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Richmond, Va.

Record No. 7305

In the Supreme Court of Appeals of Virginia at Richmond

NANCY C. COLEMAN

v.

NATIONWIDE LIFE INSURANCE COMPANY

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

RULE 5:12—BRIEFS

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HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7305

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of October, 1969.

NANCY C. COLEMAN, Plaintiff in error,

against

NATIONWIDE LIFE INSURANCE Company, Defendant in error.

From the Circuit Court of the City of Portsmouth
Henry W. MacKenzie, Jr., Judge

Upon the petition of Nancy C. Coleman a writ of error is awarded her to a judgment rendered by the Circuit Court of the City of Portsmouth on the 29th day of May, 1969, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Nationwide Life Insurance Company was defendant; upon the petitioner, or someone for her, entering into bond with sufficient security before the clerk of the said court below in the penalty of $500, with condition as the law directs.

RECORD

page 20 } INSTRUCTION NO. 2

The Court instructs the jury that the Defendant, Nationwide Life Insurance Company, issued its policy, number 522-392, on September 12, 1958 insuring the life of Ray E. Coleman and designating Nancy C. Coleman as beneficiary, and that the said policy was lapsed, but if you believe from the preponderance of the evidence that the policy was reinstated by the Defendant prior to the death of the said Ray E. Coleman, then your verdict must be for the plaintiff.

Granted 2/17/69. H.W.M.

* * * * *

page 23 } INSTRUCTION NO. 5

The Court instructs the jury that if they believe from the evidence that Ray E. Coleman failed to pay the monthly premiums as they became due, and that by reason thereof he had forfeited his right to the policy, but if they further believe from the preponderance of the evidence that the Defendant, by its officers, waived or led the insured to believe they had waived any right to rely upon the lapse, then they must find for the Plaintiff.

Granted 2/17/69. H.W.M.

* * * * *

page 28 } INSTRUCTION NO. 2-A

The Court instructs the jury that if you believe by a preponderance of the evidence that the Defendant, Nationwide Life Insurance Company, issued its policy, number 522-392, on September 12, 1958 insuring the life of Ray E. Coleman and designating Nancy C. Coleman as beneficiary, and if you believe further that the premiums were paid and in effect that said policy was in effect until the date of the death of Ray E. Coleman on April 16, 1968, or if you believe that the said policy was lapsed but was reinstated by the Defendant prior to the death of the said Ray E. Coleman then your verdict must be for the Plaintiff.

Refused 2/17/69. H.W.M.

page 29 } INSTRUCTION NO. 5-A

The Court instructs the jury that even though they may believe from the evidence that the payment of premiums on the policy sued on was not made while the policy was in full force and effect, yet, if they believe from the evidence that the Defendant company received and accepted subject application for reinstatement and retained the premiums paid, your verdict must be for the Plaintiff unless you believe that it has been proven by a preponderance of the evidence that the application for reinstatement contained misrepresentations which were material to the risk.

Refused 2/17/69. H.W.M.

* * * * *

page 30 } INSTRUCTION NO. 6-A

The Court instructs the jury that if they believe by a preponderance of the evidence that in attempting to cancel and reinstate the policy of insurance in question, that said Ray E. Coleman was following instructions given him by an representative of the Nationwide Life Insurance Company, then they must find that the Defendant waived its rights to forfeit the said policy because of any misrepresentation of Ray E. Coleman.

Refused 2/17/69. H.W.M.

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page 32 }

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VERDICT

We, the jury, find for the plaintiff and fix her damages at $6378.80.

Foreman Henry F. Berck

17 Feb. 69

* * * * *

page 34 }

* * * * *

MEMORANDUM
May 28, 1969

Ray E. Coleman was the insured under two life insurance policies issued by Nationwide Life Insurance Company, one being a "family policy," and the other a decreasing term policy of seventeen years, which is the subject matter of this litigation.

The decreasing term policy was issued in 1958, and the insured made his monthly payments of $5.60 upon the premium until November 15, 1967 at which time the insured wrote to the company advising that he would like to cash it for its surrender value at that time. The company replied under date of November 30, 1967 that the term policy had no cash value, but had accumulated dividends of $134.72; but their records showed the existence of the family policy which did have a cash surrender value and inquiry was made whether that was the policy he intended to cash. He was advised that if he did not want to cash in his family policy the term policy would lapse on December 12, 1967 if no more premiums were received. The insured wrote on the company's letter "I want to keep my family policy" and returned it to the company.

On January 26, 1968 the insured again wrote to the company advising that he did want to cash the term policy and to keep the family policy.

No more correspondence ensued between the
page 35 } company and the insured until March 15th, and in the meantime the company had sent its check covering the accrued dividends on the term policy which the insured had cashed. Apparently sometime around March 1, 1968 the insured had sent to the company a series *a* checks which maintained the premiums on the family policy and also were intended to catch up the back premiums on the term policy. On the latter date the company sent the insured a form letter acknowledging the premiums on the term policy and advising that the policy had lapsed, but that the payments were being held until he had an opportunity to comply with the reinstatement requirements which consisted of a reinstatement application. The reinstatement application was filled in by the insured and returned with the form letter on which the insured had written that he did not want to lose his policy and would make additional payments.

The company again returned the reinstatement application with a letter on March 25, 1968, calling attention to the fact

that the form had not been signed and it was necessary that the form be signed, dated and witnessed. The letter also advised that the company was holding the $22.40 previously forwarded which would be sufficient to cover the December, January, February and March monthly premiums.

The reinstatement form was dated March 30th and signed by Mr. Coleman and returned to the company with an additional payment of $50, which was received by the company on April 11th. Both policy and reinstatement application made clear the fact that reinstatement of the policy did not take place until granted by the company.

While the reinstatement application was being considered by the interested departments of Nationwide, and before action had been taken thereon, the insured died suddenly of a heart attack of which there seems to have been no
page 36 } prior warning.

The company denied liability upon the policy and this action was instituted by the beneficiary for the proceeds.

The evidence is uncontroverted that the policy had lapsed and that the insured had not complied with the requirements for reinstatement contained in the policy and in the application prior to his death, and the beneficiary is not entitled to recover unless the evidence establishes that the company had waived compliance with the reinstatement provisions or had, by its conduct, estopped itself from claiming the benefit of such reinstatement provision. The case was permitted to go to the jury on the issue whether the defendant had waived or estopped itself from asserting a noncompliance with the reinstatement requirements, and resulted in a verdict for the plaintiff. This cannot now be disturbed if there is any evidence to support the verdict. *Marketing Cooperative* v. *Garbee,* 205 Va. 757.

The evidence is uncontradicted that the policy had lapsed. While a series of checks from November through April, signed by the plaintiff who was the widow and beneficiary of the insured, covering the premiums were introduced into evidence, it appears that they were actually received by the company in March and April of 1968. Moreover, the insured's letter of January 26, 1968 to the company emphasized the fact that he wanted to cash this policy and the same had, in fact, lapsed the month before. He received and cashed the dividend payment forwarded to him by the company. There is also no doubt from the correspondence passing between the company and the insured during March and the early part of April 1968 that the company did not intend to consider the application for reinstatement until an application prop-

erly signed and witnessed had been received, and the premium payments forwarded by the insured were to be held until the reinstatement procedure had been accomplished. The insured had been engaged in meeting the requirements made known to him by the company up to the time of his death.

page 37 } The only evidence in the record that might tend to establish a waiver or estoppel against Nationwide lies in the testimony of the plaintiff's daughter, Vivian Gregory, who testified as to a part of a telephone conversation between the insured and an agent of the company, and another conversation between the same agent and the plaintiff. The testimony was as follows:

By Mr. Wells:

Q. Tell us what you heard your father say?

A. He asked the man over the phone if he was sure that when he returned the cash that it would mean that this policy had not cancelled, and that if I pay the premiums it starts right back up again. My father repeated this back so I could hear him say it.

Q. Now, later on, did any representative of Nationwide Life Insurance Company come to your home when you were present?

A. Yes, sir.

Q. Do you know the man?

A. Yes, sir.

Q. Who was he?

A. Frank Parker. I went to school with his son.

Q. Did he introduce himself?

A. Yes, sir.

Q. And did he discuss this insurance policy with you?

A. Well, my mother—he discussed it with my mother, but I was there sitting in the living room.

Q. What did he say?

A. He said—he asked to see my father, but my father was out. My father was out working. He explained to my mother and that she could explain to my father about the policy being cashed in and that it does not mean that the policy is cancelled. You see, my mother had been in the hospital. Mr. Parker said that when my father got the money that if he wanted to start his premiums right back up again he could and the policy wouldn't be cancelled. He said that it would start right back up again.

page 38 } The dates of these conversations are not given, but it was stated to be prior to the letter of Nationwide to Mr. Coleman dated November 15, 1967. It will

be noted that the substance of the telephone conversation was "when he returned the cash that it would mean that this policy had not cancelled and that if I pay the premiums it starts right back up again." The agent's statement in the face-to-face conversation with the plaintiff that occurred later is stated "He explained to my mother that she could explain to my father about the policy being cashed in and that it does not mean that the policy is cancelled . . . Mr. Parker said that when my father got the money that if he wanted to start his premiums right back up again he could and the policy wouldn't be cancelled."

It is settled in this state that a person dealing with an insurance agent may assume that his authority is commensurate with his employment and may act in good faith upon information and instructions given by the agent. *Modern Woodmen* v. *Lawson,* 110 Va. 81; *Royal Indemnity Co.* v. *Hook,* 155 Va. 956.

