UNION CENTRAL LIFE INSURANCE CO. *v.* MENDENHALL.

Opinion delivered January 26, 1931.

1. EVIDENCE—BEST AND SECONDARY.—Where the premium card kept by the insurance company was the best evidence as to the payment of insured's premiums, a photostatic copy thereof was inadmissible, in the absence of any foundation for introducing secondary evidence.
2. EVIDENCE—BEST AND SECONDARY EVIDENCE.—In the absence of identification and of notice of the opposite party to produce the originals, copies of letters by insurer's general agent and secretary *held* inadmissible.
3. TRIAL—INSTRUCTION AS TO COMPETENCY OF EVIDENCE.—An instruction which excluded certain evidence, part of which was competent and material, *held* erroneous and prejudicial.
4. INSURANCE—FIXING ATTORNEY'S FEE.—The court's action in fixing insured's attorney's fee without hearing or notice to insurer, and without evidence of a reasonable amount, *held* error.
5. APPEAL AND ERROR—REVERSAL IN PART.—If the only error of the trial court consisted in fixing insured's attorney's fee without a hearing or notice to insurer, the judgment in insured's favor would be reversed only as to the fee.

Appeal from Clay Circuit Court, Western District; *W. W. Bandy,* Judge; reversed.

STATEMENT BY THE COURT.

The Union Central Life Insurance Company issued its policy of insurance to Ora D. Mendenhall on the 23d day of April, 1923, in the sum of $2,000, payable to his estate. The first premium was paid on the 30th day of April of said year, the policy providing for annual premiums of $56.48 payable on or before the 20th day of April of each year thereafter. The premiums were

regularly paid for the years 1923 to 1927 both inclusive. Mendenhall, being indebted to the Bank of Corning, assigned and delivered the policy to the bank as security for his indebtedness, and thereafter the bank continued to hold the policy up until the institution of this suit. Mendenhall died the latter part of April, 1929. Notice of his death was given to the bank and the insurance company, and the latter waived formal proof of death and denied liability on the ground that the policy had lapsed for failure to pay the annual premium due April 20, 1928.

The appellees, the widow and heirs of the assured, instituted suit to recover on the policy of insurance, naming the appellant insurance company and the Bank of Corning as parties defendant. There is no question as to their right to maintain the action, the sole question being whether the policy was in force at the time of the death of the assured or whether it was void for the nonpayment of premium for the year 1928. It appears that Mendenhall was somewhat of a wanderer, and, while he maintained his residence at Lepanto, Arkansas, he was frequently away engaged in his vocation or in search of employment, and that while thus away he died by violence at or near Dyersburg, Tennessee. His wife testified that during his absence from home she received his mail, and that she received a receipt from the State agent, C. G. Price, at Little Rock, for the payment of the premium for the year 1928. She stated that before that time, her husband left their home for the purpose of making arrangements for the payment of the 1928 premium, and on his return from a nearby town told her that he had done so, and she stated that she afterward received a receipt for the payment of this premium. She also testified that she received a receipt in April, 1929, at the home of her sister, Mrs. N. O. Owen, who lived at Palatka, Arkansas, and had a postoffice box there. She was unable to produce any of the receipts about which she testified, claiming that those in her possession prior to

the year 1926 were destroyed by a fire which burned her home in that year, and that the receipts for the year 1927 and those which she stated she had received for the years 1928 and 1929 were kept by her in a little hand satchel which she lost the spring before the giving of her testimony at Blytheville in the wreck of a bus in which she was riding. She stated that she had been unable to recover these receipts; that she had made an effort to recover the contents of the satchel through the bus company, but that she had never notified the insurance company of her loss or requested duplicate receipts.

Mrs. N. O. Owen testified that she had seen the receipt for the premium of 1929 but paid no attention to it; thought it was signed by Mr. Price at Little Rock, but could recall no particulars regarding the receipt. She explained that she could not see much without her glasses, but did not remember whether or not she had her glasses at the time; that her husband looked at the receipt. N. O. Owen, the husband of this witness, stated that, while his sister-in-law, Mrs. Mendenhall, was visiting at his home at Palatka, Clay County, a letter addressed to Ora D. Mendenhall, Palatka, Arkansas, was received and at Mrs. Mendenhall's direction was opened by him; that it was from the appellant company's office in Little Rock and contained a receipt for the premium due in 1929; that he read this receipt for Mrs. Mendenhall because she was unable to read it herself and requested him to do so; that she could sign her name but could not read a letter. When he had read the letter, he stated to Mrs. Mendenhall what it was and from whom it was and gave it to her, and she put it in her hand satchel. Witness saw another premium receipt at that time in Mrs. Mendenhall's possession—it was either for 1927 or 1928. At that time Mendenhall was thought to be at work in Illinois.

