9-1-1968

Bank of Denver v. Sun Life Assurance Co. of Canada

NO. 23516

IN THE SUPREME COURT OF THE STATE OF COLORADO

BANK OF DENVER, a Colorado corporation,	)	Error to the District Court of the City and County of Denver State of Colorado
Plaintiff in Error,	)	
v.	)	
SUN LIFE ASSURANCE COMPANY OF CANADA, a Canadian corporation,	)	HONORABLE JAMES C. FLANIGAN Judge
Defendant in Error.	)	

BRIEF OF PLAINTIFF IN ERROR

IRELAND, STAPLETON, PRYOR & HOLMES
Robert C. Hawley
Kenneth L. Starr

1700 Broadway, Suite 2017
Denver, Colorado 80202

Attorneys for
Plaintiff in Error

September 1968

INDEX

Page

Page

TABLE OF CASES CITED

Page

Page

OTHER AUTHORITIES

NO. 23516

IN THE SUPREME COURT OF THE STATE OF COLORADO

BANK OF DENVER, a Colorado corporation,	)	Error to the District Court of the
Plaintiff in Error,	)	City and County of Denver
v.	)	State of Colorado
SUN LIFE ASSURANCE COMPANY OF CANADA, a Canadian corporation,	)	HONORABLE
Defendant in Error.	)	JAMES C. FLANIGAN Judge

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This action was brought by Plaintiff in Error ("Bank of Denver") against Defendant in Error ("Sun Life") to collect the proceeds of an insurance policy (Ex. A, f. 486). The policy was issued May 28, 1959 by Sun Life on the life of Gerald B. Calhoun ("Mr. Calhoun"). Mr. Calhoun assigned it June 19, 1959 to Bank of Denver as security for a line of credit (Ex. E, f. 490). Bank of Denver made advances to Calhoun (f. 313).

Mr. Calhoun died December 1, 1964 (f. 360). At the time of his death he and his widow Violet Calhoun ("Mrs. Calhoun") now Violet Bingenheimer, owed the Bank $15,000.00 secured by the policy. Claim was made under the policy. Sun Life refused to pay the amount that Bank of Denver and Mrs. Calhoun believed was due. Bank of Denver commenced action in the trial court praying for $15,000.00 plus dividends, interest and costs (ff. 1-17). The trial court entered Judgment for Bank of Denver for $5,727.98 (f. 201). Bank of Denver brings the matter before this Court on the belief the Judgment was insufficient.

The beneficiary in the policy was listed as the Executors or Administrators of the life assured. The policy showed a face amount of $5,000.00 and an additional benefit of $10,000.00 under a Family Security Benefit provision. It was to mature on the death of the life assured or as otherwise provided in the paid-up insurance provision. The premium for the $15,000.00 was $239.70 annually. The provision pertaining to premiums, which were payable to Sun Life's office in Denver, Colorado, stated:

> "$239.70 due March 16, 1959, and yearly on the 16th day of every 12th month thereafter until the death of the life assured. When the premium for any supplemental benefit ceases to

be payable, the premium for the policy will be reduced accordingly."

As quoted, the first premium was due over two months prior to the date of the policy (Ex. A, f. 486).

There is no dispute that Mr. Calhoun paid the premium for the years 1959, 1960, 1961, and 1962. Bank of Denver extended the line of credit to Mr. Calhoun on condition that the $15,000.00 of insurance represented by the policy be assigned the Bank. Mr. and Mrs. Calhoun had signed a note for $15,000.00 on May 28, 1959. This note was secured by the policy. Mr. Calhoun had another policy with Defendant but that policy is not involved in this case.

On June 19, 1959, Mr. Calhoun on Sun Life's Assignment for Value form assigned all of his right, title and interest in the policy to Plaintiff (Ex. E, f. 490). Sun Life received notice of this assignment. The policy was delivered to the Bank (f. 390). Mr. Calhoun was to keep the $15,000.00 policy in full force and effect. Bank of Denver did not at any time receive notices of premiums due (f. 395). The premiums were to be paid by Mr. Calhoun (f. 396). Mr. Calhoun did not pay the premium due in March 1963, or in March 1964. There is no evidence that Mr. Calhoun ever received a notice of premium due from Sun Life for the 1963 or 1964 payments (ff. 325-329). Bank of Denver prior to Mr. Calhoun's

death did not receive any notification of premiums due, lapse of the policy or that Sun Life no longer recognized the assignment to the Bank (ff. 394-396). It is admitted that Bank of Denver made loans equalling the full $15,000.00 line of credit to Mr. Calhoun, which loans the Bank believed were secured by the policy (f. 390). In September of 1964, Mr. Calhoun and Mrs. Calhoun signed a renewal note payable to Bank of Denver in the amount of $15,000.00 (ff. 396-397).

Mr. Calhoun was a man in sound health (ff. 305-308). On October 26, 1964, while riding in a cutting horse contest in a rodeo in South Dakota he collapsed. Mr. and Mrs. Calhoun returned to Denver. Mr. Calhoun drove part of the way (ff. 317-318). The doctors in Denver thought he had suffered a very mild heart attack and he was hospitalized (ff. 315-321).

Mrs. Calhoun was familiar with the insurance policy (ff. 308-309). She had always considered the policy as a $15,000.00 policy (ff. 332-333).

While Mr. Calhoun was in the hospital Mrs. Calhoun attempted to handle certain of his business affairs (ff. 323-324). Mrs. Calhoun had no reason to believe that Mr. Calhoun would not recover from his illness (ff. 315-322, 344-355).

Mr. Calhoun was transferred to Bethesda Hospital for treatment by a psychiatrist. Mrs. Calhoun was told that the reason for this was that a man who had been as physically active as Mr. Calhoun, often times became depressed if he was forced to curtail his physical activities even for a short period of time. The doctors wanted Mr. Calhoun to rest and felt that it would be to his benefit if he was relieved from worries about his business (f. 323).

In taking care of the business, early in November 1964, Mrs. Calhoun thought it would be a good idea to check up on the status of Mr. Calhoun's insurance policies. Mrs. Calhoun was not able to discover any record indicating that the policy had lapsed or that a premium was due (ff. 324-330). She called Sun Life's Denver office. She advised Sun Life that she was interested in determining the status of Mr. Calhoun's insurance. She did not have the policy and therefore told Sun Life that it was the $15,000.00 policy on the life of Gerald B. Calhoun. Sun Life requested the number of the policy. Mrs. Calhoun called Bank of Denver and obtained the number 5100403. Mrs. Calhoun then called Sun Life and gave it the policy number (ff. 331-335). She was advised by Sun Life that a premium was due but that the policy was still in force because of sufficient amounts of money from dividends and other sums in the reserve. Sun Life told

Mrs. Calhoun the policy had not lapsed (f. 334). Mrs. Calhoun requested Sun Life to give her the amount that would be necessary to pay the premium in full. Sun Life advised her that this would have to be figured out but that it would let her know. Sun Life called Mrs. Calhoun and told her that premiums owed amounted to $502.14 (ff. 335-341). On November 9, 1964, Mrs. Calhoun wrote a check payable to Sun Life in the amount of $502.14. When Sun Life received the check it made a notation thereon "reinstate policy #5100403" which check was paid on November 13, 1964 (Ex. B, f. 487).

The testimony of Mrs. Calhoun established that neither on March 16, 1963, March 16, 1964, or at any other time, did Sun Life give notice to the Calhouns that the policy or any portion of it had terminated, that premiums were due, or that there had been a reduction in the premium. To the contrary, when Mrs. Calhoun contacted Sun Life she was advised that the policy was in force and effect and that in order to bring the premium payments to date she should remit the sum of $502.14. This sum equalled two annual premiums, as shown on the face of the policy, plus interest assessed by Sun Life (Ex. K, f. 496). Under premium, the Family Security Benefit provision provided that the amount of the premium, $68.70, was included in the appropriate premiums specified in the schedule on

the first page of the policy (Ex. A, f. 486).

The Family Security Benefit provision by its terms was:

"Attached to and made a part of policy number 5100403."

Thereafter, Sun Life never contacted either Bank of Denver or Mrs. Calhoun for the purpose of requesting the policy, additional information, or for any other reason (ff. 341-344).

In November 1964 Mr. Calhoun was operated on in Porter Hospital for a brain tumor. On December 1, 1964 he died (Ex. N, f. 499). Sun Life was informed of Mr. Calhoun's death (f. 362), and on December 2, 1964, wrote to Mrs. Calhoun and to Bank of Denver enclosing claim forms (Ex. C, f. 488; Ex. F, f. 491). There was no mention in either of these letters that the policy was not in force. On December 11, 1964 Sun Life wrote Bank of Denver stating that there had been overpayments of premiums in March of 1963 and 1964 in the amount of $68.70 and an overpayment of interest on late payments of $4.29, which entitled the proper party to a refund of $141.69. No mention was made that the full $15,000.00 was not payable under the policy (Ex. G, f. 492). Later in December of 1964, Sun Life paid the proceeds of the other life insurance policy issued on Mr. Calhoun's life. This payment on the other policy No. 1859901,

was erroneously made to Bank of Denver (ff. 365-368).

