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William A. Fawcett v. Security Benefit Association : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

WILLIAM A. FAWCETT,
Plaintiff and Respondent,

vs.

SECURITY BENEFIT ASSO-
CIATION, a corporation,
Defendant and Appellant.

Case No. 6210

Appeal from District Court of Salt Lake County,
Utah

P. C. EVANS, *Judge*

RESPONDENT'S BRIEF

ROMNEY, ROMNEY & BOYER,
Attorneys for Respondent.

FILED

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RESPONDENT'S BRIEF

STATEMENT OF CASE

This case was tried upon an agreed statement of facts, which is before the court. Consequently, the parties are in harmony with respect thereto. As appellant has referred to the parties as plaintiff and defendant, we shall do likewise.

QUESTIONS INVOLVED

The general question is whether the Benefit Certificate sued upon was in full force and effect for death benefit only at the date of the death of Harriett P. Fawcett, which resolves itself into the following specific questions: (1) When did the extended insurance period commence: (2) Did the endorsement placed upon the Certificate constitute a new contract between the parties or the exercise of an option provided for in the Certificate; (3) Is the plaintiff estopped to claim rights inconsistent with the endorsement; (4) To what extent do the laws of Kansas determine the rights of the parties in this case.

BRIEF AND ARGUMENT

Before entering into a discussion of the main points involved, may we state that we fail to see that the method of operation of fraternal benefit societies, discussed by defendant at page 11, has any bearing upon any of the questions in this case. The fundamental distinction between fraternal benefit societies and so-called "old line insurance companies," is that one operates by levying assessments to meet its obligations, and the other uses the level premium plan. However, so far as this case is concerned, there is no difference. The contract

provided for the payment of a definite sum, payable monthly for a period of twenty years. While the association had the power to levy extra assessments if occasion demanded, as in the case of *White v. W.O.W.*, 87, Utah 477, 50 Pac. (2d) 422, cited by defendant on page 12, that power was not exercised during the life of the certificate in this case. Consequently, the fact that the term "assessments" is used rather than "premiums" or "payments" or some other like term is of no consequence in this case. As defendant has stated on page 15, the main question is, "What does the contract provide?" A determination of that question, so far as applicable here, is foreign to a discussion of the operation of fraternal benefit societies.

I

THE EXTENDED INSURANCE PERIOD OF TEN YEARS PLUS THIRTY DAYS COMMENCED OCTOBER 18, 1928, AND TERMINATED SUBSEQUENT TO THE DATE OF THE DEATH OF HARRIETT P. FAWCETT.

A. THE ASSESSMENT PAID ON FEBRUARY 18, 1922, WAS A MONTHLY ASSESSMENT, AND COVERED A PERIOD FROM FEBRUARY 18, 1922, TO MARCH 17, 1922 INCLUSIVE. EACH ASSESSMENT THEREAFTER FELL DUE ON THE 18TH OF THE MONTH, COMMENCING MARCH 18, 1922, AND COVERED A FULL MONTH.

We believe defendant will agree that the theory of extended insurance is that it covers a period in addition to the time covered by the payment of assessments. There is considerable authority for the view that extended insurance commences at the expiration of the grace period following the due date of the assessment not paid. See annotation in 106 A.L.R. 1276. We believe, however, that the majority view is that in the absence of any specific contract provision to the contrary, extended insurance commences on the due

date of the premium which was not paid. We have adopted the latter proposition. It therefore becomes material for the court to determine the due date of the assessments under the contract, and the period covered by each assessment.

We contend that the first assessment covered a period of one full month, and that each assessment thereafter fell due on the 18th day of each month, commencing March 18, 1922, and covered a period of one month, and that the last assessment paid on September 30, 1928 covered a period from September 18, 1928 to October 17, 1928 inclusive. We take this position for the following reasons:

1. Wording of the contract.

The Certificate reads in part as follows:

“In consideration of the statements, answers and agreements in the application of the member, which by this contract are made warranties, and in further consideration of *the first monthly contribution* of \$2.35 paid before or at the time of the delivery of this Certificate, and thereafter \$2.35 to be paid *within each month* to the Financier of the Local Council, *for a completed period of twenty years from the date of the first payment thereon.*” (Italics ours) (Ab. 42.)

The first payment was made on February 18, 1922. (Ab. 26.) It would seem that the language of the Certificate which is italicized above requires the interpretation contended for. The first payment by the terms of the Certificate was a “monthly” payment, the only logical conclusion being that it covered a full month’s

period and not a portion of a month. The court will note that such general expressions as "first monthly contribution" and "within each month" are used in the Certificate, and "first day of the month" and "last day of the month" in the Constitution and Laws. (Ab. 49-50.) In addition to such general expressions, there is the provision in the Certificate italicized above, which requires assessments to be paid "within each month for a completed period of twenty years from the date of the first payment thereon." We need not cite authority for the proposition that the court will construe all provisions of the contract together, which requires the general expressions to be construed along with and in reference to the date of the first payment. The defendant would have the court construe the general expressions without reference to the fixed date and therefore contends that "first day of the month" and "last day of the month" means first and last days of any of the months of the calendar, such as March, April or June, etc. Defendant asks the court to adopt a construction which wholly ignores the effect of the *fixed date* upon the general expressions. On the other hand, we urge upon the court a construction which takes into consideration the effect of the fixed date on the general expressions. To state it another way "first and last day of the month" as used in the Constitution and Laws must have reference to the day of the month when the first assessment was paid, which would necessarily determine the day of the month when subsequent assessments fell due. The *first day of the month for the payment of assessments* was determined by the first payment made on the certificate to be the 18th day thereof.

Defendant criticizes us on pages 16 and 17 for urging that "first day of the month" means the 18th day and "last day of the month" means the 17th day. On the other hand, we maintain our contention is sound, and it is the only way the general provisions can be harmonized with the fixed date. Furthermore, our contention has its counterpart elsewhere. Many corporations have their fiscal year commence on March 1st. The first day of the *fiscal year* does not, therefore, correspond with the first day of the year as ordinarily understood. In the same way, the *first day of the month for the payment of assessments* does not necessarily correspond with the first day of the months of the calendar.