The appellant introduced William H. Emerson as a witness, who testified that he was the supervisor of the insurance department of the appellant company at its

home office in Cincinnati, Ohio; that he had general supervision of different forms of work, including policy loans, matured policies, cancellation of policies that had been borrowed upon, and the cancellation of policies for various causes including the nonpayment of premiums. He stated that he had worked in the department of which he was then the supervisor for fifteen or twenty years and was familiar with the manner in which the records were kept in the regular course of business, the method of handling the premiums, and had supervision of the records pertaining to his division and knowledge of the premium records, particularly those of this case; that there were a large number of clerks in the office and that the general records were kept by twenty or twenty-five people; that the entries were made from reports which came into the office from the different agents of the company, and that, because of the vast volume of business done by the company, the use of ledgers had been discontinued and the records kept on what was known as "the card system," which system is the modern way large corporations keep their books; that when a policy was issued a card was made out, and thereafter all transactions relative to that particular policy were entered thereon showing the payments of premiums. Likewise, a record of all premium notes given in payment of premiums were entered upon these cards. The entries on these cards were made by different clerks who posted the records, and any one of a dozen or more of the clerks might have made entries in any one year and on any one card, and, while he did not have a personal knowledge of each entry, he knew that the records about which he testified were true as he had examined the original records, and was present at the time photostatic copies were made of the records which were kept in the ordinary course of business by the insurance company. The witness explained in detail the method of the handling of the business relating to dealings with any given policy of insurance, and that with reference to the policy in question.

It was a rule of the company to transmit to its general agents the notices of premiums due and the receipts to evidence the payments thereof, the receipts to be countersigned by the general agent and delivered to the policyholder upon payment of the premium. Following this custom, the witness testified that the notice of the premium due and the receipt to evidence its payment were in apt time transmitted by mail to C. G. Price, the general agent of the company at Little Rock, Arkansas, whose duty it was, if the premium was not paid, to return the receipt with an explanation as to why it was not paid. Witness stated that the receipt for the premium due April 20, 1928, was returned to the home office showing the premium for that year unpaid; that thereupon the value of the policy was ascertained by the actuary, the loans that had been made by the assured with accrued interest deducted therefrom, and the balance applied under the terms of the policy to a continuation of the policy, or "extended insurance," which was ascertained to be thirteen days; that with the thirty days of grace the policy carried until May 3, 1928, at which time it had no further value and was canceled, the dividend then due being disposed of as heretofore stated.

The receipt returned for the premium of 1928 was introduced in evidence by the witness and marked Exhibit A to his testimony. This receipt showed the address of the assured to be "Ora D. Mendenhall, care of Will Mendenhall, Rosehill, Illinois," and written with ink upon it, "Grace to May 20, 1928," and stamped "From premium account by canc. to May 8, 1928." The check drawn for the dividend heretofore mentioned was introduced as Exhibit B. A photostatic copy of the premium card and copies of certain letters were offered in evidence by the witness, the introduction of which the court refused to permit. To the action of the court timely objection was made and exceptions duly saved. These will be referred to again in the opinion.

The testimony of Emerson and the offer of the aforesaid letters, photostatic copies, receipts, etc., was all the testimony offered by the defendant. The court submitted the case to the jury on the question as to whether or not the premium for the year 1928 had been paid. There was a verdict for the plaintiff for the face value of the policy for which judgment was accordingly rendered in favor of the appellee bank and the plaintiff, with a twelve per cent. penalty, and the attorney's fee was fixed at $500. The appellant, in apt time, filed its motion for a new trial, assigning as error the refusal of the court to direct a verdict for it as prayed, and, among other things, the ruling of the court in excluding the aforesaid exhibits to the testimony of Emerson, paragraphs No. 7 to No. 15, both inclusive, of its said motion for a new trial, and the giving of instruction No. 3 on the court's own motion. This instruction is as follows: "Of course, in deciding this question (the payment of the 1928 premium) you will consider only testimony that has been permitted as competent here to go to the jury. You are again told that the testimony you have heard about the records of this company from their agent is excluded from your consideration because it is incompetent, and you owe it to the litigants to this lawsuit not to consider that testimony. You ought to treat it just as if you had never heard it at all, and the court will take it for granted you will follow his direction on that point."

The appellant likewise assigned as error the action of the court in fixing the attorney's fee at $500 "without inquiry or the taking of any evidence as to what would be a reasonable fee and without notice to the defendant's counsel, thus giving no opportunity for objection and exception by the defendant, which fee is unreasonable and excessive and operates as an added and unwarranted penalty against the defendant."