Whenever the company has been held bound by the acts and representations of its agent to the insured it appears to be limited to cases in which the insured has acted upon the representations and has remained in ignorance of the agent's breach of his authority until the loss has occurred or the company has undertaken to advise the insured that the action taken by the agent is being revoked. The rule applies to the reinstatement of lapsed policies. See *Lechler* v. *Montana L.I. Co.* (*N. D.* 1921) 181 *N. W.* 271; *Lounsbury* v. *Knights, etc.,* 112 *N. Y. Supp.* 921; *Weathers* v. *Sovereign Camp* (S. C.) 112 S.E. 44; *Provident Life, etc.* v. *Grant* (D. C.) 131 A (2) 885; *Thomason* v. *Commonwealth Airline Co.* (S. C. 1933) 167 S. E. 684.

Taking the testimony of the insured's daughter in the light most favorable to the plaintiff, it cannot be said page 39 } that it attains the level that would support either a waiver or an estoppel against the company, or even a jury issue thereon within the rule of the foregoing cases. It is significant that the plaintiff's testimony does not corroborate the conversation that her daughter said took place between her and the defendant's agent. At the time of the two conversations, the payment of the policy premiums was not in default and the policy was in good standing. In the light of the situation of the parties as it existed at that time, it could hardly be said that the insured could have been led to believe that he could at any time in the future and irrespective of the length of time that had elapsed revive the policy simply by beginning the payment of his monthly premium on any given date. Allowing for the discrepancy in knowledge and understanding on the subject between the company and the agent on one hand and the uneducated in-

sured on the other, the latter could hardly expect under any circumstances to claim the continuing benefit of insurance he was not paying the premium on. His subsequent actions bear out the fact that he was not misled. He advised the company in January 1968 that he wanted to cash the policy. He received the check for the dividends from the company (after he had previously been advised what they represented) and undertook to follow the instructions of the home office in filing a reinstatement application. If he had understood from the agent's representations in the beginning that he had only to resume payment of the premiums to place his policy again in good standing, he had become informed by the company's letter and requirement of a reinstatement application properly executed that the company itself did not regard the reinstatement as taking place until all of its requirements had been met and the company had acted thereon. The insured did not refuse to comply and make known that he was relying on the agent's prior representations of the requirements, but rather undertook to do what the company demanded of him, and was so engaged at the time of his death.

page 40 } The company had notified Mr. Coleman that the funds he had sent in were being held in suspense pending the process of his application for reinstatement, so no estoppel could arise from an unequivocal acceptance and a lulling of the insured into believing that the payments had been received for the purpose tendered. Nor is the lapse of five days between receipt by the company of the reinstatement application in final completed form and the death of the insured unreasonable and calculated to leave the insured and his beneficiary to believe that consideration of the application had been completed and favorable action taken thereon. It is the Court's opinion, therefore, that there is not sufficient evidence to support the jury's conclusion that the policy had been reinstated by reason of waiver of requirements by the company or estoppel by reason of its conduct to assert the defense that reinstatement had not been accomplished at the time of the decedent's death.

With this view of the case, it is not necessary to consider the further defense interposed that the insured had made material misrepresentations in his reinstatement application which would have led the company to reject such application if the truth were known. Suffice it to say this is a position that all companies take in all cases which reach the litigation stage when it comes out that the answer to some inquiry on the application form is inaccurate or untrue. The factor which caused the decedent's death was not by the testimony even remotely related to any of the alleged misrepresenta-

tions and the only evidence before the Court is that none of the ailments for which the insured had been treated were deemed to have any bearing upon his life expectancy.

The verdict is therefore being set aside and judgment being entered for the defendant upon the ground that it has not been established that the lapsed policy had been reinstated, and not because of material misrepresentations in the application.

H. W. MacKenzie, Jr.

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At this day came the parties by their Attorneys and the Court having fully heard the motion of the defendant heretofore entered herein to set aside the verdict of the jury heretofore rendered on the grounds that the said verdict is contrary to the law and evidence and enter summary judgment for the defendant, doth sustain the same, to which action of the Court, the plaintiff, by counsel, excepted; it is therefore considered by the Court that the plaintiff take nothing by her bill but for her false clamor be in Mercy, &c., and that the defendant go thereof without day and recover of the plaintiff its costs by it about its defense in this behalf expended.

Enter 5/29/69. H.W.M.

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ASSIGNMENTS OF ERROR

The Plaintiff assigns the following errors:

1. The Court was in error in setting aside the verdict of the jury on grounds that there was no evidence to support the verdict.
2. The Court was in error in entering a judgment for the Defendant.
3. The Court was in error in refusing Plaintiff's Instruction 5-A.
4. The Court was in error in granting Instruc-

page 43 } tion 2.

5. The Court was in error in refusing Instructions 2-A and 6-A.

Nancy C. Coleman

By L. Garland Wells
Counsel

* * * * *

Filed June 11 1969 Circuit Court Portsmouth, Va.

Walter M. Edmonds, Clerk

By L.K.B., D. C.

* * * * *

page 6 } GROVER MOORE, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wells:

Q. Would you state your name, please?

A. Grover L. Moore.

Q. And what is your business?

A. Physician and surgeon.

Q. And, Dr. Moore, you have been in practice for sometime in the city of Portsmouth?

A. Twenty years.

Q. And did you have occasion or occasions to treat Mr. Ray E. Coleman during his lifetime?

A. Yes, sir.

Q. Over what period of years did you see him?

A. Since 1963 and preceding that some.

Q. When was the last time that you had occasion to treat or examine him?

A. April 16, 1968, I believe.

Q. The day of his death?

A. Yes.

Q. And what was the cause of death?

page 7 } A. He had an acute coronary occlusion. In other words, he had a heart attack.

Q. When did you see him before that, doctor?

A. The last time was on 3-21-68.

Q. What treatment or examination did you give him at that time?

A. I have to look at my notes. He was treated for antrogastritis and a hiatal hernia.

Q. Would you state whether or not he was hospitalized?

A. Yes.

Q. For how long?

A. From 3-21 to 3-26.

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page 8 }

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Q. Would you please tell the jury what a hiatal hernia is, and what treatment you gave for it.

A. A hiatal hernia goes through your diaphragm and through your lungs and this you can only find on an X-ray picture and not by a physical examination. There was no other treatment other than surgical.

* * * * *

page 10 } CROSS-EXAMINATION

By Mr. Garrett:

Q. How old was this man?

A. He was forty-five at the time of his death.

Q. What is the normal blood pressure for a man at that age?

A. Normal is always one twenty over seventy or thereabouts.

Q. What was his blood pressure when he was admitted to the hospital?

A. I don't have that record with me.

Mr. Garrett: Your honor, this is a document that Mr. Wells and I have already stipulated to before.

The Court: I don't know what is in that document.

Mr. Wells: I am going to object to it because it probably contains many things that are not admissible in evidence.

Mr. Garrett: What do you contend is in it that is not admissible?

Grover Moore

The Court: There could be all kinds of things, Mr. Garrett. As far as this particular question is concerned,
page 11 } the doctor can use it to refresh his recollection.

By Mr. Garrett:

Q. Directing your attention to the third page at the top left corner, what is the blood pressure that the house doctor took?

A. The blood pressure is one hundred and fifty over a hundred.

Q. Do you have anything in your records to indicate anything different?

A. At my office I do. Let me see that. I usually accept the house doctor's blood pressure. Let's see if it was taken at any other time? No, sir.

Q. All right. Now, he was in the hospital then from the 20th of March 1968 until the 26th of March 1968, correct?

A. Right.

Q. And from his history you would learn that he had been in the Portsmouth General Hospital in 1960 for acute bronchitis, and he was also in the hospital in 1963 for a dental operation; isn't that right?

A. That's right.

Q. And your final diagnosis was antrogastritis and a hiatal hernia?

page 12 } A. Right.

Q. And during the time that he was there, he underwent *certian* test, did he not?

A. X-rays.

Q. All right. And when it says that he had a fluoroscope, that is an X-ray?

A. Part of it.

Q. And he took a barium test so that the fluoroscope would show something?

A. Right.

Q. All right, sir. What is this chart here suppose to be? (Indicating)

A. This is a graph of his pulse, temperature, and blood pressure on his admission. The blood pressure you asked me about went down to a *hudnred* and twenty over ninety under no treatment. This would indicate unquestionably that the man was excited when his blood pressure was taken the first time. He may have gotten up and walked around the room and sat back down. The blood pressure varied with his activities.

Grover Moore

Q. What about the two hundred and fifty over a hundred and ten? Wouldn't you say that his blood pressure was jumping all over the place?

A. It certainly varies within the normal limits.

page 13 } Q. Let's start out with two hundred and fifty over a hundred, and then a hundred and twenty over ninety. It wasn't taken on the 22nd, and then on the 23rd it was a hundred and ten over eighty, and the same on the 24th, and then it jumps to a hundred over eighty on the 26th.

A. Right.

Q. Now, doctor, what are the symptoms of a hiatal hernia?

A. The symptoms of a hiatal hernia—take food. Food will not go into your stomach. It will lay in your esophagus. You are belching it back up.

Q. Do you have any pain?

A. Sometimes pain if it particularly doesn't want to go through into the stomach.

Q. Where is the stomach?

A. In the epigastrium.

Q. Could you indicate in layman's language where it is?

A. Just below your chest. Just below the middle of your chest.

Q. All right, sir. And is this a pain affecting the tube through which your food goes down your throat and it doesn't get to your stomach? And this is the area between the bottom of your chest and your throat, correct?

page 14 } A. Yes.

Q. All right, sir. Now, on this report here doesn't it say—can you read this? See what it says here. (Indicating)

A. I am not sure.

Q. I think it indicates forty-five-year-old white male—let's read it here. What does that say, doctor?

A. A forty-five-year-old white male, awakened early this a. m. with colic pain.

Q. Let's read this here. What does that say with the line over it?

A. With severe pain—colic pain. He has pain over the hypochondrium. Would you like to know where that is?

Q. If you can tell us.

A. That is below your ribs. He was in severe pain and he was perspiring profusely.

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page 15 }

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Q. Doctor, you relied upon the statements that are contained herein in treating this man, didn't you?