Sun Life requested certified copies of letters testamentary or administration in order to make payment on policy No. 5100403. No mention was made of the fact that the proceeds would not be paid in the amount of $15,000.00, plus dividends and other sums earned (Ex. H, f. 493; Ex. I, f. 494).

In July of 1965 Sun Life advised Plaintiff that it would not pay the $10,000.00 benefit under the Family Security Benefit provision of the policy but would refund overpayments of premiums paid in March of 1963 and 1964 (Ex. J, f. 495). Sun Life tendered a check dated October 18, 1965 in the amount of $5,727.98, as payment under the policy. This amount included a refund of $502.14 and interest allowed in the amount of $119.84 (Ex. D, f. 489). This check, which Sun Life contended represented full settlement of its contractual liability under the policy was not cashed (f. 369).

SUMMARY OF THE ARGUMENT

I. The $15,000.00 Life Insurance Policy Issued By Sun Life On The Life Of Gerald B. Calhoun, By Its Terms And The Terms Of The "Family Security Benefit Provision" Attached To And Made A Part Of The Policy, Provides For Reinstatement In The Manner In Which

Said Policy And Family Security Benefit Provision Were In Fact Reinstated By The Actions Of Mrs. Calhoun Prior To Her Husband's Death.

Mrs. Calhoun made payment of all unpaid premiums with interest at 5 per cent per annum within two years all as required by the reinstatement provision of the policy. Evidence of insurability was not required.

II. Any Ambiguity In The Policy Is Construed Against Sun Life.

Contrary to the findings of the trial court the policy contained ambiguities. The policy form was prepared by Sun Life and these ambiguities must be construed against that company.

III. Sun Life's Conduct Constitutes An Admission The Policy Remained In Force Or In The Alternative A Waiver Of Forfeiture.

Sun Life advised Mrs. Calhoun the policy had not lapsed. This is evidence that it had continued at all times to be in force and effect or that Sun Life waived any purported forfeiture.

IV. An Insurance Company is Charged With Knowledge Of Its Business.

The content of Mr. Calhoun's policy and its status were best known to Sun Life. It had the absolute means of

knowing this information. Sun Life should not be excused from liability merely because it might have made a mistake.

V. Sun Life Had A Duty To Notify The Insured Of An Alleged Forfeiture.

Not only did Sun Life fail in its duty to notify Mr. Calhoun, Mrs. Calhoun or Bank of Denver of any forfeiture it expressly notified Mrs. Calhoun to the contrary.

VI. An Insurance Company Can Waive Conditions In Its Policy.

An insurer can waive conditions which it inserts in its policies for its benefit and Sun Life by its actions did waive certain provisions and reinstated the policy.

VII. Sun Life Is Bound By Its Representations.

Defendant in Error represented to Mrs. Calhoun that the policy had not lapsed. In reliance on this representation she paid the premiums and interest requested by Sun Life. Sun Life cannot now seek to repudiate its admitted obligations.

VIII. Sun Life Waived Termination And The Attendant Forfeiture Of The Insured's.

If a part of the policy terminated for nonpayment of premiums this forfeiture

of the rights of the insured and any beneficiary was waived by Sun Life and there was a reinstatement of the policy as originally written.

IX. Material Allegedly Contained In The Rate Books Of Sun Life Is Not Material.

The trial court should not have admitted alleged excerpts from rate books not in evidence or sponsored by any witness for the purpose of finding that Mr. Calhoun could not have purchased a $15,000.00 Sun Life policy for the amount of premiums requested by, paid to and accepted by Sun Life. Neither Mr. Calhoun, Mrs. Calhoun nor Bank of Denver had any knowledge of Sun Life's rate books. Sun Life alone established, changed, amended, raised, lowered or abandoned rates for various types and amounts of insurance issued by the company and these unilaterally maintained documents are not binding on Mr. Calhoun, Mrs. Calhoun or Bank of Denver.

X. The Insurability of Mr. Calhoun Is Not Relevant or Material.

Sun Life made no investigation of Mr. Calhoun's health when it advised Mrs. Calhoun the amount of premium and interest due which amount was paid and accepted for reinstatement of the policy. No one was aware when the payment was made of the nature of Mr. Calhoun's illness.

No false information was given Sun Life and finally, evidence of insurability was not required under the terms of the policy. Therefore, the trial court was in error to admit irrelevant and immaterial hospital records and to hold that because of uninsurability no estoppel was involved, no detriment was suffered, there was no change of position, and the oral contract made by Sun Life was voidable.

XI. Sun Life Is Bound By The Actions Of Its Denver Office.

The trial court erred in finding that only the president, managing director, vice president, actuary or secretary of Sun Life had authority to alter provisions of the policy and that none of these individuals made or agreed to any alteration. There was no evidence that the alteration was not made by one of these parties and further under Colorado law Plaintiff in Error, the insured and his beneficiaries could rely, and did rely, on the representations of the company's Denver, Colorado office which issued the policy, collected the premiums and was the office to be contacted for payment of benefits.

XII. The Trial Court Erred In Admitting Evidence Pertaining To Sun Life's Business Procedures And On The Basis Of Such Insufficient Evidence Holding That In This Case Sun Life Acted In A Timely Manner.

What Sun Life might normally do is of no consequence in this case and in fact

Sun Life in the face of Bank of Denver's objection withdrew its tender of the company's business practices. Therefore, the trial court had no rights to consider them in its holding.

XIII. The Trial Court Erred In Concluding That Bank Of Denver Suffered No Detriment Because Mr. Calhoun Was Completely Uninsurable And Sun Life's Actions Caused No Change Of Position.

No evidence was offered as to what constitutes uninsurability. Between March 1963 when Mr. Calhoun first failed to pay the premium and his death in December of 1964 Mr. Calhoun could have obtained insurance from another company or Bank of Denver could have demanded other security or refused to make additional loans under the line of credit to the Calhouns if Sun Life had advised anyone of a termination of part of the policy. This caused a change of position and detriment to the insured, Mrs. Calhoun and Bank of Denver.

XIV. Insufficiency Of Damages.

Bank of Denver is entitled to the full $15,000.00 value of the policy plus proper interest. Even if this Court should sustain the holding of the trial court interest should be allowed from the date of Mr. Calhoun's death with interest at the legal rate of 6 per cent rather than from two months after his death with interest at 3 per cent per annum.

ARGUMENT

I. THE $15,000.00 LIFE INSURANCE POLICY ISSUED BY SUN LIFE ON THE LIFE OF GERALD B. CALHOUN, BY ITS TERMS AND THE TERMS OF THE "FAMILY SECURITY BENEFIT PROVISION" ATTACHED TO AND MADE A PART OF THE POLICY, PROVIDES FOR REINSTATEMENT IN THE MANNER IN WHICH SAID POLICY AND FAMILY SECURITY BENEFIT PROVISION WERE IN FACT REINSTATED BY THE ACTIONS OF MRS. CALHOUN PRIOR TO HER HUSBAND'S DEATH.

According to the terms of the Family Security Benefit provision on the life insurance policy in question, such provision is attached to and made a part of the insurance contract (Ex. A, f. 486). By its own terms the Family Security Benefit provision is governed by the general provisions and reinstatement provisions of the policy.

> "The general provisions and the reinstatement provision of the policy will apply to this provision except as otherwise provided in the policy or by the terms of this provision."

The reinstatement provision was contained in the policy as a whole. The reinstatement provision provides that all unpaid premiums together with interest at 5 per cent per annum, must be paid. The reinstatement provision also contains the provisions:

> "WHEN EVIDENCE OF INSURABILITY NOT REQUIRED. If the application for reinstatement is made while the policy is continuing in accordance with the automatic paid-up term assurance provision and within two years from the due date of the first unpaid premium, evidence of insurability will not be required."

Payment was made within the two years specified by the terms of the policy for reinstatement without evidence of insurability being required.

II. ANY AMBIGUITY IN THE POLICY IS CONSTRUED AGAINST SUN LIFE.

The law is clear that in the case of an ambiguity the ambiguity is construed against Sun Life which prepared the policy. The trial court erroneously found there was no ambiguity in the policy and that the Family Security Benefit provision had terminated (ff. 190-192). Yet, the policy itself states that if premiums had been paid for the length of time they were paid by Mr. Calhoun the policy would be continued for several years as term insurance, a patent ambiguity.