Defendant has indicated some of the difficulties involved with its construction. (Page 23) If the first payment carried the Certificate down to the end of February, 1922, and another fell due on March 1, 1922, we fail to see how the defendant can escape one of two conclusions; namely, that the first assessment was for term insurance to March 1, 1922, or that it was not a monthly assessment and did not cover a full month's period. Defendant tries to answer these objections by definitely eliminating the first, and as to the second, by stating that the provision in the contract to the effect that the first assessment was for the month "in which the Certificate was delivered" meant the month of February, 1922. To take this position, however, defendant ignores the provision in the contract that designates the assessment as a "monthly contribution." As discussed more fully hereafter, we submit that "monthly" means a full month's period.

If defendant's contention is correct, the 240th

assessment would fall due on January 1, 1942, and if not paid, would be delinquent on February 1, 1942. To avoid a forfeiture, the 240th assessment would have to be paid before February 1, 1942, and yet the Certificate would not mature until February 18, 1942, leaving a gap from February 1st to February 18, 1942. Generally speaking, in insurance contracts the last premium is paid prior to maturity, but it is uniformly true that the maturity date of the policy and the end of the period covered by the last premium correspond, which they don't under defendant's construction. Defendant, on pages 24 and 25, tries to meet this objection by saying this provision of the contract is not before the court. The question of whether the Certificate would be forfeited or not by the failure to pay the 241st assessment is not before the court, but the provisions of the contract relating to the due date of assessments and the period they covered are before the court. The reason given by the defendant for the necessity of the language "twenty years from the date of the first payment thereon" tends to strengthen our view, and defendant therein admits that the date of the first payment controls so far as subsequent payments are concerned. Defendant admits that if Mrs. Fawcett had not paid the first assessment until April 14, 1922 (sixty days after its date), the Certificate would not mature until April 14, 1942. However, regardless of the date of payment, the 240th payment, to adopt defendant's view, would have to be paid before the first day of the month in which the Certificate matured, leaving the gap mentioned above. The above difficulties are avoided if plaintiff's view is adopted.

2. Judicial interpretation.

We have made an exhaustive search and have found no case squarely in point on the construction of a contract similar to the one before the court. We have, however, found two cases which adopt the theory which supports our contention. The defendant has cited no case against our view, nor have we been able to find any. We shall first discuss the two cases which support our position and then comment on the cases cited by the defendant.

In *Sovereign Camp of W. of W. v. Reed*, 94 So. 910 (Ala.), the facts were as follows: The certificate was dated December 15, 1919, the policy delivered, and the first monthly payment of \$1.60 was paid on December 31, 1919. There was \$3.20 paid on January 28, 1920 and the deceased died on the 25th of February, 1920. The certificate had the following clause:

"This certificate is granted in consideration of the monthly premium hereinbefore stated in the schedule and of the payment of a like amount on or before the 1st day of each consecutive month thereafter during the continuance of this contract, and the further consideration of the delivery of this certificate during the lifetime and good health of the member."

The court stated on page 913:

"In the contract are employed the words referring to the payment of premiums, 'monthly installments,' 'following months,' and 'monthly payment.' The word 'month' as so used in the beneficiary certificate and exhibits thereto or

documents incorporated therein by agreement of the parties, had reference to a calendar month."

The court, after citing the familiar rule of construction of a policy to be in favor of the assured, stated on page 913 as follows:

"When the contract sued upon is so construed, and the advance payment of \$1.60 as a monthly premium on December 31, 1919 *is held to be for the calendar month to follow*, no forfeiture ensued for non-payment of premiums. The receipt book in evidence indicated a like sum on January 28, 1920, and on the same day an additional sum of \$1.60. If these payments were properly made to the defendant as premiums on the beneficiary certificate *the same was extended and in force to and within the month of March.*" (Italics ours.)

The latter part of the above sentence which is italicized may be dicta so far as it says that the certificate was in force to and within the month of March, but the first part of the quotation is not dicta because it was one theory on which the case was decided, as is indicated by the court's statement on page 916:

"This (referring to the fact that the certificate was in force at the death of the deceased) is not only true when Sections 57 and 58-A of the constitution are considered, but is true because of the general principle we have stated that the term 'month' whether employed in statutes or contracts and not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the date of its beginning less one. If there be no corresponding day of the succeeding month, it terminates on the last day thereof."

The other case is *Rybczynski v. Chicago Fraternal Life Assurance Company*, 227 N.Y.S. 366. The deceased applied for insurance on January 5, 1926. The application was approved on January 15, 1926, and a one year premium was paid in advance on January 27, 1926. The company issued a certificate and dated it January 1, 1926. The certificate was not delivered, but a request was made for a change of beneficiary. The defendant issued a new certificate dated February 3, 1926, which was delivered. A check for the second year's premium, dated February 2, 1927, was received by the company on February 5, 1927, and returned. The insured died on February 16, 1927. The certificate provided:

"If a member elects to pay quarterly, semi-annually or annually, such payments shall be due on the first day of the calendar month of the quarterly, semi-annual or annual period, and must be paid on or before the last day of the month."

The certificate further provided:

"Should the member refuse or fail to make periodical payments at the time stipulated for such payment . . . the certificate is to be void."

The court says on page 368:

"There was no time stipulated for such payment in the benefit certificate, *save as its date, February 3, 1926, be taken in connection with the clause requiring quarterly, semi-annual or annual payments to be due on the first day of the calendar month of the quarterly, semi-annual or annual period*, and must be paid on or before

the last day of said month. That would give *at least* the month of February, 1927 for the payment of the second annual premium before forfeiture. The insured died within the *calendar month of the expiration of the one year period of the policy.*" (Italics ours.)