A. You mean on the house doctor's records?

Q. Yes.

A. Sometimes I do and sometimes I don't. These boys are Filipinos or foreign doctors, and I don't rely on their—this is part of the necessary records at the hospital. As you can see, I didn't make a diagnosis of hypertension, although his blood pressure was elevated at least on two occasions. I didn't rely on the house doctor's records in regard to that. As I pointed out, this man's hypertension goes up and it goes down, probably with his emotions rather than being true hypertension.

Q. All right. Did you treat him on any other occasion?

A. I have treated him on several occasions.

Q. Have you ever treated him in the hospital before?

A. I think I have had him in the hospital before.

page 16 } If you are referring to when the dentist pulled his teeth out, a doctor has to make a chart when a patient has any type of surgery. And I believe that when he was admitted I signed a record for the dentist stating that his heart and his lungs were satisfactory for anesthesia.

Q. That was on 7-8-63. How about 1964?

A. In 1964 he was admitted into the hospital with gastric acidity.

Q. What is that?

A. A lack of acid in your stomach.

Q. Did he receive any treatment at that time?

A. Oh, yes.

Q. What type of treatment did he receive?

A. He had a gastric analysis.

Q. Let's see. Did he have a chest X-ray at that time?

A. It was perfectly normal.

Q. Doesn't it say on the GI series that there was congestion of barium that they observed?

A. You would have to ingest the barium if you X-rayed him.

Q. And at that time you discharged him as improved. You circled that, but you did not circle that he was recovered. Why is that?

page 17 } A. When a person has gastric acidity and you keep him this number of days, he couldn't be re-

covered. However, he is not that serious to remain in the hospital. You have to state if he improved or what the disposition is. He had improved enough to be an office patient.

Q. He was in there from the 15th of March 1964 through the 21st?

A. Right.

Q. Six days?

A. Right.

Q. Now, going to the report of the 16th of April, which is the day Mr. Coleman died, we have an indication of his blood pressure on that date.

A. You mean on his admission?

Q. Yes.

A. Anyone that has an acute coronary occlusion, their blood pressure can go as high as two hundred and twenty before the blood pressure starts to fall.

Q. You have no reason to believe that that wasn't true, do you?

A. Not one bit.

Q. All right, sir. Did you treat Mr. Coleman in January 1968 for anything?

A. In the hospital or in my office?

page 18 } Q. Either one?

A. I saw him in my office on 1-18-68.

Q. What was that for?

A. That was a routine office call, because I didn't make a note that it was anything of great importance.

* * * * *

page 19 } THELMA JEFFERSON, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wells:

Q. Would you state your name, please?

A. Thelma Jefferson.

Q. Where are you employed?

A. Todd Electric Company.

Q. And in what capacity are you so employed?

A. I am payroll master and secretary.

Q. During his lifetime did you employ a Mr. Ray E. Coleman?

Thelma Jefferson

A. Yes, we did.
Q. Do you have his employment records with you?
A. Yes.
Q. When was he first employed there?
A. It was the week ending September 10, 1967.
Q. Would you please tell the jury how many work days he was absent from work during his employment there?
page 20 } A. The only record that I have of him being absent was the week of March 20th through the 26th.
Q. And according to the record did he return to work after March 26, 1968?
A. Yes.
Q. And then how long did he work?
A. The last day of employment was April 21, 1968.
Q. Did that include any vacations?
A. I have no weeks of vacation.
Q. Do your records indicate the number of hours that he worked?
A. Yes. For each week I have the straight time hours and the overtime hours.
Q. From March 26th up until the time of his death, did he work any hours in excess of his regular workday?
A. He worked each week over—
Q. Overtime?
A. Yes, he worked overtime each week. In fact, the day before he died he worked an hour and a half overtime.

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page 21 }

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REDIRECT EXAMINATION

By Mr. Wells:
Q. After the date of March 26th, would you just testify from your records each day from then on to the date of his death how much overtime he worked.
page 22 } A. I don't have all the sheets with me. I have the payroll journal. I have the week he was out sick. I have those two days for the week ending March 31st. That particular week was the week he was out. He had twenty-four hours of straight time and twenty-two and a half

hours of overtime the week of April 7th. He had eleven half hours of overtime the week ending April 14th and there was forty hours and twenty-five and a half overtime and, of course, the week he died, the week of April 21st he had eight hours of straight time and one and a half hours of overtime.

* * * * *

page 23 } NANCY C. COLEMAN, the plaintiff, called as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wells:
Q. Would you state your name, please?
A. Mrs. Ray Coleman.
Q. Mrs. Coleman, at the time of Ray Coleman's death you were his wife?
A. Yes, sir.
Q. At the time of his death?
A. Yes, sir.
Q. Did Ray Coleman during his lifetime have any insurance policies with Nationwide Life Insurance Company?
A. Yes, sir, we had two policies.
Q. Let me show you this particular policy, Mrs. Coleman. I show you this policy the number of which is 522392. I want you to look at that and tell us whether that policy was issued to your husband?
A. Yes, sir.
Q. And tell us who was the beneficiary on that policy?
A. I was, his wife.
page 24 } Q. And you are Nancy C. Coleman? Is that correct?
A. Yes.

Mr. Wells: We would like to introduce this.
The Court: This is Plaintiff's Exhibit No. 1.

(So marked by the court.)

By Mr. Wells:
Q. Can you tell us from memory, Mrs. Coleman, when that policy was issued?
A. It was taken in September of 1958.

Nancy C. Coleman

Q. Now, can you tell us how long the premiums were paid after it was issued?

A. To the best of my knowledge up until the day he died. They were paid up until the month of his death in April.

Q. And the premiums were paid?

A. Yes, sir.

Q. Continuously?

A. We made them every month.

Q. Now, I want to show you this letter, Mrs. Coleman; Would you please look at that and tell us whether
page 25 } that letter was written by your husband, Mr. Ray E. Coleman?

A. No, this letter was written by a friend of his.

Q. Did he sign it?

A. Mr. Coleman signed it.

Mr. Wells: I would like to introduce this, your honor. I would like to read part of it.

The Court: Plaintiff's Exhibit No. 2.

(So marked by the court.)

By Mr. Wells:

Q. "I am writing in reference to my insurance policy No. 522392." Incidentally, this letter is addressed to Nationwide Life Insurance Company, Box 1797, Columbus, Ohio. "Policy No. 522392 that I took out on August 21, 1958, and the policy effective date September 12, 1958, now to date has been in effect nine years, two months, and three days. I would like very much to cash it in for its surrender value at this time. Our agent said not to send my policy in to you, but write a letter to you giving the policy number and explaining the reason for the letter. I mailed this month's premium of $5.60 to you on October 30, 1967, so I am not in arrears on payments of premiums and I have never borrowed any
page 26 } money against or on this policy. Hoping to hear from you in the near future, I am sincerely yours, Ray E. Coleman." There is a P. S. "I am dictating this letter to Mr. Parker, my friend, at this time."

To the best of your knowledge, was that letter mailed?

A. Yes, sir.

Q. Mrs. Coleman, was there any particular reason for his wanting to get the surrender value on that policy?

A. Yes, sir. I had been a patient at Portsmouth General Hospital. I had just been operated on, and my hospital bill

was over $800.00. Mr. Coleman always loved to pay his bills, and he was afraid something would happen in his job, you know, garnishee his wages or something, so he wrote this letter asking—

Q. Well, please, state whether or not he had any other insurances that would have paid—

Mr. Garrett: I object to that.

By Mr. Wells:

Q. —that would have paid your hospital—

Mr. Garrett: I object to that. I am going to object to that on the grounds that it is not relevant whether or

page 27 } not he had any other insurance.

Mr. Wells: It would pay her bills.

The Court: I think it would bear on whether there was an actual surrender of the policy and whether that was his reason for doing it. I think it should probably come in.

Mr. Garrett: I object to that and note our exception.

By Mr. Wells:

Q. Just tell us why you needed the money?

Mr. Garrett: I don't think the reason he needed the money is relevant to this issue.

The Court: I overrule the objection.

Mr. Garrett: Note our exception.

A. I was patient at Portsmouth General Hospital and we had quite a bill over there.

By Mr. Wells:

Q. Did you have enough money to pay it?

A. No, sir. We did not have the money because I had been sick so much.

Q. All right. I want to show you this other

page 28 } letter, Mrs. Coleman, from Nationwide Life Insurance Company addressed to Mr. Ray E. Coleman and it is dated November 30, 1967. Would you please state whether Mr. Coleman received that letter from Nationwide Life Insurance Company?

A. Yes, sir.

Mr. Wells: I would like to introduce this as Plaintiff's Exhibit No. 3.

Nancy C. Coleman

The Court: Plaintiff's Exhibit No. 3 so marked.

By Mr. Wells:

Q. I would like to read just a portion of this letter. This is the first paragraph. "We have received your request to surrender Policy 522392. We would like to point out to you that this policy does not have a cash value. If the policy were surrendered at this time the accumulated dividends $134.72 would be sent to you as this is the only monetary value that the policy has."

Mrs. Coleman, did you have any knowledge whether or not any representative of Nationwide came to your home prior to the time that he wrote that first letter saying that he wanted to cancel the policy?

A. Well, one afternoon about five o'clock Mr. Coleman used the phone, and I heard him talking —I couldn't tell you what he was saying to the party on the other end. I know that later the next day an agent from Nationwide from Virginia Beach came by the house, and he said he was on his way home. Well, he came by my home and talked to me.

page 29

Q. Who was there?

A. My *dauther* Vivian.

Q. And?

A. Vivian and I sat on the couch and he said that he was a Nationwide representative.

Q. After Mr. Coleman wrote that letter in November, did he send any further payments of premiums?

A. Well, after we received the check and it was such a small amount, he said that we would just go ahead and continue the policy because he would lose so much in the long run. He said that the money wouldn't help us enough because it was only $134.00.

