CENTRAL STATES LIFE INSURANCE COMPANY *v.* HOLCOMBE.

4—2565

Opinion delivered May 23, 1932.

1. INSURANCE—SUFFICIENCY OF PAYMENT.—A check for interest in advance on insured's loan note and for cash part payment on a premium due did not constitute funds of the insured in the insurer's hands which the insurer was required to apply to a premium payment in order to prevent a lapse of the policy.
2. INSURANCE—WAIVER OF FORFEITURE.—Where insured, learning of insurer being placed in hands of a receiver, inquired concerning the insurer's financial condition, a reply of the insurer that it

would notify insured when reorganized *held* not a waiver of a forfeiture for nonpayment of a premium.

3. INSURANCE—WAIVER OF FORFEITURE.—A letter from the insurance company regarding a loan on "the policy and the sending of notices of premium *held* not to constitute a waiver for nonpayment of a premium.

Appeal from Saline Circuit Court; *Thomas E. Toler,* Judge; reversed.

STATEMENT BY THE COURT.

Mrs. Winnie Holcombe sued the Central States Life Insurance Company to recover $2,000 upon a life insurance policy. The policy was issued by the Home Life & Accident Company, upon the life of Robert C. Holcombe, upon March 7, 1923. Mrs. Winnie Holcombe, wife of the insured, was named as the beneficiary. Later the Home Life Insurance Company became the successor of the insurer. Still later, in April, 1931, the Central States Life Insurance Company, under a reinsurance contract with the Home Life Insurance Company, assumed its insurance obligations. The insured died on the 18th day of April, 1931. The annual premium was $58.80, due the 7th day of March. The policy contained a clause as follows:

"If any premium on this policy shall not be paid when due, the same shall be charged without action on the part of the insured, as an automatic premium loan with interest at a rate not to exceed six per cent. per annum, if the then loan value of this policy be sufficient to cover such loan in addition to any existing indebtedness and accrued interest, provided no other nonforfeiture option shall have been chosen by the insured before the expiration of the period of grace, and that this automatic premium loan feature shall not have been previously waived in writing filed at the head office. If the loan value, or the balance thereof, shall not be sufficient to pay the entire premium due, then it shall be used to pay the premium for a shorter period, but not less than entire quarterly premium, and, if not sufficient to pay a quarterly premium, the policy shall cease to be in force,

and any residue of the cash surrender value of this policy shall be paid in cash on surrender of the same. The accumulation of such automatic policy loans, with accrued interest thereon shall be a first lien on this policy, but may be paid at any time in whole or in part."

It also contained the following:

"Before any amount shall be paid hereunder, proof of the interest of the claimant must be furnished, and any indebtedness hereon or secured hereby, including the amount necessary to complete the premium for the current policy year, must be settled. * * * (9) The nonpayment at maturity of any note given in payment of any premium or premiums on this policy will void the policy, unless the cash value of the policy is in excess of the face of such note and interest due thereon."

Mrs. Winnie H. Holcombe was a witness for herself. According to her testimony, the policy was issued while they were living at Altheimer, Arkansas. Witness later moved to Vivian, Louisiana. She wrote to the company in October, 1929, to obtain for her husband a loan on the policy. They received $242.63 in cash, but a note was given for $248, which included interest in advance in the sum of $5.37. While living at El Dorado, Arkansas, the insured paid $8.80 in cash on the premium due March 7, 1930, and gave his note for $50 for the balance. The note became due November 10, 1930, and was then renewed, while they were living at Vivian, Louisiana. Witness noticed in a paper there that a receiver had been asked for for the Home Life Insurance Company. She then wrote to the company about its condition, and was advised by it that, as soon as they were reorganized, they would let her know. Her husband had told them that he didn't want the policy to lapse. Witness enclosed in the letter two one-dollar bills. Witness identified a canceled check for the sum of $23.68, representing payment of interest in advance in the sum of $14.88, due on the loan note of $248 remaining unpaid on March 7, 1930, and a balance of $8.80, representing cash paid on the annual premium due March 7, 1930, the balance of which was paid by

giving the promissory note of $50, as above stated. The premium due March 7, 1931, was never paid. The insured had thirty days of grace, which expired April 7, 1931, which was before his death.