We recognize that in neither of these cases was the date of the death of the assured subsequent to a date when the certificate would have been forfeited, under the defendant's view, but undoubtedly the court adopted the same theory in each case, which theory is authority for our contention. The point we wish to stress is that in each of the cases the court "tied in" the general expressions to a definite date. In the Reed case, the court tied in the general expressions to the date December 31, 1919, and said the first premium was "for a calendar month to follow." Under defendant's interpretation, the payment of the first premium would have covered one day only, and another would have been due on January 1, 1920. Likewise, in the Rybczynski case the general expressions are tied in to the date of the policy, February 3, 1926, and "calendar month" was tied into the date of the expiration of the one year period of the policy. (See last italicized portion above.)

As stated above, defendant has cited no authority against our contention, nor do the cases cited by defendant support its contention because in none of them was the question raised which is before this court, and in none of them did the court have a contract before it which is the same as in the instant case.

The case of *Sov. Camp W. O. W. v. Rhyne*, 171 Miss. 687, 158 So. 472, cited by defendant on page 17,

can be distinguished from the one at bar for the reason that the contract provision for the payment of premiums had no reference to a fixed date.

The case of *Craig v. Golden Rule Life Ins. Co.*, 184 Ark. 48, 41 S.W. (2d) 769, cited by defendant on page 18, is readily distinguishable in that the application recited the second premium would be due on November 1, 1929, and that the policy was "granted in consideration of the application and the payment of 85 cents on or before the 1st day of October, 1929, and a like payment on or before the 1st of each month during the calendar year and monthly payments in advance thereafter, increasing annually on January 1st of each year in accordance with the cash savings step rate plan."

The question of construction of the contract was not before this court in the case of *Moran v. Knights of Columbus*, 46 Utah 397, 151 Pac. 353, cited by defendant at page 19. The question there was whether the insurance company could insist upon a forfeiture when it had subsequently accepted payments on the certificate. There was no question of the interpretation of the contract to determine whether a forfeiture had occurred. If the *Moran* case is indicative of the "thousands of cases" referred to by defendant on page 20, we are not surprised that defendant failed to include more of them in its brief.

The provisions of the contract relating to due dates of assessments and periods covered thereby are not stated in the opinion of this court in *Kennedy v. M. W. A.*, 92 Utah 487, 69 Pac. (2d) 508, cited by defendant on page 19, and no question is raised with

respect to the interpretation thereof. For that reason, anything stated by this court in that case concerning the time when the certificate became forfeited because of non-payment of assessments has nothing to do with the case at bar. We agree with defendant that the books are full of such cases as the Kennedy case, but it cannot be concluded that because the question was never raised that the courts adopted defendant's view.

The case of *Frysh v. Commercial Casualty Ins. Co.*, 214 Wis. 453, 253 N.W. 184, cited by defendant on page 22, is distinguishable for the same reason as that pointed out in the *Craig* case, *supra*, in that the first premium paid the policy down to a definite date, namely, May 1, 1931. The court states in the opinion that it was the policy of the company to have the contracts run from the first day of one month to the first day of the next month, and that the 20th of the month was considered to be the "dead line." The first premium in contracts issued on or before the 20th day of the month covered a period down to the first of the next month and premiums on policies issued after the 20th of the month covered the period down to the first of the second month. The insurance company in the *Craig* case, *supra*, followed the same practice, but used the 15th day of the month as the "dead line." It will be noted, however, in each case the contract itself provided that the first premium would pay the policy to the first of the next or the second month, depending upon the date of issue. It is well to note, however, that in the contract the due date of the second premium was fixed by a definite date and not by a general expression such as "first day of the month." Defendant would have the court construe the contract in this case on a par

with the Craig and Frysh cases. Instead of the contract providing that the first assessment paid the certificate to the first day of a certain month, defendant's contention must rest on general language which in turn must be read in connection with a fixed date, which date is not in harmony with defendant's interpretation of the general language. Clearly, then, the Frysh and Craig cases are not helpful to defendant.

3. Calendar month.

Defendant relies on the quotation from *Warfield Natural Gas Co. v. Clark*, 257 Ky. 724, 79 S.W. (2d) 21, 97 A.L.R. 971, for the meaning of the expression "calendar month." The question in the *Warfield* case was whether the gas company had wrongfully turned off the gas in the plaintiff's home. On the back of the application was the following:

"3. The amount payable for the gas furnished during each month shall be due on the first day of the following month and unless paid on or before the 15th of such month the gas will be shut off without further notice. In the event service is discontinued during any month the amount payable shall be due immediately upon such discontinuance."

Within four or five days after January 11, 1933, the company rendered Mrs. Clark a bill for gas furnished from December 9, 1932 to January 10, 1933, which had on it the statement, "Last day to pay net amount January 26, 1933." The bill was not paid and the gas was shut off on February 6, 1933. Apparently it was the gas company's contention that they had the right under the quoted portion of the contract above to shut the gas

off if the bill remained unpaid for fifteen days from the "first day of the following month," meaning that the following month started on the day following the monthly period for which a bill was rendered for gas furnished. The court gave the definition of the words "calendar month" as given in Webster's New International Dictionary,

"(1) any of the months as adjusted in the calendar, now the Gregorian. April, June, September and November now contain 30 days, and the rest 31, except February, which has 28, and, in leap years, 29. (2) The time from any day of such a month to the corresponding day (if any; if not, to the last day) of the next month."

The court in the Warfield case adopted the first construction. The case, however, is readily distinguished from the one at bar. In the Warfield case the contract provisions "on the first day of the following month" and "on or before the 15th of such month" do not have reference to and are not connected with any particular month or day of a particular month for the time of commencement. On the other hand, when "calendar month" is used in connection with a contract of insurance and is tied into a fixed date, as was the case in *Shira v. N. Y. Life Ins. Co.*, 90 Fed (2d) 953, cited by defendant on page 21, Webster's second meaning of "calendar month" is adopted.