Q. You did receive $134.00. What did you do with the check?

A. We cashed the check, and he went immediately and started his payments right back up.

Q. I want to show you these cancelled checks and the money order receipts. I want to show you these checks dated January 1, 1968; February 1, 1968; March 3, 1968; November 3, 1968, and a money order receipt dated April 2, 1968. Would you look at those and tell us whether they were all mailed to Nationwide?

page 30

A. Yes, sir.

Mr. Wells: I would like to introduce those, your honor.
The Court: This will be marked Plaintiff's Exhibit No. 4.

By Mr. Wells:
Q. Did your husband, Mr. Ray E. Coleman, receive this letter dated March 15, 1968?
A. Yes, sir.
Q. Is that your husband, and is that the correct address that you were living at? (Indicating)
A. Yes, sir.

Mr. Wells: I would like to introduce this, your honor.
The Court: I will mark this Plaintiff's Exhibit No. 5.

By Mr. Wells:
Q. Mrs. Coleman, I am going to read the heading on this piece of paper. "Policy No. 522392, Ray E. Coleman, amount received $22.40, premium date 12-12-67." Now, do
page 31 } you have any knowledge—let me ask you this. Would you please look at this on this letter and tell us whether or not that is the handwriting of Mr. Coleman?
A. Yes, sir, to the best of my knowledge.
Q. And look at that and compare that and tell us if that is the same letter as this with a note written by your husband on it?
A. Yes, sir.
Q. Did Mr. Coleman mail this one with a note on it back to Nationwide; do you know?
A. I can't recall because I really didn't know. Mr. Coleman tended to his business and I tended to my business.
Q. Look at this please and tell us whether that is his handwriting or not?
A. Yes, sir.
Q. Well, I just—

Mr. Wells: I would like to introduce this with the note.
The Court: This will be Plaintiff's Exhibit No. 6.

By Mr. Wells:
Q. Mrs. Coleman, I am going to read part of
page 32 } this to you. A check in a square marked, "Send additional remittance of $30.00 a month, premiums due until I pay it all back $134.00 and some cents." Was that mailed to Nationwide with this letter on the back?

A. Yes, sir.
Q. Your testimony is—
A. Yes.
Q. It is marked received by the general accounting, dated March 21, 1968, but it is not signed. It is stamped received March 22, 1968. I will read from this letter. "Very sorry this has happened. I will pay all of it back so I won't loose my policy 522392. So I will put a payment in April the 12th of $30.00 and my policy payment which is $5.60. If I can, I will send more than $30.00." Please tell the jury, if you can, what Mr. Coleman meant.
A. He wanted to pay Nationwide back the $134.00 that we received from them so we wouldn't lose our policy.
Q. Just tell the jury whether or not the money he sent with that letter was kept by the insurance company?
A. They kept it. They have the check that they have signed.

page 33 } Q. Now, would you look at this letter by Nationwide addressed to Ray E. Coleman and tell us whether or not, to the best of your knowledge, Mr. Coleman received this letter from the insurance company?
A. Yes, sir, March 25, 1968.

Mr. Wells: I would like to have this marked.
The Court: Plaintiff's Exhibit No. 7.

By Mr. Wells:
Q. Mrs. Coleman I am going to read part of this to you. I am going to read the last paragraph "The $22.40 that we are holding will be sufficient to cover December, January, February, and March 12th monthly premiums. We are very glad to be of service to you, Mr. Coleman, and if you have any questions, please let us know." There is a sentence I would like to read in the first paragraph. "We certainly appreciate your interest in our company expressed by your desire to reinstate your valuable insurance coverage." Would you look at that, Mrs. Coleman. Do you have any knowledge of Mr. Coleman filling out that form, Mrs. Coleman?
A. No, sir, I do not. It is his handwriting. I think it was done on a Saturday morning when I was doing my marketing.

page 34 } Q. Is that his signature?
A. Yes, sir.
Q. And this was an application for reinstatement of policy number 522392?
A. Yes.

Mr. Wells: I would like to introduce this as Plaintiff's Exhibit No. 8.

(So marked by the court.)

By Mr. Wells:

Q. To the best of your knowledge, is this the reinstatement form that the letter dated March 25, 1968, which says, "I am returning the reinstatement form for the reason that it is not signed"?

A. Yes.

Q. In other words, he had mailed it and forgot to sign it?

A. Yes, sir.

Q. Do you know where or how he received this reinstatement form?

A. Nationwide sent it to him.

Q. Now, I would like to read the top line which says, "Policy No. 522392 lapsed for non-payment of premium." There is a blank there. And then it says, "Due date." I believe, Mrs. Coleman, you will tell the jury or you

page 35 } can testify, that he had not been in the hospital.

Mr. Garrett: He is leading her.

By Mr. Wells:

Q. That he has never been in the hospital since he was in the US Navy in 1942, in the war, for an upset stomach. Now, is that correct or not?

A. No, he had been in the hospital, but it was nothing serious.

Q. Do you have any reason why—

A. He had talked to the agent and I don't know what the agent told him on the other end of the phone.

Q. After the form was sent back a second time?

A. Not to my knowledge.

Q. This reinstatement form?

A. Not to my knowledge.

Q. It is dated March 30, 1968, is the date on it. And after that date, Mrs. Coleman, did you hear anything further from the Nationwide Insurance Company?

A. The day of his death.

Q. I mean from that time up until the day of his death?

A. No, sir, I didn't.

Q. Was there any further correspondence, to

page 36 } your knowledge, after that application was signed on March 30th?

A. No, sir.
Q. And when did he die?
A. April 16, 1968, Portsmouth General, at 8:25.
Q. April 16th?
A. Yes, sir.
Q. After the date of his death on April 16, 1968, did you get any further correspondence with Nationwide?
A. Nationwide sent me a check. I don't recall how much. They sent it two days after his death. He died on the 16th and I received the check on the 18th.
Q. I want to show you this check, Mrs. Coleman, and can you identify it as to whether this was the check that you received?
A. Yes, sir, that is the check I received two days after his death. The check was for $103.53.
Q. What was the date on it?
A. They have the date here. It was 4-19-68.
Q. April the 19th of 1968?
A. Yes, sir.
Q. Have you or anyone for you presented this policy for payment to anybody connected with Nationwide
page 37 } Life Insurance Company after his death?
A. Did they do what?
Q. Did anyone present the policy in question for payment?
A. No, sir.
Q. Tell us what your son did after his dad—

Mr. Garrett: I object to what the son did.
The Court: Well, if she knows.

By Mr. Wells:
Q. Have you tried to get Nationwide Life Insurance Company to pay this policy?
A. Yes, sir. My son was in the Navy, and he was brought home for the emergency.
Q. What did he do?
A. He went to the Nationwide Company—

Mr. Garrett: I object unless you actually went with him. I object to this testimony. This testimony is hearsay.

By Mr. Wells:
Q. Tell us whether they have paid anything or not?
A. They haven't paid me anything.
page 38 } Q. Have you tried to get it?
A. I have tried.

Nancy C. Coleman

Mr. Wells: You can answer Mr. Garrett.
The Court: Let us take a short recess before Mr. Garrett starts his cross-examination of this witness.

(At 11:27 a. m., February 17, 1969, the court recessed and the jury withdrew from the courtroom.)

(At 11:40 a. m., February 17, 1969, the court and jury returned to the courtroom.)

Mr. Wells: Your honor, I have one more question that I would like to ask Mrs. Coleman before Mr. Garrett starts his cross-examination.
The Court: Proceed.

By Mr. Wells:
Q. Mrs. Coleman, would you state whether or not the premium payment on this policy in question was mailed to Nationwide for the month of April 1968?
A. Yes, sir.
Q. And do you recall when it was mailed?
A. It is always mailed around the first of the month. It was mailed between the first of the month or the
page 39 } 9th of the month.

Mr. Wells: I have no further questions. You can answer Mr. Garrett.

CROSS-EXAMINATION

By Mr. Garrett:
Q. Do you actually recall mailing this at this time?
A. Yes, sir.
Q. Who mailed it?
A. I don't know if it was put in the box by me or Mr. Coleman or one of the children.
Q. You actually don't know what day it was done, do you?
A. You have the check.
Q. It is not a question of whether I have the check or not. The question is when it was mailed?
A. Yes.
Q. But you don't know who mailed it, do you?
A. No, I don't.
Q. I show you here a letter dated January 26, 1968, is that Mr. Coleman's handwriting?

A. Yes, sir.

Mr. Garrett: We offer this as Defendant's Ex-
page 40 } hibit No. 1.

(So marked by the court.)

By Mr. Garrett:
Q. I also show you this written statement dated May 2, 1968, and I ask you if that is your signature at the bottom?
A. Yes, sir.

Mr. Garrett: Would you like to see this, Mr. Wells?
Mr. Wells: Yes.
Mr. Garrett: I offer this as Defendant's Exhibit No. 2.

(So marked by the court.)

By Mr. Garrett:
Q. Do you recognize your signature on the back of this?
A. Yes, sir, I do.
Q. Do you recognize the front of it?
A. Yes, sir.

Mr. Garrett: We ask that this check be introduced also.
The Court: This will be marked Defendant's Exhibit No. 3.

page 41 } By Mr. Garrett:
Q. Do you recognize this?
A. Yes, sir, that was the checkbook that my husband had in his tool box, which was opened after his death.

Mr. Garrett: All right. And specifically there is a reference here after the stub of December 9th payable to Nationwide for $31.31, which was a payment for two policies, and here is another one for the 29th payable for $5.60.
We would like to introduce this as Defendant's Exhibit No. 4.