In Columbian Co. v. McClain, 115 Colo. 458, 174 P.2d 348 (1946), Mrs. McClain obtained a judgment against the insurance company on a policy of insurance issued on the life of her husband. The policy involved term provisions such as those

of the policy in dispute in this action. McClain died without paying a second premium on the policy and the insurance company claimed that the policy had lapsed prior to his death. There was an ambiguity in the policy and the Supreme Court in ruling on a construction in such cases, stated:

> "The rules of construction of insurance policies are simple; the application often difficult. In construing such a contract of insurance, the court should attempt to ascertain and carry out the intention of the parties which is to be ascertained, if possible, from the words of the contract alone. It should be given a reasonable construction such as intelligent businessmen would give to it, and where, by reason of ambiguity in the language of the policy, there is doubt or uncertainty as to its meaning and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted. The court will construe the policy, when possible, so as to uphold rather than avoid, the contract and to accomplish the purpose for which it was made. Forfeiture for nonpayment of premiums is not favored nor authorized unless clearly required by the wording of the contract."

It should be remembered that the only information obtained from Sun Life was

that the policy had not lapsed. If it had not lapsed, Bank of Denver is entitled to recover $15,000.00. Sun Life should not be allowed to profit from its own ambiguity and attempt to reform the policy in order to avoid its obligation. In German Am. Ins. Co. v. Hyman, 42 Colo. 156, 169, 94 P. 27 (1908), the Court stated:

> "There is no attempt to reform the policy and rest the recovery upon a new or different contract. The action remains upon the original contract; the replication simply shows that defendant has no right to plead or rely upon the alleged violation of that contract. And if plaintiff recovers, he recovers upon the contract as it was originally written. Defendant simply is not allowed to establish the asserted forfeiture or violation and thus defeat the recovery."

III. SUN LIFE'S CONDUCT CONSTITUTES AN ADMISSION THE POLICY REMAINED IN FORCE OR IN THE ALTERNATIVE A WAIVER OF FORFEITURE.

Certainly the conduct of Sun Life in this case constituted an admission that the policy was in force and effect or a waiver of any forfeiture. If the former, the policy was always in force and Sun Life has no standing in this action. If the latter, the insurer is estopped from asserting the forfeiture. In

Farmers Union Mut. Ins. Co. v. Wyman, 221 Ark. 1, 251 S.W.2d 819 (1952), the court dealt with one of the defenses in this case, the defense that Calhoun's policy had lapsed and that it could not be reinstated without: (1) payment of all premiums due; (2) a written request for a renewal; and (3) the amount renewed could not be less than $5,000.00. The court rejected this defense and held for the insured.

It should be noted that the provisions of this defense apply to a renewal. The requirements in the reinstatement provision of the Sun Life policy are not consistent. The major provision in the reinstatement provision being that all unpaid premiums which would have been payable had the policy continued in full force to the date of reinstatement together with interest at the rate of 5 per cent per annum, be paid. Sun Life's request of Mrs. Calhoun could only have been made under the reinstatement provision as there was a specific requirement for an additional sum representing interest which was demanded and paid. The schedule for paid-up term assurance contained in the policy indicates that on March 16, 1963 Mr. Calhoun's period of paid-up term assurance was five years and 192 days. It is true that these provisions create ambiguity in the policy. As argued, supra, this ambiguity is construed against Sun Life whose form was used. It was deemed to be knowledgeable

in insurance practices. As was stated in Connecticut Co. v. Colo. Co., 50 Colo. 424, 442, 116 P. 154 (1911):

> "This court and many others have stated that in case of doubtful meaning a policy should be construed in favor of the insured. Forfeitures are not favored and the courts do not declare one by implication."

IV. AN INSURANCE COMPANY IS CHARGED WITH KNOWLEDGE OF ITS BUSINESS.

In Kennedy v. Pacific Indemnity Co., 267 F.Supp. 16 (D. Ore. 1967), Pacific Indemnity was seeking to dodge its liability under an insurance policy. Pacific Indemnity claimed that the insurance policy involved had lapsed because the insurance premiums had been paid after the grace period allowed in the policy. In commenting on this defense, Chief Judge Solomon stated:

> "In my view, Pacific cannot maintain accounting, billing and notice procedures which permit it to keep its insured's premiums without giving them coverage, nor can it receive premium advances from an agent that charges insured's interest on late payments and then contend that the advances do not benefit the insureds."

In Melick v. Metropolitan Life Ins. Co., 84 N.J.L. 434, 87 A. 75 (1913), a case

in which the insurance company was attempting to establish that its policy was void as against the insured, an argument rejected by the Supreme Court of New Jersey, the court met head on the point that as between the insurance company which deals daily with its policies and an insured relatively inexperienced in this field, the insurance company is presumed to have knowledge of the facts surrounding the policy. The court stating:

> "An act thus repeated hundreds and hundreds of times normally carries with it the conclusive presumption of knowledge." (87 A. 75, 77)

Further, the New Jersey Court stated that an insurance company knows the contents of its own policies and that it knows or has the absolute means of knowing the names of its policyholders and the state of their insurance.

V. SUN LIFE HAD A DUTY TO NOTIFY THE INSURED OF AN ALLEGED FORFEITURE.

The courts have additionally imposed upon insurance companies in cases involving alleged forfeiture and termination of a policy the duty to notify interested parties. In this case, there is no evidence that any notice of premium due or lapse of policy notice was ever sent or received by Bank of Denver, Mr. Calhoun or Mrs. Calhoun.

In the German American case, supra, the Court held that the insurance company could not remain silent allowing the plaintiff to rest securely in the belief that his policies were good until after a loss had occurred. At no time in the instant case was information given to any interested party that the policy was not in force. To the contrary, the information given was that the policy was in force.

In Bankers Life and Loan Assn. of Dallas v. Ashford, 139 S.W.2d 858 (Tex. Civ. App. 1940), Bankers Life issued an insurance policy on the life of one Carter. After Carter's death, the insurance company refused to pay the full face amount of the policy by virtue of an alleged forfeiture. As in this case, Bankers Life tendered a partial payment in full settlement of the claim. The claimant plead that Bankers Life by accepting payment of past due premiums had waived its right to declare the policy forfeited and that it was estopped to deny full liability under the policy. The alleged forfeiture was created by nonpayment of premiums. As in this case, the insurance company had accepted the past due premiums. On receipt of the past due premiums Bankers Life caused an entry to be made on its books to the effect that the policy had been reinstated. Bankers Life, as Sun Life in this case, did not notify the insured that the policy had lapsed and

been reinstated. The insured believed that the policy was in force and effect as of the date of its original issue up to the time of his death. The claimant against the insurance company was successful in the trial court. The trial court found that the insurance company had a right under the terms of the contract to either forfeit the policy or reinstate it, but it was under a duty to notify the insured of any change in the status of the policy. Having failed to do so, the insurance company was estopped from relying on the alleged change, when it raised the issue for the first time subsequent to the death of the insured. In its opinion affirming the trial court, the Court of Appeals stated:

> "It is a well settled rule in the law of insurance that: When, under a policy of insurance, a forfeiture has been worked and the insurer has knowledge of the existence of facts which constitute the forfeiture of the policy, any unequivocal act done after the forfeiture has become absolute which recognizes the continued existence of the policy or which is wholly inconsistent with a forfeiture, will constitute a waiver thereof. (Citations omitted). Under the above rule, in order to bring about a waiver of the forfeiture and reinstatement to the instant case, three conditions of fact are necessary: (1) The insurer must have had knowledge of the facts

> constituting the forfeiture of the policy in question; (2) the forfeiture must have been complete and absolute; and (3) there must have been some equivocal act on the part of the insurer which recognized the continuance of the policy, or which was wholly inconsistent with the forfeiture.
>
> "In this case it is undisputed that appellant had knowledge of the facts constituting the forfeiture, since the record shows that it caused an entry to be made in its books to the effect that the policy in question had been reinstated."

In applying the tests set forth in the opinion of the Texas Court of Civil Appeals to this case, it is quite clear that as to the first condition, any knowledge which Sun Life had as to the facts constituting the forfeiture was known to the same extent at the time early in November when Mrs. Calhoun contacted the company, as was known almost a month later at the time of the death of the insured, and almost a year later when Sun Life definitely refused to make payment of the full amount of the policy. As to the second condition, Sun Life advised Mrs. Calhoun the policy was in force and effect, an admission that there was no complete and absolute forfeiture. As to the third condition, Sun Life advised Mrs. Calhoun the amount of the premium necessary to make payment current, it

added an interest factor thereto, it wrote on Mrs. Calhoun's check when it was received, that it was for reinstatement of policy No. 5100403; it cashed the check and entered on its corporate records the payment of the premium for the full amount of the $15,000.00 coverage.

Directly in point in the instant case, the Texas Court stated in its opinion:

> "The remaining question to be determined is whether there was an unequivocal act by the insurance company subsequent to the forfeiture of the policy which recognized the continuance of the policy. The trial court found that the fact of appellant's accepting a past due premium two days after the days of grace had expired, without notifying insured of its action in declaring the policy lapsed and reinstated, constituted an unequivocal act recognizing the continued existence of said policy according to the terms of its original issuance. Further, as a circumstance tending to show a waiver of its intention to forfeit said policy, no certificate as to the health of insured at the time of the alleged reinstatement was required and appellant continued to receive the premiums on said policy as they became due until the death of the insured, a period of more than fourteen months, without notifying insured that said policy had been forfeited and reinstated.