The provision in the contract for payment of premiums was as follows:

"This contract is made in consideration of the application therefor, and of the payment in ad-

vance of the sum of \$78.40, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this policy for the period terminating on the second day of April, Nineteen Hundred and Thirty, and of a like sum on said date and every three calendar months thereafter during the life of the Insured."

The court said on page 956:

"The contract expressly provided that the initial premium would cover a period terminating on April 2, 1930, and that the insured should pay a like premium every three calendar months thereafter to maintain the policy."

There is no question as to the meaning of the phrase "every three calendar months thereafter" as the court said on page 955: "Insured failed to pay the premium due April 2, 1933." In other words, "three calendar months thereafter," when tied to a definite date as in the Shira case, meant on the date corresponding to the fixed date every three months, which would be the 2nd day of July, October and January of each year, whereas defendant's interpretation would require the uncalled for construction that premiums fell due on the first day of July, October, January and April thereafter. The same interpretation is used in many cases where a fixed date is involved.

Thus, in *Shea v. Graves*, 19 Pac. (2d) 406, (Ore.), it was held that a complaint to foreclose a mechanic's lien filed on November 2, 1938, was filed within six months from May 2, 1938, the date of the filing of the lien, and in *Hayward Lumber & Investment Co. v. Corbett*, 33 Pac. (2d) 41 (Calif.), the court held that

a notice of default dated April 18, 1929, was premature under a trust providing that the trust should be in default for three months before the whole amount of the obligation would become due and payable, where the first default was February 1, 1929. The notice could not be effective if dated before May 1, 1929. The following is a quotation from *Langley v. State*, 155 So. 682, (Miss.):

“The term ‘month’ when used in any statute means a calendar month unless a contrary intention be expressed . . . in computing which time must be reckoned by looking at the calendar and not by counting days, and when not coincident with the particular month named in the calendar, such a month is the period of time from the day from which the month is to be computed to the day numerically corresponding thereto in the following month less one, if the following month has so many days; if not, to the last day thereof.”

The Alabama court, in the recent case of *Daniel v. Ormand*, 163 So. 361 (Ala.), still uses the same interpretation of the phrase “calendar month” as was used in *Sovereign Camp W. O. W. v. Reed*, 94, So. 910, which defendant criticizes on page 26. The court says in the *Daniel* case:

“With us, the word ‘month,’ unless otherwise expressed, means a ‘calendar month,’ Code 1928, Para. 9, *Sov. Camp W.O.W. v. Reed*, 208 Ala. 457, 94 So. 910, which according to Webster’s New International Dictionary means the time from any day of any of the months as adjusted in the calendar to the corresponding day (if any; if not, to the last day) of the next month.”

The case which best illustrates the importance of the meaning of calendar month as tied to a specific date which we have been able to find, is *Schissler v. Wisconsin Life Ins. Co.*, 202 N.W. 177 (Wis.). The plaintiff had a contract with the defendant giving him exclusive right to sell insurance in a certain area, with certain provisions of cancellation, one of which was that defendant could cancel the contract if plaintiff failed for two consecutive months to produce any accepted and paid for business. The plaintiff failed from January 4, to March 15, 1917 to produce any applications for insurance, and defendant exercised its privilege of cancellation. Quoting from the opinion:

“Such period, however, it is contended by plaintiff, was not the ‘two consecutive months’ under Clause 15 quoted above, for the reason, as it is argued, that in the absence of a more specific designation the months must be calendar months and be computed as starting on the first day of some month immediately following in which, at any time therein, business had been produced, and that therefore, the applications of January 4th prevented the commencement of the period of two consecutive months until the first of February, and there having been an application produced in March there was but one instead of two calendar months intervening the January 4th and March 17th applications. Reliance is placed upon Section 4971 (10) Statutes, providing that the word ‘month’ shall be construed to mean a calendar month unless otherwise expressed. *This, however, does not determine the time for commencement of a period computed in calendar rather than lunar months.* This statute also provides that where the word year is used it means a calendar year. The contract in

question was made December 3, 1914, and clearly, the yearly period referred to in the contract within which a specified amount of business was required to be produced in order that plaintiffs might preserve their exclusive territory would expire on the 4th of December of each year thereafter rather than merely starting on the first of January following. By the same reasoning, the expressions here involved should be computed as the period of two calendar months from the day upon which any particular insurance business was produced. More than such period had clearly expired at the time of the obtaining of the policy on March 17th." (*Italics ours.*)

4. Construction of By-Laws and Certificate:

Without reiterating again the provisions of the By-Laws and Certificate with reference to due dates of assessments, etc., may we state that the wording of the By-Laws standing alone and apart from the Certificate tends to support defendant's contention, and likewise, we maintain there is little or no question about our position based upon the wording of the Certificate alone. How then shall the court construe the contract? It is elementary that the court will construe the entire contract and harmonize the provisions contained therein if possible. This can be done only if "first day" and "last day" of the month, as used in the Laws, are considered in connection with the date when the first assessment was paid as used in the Certificate, thus making the first day of the month the 18th and the last day the 17th of the next month, commencing February 18, 1922, and continuing for twenty years thereafter.

It is only when the contention of the defendant is

urged that ambiguity exists. There is no way that ambiguity can be avoided if "first" and "last" day of the month, as used in the Laws, refers to the first and last day of March, April or May, etc., when considered in connection with the wording of the certificate.

However, if there is ambiguity between the Laws and the Certificate, there is ample authority holding that the wording of the Certificate controls. The following cases hold that where there is a conflict between the By-Laws and the policy, the policy will prevail over the By-Laws: *Mosson v. Woodmen of Union* (Ark.), 262 S.W. 648; *Greenlaw v. Aroostook County P. M. F.* (Maine), 105 Atl. 116; *Failey v. Fee* (Md.), 34 Atl. 839; *Davidson v. Old People, etc.* (Minn.) 39 N.W. 803; *Eminent Household v. Bunch* (Miss.), 76 So. 540; *Courtney v. Fidelity Mutual Aid Society* (Missouri), 94 S.W. 768.