(So marked by the court.)

By Mr. Garrett:
Q. Do you recognize that check?
A. Yes.
Q. That is your check No. 142 payable to Nationwide?

A. Yes, sir.

Mr. Garrett: I would like to introduce this as Defendant's Exhibit No. 5.

(So marked by the court.)

page 42 } By Mr. Garrett:
Q. All right. Here is a check No. 208 drawn on your account. Do you recognize that? Is that payable to Nationwide?
A. Yes, sir.

Mr. Garrett: I would like to introduce this as Defendant's Exhibit No. 6.

(So marked by the court.)

By Mr. Garrett:
Q. All right. Here is another check No. 218 on your account. Do you recognize that?
A. Yes, sir.
Q. That is your check?
A. Yes, sir.

Mr. Garrett: I would like to introduce this as Defendant's Exhibit No. 7.

(So marked by the court.)

By Mr. Garrett:
Q. Here is another check drawn on your account No. 234. Do you recognize that check?
A. Yes, sir.

Mr. Garrett: I would like to introduce this as Defendant's Exhibit No. 8.

page 43 } (So marked by the court.)

By Mr. Garrett:
Q. I show you another one No. 333 on the same account. Do you recognize that?
A. That was paid in April 1968 just before his death. That was the last payment.

Mr. Garrett: I would like to introduce this as Defendant's Exhibit No. 9.

(So marked by the court.)

By Mr. Garrett:

Q. Now, look at all of these checks and tell us who signed every one of those checks?

A. They are signed by Mr. Coleman and some of them—

Q. Isn't every one of them signed Mrs. Coleman?

A. I always paid the bills. He wrote them out and I signed them. If you would look at those others, you will see my handwriting on those.

Q. All right. In this letter of January 26th your husband refers to being in the hospital. What did he mean by that?

page 44 } A. He had been in sitting up with me at the hospital. I think that is what he was recalling, sir.

Q. Then in your statement here you say he was at Portsmouth General Hospital for eight days in January 1968 under Dr. Moore for intestinal cramps.

A. Did Dr. Moore have that record? I don't recall it. I have been so sick, sir.

Q. You did make him sign the statement at that time?

A. I was really sick, too.

Q. Now, in November 1967 you knew that your husband had cancelled the policy?

A. Yes, sir.

Q. Now, you also knew that he filled in a reinstatement application, did you not?

A. Did I know what, sir?

Q. That he filled in a reinstatement application?

A. To the best of my knowledge, yes.

Q. You told me, haven't you, that you carried it to him?

A. Carried it to him?

Q. Yes?

A. What do you mean carried it to him?

Q. Do you recall testifying in my office back on October 11th of last year?

page 45 } A. Yes, sir.

Q. And I asked you the question, "Now, your husband executed or filled out a reinstatement application, didn't he?" And your answer was, "Yes, sir, he did." And then I asked you, "And that was returned to him to be signed,

was it not?" And then you said, "Yes, sir, I carried it to him and he signed it."

A. I probably meant from one room to another room. I really don't recall, sir.

Q. And this was during the period of time that he was in the hospital, was it not?

A. He wasn't in the hospital in October or November.

Q. I am talking about the reinstatement application between the 15th and 30th of March?

A. I don't recall, sir.

Q. But you do know that you carried it to him?

A. I don't recall, sir.

Q. Okay. Was your husband in Portsmouth General Hospital in January 1960 for acute bronchitis?

A. Yes, sir.

Q. And he was there for six days from the 13th to the 19th in 1960?

A. Yes, sir.

page 46 } Q. And he was there in July 1963 for his dental operation; is that correct?

A. Yes, sir.

Q. And he was there at that time from the 8th to the 13th; would that be accurate?

A. Yes, sir.

Q. Now, on direct examination you said something about you hadn't gotten any money. But isn't it true that you received money on the other policy?

Mr. Wells: I object to that, your honor. That hasn't got a thing to do with this policy.

Mr. Garrett: She testified that she didn't get any money.

A. Not from this policy.

Mr. Wells: It has nothing to do with this case.

The Court: I don't see the relevancy of it.

Mr. Garrett: I think it is going to be relevant. One of the issues in this case is going to be the manner in which Nationwide Life Insurance Company conducts its business.

The Court: Note your exception, Mr. Wells.

Mr. Wells: Note my exception.

page 47 } By Mr. Garrett:

Q. Did you not receive money on policy number 522391?

A. No, sir.

Q. You didn't get this check here?

A. The $7,000.00—I got $7,500.00.

Vivian Gregory

Q. Is that your signature on the back?
A. That is not the check that—I received $7,500.00.

Mr. Wells: We'll admit that she received payment on other policies, but not on this one here. I note my exception on the court's ruling on the previous objection.

* * * * *

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VIVIAN GREGORY, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wells:
Q. Would you state your name, please.
A. Vivian Gregory.
Q. Are you related to Nancy C. Coleman?
A. Yes, sir.
Q. What is the relationship?
A. Nancy C. Coleman is my mother.
page 49 } Q. Mrs. Gregory, I would like to show you a letter that has been introduced in evidence. The letter is addressed to Nationwide Life Insurance Company, dated November 15, 1967, signed by R. E. Coleman. A part of this letter says, "I would like very much to cash in an insurance policy for its cash surrender value." Do you remember that particular correspondence that your father had with Nationwide Life Insurance Company?
A. Yes, sir.
Q. Prior to that date, do you have any knowledge of your father talking to any representative of Nationwide Life Insurance Company?
A. Yes, sir.
Q. Was it by telephone?
A. Yes, sir, by telephone.
Q. And where did this take place?
A. At my home.
Q. And where was your father at the time?
A. In the kitchen. I was doing my homework.

Vivian Gregory

Q. Now, do you recall—you can't testify as to what may have been said to him.
A. I don't know that.
Q. Do you recall any of the things he said on the phone?
A. Well, my father repeated it.

page 50 } Mr. Garrett: She doesn't know who was on the other end of the telephone.

By Mr. Wells:
Q. Well, let me ask you this. Was there any conversation pertaining to any life insurance policy?
A. Yes, sir. He repeated back to me—
Q. Do you know what company?

Mr. Garrett: I object to that, your honor. We still don't know who he was talking to. He could have been talking to anybody.
The Court: I overrule the objection.

By Mr. Wells:
Q. And what company did the conversation involve?
A. It was about the policy with Nationwide.
Q. Well, what did your father say?
A. He repeated back—

Mr. Garrett: I object to that, your honor, as to what he said.
The Court: I overrule the objection.

By Mr. Wells:
Q. Go ahead.

page 51 } Mr. Garrett: I certainly object to whatever somebody else said.
We note our exception as to any testimony of what her father may have told her or what somebody else said.
Mr. Wells: She heard this. He repeated it so she would hear what was being said. She heard what he told somebody else. We are not offering what somebody else said. She is going to testify to what she heard Ray E. Coleman say into the telephone.
Mr. Garrett: All right. That I will go along with, but nothing else.

Vivian Gregory

By Mr. Wells:

Q. Tell us what you heard your father say?

A. He asked the man over the phone if he was sure that when he returned the cash that it would mean that this policy had not cancelled, and that if I pay the *premuims* it starts right back up again. My father repeated this back so I could hear him say it.

Q. Now, later on, did any representative of Nationwide Life Insurance Company come to your home when you were present?

A. Yes, sir.

page 52 } Q. Do you know the man?

A. Yes, sir.

Q. Who was he?

A. Frank Parker. I went to school with his son.

Q. Did he introduce himself?

A. Yes, sir.

Q. And did he discuss this insurance policy with you?

A. Well, my mother—he discussed it with my mother, but I was there sitting in the living room.

Q. What did he say?

A. He said—he asked to see my father, but my father was out. My father was out working. He explained to my mother and that she could explain to my father about the policy being cashed in and that it does not mean that the policy is cancelled. You see, my mother had been in the hospital. Mr. Parker said that when my father got the money that if he wanted to start his *premuims* right back up again he could and the policy wouldn't be cancelled. He said that it would start right back up again.

Mr. Wells: I have no further questions.

page 53 } CROSS-EXAMINATION

By Mr. Garrett:

Q. How long did Mr. Parker stay?

A. I have no idea.

Q. How long did you stay?

A. Well, I stayed until the rest of the night. I mean that was my home.

Q. You were living there at the time?

A. Yes, sir.

Q. How many times did you see Mr. Parker?

A. That was the first time I had ever seen Mr. Parker besides at football games.

Mr. Garrett: That is all the questions I have.
Mr. Wells: I have no further questions.

page 54 } RALPH YODER, called as an adverse witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (Adverse)

By Mr. Wells:
Q. Would you state your name, please?
A. Ralph Yoder.
Q. What is your business, Mr. Yoder?
A. I am a manager of the life underwriting department of Nationwide Life Insurance Company and also the chief life underwriter.
Q. Mr. Yoder, I want to show you a deposition. For the purpose of refreshing your recollection, you may refer to your copy. The deposition is dated October 18, 1968, deposition of Ralph Yoder, 246 North High Street, Columbus, Ohio, 1968.
Please refer to the bottom of page five. The last question on the bottom of the page says, "Was the reinstatement application completed and returned?" Well, I will ask you again was it returned and when?
A. It was returned the first time on March 21, 1968, and it was received in our office on March the 21st.
page 55 } Q. And that was in 1968?
A. Yes.
Q. And had the application been signed or dated?
A. No, sir, not at that time.
Q. Was there any note that followed the application? Was there any note signed by Mr. Coleman that came with it?
A. Not that I am aware of.
Q. Maybe this will refresh your recollection.
A. There is a note of March 15th. I would have to see it.
Q. Maybe I can read this to you, and you can tell me whether this is true. It says in so many words, that he was returning with the application a letter, and that he would send back the dividends, and that he would pay the premiums. And the next statement is on March 25th when you returned the reinstatement application to Mr. Coleman advising that it would be necessary that it be completed; is that true?
A. Well, by completed that meant signed and dated, right.
Q. On March 25th you returned it; is that right?