> Nothing could be more inconsistent with the forfeiture of an insurance policy than the acceptance and retention of the premiums paid by the insured for the full protection afforded by the policy which, it is admitted, the insured thought would be paid to the beneficiary under the policy after his death. Our courts have uniformly held that a waiver may be created by acts, conduct or declarations, and that it may be shown by any competent evidence, express or circumstantial, which tends to prove or disprove such fact."

No one was ever given timely notice by Sun Life that the policy had lapsed. Instead, when contacted, Sun Life affirmatively stated that the policy was in full force and effect and requested Mrs. Calhoun to submit a sum representing total premiums for two years, together with interest. The representation was that the policy was in effect and that it had never been terminated in whole or in part. As stated in German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 P. 27 (1908):

> "Defendants cannot under the circumstances, be permitted to remain silent, treating the policies as valid and binding contracts until a fire occurs, and then assert the invalidity of such contract. For if the insurer has knowledge of a breach of a condition in the policy, but treats it as still

> operative and valid by failing to assert the right to forfeit and cancel the same, the policy will continue in full force and effect." (citations omitted)

VI. AN INSURANCE COMPANY CAN WAIVE CONDITIONS IN ITS POLICY.

The trial court in its findings dealt with the termination and the requirements for renewal of the Family Security Benefit provision (ff. 179-180). The renewal provisions were specifically set out. They were (1) payment of all premiums prior to renewal, (2) a written request for renewal and delivery of the policy to the company, and (3) the amount of term insurance renewed was not less than $5,000.00. The evidence disclosed that conditions 1 and 3 were complied with and that in relation to condition 2, neither the insured nor his wife had the policy in their possession. They relied upon the representations of Sun Life. It knew Bank of Denver had the policy. It is true that the Family Security Benefit provision would terminate and the premium cease to be payable on the termination date or on the date which paid-up insurance becomes effective in accordance with the paid-up insurance provision, whichever is earlier. However, Sun Life had no intention of reducing the premium and in fact, stated it was owing approximately 18 months after March 16, 1963. Further, the policy never became

a paid-up life assurance policy under the terms set out therein. Rather, the entire policy became a paid-up term assurance policy. There is no question that Sun Life intended to reinstate the policy. In fact, it reinstated the policy. On the check (Ex. B, f. 487) which was submitted to Sun Life at its request, Sun Life wrote "reinstate policy No. 5100403," following which it negotiated the check. On its ledger sheet Sun Life made entries clearly indicating that the policy for the full amount of premium was reinstated (Ex. K, f. 496). At some subsequent time, changes were made in Exhibit K . These are self-serving declarations. Sun Life's real intent must be derived from its actions at the time the entries were made on its records.

VII. SUN LIFE IS BOUND BY ITS REPRESENTATIONS.

Sun Life advised Mrs. Calhoun that the policy was still in force. Sun Life told Mrs. Calhoun that to bring the premiums up to date would require payment of $502.14. This figure was arrived at by taking two premiums of $239.70 and adding interest thereto for late payment. This constituted a continuing representation that the policy was in force and Mrs. Calhoun in reliance on this representation made the requested payment which was retained by Sun Life. In the Melick case, supra, the court

in a similar situation stated, at 87 A. 78:

> "It is also to be observed that the situation presented by the issuance of this policy, and the continued collection of premiums upon it which the policy holder was clearly paying under the impression that her policy was valid, has in one of its aspects the force of a continuing representation by the company that its policy holder was right in the impression under which she continued to pay her premiums. If such representation be true, the policy is in fact valid; if it is false, the company should not be permitted to take advantage of its own false representation. 'In order to establish a case of false representation,' as was said in Lomerson v. Johnston, 47 N.J. Eq. 312, 20 A. 675, 24 Am. St. Rep. 410, 'it is not necessary that something which is false should have been stated as if it were true. If the presentation of that which is true, creates an impression which is false, it is, as to him who, seeing the misapprehension, seeks to profit by it, a case of false representation.' With what motive would this humble policy holder have paid over her weekly pittance to the agent of the defendant unless she was under the impression that it was the premium on a valid insurance, and, knowing that such payments were made under this impression,

> how can the defendant, under the doctrine stated, take advantage of it by denying that such payments were in fact what it permitted her to believe that they were?"

Sun Life's conduct is binding upon the company. The Melick opinion aptly summarizing this in the following words:

> "Where such contracting parties are, on the one hand, an insurance company that has formulated the contract in advance with the business foresight and legal advice at its command and, on the other, a person who, upon the presentation of such contract to him must accept or reject it with no other aid than his own limited experience and lack of legal knowledge, a further canon is invoked which is thus stated in our decisions, 'It has become a settled rule in the construction of contracts of insurance.' said Mr. Justice Depue in Carson v. Jersey City Insurance Co., 43 N.J. Law, 300 Am. Rep. 584, that policies of insurance will be liberally construed to uphold the contract and conditions in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy." (87 A. at page 76)

VIII. SUN LIFE WAIVED TERMINATION AND THE ATTENDANT FORFEITURE OF THE INSURED'S RIGHTS AND REINSTATED THE POLICY.

If, as the trial court found, a part of the policy was terminated, Sun Life by its conduct waived the forfeiture and the trial court concluded as a matter of law that no forfeiture was involved (ff. 193-194). This is error. If a part of the policy terminated for nonpayment of premium there was a forfeiture of the rights of the insured and any beneficiary. Sun Life waived this forfeiture which constitutes a waiver of termination, and reinstated the original policy.

The writing on the check and the Sun Life company records indicate a reinstatement of the policy. If the policy had lapsed Sun Life by its conduct waived forfeiture and the policy continued in full force and effect. In Western Empire Life Insurance Company v. Wash, 412 P.2d 910 (1966), Justice Moore, in his opinion quoted from C.J.S. on Insurance as follows:

> "The company may be estopped to deny an acceptance of an application for life insurance where the applicant was led to believe, and did believe that it had been accepted, as where an officer or agent clothed with the authority to transmit information for

> the company as to such matters, notify the applicant that his application had been accepted, or, without expressly saying so, led him to believe that it had been * * *."

The Wash case dealt with an application. There could be little doubt that if this rule is applied to an application for life insurance it would be even more stringently applied by the court in a situation where a policy had in fact been issued several years before with premiums having been paid in full prior to the death of the insured. In support of this the Wash case dealt with a Colorado Statute, C.R.S. 1953, 72-1-25, which protects a company from declarations made by an agent which are not contained in an application. In error the trial court applied this statute to the instant case (f. 198). Justice Moore pointed out in the Wash case that the statute was inapplicable because the statement was not made at the time of taking the application but was made upon delivery of the policy which had been issued following the application made by the deceased. This applies to the instant case, even more so when one remembers that the statement that the policy had not lapsed made to Mrs. Calhoun, was not made by an agent for the company, but by the company itself. The Wash case dealt with failure to pay sufficient premiums, the binding effect upon an insurance company of statements and

representations made by one with apparent authority and the retention and deposit of premiums by the insurance company. On another point, it was identical to the instant case in that it dealt with a situation where the insurance company did not attempt to refund premium checks which had been accepted and deposited until after the company had been informed of the insured's death. As in the instant case, Western Empire's first attempt to repudiate the policy was subsequent to the death of the insured. The judgment of the trial court in favor of the beneficiary of the policy was affirmed. We think it a fair assumption when Sun Life notified Mrs. Calhoun the amount that should be paid, accepted that amount, deposited it, noted receipt on the records of the company, that it would have retained the proceeds until the death of the insured whether such death had occurred in one week, one month, one year or any other period. It is inconsistent with law and equity that an insurance company be afforded the option of retaining premiums paid in full without notification of lapse until after the death of the insured and then be allowed to return the over-paid premiums rather than pay on the policy. The premiums were paid for full coverage under the policy, not for their return subsequent to the death of the insured. The law is well summed up in the statement:

"It is also generally true that if the insured, complying with the demand of

> the insurer for payment of premiums or assessments after a cause for forfeiture has arisen, tenders or pays such premiums or assessments, the cause for forfeiture may be deemed waived." 29A Am. Jur. Insurance § 1077.

The same authority states in Section 1081, "Waiver or Estoppel as to Delinquency in Payment":

> "It is a well-settled rule of law that an insurer which with knowledge of facts entitling it to treat a policy as no longer in force, receives and accepts a premium on the policy, is estopped to take advantage of the forfeiture. It cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums."