A very recent case from Kansas, the state of the incorporation of the defendant company, is that of *Lawson v. Brotherhood of American Yoemen*, 25 P. (2d) 344, which holds:

"Where the contract consists of the by-laws, the certificate, and certain other documents, all should be considered. They should be construed together. If there is inconsistency in them when so considered, the court will, when interpretation is possible, so construe them as to give the insured the benefit of provisions favorable to him." Quoting several cases.

The Supreme Court of Utah, in the case of *Maynard v. Locomotive Engineer's Mutual Life*, 16 Utah 145, 51 P. 259, has held substantially the same thing. The court says on page 260:

“The terms of the by-laws in question must be interpreted liberally and reasonably, and, as they appear to be susceptible of two constructions, that must be adopted which will more nearly carry out the benign object of the association and sustain the claim of the insured. The provisions will not be scrutinized for the purpose of enabling the organization to escape liability to any of its members, or for the purpose of creating limitations in favor of the association which do not satisfactorily appear within the terms of the by-laws. Where associations or corporations are organized for the purpose of mutual benefit and relief, their by-laws will not be so interpreted as to favor the forfeiture of the rights of its members.”

When plaintiff's view is adopted, there is no ambiguity in the contract, but if defendant's view is accepted, ambiguity cannot be avoided. If there is ambiguity, the wording of the Certificate controls and the construction most favorable to the insured must be adopted. In either event, the court should affirm the decision of the lower court for the plaintiff.

5. First monthly contribution.

The Certificate was issued in consideration “of the first monthly contribution” We contend that the first assessment covered a period of one full month from the time it was paid. We recognize the general rule, as stated by the defendant on page 13, that the parties to an insurance contract may agree that future premiums shall be paid on certain dates in spite of the

fact that the first premium may not cover a full month or a full year. The corollary of this statement is also true. In the absence of contract providing otherwise, the assessment which is called a "monthly" assessment must be held to cover a full month. The question, of course, arises whether or not there is a provision in the contract requiring the second assessment to be paid short of one month from the date of the payment of the first assessment. Without again repeating what has heretofore been said about definite fixed dates and general provisions, we maintain that there is no such contract provision before the court in this case.

However, in the case of *Kennedy v. National Accident & Health Ins. Co.*, 76, S.W. (2d) 748 (Mo.), even in the face of a provision in the policy limiting payment of the first premium which was paid on July 10th, to August 1st, the court refused to hold that it did not cover a full month. The court said:

"The initial premium paid on July 10th upon delivery of the policy was described in the policy itself as a *monthly* premium, so that from the very beginning the policy was a monthly premium payment policy, which carried it, in accordance with the conclusions above announced, from the date of its delivery for one month."
(Italics ours.)

And likewise, in the case of *Jefferson Standard Life Insurance Company v. Myers*, 284 S.W. 216 (Texas), the court said:

"In other words, the company, in the absence of a contract to the contrary, has no right to

collect a premium for almost a month before the insured has any protection under the policy. The premium is for a year."

6. Assessments fell due on the monthly date corresponding to the effective date of the Certificate.

The Certificate did not become effective until the first assessment was paid and the Certificate delivered and signed by the applicant during her good health, which date was February 18, 1922. (Ab. 46, 49.) There is considerable authority for the proposition that when the policy does not become effective until delivery, subsequent premiums shall fall due on dates corresponding to the effective date of the policy. See annotations in 6 A.L.R. 774; 32 A.L.R. 1253; 80 A.L.R. 957; and 111 A.L.R. 1420. We recognize that the cases so holding seem to be in the minority where the parties have contracted that subsequent premiums shall fall due on definite dates which do not correspond with the effective date. Granting the majority view to be as stated, we have found no cases so holding unless the contract definitely fixed the date for the payment of subsequent premiums other than to corresponding with the effective date. We maintain there is no definite date fixed in the contract before the court requiring the payment of subsequent assessments, other than to correspond with the first, which is the effective date of the certificate. In the absence of the fixing of such a date by the contract, the cases cited in the A.L.R. annotations above, which appear to be in the minority so far as the proposition there annotated is concerned, undoubtedly are good authority for the contention we make herein.

B. HARRIETT P. FAWCETT WAS ENTITLED TO EXTENDED INSURANCE COMMENCING ON A DATE CORRESPONDING TO THE DATE TO WHICH ASSESSMENTS WERE PAID AS DETERMINED BY THE EFFECTIVE DATE OF THE CERTIFICATE, WHICH WAS FEBRUARY 18, 1922. .

Authority for the above statement is the recent case of *Harvey v. Union Central Life Ins. Co.*, 45 Fed. (2d) 78. The application was dated October 22, 1918, and was approved November 7, 1918. The policy was dated November 9, 1918, and provided for the payment of an annual premium on October 22nd of each year. The policy provided that the insurance became effective on the date of the approval of the application. There was a provision for extended insurance which, according to the amount on hand at the time of default in payment of premiums, covered a period of two hundred thirty-seven days. The insurance company figured the extended insurance from October 22, 1928 to June 16, 1929. The insured died on June 25, 1929. The beneficiary contended the extended insurance should have been figured from November 7, 1928, the anniversary of the date of the approval of the application, and which would have included the date of the death of the deceased. The court held that the extended insurance should have been figured from the anniversary of the effective date of the policy and not from the the anniversary of the date provided for the payment of

premiums. The following excerpts from the opinion are enlightening. The court says in the first column on page 81 :