Ralph Yoder

A. Our Mr. Clinger wrote to Mr. Coleman, and page 56 } he returned the application.

Q. Now, when you received this application on April the 9th, was there any money that came with it? Was there a check or a money order or any payment of money?

A. Yes. He submitted additional monies, and I believe it came with the application when he returned it the second time.

Q. You testified here that it was $81.13 returned with it on April 9th when it was sent to your company?

A. Correct.

Q. Is that true?

A. That's true.

Q. And it says $5.60 was to pay on the policy; is that correct?

A. On the lapsed policy?

Q. Yes. That was the premium for April on this policy that you claim lapsed; is that correct?

A. Well, it would have been an additional monthly payment. This would have been the fifth payment we would have received.

Q. You had already received December, January, February, and March?

A. Well, we had received four separate payments page 57 } previous to this.

Q. And this would have been from April of 1968; correct?

A. It lapsed in December. So this would have been December to January to February to March to April to May that it would have been paid.

Q. Maybe I can read this letter that would refresh your recollection that that would have been the fifth payment.

A. That would have been for April 12th.

Q. And $50.00 of that $81.00 was to apply to the dividend payment, the refund dividends, right?

A. I assume that is what he was attempting to do.

Q. Your testimony has been that he applied the $50.00 to restore the dividends?

A. On the lapsed policy?

Q. Yes.

A. Right.

Q. So that is true?

A. That is true, insofar as I know that is true. Yes, sir.

Q. And there was $25.53 for the policy—the $25.53 was for a different policy, right?

A. Yes.

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CROSS-EXAMINATION (Adverse)

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page 59 }

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By Mr. Garrett:

Q. I am going to read the question beginning at the bottom of page five which says, "Was the reinstatement application completed and returned?" And your answer was, "It was returned to our office on March 21st. The questions had been answered, but the application was neither signed nor dated. With the application he also returned our letter of March 15th with a note saying he would send back the dividends he had taken and would pay the back premiums. On March 25th we returned the reinstatement application to Mr. Coleman advising him that it would be necessary that it be completed. On April 9th, he sent a check for $81.13 which showed up in suspense on April 11th as completely unidentifiable. Due to the number of items, it required until April 17th to allocate the payment which was a payment of $5.60 on the lapsed policy, and $50.00 to apply to the restored dividend he had taken, and $25.53 for premiums on policy 522391. With the check he returned the reinstatement application."

Now, as it turned out, Mr. Yoder, the $81.13 was made up of more than one item; is that correct?

page 60 } A. That's correct. It was a payment of $81.13.

Q. Now, I show you this check of April 5th for $31.13 and on the back it has Nationwide stamped on it, does it not?

A. Yes, sir.

Q. Now, would you explain briefly to the jury what happens when a check comes in?

A. Well, first it comes into the office and it is opened. Usually the remittance and the check are accompanied by a premium card, which is an IBM card.

The premium card is examined along with the check. If

they correspond or are identical, then the premium card is placed on this pile and the check is placed on this pile.

Now, at the end of the day you have a stack of premium cards and you have a stack of checks.

Now, some of the checks, of course, don't correspond with the premium cards, so they have to be put aside over here. They are put into another stack because they can't be identified as a payment for any particular policy or any particular amount. So you have to take those checks that come without a premium card and identify them by going to the company records.

page 61 } You do this by looking up the name alphabetically. We can then see the policy this person has or had with our company. We then pull additional records from the file, and we are then able to get what the record of payment is and so forth.

We then make up a new premium card which can be served as input and put into the IBM equipment. These IBM cards are the premium cards. Now, we have a complete stack of premium cards or IBM cards and a stack of checks. The IBM cards are sent to the statistical department and they are run through IBM machines.

While that is being done over here, another tape is run on the check. This tape is getting it aggregated. We do this to find the proper type of payment, that is, was it paid monthly, quarterly, et cetera. It will also tell us the due date. All these things are put in proper sequence with an aggregate amount.

Now, that amount must balance with the tape which has been run on the check. If it doesn't balance, we can't deposit it. We have to find the error before we can deposit. Of course, this again is just a matter of bookkeeping. But once they are brought together then the checks are deposited. Now, from that point on you have the IBM cards and these are matched to a whole deck of cards which we term premium due cards.

page 62 } Let me illustrate. If a person had a policy which was in force, and they paid it monthly for one year they would have twelve premium due cards. As these premiums are paid, you get this card from the policyholder and we would match it to a card here in our file. We pull them both out and put them in the machine and it would be credited as payment. I am not sure if I made myself clear or not.

Q. In other words, to put it another way, first of all, you have to identify the payment?

Ralph Yoder

A. Right.

Q. And the machine has to send that card showing there has been a payment to match it up with the income to the company?

A. Right.

Q. And then it has to match, and in order for it to do that it has to match up with a card or numbers in the machine showing there is such a policy on which a payment should be paid?

A. That's true. We can't apply the money unless there is a policy. We can't do it unless we have such a policy and the policy is in force.

Q. And at this time tell us whether or not there was any such card for policy number 522392, that is, in April?

A. There were no cards for that policy.

page 63 } Q. And that policy was lapsed?

A. Right.

Q. All right, sir. Now, there is no card then. Did you again have to go to the file to try and determine if any such person had a policy with your company?

A. Yes. We needed to discover the purpose of the payment and by doing so we have to gather all our records together including the policy file. We would very soon discover that he had lapsed his policy, and we had to get additional records. And upon bringing it all together, we recognized that the $5.60 was the amount of money which had been charged monthly for the other policy which was lapsed.

Q. So in other words, when you received his check for $5.60 it wasn't because of anything on the check or anything that you received. It was by a process of elimination.

A. Well, it was a process of discovery rather than elimination. We discovered this by going to the file and seeing that there was or rather that there had been a policy issued and that the monthly rate for that policy had been $5.60.

Q. All right, sir. On the company records when was this policy lapsed?

page 64 } A. December 12, 1967.

Q. And for what reason was it lapsed?

A. Upon the request of the policyholder, Mr. Coleman.

Q. What was the direct reason, though?

A. For nonpayment of premium.

Q. Now, after Mr. Coleman died does the record reflect when the company received word of his death?

A. We received word of Mr. Coleman's death? Was that the question?

Q. Yes. When?

Ralph Yoder

A. On April 18, 1968.
Q. All right. Now, with respect to this other policy, the one that was in force, did you issue a check or did your company issue a check on that?
A. Yes, sir.
Q. Do you know when you received the death certificate?

Mr. Wells: Your honor, I don't want to object ot it, but can he go outside the scope of my direct examination?
Mr. Garrett: I will call him later.
That's all.

page 65 } REDIRECT EXAMINATION (Adv.)

By Mr. Wells:
Q. Mr. Yoder, it took until the 17th of April for everything to get to the proper place in your company; is that correct?
A. To get to the underwriter.
Q. And you are an underwriter?
A. Yes.
Q. Mr. Coleman died on the 16th; is that correct?
A. I believe that is correct.
Q. And also with that check came this reinstatement application on the 9th of April?
A. On April the 9th?
Q. I mean this reinstatement application actually came with that check; did it not?
A. That's true.
Q. With a note by Mr. Coleman that he wanted to pay the premium?
A. Well, now, I will have to refer back again to my records.
Q. I believe that is what you said.

Mr. Garrett: No, he didn't say that.

page 66 } By Mr. Wells:
Q. There is a reinstatement application and a note by Mr. Coleman; is that not correct? You may refresh your recollection by reading the bottom of page five.
A. That note came in with the reinstatement application the first time, but the second time on April 9th there was no note that I am aware of. That is why I am puzzled. There was a note on March 15th, but there was no note on April 9th that I am aware of.

Mr. Wells: I have no further questions.

RECROSS EXAMINATION (Adv.)

By Mr. Garrett:

Q. How many premium payments do you-all receive a day at this office?

A. We process on an average of about six thousand premiums a day.

Mr. Wells: I object to that. I don't see the materiality of it.

The Court: I am going to overrule the objection.

page 67 } By Mr. Garrett:

Q. One other thing. You spoke of different departments. Tell us whether or not the people that would handle the checks and premium notices are the same people that would handle the applications such as the one that was here for reinstatement? In other words, would these things stay together or would they be sent to the various departments?

A. They would stay together up to a certain point, and then, of course, the check would be deposited. A record of this would be made and it would be sent to the underwriter with the additional payment which we call a suspended item. Since this was a lapsed policy, the money could not be applied into the record as a premium receipt.

In order to apply the money as a premium payment, the policy must be in force. Now, insofar as the policy was not in force, you have to give an accounting for this money when you deposit the check. We make up a suspense item.

Now, this suspense item after it was made up would have been routed to the underwriter with the reinstatement application so that he would have received the $5.60 with the reinstatement application.

* * * * *

page 79 } RALPH YODER, was recalled as a witness on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Ralph Yoder

DIRECT EXAMINATION

By Mr. Garrett:

Q. All right, Mr. Yoder. Mr. Yoder, you have previously testified, and you have heard the testimony of Dr. Moore with regard to the medical condition of Mr. Coleman?

A. Yes, sir.

Q. And in your capacity and in your experience as an underwriter would the diagnosis of a hiatal hernia mean anything to you as an underwriter?

A. Yes, it would.

Q. Not only to you personally, but would it mean anything to any underwriter in this type of situation?

A. Yes, sir, it would be significant.

Q. All right, sir. And do you have any standard table for assessing risk that are used throughout the insurance industry?