It is evident that Mr. Calhoun's failure to pay the premiums on time converted the entire $15,000.00 policy to a term policy rather than a two-part policy which was comprised of part one, whole life, and part two, five-year term assurance. Thus, the policy by its terms became automatic-paid-up term assurance without the necessity of any action on the part of the insured or another party on his behalf. In Farmers Union Mut. Ins. Co. v. Wyman, 221 Ark. 1, 251 S.W.2d 819 (1952), the principal questions

involved waiver by the insurance company in connection with a permit and proof of loss. The Arkansas Supreme Court in affirming the trial court's decision in favor of the insured and against the insurance company, stated, at page 821 of the Southwest Reporter:

> "Also, it has been generally and uniformly held by our Court that forfeitures, such as here claimed by appellant, are not favored. This rule is well stated in National Surety Company of N.Y. v. Fox, supra [174 Ark. 827 296 S.W. 720], which quotes with approval from German Insurance Company v. Gibson, supra, as follows:
>
> "'Forfeitures are not favored in law; and any agreement, declaration or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by conformity on his part, will estop the (insurance) company from insisting upon the forfeiture.'
>
> "The above rule, consistently followed by this Court, was recently reaffirmed in Washington County Farmers Mutual Fire Insurance Company v. Reed, supra. Perhaps the strongest expression of aversion to forfeitures by this Court is found in American Life Association v. Vaden, 164 Ark. 75, at page 88, 261 S.W. 320, at page 324, where the Court

approved the following language:

"' * * * Waiver of a forfeiture though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel, and the courts, not favoring forfeitures, are inclined to grasp any circumstances which indicate an election to waive a forfeiture.'"

Colorado has long followed the same rule as to forfeitures. They must be asserted while there is a default. After an insurance company accepts payment of the premium and retains the same without having given any notice of default, it cannot declare a forfeiture.

As early as 1896 the Colorado Court of Appeals in Mutual Aid Assn. v. Colmar, 7 Colo. App. 275, 279, 43 P. 159 (1896), said in regard to alleged forfeiture of an insurance policy for late payment of premiums:

"Forfeitures must be clearly established. They are defenses closely scrutinized and not favored by courts. As to the supposed forfeiture by failure to pay the $1.00, the claim seems technical and trivial. To have been available, it must have been asserted while the insured was delinquent. Having, during all that time, waived the default, and followed up by a subsequent assessment, it was too

> late, after receiving the money, to go back and declare forfeiture. Authorities in support of these positions are numerous."

In Lagrow v. Woodmen, 75 Colo. 466, 468, 226 P. 1086 (1924), a question similar to that in the instant case arose. The Court stated on this point in connection with an alleged default on an insurance policy by failure to pay premium:

> "The waiver by the society is established by the evidence that payments were made and accepted after the deceased was in default, and the society was aware of such defaults."

In Reliance Co. v. Wolverton, 88 Colo. 353, 296 P. 793, the Supreme Court succinctly summed it up as follows:

> "The insurance policy was for $3,000 payment of which the company resisted on the ground that an insurance premium due July 11, 1927, was not paid when due nor before the end of the period of grace as provided in the policy, and that by reason thereof the policy ceased and became void on or about the 12th day of August, 1927. Plaintiff's amended replication admits that the premium was not paid or tendered before November 12, 1927, but avers that the company accepted the premium and waived payment when due.

> The company contends that the acceptance was conditioned on Wolverton's furnishing a health certificate, but plaintiff contends that the acceptance was unconditional. This is the only substantial point disputed."

In its opinion the Court stated:

> "Forfeitures are not favored and courts should be liberal in construing the transaction in favor of avoiding a forfeiture."

In affirming a judgment in favor of the beneficiary of the deceased policy-holder and against the insurance company the Court said:

> "A condition in an insurance policy that it shall be void if premiums are not paid when due may be waived. (citations omitted)
>
> "As said in Grigsby v. Russell, supra, at page 155 of the opinion. 'A condition in a policy that it shall be void if premiums are not paid when due, means only that it shall be voidable at the option of the company.' * * * 'A waiver by the society is established by the evidence that payments were made and accepted after the deceased was in default, and the society was aware of such defaults.'

> "After the receipt and unconditional acceptance of the money it is too late to declare a forfeiture." (citations omitted)

The Court further upheld the proposition that a party always has the option to waive a condition made in its own favor.

The case of Insurance Co. v. Campion, 71 Colo. 156, 204 P. 604 (1922), extended the doctrine of waiver far beyond the instant case. In the Campion case the insurance policy provided that it was not in effect until the premium was paid, the loss insured against occurred before the first premium was paid. The Court held that the provision in the policy was waived by the acts of the defendant insurance company's general agent in retaining the premium after it was paid, in accordance with an agreement made between the insured and the general agent.

Knights of Maccabees v. Pelton, 21 Colo. App. 185, 121 P. 749 (1912), is similar and covers many of the points presented in the instant case. The defense in the Maccabees case was similar to a defense stated by Sun Life in this case. In the Maccabees case the Court set out the defense as follows:

> "Appellee, plaintiff below, recovered judgment in the District Court on a

> policy of life insurance issued by appellant to her deceased husband. The only defense interposed, which we deem of sufficient importance to consider, was based upon the contention that the assured had been suspended for nonpayment of dues, and thereafter, had never been regularly and legally reinstated."

In the instant case the trial court erroneously accepted this defense. In its Findings of Fact and Conclusions of Law the trial court held that the policy had terminated and had not been renewed. It further discounted forfeiture, waiver or estoppel by Sun Life (ff. 180-183, 190-195). This was clearly error and contrary to Colorado law. The Maccabees case establishes the principle that should have been followed by the trial court. In that case following payment of the premiums upon the representations of the insurer, as in the instant case, Pelton the insured died. No offer of premium refund was made prior to his death. The insurer requested proofs of death as did Sun Life in this case. These were submitted, as in the instant case, protest was not made until subsequent thereto. The Colorado Court commented on this as follows:

> "After Pelton's death, application was made to the head organization, by appellee's attorney, for proof of death blanks, which were forwarded

> and thereafter proof of death was regularly made and filed with said organization, without any intimation up to that point, that Pelton was not regarded as a member in good standing.
>
> "So long as Pelton lived, no protest whatever was made by the supreme Tent to the local Tent concerning their exacting and accepting dues from him, and no offer was made by either body to return what he had paid, until after the death of Pelton had become known to the supreme officials. It is upon this state of facts, which are undisputed, that appellee bases her claim of waiver by the order, even if it be granted that her husband was in default for the months of July and August."

The decision in the Maccabees case affirmed the judgment of the trial court in favor of the beneficiary under the insurance policy as against the insurance company.

In almost all cases involving termination of insurance policies for non-payment of premiums, the position taken by the insurance company has been that the policy had terminated. The cases hold that by its actions an insurance company can reinstate terminated policies. Therefore, it is immaterial as to whether the policy terminates during a particular term, or at any other time. If by its actions, Sun Life

reinstated the policy, it would be reinstated on the terms of the original contract. Certainly there is no legal bar to an insurance company entering into a contract or reinstating a contract which has ended. Western Empire Life Insurance Company v. Wash, 159 Colo.523, 412 P.2d 910 (1966), 29A Am. Jur. Insurance §§ 1077, 1081. In the absence of contrary provisions, reinstatement of a contract creates a contract containing the same terms and conditions as the original contract. German Am. Ins. Co. v. Hyman, 42 Colo.156, 94 P. 27 (1908). Dannhauser v. Wallenstein, 169 N.Y. 199, 62 N.E. 160 (1901); McDonnel v. Alabama Gold Life Insurance Co., 85 Ala. 401, 5 So. 120 (1888).

IX. MATERIAL ALLEGEDLY CONTAINED IN THE RATE BOOKS OF SUN LIFE IS NOT MATERIAL.

Following the close of trial on November 22, 1967, Sun Life on November 24, 1967 filed a Motion to Reopen Defendant's case (f. 174). The purpose was to show that the company's rate books provide that if an insured is 49 years old he would have to pay an annual premium of $114.70 for $10,000.00 coverage under a Family Security Benefit (f. 175). Bank of Denver admitted these figures would be shown in rate books of Sun Life. It was also stipulated that neither Bank of Denver, the insured or Mrs. Calhoun had knowledge of these rate books, which

were not offered as evidence. Further, it was agreed that the only knowledge of premiums Bank of Denver or the Calhouns had were those set out in the policy (Ex. A, f. 480). Bank of Denver objected to the relevancy and materiality of these books and further advised the trial court and Sun Life that if an insurance company adjusts premiums, changes rates, or waives premiums this has no effect on a third party who has no notice. The trial court included these figures in its Findings of Fact (f. 180). This was done to show that the premium which Sun Life told Mrs. Calhoun should be paid and which was paid to reinstate the policy, was not sufficient. This was error.

There is no dispute that Sun Life has rate books and for what it is worth, which Bank of Denver believes is nothing, that the rate books would indicate the figures shown therein. The same rate book would show that upon payment of premium in the amount of $68.70 per year for term insurance, Gerald B. Calhoun at 49 years old could have obtained a policy with a Family Benefit provision in the amount of $5,900.00. This is brought up only to show that the figure of $11.70 per $1,000.00 of insurance, is not inviolate. Again, this applies to renewal and not to reinstatement. Sun Life's rates and rate books are within the knowledge and custody of the company. Sun Life establishes its rates. These are

subject to change. There was no negotiation between Mrs. Calhoun and Sun Life as to the amount of premium. Mrs. Calhoun paid what she was told to pay. It is also clear that neither Bank of Denver nor the Calhouns had any knowledge of the rate books, the contents thereof, the cost of insurance, or the amount of insurance that could be purchased for $239.70, $68.70 or any other amount. The only information that was given to Mrs. Calhoun was when she made inquiry as to the $15,000.00 policy on the life of Gerald B. Calhoun and was advised that to bring the premiums to date would require the payment of $502.14.