W. C. Langley was a witness for the insurance company. He is now connected with the Central States Life Insurance Company, and had been employed by the Home Life Insurance Company for eleven years prior thereto. He was assistant secretary of that company in 1929, 1930 and 1931, and his duty was to keep the records of the company. On March 7, 1931, the policy had been in force eight years and had a loan value of $300. By this is meant that the policy itself provided that, if the insured wanted to borrow money from the company on the policy, he could, as of that date, get $300. The policy had no additional value after that date. On October 25, 1929, the insured obtained a loan from the company in the sum of $248, which bore interest at six per cent., payable in advance. The note given to the company was due March 5, 1930, and was never paid. The interest on the note was paid until March 5, 1931, and amounted to $14.88. On March 5, 1931, the amount due on the note was $248. The company liquidated the note by applying the loan value of the policy in satisfaction of it. In other words, the note was used as a set-off against the cash value. The cash value of March 7, 1931, was $300. The company used $248 of that amount to pay the note of the same face value, and that left a cash value in the policy of $52. The company used that amount to pay the other note, dated November 10, 1930, for the sum of $51, due March 5, 1931, with interest at the rate of six per cent. This last note was a renewal of the $50 note, given in payment of the annual premium due March 5 or 7, 1930, and which was renewed on November 10, 1930, after it became due. In other words, the insured made a note in lieu of the old note, given in payment of the premium due March 5, 1930. The principal was $51, and the interest $1.02. This covered the balance of the loan value of the policy. This amount, together with the $248 used in

liquidating the note for that amount, consumed the entire loan value of $300. The premium due March 7, 1931, was not paid on that date, nor within the grace period extending the policy to April 7, 1931. The insured had notice of this from the company. Other facts will be stated in the opinion.

There was a verdict and judgment for the plaintiff, and the defendant has appealed.

Burk Mann and *T. D. Wynne,* for appellant.

J. B. Milham, for appellee.

HART, C. J., (after stating the facts). It is first sought to uphold the judgment on the theory that the insurance company had funds in its hands belonging to the insured which would have paid the next quarterly premium, and, that being true, it was its duty to apply the amount thereto. *Inter-Ocean Casualty Company* v. *Copeland,* 184 Ark. 648, 43 S. W. (2d) 65. The amount referred to was a canceled check for the sum of $23.68, sent by the insured to the company. According to the testimony of Mrs. Holcombe, this represented payment of interest in advance in the sum of $14.88, due on the loan note of $248 remaining unpaid on March 7, 1930, and a balance of $8.80, representing cash payment on the annual premium of $58.80, due on March 7, 1930. The check was applied to these purposes. Hence there were no funds on hand belonging to the insured with which to pay the next premium, due March 7, 1931.

The next contention of the plaintiff is that the company waived the forfeiture under the principles of law decided in *Home Life & Accident Company* v. *Scheuer,* 162 Ark. 600, 258 S. W. 648. On this branch of the case, Mrs. Holcombe testified that they saw in a newspaper a notice that a receiver would be applied for, and that in December, 1930, they wrote to the company with respect to its financial condition. They received a reply that the company would notify them as soon as it was reorganized, and the company did not notify them. She admitted that the letter had been lost and, further on in her testimony, stated that she thought, when they got the company re-

organized, they would let them know to whom to pay the premium. She admitted that she knew that the premiums were due annually on the 7th day of March, and that they had a grace period of thirty days. She also admitted that she knew that, under the terms of the policy, it would be forfeited if they did not pay the annual premium when due, and that the forfeiture would take place under the terms of the policy without any notice thereof. It will be noted that the insured wrote to the company to know about its financial condition, and there was no definite promise made by the company to waive the forfeiture under the terms of the policy, and the insured had no right to rely upon the general statement which plaintiff says was in the letter to the effect that the company would notify the insured when they got reorganized. Plaintiff admits that they were moving around the country at that time and did not stay in one place long.

It is next insisted that there was a waiver of the forfeiture by the letter dated April 7, 1931, which was not received until the 17th day of April, the date on which the insured was fatally burned, and died therefrom sometime that night. This letter appears to have been a form letter, signed "Conservation Department." It was written about the premium loan of $300, which had been placed against the policy, covering the note due March 5, 1931. The letter also notified the insured that the arrangement was to help continue the policy in force, and that the loan might be paid in part or in full at any time during the continuance of the policy. In conclusion, the insured was reminded in the letter that premium notices would be sent, and that all future premiums should be paid promptly in order to maintain the valuable protection that the policy offered. She admitted that she knew the date the premiums were due, and that the policy would be forfeited under its own terms if the annual premium was not paid within the thirty days' grace extension after it became due. This court has held that, under a policy of life insurance providing that it should become void on failure to pay premiums when due, the nonpay-

ment of a premium when due *ipso facto* caused a forfeiture of the insured's rights under the policy. *Home Life & Accident Company* v. *Haskins,* 156 Ark. 77, 245 S. W. 181; and *Home Life & Accident Company* v. *Scheuer,* 162 Ark. 600, 258 S. W. 648.

The result of our views is that, under the undisputed evidence, the court should have directed a verdict for the defendant. For the error in refusing to do so, the judgment must be reversed; and, inasmuch as the cause of action has been fully developed, it will be dismissed here. It is so ordered.