“Three separate dates are mentioned in the policy. October 22 is definitely fixed as the date upon which annual premiums must be paid in advance. It was agreed, however, that the policy should not become effective until the application was approved by the company and the date of such approval is November 7. The policy itself was not signed by the company nor dated until November 9. The result of the agreement between the parties was to require the insured to prepay his premiums sixteen days before receiving any benefit therefrom. It was an apparently somewhat insignificant and perhaps unforeseen hardship to which he became bound. In the matter of lapse it might have been serious, and if appellee’s contention is correct, it results in the tragedy of forfeiture.”

and further states in the second column on page 81 :

“There can be no doubt under the decisions that the requirement to pay premiums annually in advance on October 22 was a valid and binding agreement. The minds of the parties definitely met upon that point, and there is nothing in the record to indicate that the insured was in any way misled. Failure to pay any annual premium on that date resulted, after thirty days’ grace, in lapse. This only meant, however, that thereafter the insured had forfeited his right to keep the policy alive by subsequent payment of premiums. To restore such right required reinstatement under the rules and regulations of the company. Such lapse, however, in no way avoided

his right to extended insurance if entitled thereto under the other conditions of the policy."

The court further states in the first column on page 82:

"A review of the numerous authorities cited in appellee's brief will disclose no case, nor do we think any can be found, of persuasive force, in which the mere provision for payment of premiums in advance was construed to overcome the plain provisions of a policy that it should take effect on a subsequent date. Had the parties agreed that the policy should not become effective until approved but that if and when approved the insurance year should run from October 22, appellee's contention would be sustained by the weight of authority. It has been held in numerous cases that where the effective date of a policy is agreed upon as the beginning of the policy year, such date must govern though the premium may not have been paid until a later date nor the policy delivered until such time."

and further in the second column on page 82:

"A reference to the policy will clearly show that the date, October 22, related only to the day for paying premiums. In providing for incontestability, article 21 of the policy provides that it shall be incontestable after one year 'from date of issue, except for non-payment of premium,' and certainly the policy was not issued until the application was approved by the company. In article 25 it is provided that the policy shall be avoided by the suicide of the insured 'within one year.' We cannot conceive of the company's asserting that this limited the time to one year from the date of the application and the date of the payment of premium. The expression 'policy year' or 'end of policy year' is mentioned

no less than three times in the policy, and there also appears the expression 'on the anniversary of the policy.' This evidently refers to the anniversary of the birth of the policy which occurred on the approval of the application. It is true that option 1, article 14, of the policy states that the reserve value shall be applied to the extension of this policy as participating term insurance 'from the date to which premiums have been paid.' It does not state, however, that this shall be from the date on which premiums are paid or are required to be paid. Subscriptions to newspapers and periodicals are frequently required to be paid in advance, but when an annual subscription is thus paid, it is paid to the anniversary date from which the subscription begins to run and not from the date on which payment was made. The same is frequently applied to other business organizations, social clubs, etc. *Where dues are paid in advance, they are universally recognized as covering the period from which the privilege, for which payment is made, begins to run and not from the date of payment itself. We think it clear, therefore, that the date to which premiums were paid as provided in the policy was the end of the policy year from which the insurance became effective.*" (Italics ours.)

We think the Harvey case goes farther than is necessary to sustain our position. In the Harvey case there was a definite date in the policy for payment of the second and subsequent premiums short of one year from the effective date, which is not true in the case at bar. Even if defendant's view that the second assessment fell due on March 1, 1922 be adopted, the Harvey case is authority for the proposition that extended insurance shall be figured from the date premiums are paid to as determined by the effective date of the policy. As stated in

the Harvey case, the date October 22nd related only to payment of premiums. But all the other rights of the parties, such as incontestability, suicide clause, etc., were determined from "date of issue." Likewise, in the case at bar the rights of the parties, even including the date for payment of premiums, are determined with reference to the effective date of the certificate, as is indicated by the following excerpts from the Certificate and the Laws:

"(5) This Certificate shall not take effect until all required assessments have been paid and the Certificate signed by the applicant in person, and during the applicant's good health." (Ab. 46.)

Sections 96 and 98 (Exhibit No. 3, pages 45, 46) read in part as follows:

"Sec. 96: such Beneficiary Certificate shall not become effective until manually delivered to the applicant while the applicant is in good health and the assessment and dues, for the month in which the Certificate is delivered, have been paid and said Beneficiary Certificate signed by the applicant while in good health, nor unless delivered within sixty days after the date thereof."

"Sec. 98: When Certificate in Force. The Beneficiary Certificate shall become effective and be in force from and after the initiation of the member and the payment of one assessment and Subordinate Council dues to the Financier, the Certificate having been signed by the member and delivered to him while in good health."

We think the wording of the last part of the ex-

cerpt from the second column of page 82 in the Harvey case is very significant as applied to our case. The defendant urges it is good business policy for insurance companies to have definite dates for payment of assessments, and that therefore, first day of the month as used in the Laws means the first day of March, etc. Granting this to be true, it does not alter the right of the insured to extend insurance, according to the Harvey case. In other words, for the convenience of the company in having a definite date for payment of assessments, it may be necessary, in order to avoid a forfeiture, for the insured to pay assessments on or before the last day of each month of the calendar. But as stated in the Harvey case, the payment may be required to be made in advance, but covers a period beyond the time when the next falls due. Therefore, taking defendant's contention as to the due date of assessments to mean that the last one paid fell due on September 1, 1928, and had to be paid on or before the last day of September, 1928, still under the Harvey case it covered a period from September 18, 1928 to October 17, 1928, inclusive, and extended insurance should have been figured from that time.

We do not believe the above construction necessary to our case for the reasons stated herein. But such a construction is essentially fair to both parties. It gives effect to the definiteness of the date for payment of assessments desired by the insurance company, and at the same time gives the insured the benefit of a full month's insurance for each assessment. If the insured is to get one full month's insurance for each assessment, this can be accomplished with the construction suggested in the Harvey case.

II

THERE IS NO EVIDENCE BEFORE THE COURT OF THE CONSTRUCTION THE PARTIES PLACED ON THE CONTRACT.