The Maccabees case, supra, in dealing with the argument of the insurance company that a renewal of term insurance requires the payment of higher premiums because of the increased age of the insured, stated:

> "For reasons not necessary here to discuss, his rates seem to have been increased, so that he ought to have paid $9.00, or thereabouts, for each of the months of July and August, whereas, he paid but three dollars and some cents, for each of said months. Thus, it will be seen, the question of his default is based entirely upon the difference between the amount he actually paid, and the amounts he should have paid for said months. The amounts that he actually

> paid for said months was all that was exacted of him by the officers of the local Tent, and these sums, as well as the sums he paid for the two following months, when he paid the full amounts claimed of him by both the local and supreme Tents, were forwarded to and retained by the head officers of the organization. If it be granted that Pelton had not paid the full dues for July and August there is no evidence that his failure in this respect was wilful. On the contrary, his conduct in this respect appears to have been occasioned by representations made to him by the officers of the local Tent, whose advice and suggestions he adopted and acted upon in all substantial features."

X. THE INSURABILITY OF MR. CALHOUN IS NOT RELEVANT OR MATERIAL.

Sun Life argued that because Mr. Calhoun was ill at the time the premiums were paid in full, he was not insurable, this despite the fact that Sun Life made no inquiry as to the state of Calhoun's health.

On the basis of hospital records (Exs. 1, 2, 3, ff. 500, 501, 502) none of which should have been admitted into evidence, the trial court entered its Finding No. 11 (f. 184). It further found that Mr. Calhoun was not insurable on November 9, 1964 and concluded that

because of this as a matter of law Sun Life was not estopped (ff. 185, 186). This was error. The only basis for this finding, to which the trial court attached so much importance was based upon a stipulation that the records were authentic and that if called the doctors and nurses who wrote them would testify as to the facts set forth therein. Bank of Denver denied their relevancy and materiality(ff. 456-458). There was no evidence on insurability. This was arrived at, based only upon the discussion of counsel as follows:

"MR. HAWLEY: In response to the first stipulation which I will -- in order to avoid any misunderstanding, I will reiterate as I understand it -- the first stipulation would be that Mr. Turner's witness would testify that in connection with the Defendant's Exhibits 1, 2, and 3 of the medical reports that if he examined those medical reports, in his opinion, the person who was the subject of those reports would not be insurable -- am I correct on that?

"MR. TURNER: That's right.

"MR. HAWLEY: And we would have stipulated and advised Mr. Turner that we would admit the authenticity of these medical reports -- the fact, as I have said before, that the doctors or

nurses, if called to the stand, would testify they wrote that information on there at the time. We have further stipulated with him that if he called his witness from Canada, that that witness would testify that in his opinion the records would indicate the non-insurability of a person who is suffering from these maladies, and we would so stipulate. I had advised Mr. Turner and for the record, I again state that we did not admit the competency of the adjustor whom he had mentioned to us was not a medical doctor -- his opinion would be based solely on that as an underwriter, that of an insurance adjustor, and not as a person learned in medicine.

"MR. TURNER: 'Underwriter' I think is the correct terminology.

"MR. HAWLEY: 'Insurance underwriter.' The next portion I bring to the attention of the Court is that his testimony would be based upon those records as he examined them subsequent to the death of Mr. Calhoun without being an admission that he examined those records prior to or at the time of the death of Mr. Calhoun -- and finally, that we reserve an objection to the competency and -- I mean, pardon me, not the competency, but the materiality and relevancy of the testimony because there was no evidence that anyone examined these records or made inquiry

about them or for them of Mrs. Calhoun or plaintiff of this case. Have I correctly -- (Discussion off the record.)

"MR. HAWLEY: There was one point brought to my attention by Mr. Starr. I asked Mr. Turner about this because I do not recall -- as I recall in that stipulation, I overlooked this -- you mentioned, Mr. Turner, the man who testified that no insurance company would insure Mr. Calhoun --

"MR. TURNER: -- in his opinion --

"MR. HAWLEY: -- in his opinion --

"MR. TURNER: Yeah, he can't state that as a fact.

"MR. HAWLEY: I didn't -- I don't recall you mentioning this to me at a prior occasion. I certainly would not deny that this man would state "in his opinion' but I certainly would not feel that that would be binding upon what some other insurance company who was not a party to this suit might or might not do." (ff. 464-469)

The only support for Finding of Fact No. 12 was the stipulation that if an underwriter of Sun Life had been called to testify, he would have testified in his opinion that Mr. Calhoun would not have been insured by Sun Life. It was

admitted that such a witness was not a person possessed of medical knowledge and that his testimony would be opinion. No underwriter was called as a witness. What he might have said on direct or cross-examination is mere conjecture. It is not a proper basis for a finding of fact followed by a legal conclusion of uninsurability. No standards of what constitutes insurability were ever established by evidence presented by Sun Life. It was undisputed that prior to October 26, 1964, Mr. Calhoun was an exceptionally active man in good health. It is undisputed that Sun Life never made any inquiry as to the state of Calhoun's health when it reinstated the policy. It is undisputed that doctors treating Mr. Calhoun were not sure of what his illness was. It is undisputed that neither Mr. Calhoun nor Mrs. Calhoun had any knowledge that Mr. Calhoun would not quickly return to good health. In any event, evidence of insurability was not required for reinstatement.

There is no doubt that large numbers of people who are covered by life insurance, die. There is little doubt that on their death bed they would probably not be insurable. This does not void an insurance contract made many years prior under conditions imposed by the insurance company which in the interim has accepted payment of the premiums. There is no evidence that Mr. Calhoun

was affected by ill health in March of 1963 or March of 1964, the premium due dates. In fact, he was in good health on these dates. Sun Life could have submitted a notice of premium due and a notice of forfeiture following the nonpayment of a premium. It might even have notified the Bank of Denver. In fact, it did not do any of these things. There is no evidence that Mr. Calhoun, a man in good health, who in October of 1964, was riding a cutting horse in a rodeo, a pursuit which he actively followed, would die on December 1, 1964, or for that matter, at any other time. Any reasonable woman could be assumed, in a situation when she was handling certain affairs of her husband, to check on his insurance policies together with other matters (ff. 324-325). Even, had Mrs. Calhoun believed that her husband was afflicted with a fatal illness, if the policy was in effect as she had been informed by the insurance company, the insurance company would still have the obligation to pay. This problem of ill health has been met by the courts in Colorado. The decisions based upon facts similar to this case are in accord that the insurance company cannot escape its liability by viewing the situation in retrospect as an excuse for its failure to act timely and for misleading those who rely upon it.

In Connecticut Co. vs. Colorado Co., 50 Colo., 424, 116 P.154 (1911), the

insurance company set up 11 separate defenses each of which related to an alleged breach of some condition of the policy which the company argued was sufficient to defeat plaintiff's action for recovery. In reaching a decision, against the insurance company and in favor of the insured, the Supreme Court stated:

> "The defendant loses sight of a very important fact in this case, and that is, that no inquiry was made on the plaintiff about the matters alleged to have been concealed, and that no written application was made for this insurance. 'Concealment is the designed and intentional withholding of any fact, material to the risk, which the assured in honesty and good faith ought to communicate.' -- Clark v. Ins. Co., 40 N.H. 333. So that a concealment involves, not only the materiality of the fact withheld and which ought to have been communicated, but also the design and intention of the insured in withholding it, and of course, the condition in the policy must be construed in the light of this definition of a concealment with which it is concerned. If an inquiry is made about a material fact and that fact is not disclosed upon such inquiry, it is very likely that the person questioned intended to withhold it; but if no inquiry is made, the intention to withhold the fact is not so

plain. Hence, the authorities make a distinction between cases where inquiry is made and cases in which no inquiry is made. The rule is stated in Wood on Insurance, 388:

"'When no inquiries are made, the intention of the assured becomes material, and to avoid the policy, they must find, not only that the matter was material, but also that it was intentionally and fraudulently concealed.'"

This is summarized in the following statement of general law:

"To effect a waiver, it is sufficient it has been held, that the insurer knows of the default in payment of premiums existing as a cause of forfeiture, notwithstanding the insurer does not know at the time of accepting the payment of premium that the insured is ill. The acceptance of the over-due premium continues the original contract in force as though the premium were paid in time, in which case the illness of the insured would not constitute the ground of forfeiture." 29A Am. Jur. Insurance § 1081.