Hunter & Hunter and *D. K. Hawthorne,* for appellant.

Oliver & Oliver and *E. L. Holloway,* for appellee.

BUTLER, J., (after stating the facts). 1. The original premium card was the best evidence, and there was no proper foundation laid for the introduction of a copy. It had no entries relating to any other policy or to any other business transaction; it was not affixed to any other record, but was a separate card which could be easily taken from the appellant's files and conveniently brought into the court, and no reason is given why this was not done. The court correctly held the photostatic copy inadmissible. That it was a photograph and less liable to imperfectly depict the original than a copy transcribed ordinarily would, does not alter the general rule. 10 R. C. L., p. 910, § 65. One of the copies offered in evidence was of a letter written from the office of the general agent for Arkansas at Little Rock to the assured and appellee bank, mailed to the latter and explaining the check for $10.52 inclosed. This letter advised that the policy had been canceled for failure to pay the premium due April 20, 1928, and that under the terms of the policy the earned dividend at the time of the cancellation was to be paid in cash to the assured, and, if the addressees did not want to continue the policy, to indorse and collect the check. The fact that the check was later indorsed by, and its proceeds paid to, the drawees made this letter highly important, but the copy was not identified. The witness only knew that a paper was in the files of appellant company in Cincinnati which purported to be a copy of a letter written by the State agent to the assured and the appellee bank; that agent was in Little Rock and there was no reason given why he had not been called upon to identify it. Also, there was no proof offered that the adversary party had been called upon to produce the original and had refused or failed to do so, or that the copy offered was a "carbon copy" of the original.

Another copy offered was of a letter written by appellant company's secretary, addressed to the assured at Rose Hill, Illinois, advising of the cancellation of the policy. Copies of other letters material to the defense of the appellant were offered and refused. All of these

as to identification and notice to the adversary for production are on the same footing as that first discussed. Therefore, the court properly refused to permit their introduction as identification and notice for the production of the originals was necessary to authorize the introduction of the copies. *Jones* v. *Robinson,* 11 Ark. 504; *Heard* v. *Farmers Bank,* 174 Ark. 194, 295 S. W. 38.

2. There were, however, two original documents taken from the files of the company and offered in evidence which were relevant to the issue and which were properly identified: the receipt for the premium of April 20, 1928, sent to the State agent for delivery to the assured on payment of the premium which was returned with the advice that the premium had not been paid, and the check for the dividend due on April 20, 1928, payable to the assured upon cancellation of the policy. These were competent and admissible under the showing made.

The witness Emerson testified that he had no supervision of the collection of premiums, but that the duty of issuing the receipts appertained to the department over which he had supervision, and that he supervised the entries relating to the cancellation of policies; that the receipt was issued and sent to the mailing room by his direction, and he had knowledge of its return. He likewise testified that the dividend check was issued by his direction, and that he was able to identify both the returned receipt and the paid check. This evidence was admitted by the court, but at the close of the testimony, after submitting the issue to the jury, the court on its own motion gave instruction No. 3. It will be noted that this instruction did not point out any particular testimony relating to the records of the company which the jury was told was incompetent, nor by any saving clause exclude any of Emerson's testimony from its inhibition, but in broad terms told the jury that "the testimony you have heard about the records of the company from their agent is excluded from your consideration because it is incompetent, and you owe it to the litigants to this lawsuit not to consider that testimony. You ought to treat

it as if you had never heard it." This sweeping declaration, whether intended or not to include the original receipt and canceled check and the testimony of the witness relating to them, might, and perhaps did, have that meaning to the jury. This was error and prejudicial to the rights of appellant.

3. Counsel for the appellant earnestly insist that the verdict of the jury is unsupported by any substantial evidence, and urge that the court erred in not directing a verdict in its favor and ask for a dismissal of the case here. In support of its contention, it points out certain circumstances in connection with the testimony of the witnesses for appellee, which it insists makes that testimony run counter to human experience and common observation, and in the very nature of things that it cannot be true. As this case must be reversed for the error above indicated, we deem it unnecessary to allude to the circumstances which it is claimed refute and make incredible appellee's testimony, or to comment upon the weight and sufficiency of the evidence considered in connection with attendant proved facts, as there may be additional evidence adduced by both the litigants in another trial.

4. The court erred in fixing the amount of attorney's fee without a hearing given on the motion for same and without hearing evidence tending to establish the proper amount. The judgment in its entirety would not have been reversed for this error alone, but only as to the attorney's fee.

For the error of the court below in its charge to the jury, the judgment is reversed, and the cause remanded for a new trial.

KIRBY, J., dissents.