A. We have a number of underwriting manuals that we use and that other companies use in the practice
page 80 } of underwriting and assigning certain premium rates to certain types of impairments.

Q. All right, sir. Now, taking the application or the reinstatement application that Mr. Coleman made there is a statement which says, "Never been in the hospital since I was in the USN in 1942 in (war) for upset stomach." Now, in and of itself would that have alerted you to anything?

A. 1942. Well, that would have told us, of course, that he did have an impairment or some sort of distress of his stomach.

Q. Of course, sir. Was there in your file of April 9th or at the time this application was received and signed, this letter, that is, Defendant's Exhibit No. 1, dated January 26th, from Mr. Coleman?

A. This was in our file at that time.

Q. Now, that letter states that he was in the hospital in January; is that not true?

A. The letter is dated January 26th, and he said in the letter that he had been sick and in the hospital.

Q. Now, taking these two items together you as an underwriter what would your next step then be?

A. There is an obvious inconsistency. He says on the application that he has not been in the hospital
page 81 } since 1942 and then, on the other hand, he says that he was off sick and in the hospital. So as an underwriter I have an obligation to reconcile this difference

or resolve the conflict of information, which you have. You simply can't make a decision when you have this sort of discrepancy.

Q. All right, sir. Now, had you known at the time that Mr. Coleman had been in the hospital in March of 1968 for a hiatal hernia and that he had been in the hospital for various treatments would that have made any difference?

Mr. Wells: Your honor, I object to that. I think it is highly speculative. Like Dr. Moore said there are different degrees of hiatal hernias. How can he say it would have made a difference or not?

The Court: I overrule the objection. It is a proper question.

By Mr. Garrett:

Q. Would it have made any difference as to whether or not this policy would have been reinstated?

A. Yes. It would have made a difference. As a matter of fact, it would not have been reinstated.

Q. All right, sir. Now, what would have been
page 82 } done with relationship to obtaining more information?

A. Well, we would have obviously requested a current medical examination, which would have been made by an authorized examiner or qualified physician. Then we would have wanted hospital records from the doctors who treated him so we would have direct evidence as to the *symtoms* and the diagnosis and the type of impairments that we were dealing with. We would also have requested a current inspection report or mercantile report. Those are basically the sources of evidence.

Q. This is what you would have done if Mr. Coleman had not died?

A. Based on the fact that he had been in the hospital.

Q. Right. You never had time to do those things, did you?

A. Right.

Q. And if you had found out what you then learned you would not have reinstated the policy; is that correct?

A. Yes.

Q. Getting back to those manuals, do you have some copies of those?

A. I did.

Q. Would you refer to those manuals. And tell
page 83 } us whether or not a man with a condition that has

Ralph Yoder

been related here today, which Mr. Coleman had, whether he is still a standard risk?

A. Well, I have before me four pages from various underwriting manuals.

Q. Are those the manuals that you use?

A. These are the manuals of those companies with whom we reinsure, and these are just selected pages covering the impairments that we are talking about.

First, this is a chart covering the underwriting of blood pressure and it is taken from the Nationwide manual, Nationwide being the largest reinsurance company located in Fort Wayne, Indiana. It simply places upon the chart the various levels of systolic reading and then of the diastolic reading of the blood pressure and from those two readings then a debit or a percentage of extra mortality is assigned to the policy in question or to the application in question, and then a price is applied accordingly because of the increased risk, due to the increased chance of death.

Q. I believe at one point this morning it was testified to that he had a recorded blood pressure of as high as 150 over 100 or 150 over something. What would that show on the table?

A. On that reading alone by this table this page 84 } would have presented 250 percent of standard mortality based on that blood pressure reading, so that would be about 250 percentage time the standard rate.

Q. And that would increase his premium another whole premium plus another half of a *premiun* more?

A. That's right.

Q. How about the hiatal hernia? What effect does that have?

A. A hiatal hernia based on the testimony would have been assigned a rating of 150 percent. In other words, the basic rating times one and a half. This would be fifty cents extra for each dollar premium.

Q. Do any of *theos* tables show whether the man would be uninsurable on this type of thing?

A. Not if the hiatal hernia was carefully and satisfactorily diagnosed and we could completely rule out any possibility of *cornary* disease and angina pain and that type of thing. The symptoms are very often somewhat alike. If someone has a history of chest pains, you have to be sure you are talking about a hiatal hernia, not a pain emanating from a *cornary* disease or angina pectoris. However, the company never had an opportunity to have its own physician examine

him. We never had an opportunity to obtain those records from the hospital or the doctor.

page 85 } Q. Now, in the event that a person allows a policy to lapse and then attempts to reinstate the policy such as was attempted here and the company found that because of the man's physical condition the former policyholder was not eligible to reinstate the policy at the former premium, what would happen then? Would the policy be reinstated or would a new policy be issued?

A. It wouldn't be reinstated because you can reinstate only on the same basis as the original policy was issued. You would in effect have to offer the man a new contract just as though he were applying for a new policy on the basis of the premium which was applicable based on his current physical condition.

Q. All right. Now, in this particular case did the company ever issue to Mr. Coleman or anybody for him a receipt binding the company to either reinstate this policy or to issue him any new policy?

A. None that I am aware of, sir.

Q. All right, sir. Now, in fact, is it not in the language right above where you sign this reinstatement application, that language here, that any payment of premium made in connection with this application or any receipt shall not be binding nor shall the policy be reinstated until he is approved to be insurable and all persons insured under this policy. Does that language—as it appears there does it

page 86 } not say that if he does make any payment it shall be returned to him if the company elects not to reinstate him?

A. That's true. It is money that must be returned to him.

Q. All right, sir. Now, of course, this reinstatement application is based on paragraph 13 of the main policy, is it not?

A. Yes, sir, this is a standard provision of all life insurance policies, this reinstatement provision.

Q. All right, sir. And, of course, this provides should the policy lapse it may be reinstated within three years after due date of the premium and that the policyholder satisfy the company of insurability including good health of the insured together with payment of all premiums in arrears with compounded interest to the date of the reinstatement at the rate of five percent per annum. Is that the standard clause?

A. Yes, sir. That was taken from the original policy.

Q. And during the lifetime of Ray Coleman did he ever present evidence that he was insurable?

Ralph Yoder

A. No, he did not.

page 87 } Q. Let's go back to a couple questions about time. Now, I believe you told me when you testified earlier that according to the company records the policy lapsed on December 12, 1968, for nonpayment of premium; is that correct?

A. Yes, sir; that's correct.

Q. In the policy is there a provision for a grace period?

A. There is a thirty-one-day grace period.

Q. And during that period it is according to the provisions to simply pay the premium and the policy continues?

A. Yes, it continues.

Q. We heard something about the easy reinstatement business. How long does that last?

A. This is a company practice. We allow reinstatement up to sixty days following the due date during which we will accept premium payments without any evidence of insurability.

Q. And that sixty days would have expired on what day?

A. February 10th.

Q. I show you here a memorandum entitled, "Life Instruction Sheet." It has a printed ink dated February 17, 1968. Did this come out of Mr. Coleman's file on this policy?

A. Yes, sir.

page 88 } Q. Now, do you know what caused that memorandum to be made up?

A. A letter received from Mr. Coleman to the effect that he did not want this policy and this gave rise to this office *memeorandum* being prepared.

Q. In other words, this is a letter we refer to as Defendant's Exhibit No. 1, the one in which he says, "I do want to cash in this policy 522392, and I want to keep my family policy which costs me $25.60 a month, but the other policy I do not need at this time"?

A. Yes, sir; that is correct.

Mr. Garrett: All right. We would like to offer that.

The Court: This is Defendant's Exhibit No. 10.

By Mr. Garrett:

Q. I would also like to show you Plaintiff's Exhibit No. 6. And, of course, you have in your file a copy of this before it was written on by Mr. Coleman, do you not?

A. Yes.

Q. And tell us about the writing on the front of it insofar

page 89 } as this block that is checked and some words about $30.00 are written in there. Is that what the company wrote or what Mr. Coleman wrote?

A. This was prepared and sent to him with a reinstatement application. He then returned this to us and he had written $30.00 a month until I pay it all back, $135.00. And on the reverse side it says, "Very sorry this has happened. I will pay all of it back so I won't lose my policy 522392. So I will let a payment in April the 12th of $30.00 and my policy payment which is $5.60. If I can I will send more than $30.00. Thank you so very much."

Q. And this was received back according to the stamp here on March 21st?

A. That's correct.

Q. And this is the first knowledge or written knowledge that you had from the policyholder that he wanted to keep the policy?

A. That is the first specific evidence from him. It was the first written document from that—that he wanted to do anything with his policy.

Q. Now, at that time what was the method of reinstating the policy or attempting to reinstate it?

A. Well, I need to point out that this reply came to us with the reinstatement application which he had not signed. And

page 90 } since the reinstatement application was not dated or signed, we still had nowhere to go. We had no application on which to take action. We did have this letter and we then did what seemed to us the most logical thing; that is, we returned the application for his signature so we would have some basis for action. And then upon receiving the application completely filled out we were in a position for our underwriters to obtain the necessary information such as medical reports, physician reports, mercantile reports and anything else that might be needed.

Mr. Garrett: I think that is all the questions I have.

CROSS-EXAMINATION

By Mr. Wells:

Q. Mr. Yoder, you have explained what the easy reinstatement application means. Can you please tell me why they mailed it to him in March? Why didn't they fill in the date where it says, "Lapsed for nonpayment of premium." Do you know why they didn't fill that in?

Ralph Yoder

A. No, I don't know why they did not, nor why they would have either for that matter.

Q. Well, there is a place on the form to fill in where it lapsed; isn't that correct?

page 91 } A. It has an explanation. There are places for other—

Q. Don't you think he should have been told when his policy—

A. He was told with the reinstatement application. I think this was transmitted to him with other forms which clearly said the date of when the policy lapsed.