In the case of Pomeroy v. R.M. Ins. and Sav. Inst., 9 Colo. 295, 12 P. 153 (1886), the insured, as Mr. Calhoun, had assigned his policy to a third party

in consideration of monies advanced. The policy contained the condition that if the insured should become so far intemperate as to impair his health, the policy would become void. The insured was in default in payment of his premiums and was forfeited. The forfeiture was declared by the company which had knowledge of the insured's intemperate habits. The delinquent premiums were paid by the third party and were accepted and kept by the insurance company. Shortly thereafter the insured died. The company had knowledge of the assignment of the policy. Following the death of the insured the insurer denied its obligation under the terms of the policy on the grounds that the policy had been forfeited. The Court held that by accepting the past due premiums and having full knowledge of the assignment of the policy the company waived the condition respecting the impairment of health of the insured, stating:

> "The company cannot be allowed to treat the contract as valid for the purpose of collecting dues, and as void when it comes to paying the insurance; or, as otherwise stated, 'the company cannot be permitted to occupy the vantage ground of retaining the premium if the party continued in life, and repudiating it if he died.'" (citations omitted)

In the Pomeroy case the insurance company went a step further than Sun Life. It made some inquiry as to the state of the insured's health. Sun Life made no inquiry as to this nor did it make any requirement other than that the third party, Mrs. Calhoun, submit the sum of $502.14 which the company retained.

XI. SUN LIFE IS BOUND BY THE ACTIONS OF ITS DENVER OFFICE.

The trial court, in error, in its finding and conclusions has included provisions in the policy pertaining to reinstatement and to the limitations of authority imposed upon Sun Life personnel in connection with the alteration of its contracts and the waiver of its rights (f. 187).

Mrs. Calhoun did not know the status of the policy when she contacted Sun Life in November 1964.. She was not attempting to obtain insurance on the life of Mr. Calhoun. This he had previously accomplished years earlier by obtaining policies from Sun Life. She was advised by Sun Life that the policy was still in force and effect because the reserve was sufficient to cover the premium payments.

Mrs. Calhoun looked to Sun Life's Denver office. Was it reasonable to expect that she was to contact Montreal, Canada? Even if we assume the

information she received in a contact with Montreal would be different than that she received in her contact with the Denver office, still the Denver office had issued the policy. The policy had been issued on the life of a Colorado resident. The policy stated that amounts due under the policy were payable at the Denver office. Sun Life is bound by the actions of its branch office in Denver.

Sun Life is authorized to do business in the United States and the State of Colorado. One of the prime reasons for the requirement to so qualify itself, is to avoid difficulties which would be encountered by citizens of the United States if they had to transact all of their dealings with Sun Life in the Province of Quebec, Canada. Colorado law controls the policy.

In German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 P. 27 (1908), the Colorado Supreme Court specifically dealt with the question as to whether or not an insurance company is bound by the action of its agents despite language in the policy that it is not. In the German American case the policy involved was issued by an agency which represented more than one insurance company. In the instant case the actions of the Denver office would be even more binding as it is an office of Sun Life itself. The Court, page 165 of the Colorado Reports stated:

"The knowledge of Wright and Stotesbury (the agents) was the knowledge of the

defendant companies; and their action, under the circumstances, may be presumed to have been the action of those companies. Whatever view we would adopt, were Wright and Stotesbury themselves the insurers, must, therefore, be adopted with reference to these defendants."

In dealing directly with language of limitation of authority, the Supreme Court stated, at page 168:

"Nor does the presence of a provision in the policy that no officer or agent shall have the power to waive any of the restrictive clauses except where such waiver is expressly authorized, or that such waiver when permissible, shall in no case be effective unless written upon or attached to the policy, change or modify the foregoing conclusions. The general agent's power to make and rescind contracts implies the power to modify the same. The insurer is estopped from asserting a forfeiture on the ground of such agent's want of authority to waive the forfeiture or because of absence of the formal written endorsement upon the instrument suspending the prohibitory provision." (citations omitted)

In Farmers Union Mut. Ins. Co. v. Wyman, 221 Ark. 1, 251 S.W.2d 819 (1952), the court stated, page 821 of the Southwest Report.

"If an agent pretends to have authority to make an adjustment, the insured has

a right to rely on it."

In Colorado, this doctrine is extended to general agents waiving conditions of forfeiture even when it is in excess of their actual authority, Insurance Co. v. Campion, 71 Colo. 156, 204 P. 604 (1922). In the Campion case affirming judgment against the insurance company and upholding a waiver the Supreme Court stated, page 159 Colorado Reports:

> "As such general agents they were empowered to waive conditions of forfeiture in the policy, and it should be held that their knowledge is the knowledge of the insurer, notwithstanding any excess of their actual authority."

No one should have more knowledge of its insurance policies than Sun Life. Its business is the selling of insurance. If its policyholders cannot rely upon information received from Defendant, what other source could they look to.

Sun Life cannot be allowed to treat the contract as valid for the purpose of collecting premiums and then declare it void when it had an obligation to pay the death benefit. Pomeroy v. R.M. Ins. and Sav. Inst., 9 Colo. 295, 12 P. 153, (1886).

In the Maccabees case, supra, the supreme Tent occupied a position similar

to Sun Life's home office in Montreal. The local Tent occupied a position similar to its Denver office. Questions arose as to the authority of the home office and the branch office and the lack of authority of the branch office to bind the home office. The Court stated:

> "If the general rules of law pertaining to agents, and the doctrine of waiver may in this manner be entirely swept aside, then foreign corporations or organizations would be permitted to transact business in this state without responsible agents of any sort, thus setting at naught our wholesome laws regulating foreign corporation. It has been said by the supreme court of this state: 'That contracts like the one in suit are life insurance policies is, in this jurisdiction, settled beyond recall' -- Woodmen v. Sloss, 49 Colo. 177."

> "In collecting and forwarding dues, the local officers are the agents of the order, anything in their constitution and by-laws to the contrary notwithstanding.-- Supreme Lodge K. of H. v. Davis, 26 Colo. 253."

As to Finding of Fact No. 14, there is no evidence as to who with Sun Life altered provisions of the policy, or as to what position was held by the party to whom Mrs. Calhoun talked. It might or might not have been a party listed

in the policy. Mrs. Calhoun was not referred to anyone else (f. 187).

There was not just one call. There were three. In the third call Sun Life called Mrs. Calhoun and gave her the information (ff. 331-335). There is nothing in the record that establishes a lack of authority on the part of the person who talked with Mrs. Calhoun. Sun Life was bound and the trial court's finding is based not upon insufficient evidence, but on complete failure of evidence.

XII. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE PERTAINING TO SUN LIFE'S BUSINESS PROCEDURES AND ON THE BASIS OF SUCH INSUFFICIENT EVIDENCE HOLDING THAT IN THIS CASE SUN LIFE ACTED IN A TIMELY MANNER.

The trial court found that Sun Life's business procedures excused it from liability in this action (ff. 187, 188). On this basis it concluded as a matter of law that Sun Life's error in computation, though constituting "an oral contract to reinstate the policy in question," created a voidable contract subject to rescission and that Sun Life had rescinded (ff. 196-199). Counsel for Sun Life voluntarily withdrew his request for admission of these company procedures:

"MR. HAWLEY: Now, as to the second stipulation -- as I understand it,

it was that Sun Life customarily goes through a procedure where collections from its branch office go to its home office in Montreal, Canada, and they are then handled through an accounting procedure or a computer procedure and within a couple of weeks, the results of this come back to the branch office -- am I correct on that?

"MR. TURNER: Well, yes, and that the records of the company show that this particular $502.14 left the Denver Office -- the record of it left the Denver Office the day it was received, November 10th, 1964, and was shipped up to Canada on that date and was processed on this bimonthly computer cycle, Cycle B23, and the results of that processing were received by the company, of people that receive it, on December 3rd, 1964.

"MR. HAWLEY: Well, let me ask you this, if I might, Mr. Turner -- this man from Canada could not possibly testify, could he, that this check, $502.14, was sent to Canada --

"MR. TURNER: No, no.

"MR. HAWLEY: -- on this particular day?

"MR. TURNER: The record of the check -- the check was actually negotiated in Denver, I believe.

"MR. HAWLEY: Yes.

"MR. TURNER: But the record of the $502.14 payment was transmitted to the home office on December 10th.

"MR. HAWLEY: I see - well, I think the check speaks for itself. I believe it was cashed on November the 10th or some such date in Denver -- deposited in Denver.

"MR. TURNER: Right -- that check was not sent to Canada physically.

"MR. HAWLEY: Now, this particular stipulation, Your Honor, is one that Mr. Turner and I discussed during the recess. We had some misunderstanding upon it. I don't know whether this procedure is relevant or material or not. I would certainly agree that if Mr. Turner called a witness from Canada that that man would attempt to testify and would insofar as the Court would let him, over any objection I might make, testify as to what the company's procedures were. I don't know what they are. I am not going to dispute that they normally go through this computing cycle. I would object to the point that simply because this is a customary procedure of the company that I could definitely admit that this matter was handled in this way. I would go one step further and say that I don't know that it wasn't handled in

this way, but I couldn't stipulate to something that I don't know anything about. I don't know whether this is material or relevant but I would agree that Mr. Turner's witness would stipulate that this is the normal cycle, if I am using the correct terminology, with his company.