To adopt the rule contended for by defendant on page 31, there must be some evidence of the construction the parties placed on the contract. In the case of *Scotten v. Metropolitan Life Ins. Co.*, 336 Mo. 724, 81 S.W. (2d) 313, cited by defendant on page 31, the court held that the interpretation the insured had adopted must control. However, there could be no question as to his interpretation as he had requested the payment of premiums as of April 15th and had paid premiums on the basis that April 15th was the due date for several years, and had signed an application for reinstatement upon two occasions on the basis that he had not paid the premium which fell due on April 15th. What evidence is there in this case that Harriett P. Fawcett ever adopted the defendant's construction? The date of the last payment, September 30, 1928, is just as consistent with plaintiff's view as with that of defendant. Defendant urges that the assured adopted its view when she retained the Certificate with the endorsement on it for over ten years without objection. No weight can be attached to the fact that the assured retained the Certificate with the endorsement on it without objection for the reason that such fact does not go to show what her interpretation of the contract was with reference to the payment of assessments. The contract in no place states the date or time from which extended insurance shall be figured. There is nothing in the application for extended insurance or the en-

dorsement which attempts to tie the date of its commencement with the date for payment of assessments. The books are full of litigation as to when the period of extended insurance begins. We have adopted in this case what we consider to be the majority rule, that in the absence of a contract provision to the contrary the extended insurance begins to run on the due date of the premium which was not paid. Other courts have held that it starts at the end of the grace period, which rule, if adopted by this court would permit recovery by plaintiff under defendant's theory. See annotation entitled, "Due Date of Premium or Date of Expiration of Grace Period as Commencement of Period of Extended Insurance," 106 A.L.R. 1276. A third possibility is found in the Harvey case, *supra*, and there are others. If the contract had contained a provision that extended insurance was to commence on the due date of the assesment which was not paid, or some similar provision, there might be some basis for defendant's contention, but in view of the fact that the highest courts of the land are not in harmony on the subject of the time of commencement of extended insurance and some courts hold that its commencement is not necessarily connected with the due date of premiums, no significance can be attached to the fact that Mrs. Fawcett failed to object to the terms of the endorsement so far as such fact is related to her interpretation of the contract as to the due dates of assessments.

We refer the court to our discussion on the heading of estoppel herein for the futility of objection by the assured if she did not adopt defendant's construction. Her failure to object is of no consequence by way of evidence of her interpretation of the contract.

III

THE ENDORSEMENT ON THE CERTIFICATE DOES NOT CONSTITUTE A NEW CONTRACT.

We contend that the right to extended insurance existed in the Certificate itself, and that after the required number of assessments were paid the assured was entitled, as a matter of right, by filing a written application, to extended insurance for the period stated in the table of values in the Certificate. Making written application for extended insurance was the exercise by the assured of one of the options granted to her in the Certificate. The only contract provision for extended insurance is in the Certificate as follows:

“VI. The Security Benefit Association promises to Waive periodical contributions hereinbefore stipulated and to continue protection for death benefit only to the said member in the amount of the face of this Certificate during such period as its withdrawal equity, taken as a single premium, will purchase as temporary protection; provided the member has made the stipulated periodical contributions without default for not less than three years prior to the application for this privilege, and has maintained his status as a member as required and prescribed in the Constitution and Laws of the Association.” (Ab. 44.)

The application for extended insurance, a form furnished by the company, reads in part as follows:

“I desire to *exercise my option* to discontinue beneficiary contributions . . . and I desire to change beneficiary certificate No. 911864, dated

February 14, 1922, for \$1000.00 to continued or extended whole life protection, for death benefit only" (Ab. 51, 52.)

The right to extended insurance accrued upon application made by virtue of the terms of the Certificate itself, apart from and independent of the endorsement. The endorsement was not necessary to the creation of the right. Indeed no act on the part of the company was necessary to create such right, but merely the election of the assured by filing an application. The right was inchoate at the issuance of the Certificate and became vested when application was filed, and the endorsement itself is merely an attempt to state the period covered by the extended insurance, and does not amount to a new contract.

It is well to note that the application states as follows:

"At the expiration of which time the Certificate shall be void and cancelled by expiry." (Ab. 52.)

and the endorsement says:

"As part of the consideration for this extension the said Harriett P. Fawcett agrees to surrender this Certificate for cancellation after the expiration thereof as above described." (Ab. 27.)

indicating definitely that it was intended that the Certificate should be in force as modified by the option, until the expiration of the extended insurance period. Clearly, if the transaction was a new contract, the Certificate would have been surrendered at the time and not at the expiration of the extended insurance period.

It is well to note also in this connection, that in her application Harriett P. Fawcett asks for extended insurance for ten years and thirty days, but it does not state from any definite time.

We have been fortunate in finding an excellent case on this point. In *New York Life Insurance Company v. Gilbert*, a Missouri case decided in 1923, and reported in 256 S.W. 148, this question is discussed. The facts of the case are as follows: The insured had a loan on his policy. He had discontinued payment of premiums. He wrote to the company on December 4, 1920, and asked how much paid up insurance he could get after cancellation of the loan. The company wrote back stating he would have paid up insurance for \$768.00. The company later found it had made a mistake and that the policy was good for only \$296.00 in paid up insurance. An endorsement was made on the policy showing it was worth \$768.00 in paid up insurance, and the policy with the endorsement was forwarded to the insured. The mistake was discovered about a year later. The court held that the company was entitled to have the endorsement reformed to correspond to the true amount. The question of option or new contract was involved. The court stated on page 150:

“It would seem that the determinative question in this case is: Was it intended to settle in accordance with the terms of a previous contract or agreement, or was it intended to settle upon an agreement outside of the terms of the policy, showing an intention to extinguish the old con-

tract and make a new one? It seems quite evident to us that it was the insured's intention to settle under the terms of the policy when he wrote his letter of December 4, 1920. In this letter he inquired as to how much paid up insurance he could get. In the first place, the letter assumed that he was entitled to paid up insurance, which assumption could only be referable to the policy provisions. The amount of paid up insurance was not to be an arbitrary sum, but was to be 'figured' so clearly that the insured could understand it. This assumes that it was to be figured upon some basis, and under the circumstances then existing it could have had reference to nothing but the provisions of the policy, which is mentioned by number in the letter. It is quite apparent from all the facts that the agreement between plaintiff and the insured was that the settlement was to be made in accordance with the terms of an existing contract or policy; that it was not to be a new contract wholly outside the terms of the old one, or, in other words, a substitution of a new contract for the old one; but that it was to be merely a continuation of the old contract under an option in favor of the insured that was provided for in it."