Q. If a policyholder misses some premiums, you can waive that, can't you, and you can accept his premiums and leave his policy in force, can't you?

A. No. Do you mean beyond a certain period of time?

Q. Well, if he misses a month or two and then sends in the money, you can elect to accept those premiums and let it go ahead, can't you?

A. No, certainly not. This is highly discriminatory. As I explained before, we do have a practice of the thirty-one-day grace period.

Q. What I am getting at is—

A. Then following that you have another twenty-nine days and that is a total of sixty days. And during that time, the policyholder can send us a premium and it will be applied without any questions or without evidence of insurability. However, after that point he must give evidence of

page 92 } insurability. If we did it any other way, it would be discriminatory.

Q. Well, that explains what I asked you. I notice in your letter there that your company wrote, which says, "The money we are holding will pay the premiums for December, January, February, and March." Now, that was figured on the rate of $5.60 a month; is that correct?

A. That's true, yes.

Q. And you accepted this premium in April for $5.60. Now, you never did tell him that his rate might go up because of this hiatal hernia, did you?

A. For a very good reason though. We hadn't commenced our underwriting at that point.

Q. But your company told him, isn't it true, that this would pay the payments for December, January, and *et cetera?*

A. You used the expression, "accept." We neither accepted nor rejected this money. We received this money and we held it in suspense.

Q. I understand that. My question is if you had any thought that the risk might be increased and that the premium would be increased then that money would not have been enough to pay those premiums, would it?

A. Well, if we had known that the risk would have been increased it wouldn't have paid the premium, but

page 93 } we didn't know this.

Q. Well, could you please explain if that money paid the premiums for December, January, February, and March?

A. I am not sure. They didn't say it paid the premiums. It said it will pay it on the basis of the original policy which carried a—

Q. The letter says, "The $22.40 that we are holding will be sufficient to cover December, January, February, and March."

A. And your question was what?

Q. It wouldn't been sufficient if they were going to raise the premium; is that correct?

A. Well, had the policy been reinstated on the basis of the original contract it would have paid those premiums at the rate of $5.60. As a matter of fact, the policy was not reinstated nor was he qualified to have been reinstated.

Q. But they said it was sufficient.

A. But we did not yet know—we had not commenced our underwriting.

Q. Well, shouldn't it have said it will be sufficient unless your premium is raised? Wouldn't that have been a more accurate statement?

A. Well, if it is a matter of semantics I guess

page 94 } I can't dispute the degree of accuracy. I think the intent is very clear. We were simply acknowledging receipts of these premiums of four payments at $5.60 each.

Mr. Wells: I have no further questions.

REDIRECT EXAMINATION

By Mr. Garrett:

Q. Let's get to these four payments for just a minute. I show you these four checks that the plaintiff has introduced into evidence here. They are dated as follows: January 1st, March 3rd, March 3rd, and February 1st. There were two of them in March; is that correct?

A. Yes.

Ralph Yoder

Q. All right. Now, the two checks numbered 325 and 312 were both dated March 3rd. Now, when is it dated on the back there that they were cashed by Nationwide?

A. March 8th.

Q. What about this one here?

A. March 8th.

Q. Now, this check dated February 1st which is check number 310 and check number 309 dated January 1st, when were they deposited by Nationwide?

A. It appears to be March 4th.

page 95 } Q. What about this one here?

A. March 4th.

Q. Okay. Now, Mr. Yoder, in the normal course of events and taking into consideration what the company knew at this time when would these four checks have been deposited after they were received?

A. Well, in the normal course of events if premium notices were received with the check and they corresponded and there was no question about them they would probably be deposited the same day or early the next morning.

Mr. Garrett: All right. That's all.

Mr. Wells: No more questions.

The Court: Let me ask a question.

Mr. Yoder, do you have any records of anything coming into the company with these checks or any other communication from Mr. Coleman about the reinstatement of the policy prior to your sending him this letter that is marked Plaintiff's Exhibit No. 5?

The Witness: No, sir. We have nothing from him prior to that letter. The only thing we have from him are a series of communications saying he does not want the policy.

The Court: Did these checks come in the mail

page 96 } without anything to mark them?

The Witness: No identification at all. Upon receiving them—there was no correspondence received with them. We had to search our records, and we discovered that he had had this policy. We received the four checks without any correspondence or anything.

The Court: All right. I think that is all.

RECROSS-EXAMINATION

By Mr. Wells:

Q. Mr. Yoder, one other question. When these checks came

in like that for $5.60, you didn't personally receive them, did you?

A. Did I personally receive the checks? Oh, no.

Q. So all you know is that you didn't find any other correspondence in the file; is that right?

A. Well, that is true.

Mr. Wells: That's all.

A Juror: Your honor, can I ask a question? Should ask you the question first?

The Court: You can ask the question.

page 97 } A Juror: Mr. Yoder, if they would have received payment by February 10th would the policy still have been in force? Can I ask that question?

The Court: That is perfectly proper.

The Witness: If I said it—what I hope I said was that if the payments which were due for December 12th and January 12th which were a total of $11.20 had been received by February 10th we would have reinstated him *wihtout* evidence of insurability. This money would have been applied without asking any questions pertaining to his health or his insurability and he would have been given notice that the policy was reinstated and then the February 12th payment would again have been due.

A Juror: Do you go according to when the letter is received or what?

The Witness: The postmark is what we go by.

A Juror: Can I ask him another question?

The Court: Go right ahead.

A Juror: The cards and checks are to correspond. And even if the man wrote you that he wanted to cash

page 98 } in his policy these cards are still in the file; is that it?

The Witness: I know what you mean. I think I have that document right here. I have precisely when we were instructed to pull those cards. It was based on that letter from Mr. Coleman instructing us to send him a check of the accumulated dividends of $134.72 and to also process the lapse without any further conversations.

A Juror: Can I ask him if the check for the dividends automatically lapses the policy?

The Court: I do not think the form of that question would be proper. In other words, that would be a question of law.

A Juror: Can I ask another question? Is it customary for a company to accept a check and to cash the check if a policy is not in force?

Ralph Yoder

The Court: That is a proper question.

A Juror: These checks were cashed and they were returned by the company, and yet, you say the policy was lapsed. Is that a company policy to accept payment and cash a check if a policy is not in force?

page 99 } The Witness: It is with our company and several other companies. We have a responsibility to take care of these payments, to take care of these checks, and this money is not applied as a premium payment but it is deposited for safekeeping so that the check does not become lost.

A Juror: But it is just as safe for them to send it back to the person as not acceptable because the policy is not in force, is it not?

The Witness: A lot needs to be said in order to answer that. A number of policyholders do lapse their policy and a number of them come in for reinstatement and we recognize that they want to reinstate their policy. It is pointless for us as a company to send back their money which we feel they sent us for the purpose—we feel we ought to hold that money and discover the policyholders intent. We can then use it or we return it depending on the circumstances.

A Juror: And by the same token the person that makes the payment with that check if it is accepted by

page 100 } the company and sent back to him as a cancelled check, that is a receipt of payment being accepted by the company in all good will; is that true?

Mr. Garrett: I think that calls for a conclusion of law under the terms of the policy.

The Court: I don't think that is a proper question to put to a witness. Here again it is a matter that the jury can consider under all of the circumstances that have been proven.

A Juror: That's all. Thank you.

Mr. Wells: I have no further questions.

REDIRECT EXAMINATION

By Mr. Garrett:

Q. I think the question this gentleman had in mind was whether or not the company has any right absent of specific directions to apply accrued dividends to premium statement—to use dividends to pay premiums in the absence of directions?

A. No, not in the absence of directions. We

page 101 } could do it if directed to do so on a term policy.

No, in answer to your question, if the policy was a permanent plan of insurance with cash values then the accumulated dividends could be treated as part of those cash values, and under the contract if the man has applied for the automatic premium loan provision then those values include premiums. But that is not a part of the contract in question. This is a term insurance contract and it would not be if the policyholder specifically directed that these dividends be withdrawn and applied as premium payments that we would do so.

Mr. Garrett: That's all.

RECROSS-EXAMINATION

By Mr. Wells:

Q. Mr. Yoder, how was your company notified of Mr. Coleman's death?

A. By telephone.

Q. Telephone. Do you know who notified your company?

A. The record reflects that a Mr. Mason called our office.

Q. Do you know of your own knowledge whether or not before February the 10th if Mr. Mason or any

page 102 } other representative had called?

A. No.

Q. You don't know whether or not he was going to keep the policy?

A. Our correspondence was solely with Mr. Coleman and not with an agent at that time.

* * * * *

NANCY C. COLEMAN, the plaintiff, was recalled as a witness on her own behalf, have previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wells:

Q. Mrs. Coleman, you have heard the testimony in reference to paying these checks. Did you or your husband have any sort of a coupon book that you used to make your payments?

A. All checks that was made to the Nationwide have an enclosed envelope to Nationwide, Columbus, Ohio.

page 103 } There was a long slip and on one side it would say hold this for your payment receipt until our checks are back and the long slip goes with the payment and they can't receive those checks without those statements because we have our name on it, our address, and the policy number, and that does not go on the check.

Q. Well, now, when these checks were mailed in was the long part of those coupons mailed?

A. When I went into the file after Mr. Coleman's death, all the coupons were gone that had gone in with those checks. The next premium would have been May 12, 1968.

Q. So some of the coupons were missing?

A. The coupons go in with the statement—with the check to Columbus, Ohio.

Q. Do you have a book of coupons?

A. They send us twelve. They send us one for each month, and they got on there for which month it is.

Q. After Mr. Coleman's death, how many of those coupons were there?

A. Just from May until December were left.

Q. The rest were missing?

A. Yes, sir.

Mr. Wells: That's all.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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