"MR. TURNER: I don't know that it is material or relevant, either, Your Honor, and if you want to make an objection, I will withdraw the offer. I am not sure that in my mind it has any relevancy or materiality and if you want to object to it on that basis, I will accept that objection.

"MR. HAWLEY: Well, I will object then, and accept Mr. Turner's withdrawal. I don't think we have any dispute to the fact here that the money was paid and the man died and that's really what is material.

"MR. TURNER: So as I understand, you accept the stipulation and object to it on the basis of irrelevancy, and I will withdraw it.

"MR. HAWLEY: Yes." (ff. 469-475)

There is not one scintilla of evidence as to what intra-company procedure Sun Life used in connection with processing of the premium of $502.14.

Sun Life's records produced under a subpoena duces tecum consisted of a limited number of documents. The subpoena requested production of all books, papers, correspondence, ledger sheets, bank statements and documents of any kind without limitation relating to the action and relating to any and all life insurance policies and riders on the life of Gerald B. Calhoun, with Sun Life Assurance Company of Canada from January 1, 1959 to February 7, 1966. There was no evidence of magnetic tape or other computer data contained in the files. To the contrary, Exhibit K Defendant's ledger sheet, indicated that the full amount of premium $239.70 for the policy assigned to Bank of Denver, was credited for the years 1963 and 1964 plus the interest required by the policy for reinstatement (f. 496).

Exhibit L , a written memorandum from Sun Life's Canadian office to the Denver office, dated December 8, 1964, subject 5100403, file REF 1859901-Calhoun-D/C 1964, originally stated:

> "We are in receipt of your letters of death for the above numbered policies. We are attaching a copy of a memo which we received from our policy administration department regarding the figures under policy number 5100403. Please check your records against the memo and if you still disagree, we trust you will let us know.

"In addition to our usual claim requirements, we will require certified copies of letters testamentary or letters of administration." (f. 497)

Thus, both the Canadian office and the Denver office had been aware of this matter and that there was some disagreement between them as to the interpretation of the policy. At the very least, this indicates an ambiguity in the policy as between the two offices. The policy was issued in Denver. The premiums were paid in Denver and all amounts under the policy were payable at the company's Denver office. It appears that subsequently Exhibit L was altered by erasure and deletion, as shown on Exhibit M , of the word "still" before disagree. Additionally, after the period following "administration" at the end of the memorandum, someone in a different handwriting inserted the language "in order to refund the premiums" (f. 498). These changes were probably made in order that the memorandum would more nearly reflect Sun Life's position in this lawsuit. The changes evidence an inconsistency in the position of Sun Life. If letters testamentary or letters of administration are required, in order to refund the premiums, it seems clear Sun Life intended to retain the full $502.14 if Calhoun had not died. If the policy had terminated, Sun Life did not need proof of death to refund the premiums but more

reasonably would have refunded them to Mr. Calhoun, during his lifetime. Why would Sun Life wish to retain the premiums until after the insured's death and require proof of death to refund premiums paid on a policy which the company denies existed?

Sun Life had the same information concerning the nonpayment of premiums available to it when Calhoun was in sound health and after his apparent mild illness as it had following his death. It cannot, after Calhoun's death, rely on a supposed slowness in processing premiums to terminate a contract which it in fact had reinstated. Bankers Life and Loan Assn. of Dallas v. Ashford, 139 S.W.2d 858 (Tex. Civ. App. 1940).

XIII. THE TRIAL COURT ERRED IN CONCLUDING THAT BANK OF DENVER SUFFERED NO DETRIMENT BECAUSE MR. CALHOUN WAS COMPLETELY UNINSURABLE AND SUN LIFE'S ACTIONS CAUSED NO CHANGE OF POSITION.

The trial court's Conclusions of Law set forth that there was no material change in the position of the Bank of Denver or the insured (f. 196). There was most assuredly a change in position. Had Sun Life notified the insured subsequent to March 16, 1963 that the Family Security Benefit provision of the policy had terminated, the insured could have reinstated earlier under the

reinstatement provision of the policy or being in sound health, certainly until the latter part of October 1964, could have obtained insurance elsewhere. Bank of Denver could have been protected in its loan advanced to the insured under the line of credit as late as September 1964 by assignment of a policy giving full protection, or in the alternative the Bank could have requested other security from Mr. Calhoun or finally, not made advances to the full extent of the line of credit, thus protecting itself from loss. However, Sun Life did not notify the insured nor Bank of Denver of the termination of the policy, or any portion thereof, or of the fact that premiums were past due and that the policy was being continued as a term policy under the paid-up insurance provisions. Under this type of insurance no additional premiums were necessary. The policy would continue until the reserve was exhausted. If properly notified the insured could have reinstated earlier or requested a paid-up policy. This would have materially effected both Bank of Denver and the insured. Sun Life had a duty to give notice. The records of Sun Life evidence the fact that it was aware of a possible problem concerning Mr. Calhoun's insurance (Ex. K, f. 496). It took no action to do anything about it. At law, Sun Life was charged with the knowledge of the conduct of its own business. Kennedy v. Pacific Indemnity Co., 267 F.Supp. 16 (D. Ore. 1967);

Melick v. Metropolitan Life Ins. Co., 84 N.J.L. 437, 87 A. 75 (1913). Instead of advising of termination of the policy or any part thereof, Sun Life, to the contrary, represented that the policy was in force and effect. Sun Life is bound by these representations. Melick v. Metropolitan Ins. Co., 84 N.J.L. 437, 87 A. 75 (1913); Bankers Life and Loan Assn. of Dallas v. Ashford, 139 S.W.2d 858 (Tex. Civ. App. 1940); German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 P. 27 (1908).

These facts in addition to Sun Life's own records indicate an ambiguity in the policy, and the trial court erred in finding otherwise as a matter of law (f. 192). If the insurability of Mr. Calhoun had been of any consequence or was material, investigation of the physical condition of Mr. Calhoun, the insured, would have been made. It was not material because the policy could be reinstated within two years without evidence of insurability being submitted. The required two years had not elapsed -- Sun Life would have to reinstate the policy. If Sun Life had breached the contract by failure to reinstate within the two years, Calhoun, could if properly notified, have obtained insurance elsewhere prior to his illness. All of these ambiguities are to be construed against Sun Life which prepared the policy on its form, was experienced in the insurance business, maintained

records pertaining to the policy, and supplied the form (Ex. E, f. 490), upon which assignment of the policy was made by Calhoun to Bank of Denver. Columbian Co. v. McClain, 115 Colo. 458, 174 P.2d 348 (1946); Connecticut Fire Insurance Co. v. Colo. Leasing, Mining & Milling Co., 50 Colo. 424, 116 P. 154 (1911). In reinstating the policy Sun Life was exercising its right to contract and in so doing there was nothing to prevent it from waiving a condition made in its own favor. Capital Livestock Insurance Co. v. Campion, 71 Colo. 156, 204 P. 604 (1922); Reliance Life Insurance Co. v. Wolverton, 88 Colo. 353, 296 P. 793 (1931).

Bank of Denver, Mr. Calhoun and Mrs. Calhoun relied on Sun Life, each to his detriment. There was a change of position. Sun Life is estopped to deny this and should be liable for the result.

XIV. INSUFFICIENCY OF DAMAGES.

The Judgment of the court below awarded the Bank of Denver the sum of $5,727.98. This sum was arrived at by taking the amount of insurance under the extended term provisions of the policy a total of $5,106.00 refunding the premiums paid by Mrs. Calhoun on November 9, 1964, $502.14 and paying interest totaling $119.84 based on the rate of three per cent from two months after the date of Mr. Calhoun's death, December 1, 1964

to October 18, 1965. Bank of Denver contends that it is entitled to $5,106.00 representing the insurance under the extended term policy, plus interest from the date of Mr. Calhoun's death on December 1, 1964, to October 18, 1965, the date Sun Life tendered Exhibit B (f. 489), at six per cent, the legal rate, totaling $280.83, $10,000.00 payable under the Family Security Benefit provision of the policy and $1,788.00 representing interest on the $10,000.00 at six per cent from the date of death of Gerald B. Calhoun, to the date of trial of this action, November 22, 1967. Total damages of $17,174.83, plus interest which might accrue at the statutory rate following the date of trial.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that this Court reverse the Judgment of the court below and remand for an award consistent with the opinion of this Court and granting the relief requested below.

Respectfully submitted,

IRELAND, STAPLETON, PRYOR & HOLMES
Robert C. Hawley
Kenneth L. Starr
1700 Broadway, Suite 2017
Denver, Colorado 80202
266-2631

Attorneys for
Plaintiff in Error

September 1968