See also the following cases: *New York Life Insurance Co. v. Kimball*, 106 Atl. 676 (Vt.) ; *Alabama Gold Life Insurance Co. v. Thomas*, 74 Ala. 578; *Holman v. Continental Life Insurance Co.*, (Conn.), 6 Atl. 405; *People v. Knickerbocker Life Insurance Co.*, (New York), 9. N.E. 35.

Defendant urges that Harriett P. Fawcett was not entitled, as a matter of right, to extended insurance for

the reason that her application therefor was not made while she was in good standing. No such requirement is to be found in Option VI of the contract. It is apparent that the wording,

“And has maintained his status as a member as required and prescribed in the Constitution and Laws of the association.”

refers to and must be read in connection with the three year period mentioned immediately preceding it. In other words, before the right to extended insurance accrued, the insured must have made the periodical contributions without default and “maintained his status as a member as required and prescribed in the Constitution and Laws of the association” for a period of three years before making application. Does the three year period mean immediately preceding the making of the application, or does it mean subsequent to the date payments began. Clearly it means the latter for the reason given in *Kennedy v. M.W.A.*, 92 Utah 487, 69 Pac. (2d) 508, cited by defendant on page 36. The court, after referring to conditions precedent to the application for extended insurance, says at the top of the second column on page 510 of 69 Pac. (2d) :

“The first condition clearly contemplates at least thirty-six consecutive monthly payments without any interruption. This is necessary in order that the proper reserve be built up to carry the extended insurance.”

The wording of the certificate in the *Kennedy* case was as follows:

“If all payments by the member have been regularly made in full for three or more full years, then upon written request of the member, on forms to be furnished by the head clerk of the society, *while this benefit certificate is in full force*, the society will extend, etc.” (Italics ours.)

The conclusion that the provision in the contract before the court is equivalent to a statement that the application must be made while the certificate is in full force, as in the Kennedy case, is unwarranted.

IV

PLAINTIFF IS NOT ESTOPPED TO CLAIM RIGHTS INCONSISTENT WITH THE ENDORSEMENT.

If the length of defendant's argument on this subject is indicative of the weight attached thereto, little need be said in answer. There is no basis for estoppel. The defendant has not been led to act differently or do anything, or fail to do anything, it would not otherwise have done, in reliance on Mrs. Fawcett's failure to object to the terms of the endorsement. In order for the date of the endorsement to have made any difference Mrs. Fawcett would have to have contemplated dying between October 31, 1938 and November 16, 1938. If she died before October 31, 1938, she would be protected under the terms of the endorsement. If she died after November 16, 1938, she would have been precluded from recovery. It seems wholly unwarranted for the defendant to conclude that because she failed to make objection to the date contained in the endorsement, when there was such a remote chance of it making any difference, that by her failure to object she adopted it as her construction of the contract, or that her beneficiary should now be estopped to claim rights under the certificate inconsistent with the endorsement. In other words, under the circumstances of this case, her having retained the certificate with the endorsement without objection is no

evidence at all of the construction she placed on the contract. Without lengthening this brief further, if the court is interested in this point it is fully discussed in a well written opinion by the late Justice McDermott, in the case of *Columbian National Life v. Black*, 35 F. (2d), 571.

THE LAWS OF KANSAS HAVE NOT DETERMINED THE QUESTION BEFORE THE COURT.

The case of *Wolford, Administratrix, v. National Life Ins. Co.*, 114 Kan. 411, 219 Pac. 263, cited by defendant on pages 14 and 38, and so strongly relied upon by defendant, does not decide the question before the court. We have heretofore stated that subject to the exceptions in I-A-5 herein, the majority view seems to be that the parties to an insurance contract have the right to contract that the second premium shall become due on a date certain which is short of a month or year from the date the insurance became effective. The insurance in the *Wolford* case was granted in consideration of an advance payment of \$227.70, terminating on November 14, 1918, and of the payment of annual renewals on or before the 14th day of November thereafter. The *Wolford* case is subject to the same criticism as the other cases cited by defendant in this connection, in that defendant attempts to use a case involving a specific date as authority for its contention in the case at bar where only general language is used. For defendant to contend that its contention is upheld by the *Wolford* case begs the whole question of this law suit.

CONCLUSION

We have attempted in the foregoing argument to discuss the several points raised by the defendant on their merits, and also to state our own contentions and authorities in support thereof.

By way of conclusion, may we add that it is not the disposition of courts to read more into an insurance contract than is found there, especially when to do so would result in a forfeiture and limitation of the rights of the insured. Defendant cannot rely on strictness of adjudication unless the contract contains strict provisions therefor, as is borne out by the following statement from the court in *Sovereign Camp v. Rhyne*, 158 So. 472, cited by defendant on page 17 of its brief:

“When a party relies upon a time provision in a contract as being the essence of that contract, it is no more than just that when he thus calls for strictness in adjudication, he should show that he has been as definite and certain in his contract stipulations in respect to the time relied upon as he is in the strictness to which he seeks to hold the other party in relation thereto.”

We sincerely maintain that the court should affirm the judgment in favor of the plaintiff.

Respectfully submitted,

ROMNEY, ROMNEY & BOYER,
Attorneys for Respondent

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