, and failure to comply with a condition avoids the agreement at the election of the other party. *Metropolitan Life Insurance Co. v. Erdes*, 37 O. L. R. 55 (1932), *Same v. King*, 34 O. L. R. 370 (1931), *Same v. Howle*, 62 Ohio St. 204 (1900).

"A provision of a contract which required the agent to produce a specified amount of business each year during the period of the contract was a condition precedent, and upon failure to comply with this condition the agent lost all his rights under the contract." *Boswell v. Security Life Ins. Co.*, 26 O. C. C. N. S. 385, 35 O. C. D. 313 (1916).

It is equally well settled, however that performance must not be prevented through fault of the insurance company. *Fire Association of Philadelphia v. Appel*, 76 Ohio St. 1, 80 N.E. 952 (1907). Where performance of a condition precedent has been prevented by the defendant, such prevention may be averred as an excuse for non-performance. *Ruble v. Massey*, 2 Ind. 636 (1851).

Sometimes, prevention or hindrance of performance by the other party is treated by the courts as a waiver of the condition precedent. *Mayor of New York v. Butler*, 1 Barb. 325 (1847). A waiver is a voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance. *List and Sons Co. v. Chase*, 80 Ohio St. 42, 88 N.E. 120, 17 Ann. Cas. 61 (1909), *Farmer's Insurance Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922).

The court might well have found that the acts of the company amounted at least to a hindrance of Weisant's performance of the precedent condition. It is reasonable to suppose that a substantial part of the \$30,500 worth of insurance written by the new agent in Youngstown would have gone to Weisant if the second agent had not been appointed. It is pointed out by the court of appeals that the combined amounts still did not equal the

\$150,000 which Weisant was required to get. But that does not prove that he would not have written the required amount had he been left alone. The confusion resulting from the establishment of two agencies in the same city, apparently in competition with each other, may have been the cause of the loss of much business by Weisant, not to mention his loss of time in trying to have matters straightened out.

It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it. Williston on Contracts, vol. 2, sec. 677. Mr. Williston has made an exception to this principle where the hindrance is due to some action of the promisor, which, under the terms of the contract or the customs of the business, he was permitted to take. It could well be found that this exception does not apply to the present case, because the acts of hindrance, in themselves, indicated bad faith on the part of the insurance company and a breach of the fiduciary relation, and by depriving Weisant of the benefits under his contract, such acts amounted to a breach of contract. *Meyers v. Knickerbocker Ins. Co.*, ante.

By hindering Weisant in performing the condition precedent, the insurance company waived such condition. As a result, there was no valid reason for Weisant's discharge on January 16, 1931. Interpreted in this light, the discharge being wrongful, Weisant became entitled to damages for breach of the contract, and these should have been set off against the insurance company's counterclaim.

E. R. TEPLE

## THE POWER OF MUNICIPALITIES TO PURCHASE PROPERTY BY THE PLEDGE OF RECEIPTS PLAN

Plaintiff in error, a village owning a distributing system for electric current, contracted with another to supply generating machinery for its system for the sum of \$24,960 payable partly in cash and partly in deferred installments from the net revenues derived from the plant's operation. The title to the machinery was to remain in the seller until paid for, but the purchase price installments were not to be the general obligation of the village or payable from taxes. One Hill, a taxpayer, resident of the village, brings this action to restrain the village from carrying out the terms of the contract, contending that the transaction is prohibited by Section 6, Article VIII of the Constitution of Ohio. *Held*—"The foregoing transaction between the village and the seller of the machinery contemplates the union of the property of the village with that of the seller in a common enterprise, from which the net earnings of the joint operation would be paid to the seller. To the extent that the village devoted the whole of its own property to secure the seller, to that extent did it loan its financial credit to, and in aid of the seller, in violation of Section 6, Article VIII of the Constitution of Ohio." *Village of Brewster v. Hill*, 128 Ohio St. 343, 7 Ohio Bar No. 12, June 18, 1934. (Decided, April 11, 1934).

The constitutional provision referred to provides,—“No laws shall be passed authorizing any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation,