

1977

J.O. Kingston v. Great Southwest Fire Insurance Company, A Corporation: Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. O. KINGSTON,

Plaintiff and
Appellant,

vs.

GREAT SOUTHWEST FIRE
INSURANCE COMPANY, a
corporation,

Defendant and
Respondent.

Case No. 15323

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable G. Hal Taylor, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. O. KINGSTON,)	
)	
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Appellant,)	
)	
vs.)	Case No. 15323
)	
GREAT SOUTHWEST FIRE)	
INSURANCE COMPANY, a)	
corporation,)	
)	
Defendant and)	
Respondent.)	
)	

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

This is an action brought by the plaintiff insured against the defendant insurance company alleging that defendant wrongfully failed to compensate plaintiff for a fire loss to a warehouse located in Salt Lake City.

DISPOSITION IN LOWER COURT

Both sides stipulated to the facts and the case was submitted to the Honorable G. Hal Taylor, District Judge for the Third Judicial District. The Court ruled that plaintiff did not have an insurable interest in the warehouse at the time of the fire and therefore granted judgment in favor of defendant.

RELIEF SOUGHT ON APPEAL

Defendant-respondent seeks affirmance of the lower court

STATEMENT OF FACTS

In 1971 plaintiff, J. O. Kingston, purchased a building located at 9th South and 8th West for approximately \$34,000. (Deposition of J. O. Kingston taken April 13, 1977, pp. 4-5). This purchase price included both the building and the ground. (Deposition, p. 8). It was used as a general warehouse for products handled by Mr. Kingston. (Deposition, p. 8).

Defendant-respondent, Great Southwest Fire Insurance Company, issued a policy of fire insurance in the total amount of \$20,000 providing fire insurance coverage for the warehouse building with effective dates of May 10, 1975 to May 10, 1976. (R., p. 88).

On July 3, 1975 Salt Lake City Corporation commenced a condemnation action pursuant to a resolution by the Salt Lake City Commission against plaintiff, J. O. Kingston and others to condemn the property and building in question for the purpose of erecting a Senior Citizen's Center. The action was entitled Salt Lake City Corporation v. J. O. Kingston, et al. No. 228991. (R., p. 88; Ex. A). Kingston was served with Summons on July 14, 1975. (Ex. A., p. 15).

On the 30th day of July, 1975, Salt Lake City Corporation filed its Motion for an Order of Immediate Occupancy of the Premises. (Ex. A, pp. 24-27). Attached to the Motion was an affidavit of a real estate appraiser who determined the

value of the property to be \$33,000. (Ex. A, pp. 26-27).

On August 12, 1975 an Order for Immediate Occupancy was granted by the Honorable Bryant Croft permitting the City to occupy the premises and:

. . .to take immediate possession of said property of Defendant as required and as described and as set out in Plaintiff's Complaint, and to continue the possession of the same pending hearing and trial on the issues that may be raised in this action, and to do such work thereon as may be required for the purposes for which said premises are sought to be condemned and according to the nature thereof. (Ex. A, pp. 30-33).

In addition, the Order of Immediate Occupancy required the City to deposit at least 75 per cent of the appraised value of defendant's property with the Clerk of the Court and in addition restrained Kingston from hindering or interfering with the occupation of the premises. Accordingly, the City deposited 100 per cent of the appraised value of \$33,000. (R., p. 89; Ex. A, p. 33).

Approximately 38 days later a fire occurred at the warehouse and the building was totally destroyed. (R., p. 89). At the time of the fire plaintiff Kingston had certain materials in the warehouse which were not insured under the policy in question. (R., p. 89).

Plaintiff contested the appraised value tendered to the District Court Clerk. An agreement was entered into between

plaintiff Kingston and Salt Lake City Corporation in May of 1976 in which the City paid Kingston \$49,000 and assigned to Kingston any interest it may have had in the insurance proceeds. (Ex. A., pp. 79-81). The Final Order of Condemnation was entered on June 29, 1976. (Ex. A, pp. 101-102).

Before this agreement had been reached with Salt Lake City, Kingston filed a complaint against defendant Great Southwest Insurance Company on January 23, 1976, (R., pp. 2-3) alleging wrongful refusal to pay pursuant to the policy. The question of insurable interest was submitted to the lower court upon stipulation of the parties and the court held the plaintiff had no insurable interest in the warehouse destroyed and accordingly entered judgment in favor of the defendant. (R., pp. 89-92). It is from this judgment that plaintiff appeals. (R., p. 97).

ARGUMENT

THE TRIAL COURT WAS CORRECT IN FINDING
AS A MATTER OF LAW THAT PLAINTIFF HAD NO
INSURABLE INTEREST IN THE WAREHOUSE AT
THE TIME OF LOSS.

A. After Possession is Granted to the Condemning Authority and Tender is Made Pursuant to Utah Eminent Domain Procedure, An Owner Loses any Insurable Interest in the Condemned Property.

The instant case presents a simple question of whether an owner can claim an insurable interest in property which

has been condemned initially by the City but which no final award has been made. The answer to this question, however depends entirely upon the statutory law of Utah relating to insurable interest and eminent domain. For this reason, therefore, this case is unique in that this question has never been decided in the state of Utah interpreting these particular statutes.

The critical importance of the statutory procedure was recognized by the court of appeals of Kentucky in Patrick v. Kentucky Farm Bureau Mutual Insurance Company, 413 S.W.2d 340 (Ct. App. Ky. 1967) when it said:

We have considered the cases cited and have concluded that it would be pointless to extend this opinion by detailed discussion of them. It is apparent that the statutory provisions relating to eminent domain of the particular state involved are largely responsible for the results reached in these cases and, therefore, it is necessary that we consider the problem in the light of the Kentucky Statutes which are peculiar to the problem presented and contribute, in large measure, to the result reached. Id. at 343.

The applicable insurance statute is as follows. Section 31-19-4 of the Insurance Code specifically defines "insurable interest" in the following manner:

1. No contract of insurance on property or of any interest therein or arising therefrom, shall be enforceable except for the benefit of persons having an insurable interest in the thing insured.
2. "Insurable interest" as used in this

section means any lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage.

This Court has addressed itself to the question of an "insurable interest" of property destroyed by fire on two separate occasions. In Hill v. Safeco Insurance Company, 20 U.2d 96, 448 P.2d 915 (Utah 1969) this Court quoted with approval an authority which defined insurable interest of property as follows:

Generally speaking, a person has an insurable interest in property whenever he would profit by or gain some advantage by its continued existence and suffer some loss or disadvantage by its destruction. If he would sustain such loss, it is immaterial whether he has, or has not, any title in, or lien upon, or possession of, the property itself. Id. at p. 917, fn. 2 (Emphasis added).

In National Farmers Union Property and Casualty Company v. Thompson, 4 U.2d 7, 286 P.2d 249 (Utah 1955) this Court recognized that such an insurable interest is necessary to prevent a person having no interest in property except a potential gain from its destruction to gamble upon its loss.

Thus, it is clear what criteria should be used in determining an insurable interest and why such an interest must be shown. In this particular case it is necessary to thoroughly examine the eminent domain procedure in order to ascertain the interest which the condemning authority and the owner

in the condemned property.

Chapter 34 of Title 78 concerns the eminent domain procedure in Utah. Section 78-34-1 defines when the right of eminent domain may be exercised. There is no question in this case that the condemning of appellant's property was proper under the eminent domain statute.

Section 78-34-6 prescribes what elements the complaint must contain. This procedure was strictly followed by Salt Lake City. (Exhibit A, pp. 1-3).

Section 78-34-9 is entitled, "Occupancy of Premises Pending Action" and has been substantially amended in 1967 from the original 1943 version. The original provision allowed occupancy of condemned property upon payment of a bond "not less than double the value of the premises sought to be condemned and the damages which will ensue from condemnation". The original provision spoke in terms of a surety rather than an actual payment for the property taken.

The amended 1967 section allows occupancy of the premises and permission to perform "such work thereon as may be required" upon filing with the Clerk of the Court "a sum equivalent to at least 75 per cent of the condemning authorities' appraised valuation of the property sought to be condemned." The amended statute further provides interest at the rate of 8 per cent per annum to be applied to a formula

based upon whether the ultimate award of condemnation is greater or less than the initial deposit with the Clerk of the Court. This statute clearly speaks in terms of an actual payment for the value of the property since it is assumed the taking of the property has already occurred as stated in 78-34-11.

In the instant case Judge Croft entered an Order of Immediate Occupancy on August 12, 1975 requiring at least 75 per cent of the appraised value to be paid into the County Clerk Depository and restraining defendant from interfering with the occupation and work of the premises. One-hundred per cent of the appraised value was actually deposited.

Section 78-34-11 concerns when the right to damages have accrued. This section states the following:

For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section. No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages. (Emphasis added).

This Court in Redevelopment Agency of Salt Lake City v. Mits Investment Inc., 522 P.2d 1370 (Utah 1974) held that the v.

of condemned property is to be determined as of the date and under the circumstances existing at the time of the taking and that "ordinarily evidence of subsequent occurrences is not admissible as bearing thereon". Id. at 1372.

Thus, under this provision Salt Lake City was legally bound to pay plaintiff Kingston the value of the property at the time the complaint was served (July 14, 1975) regardless of any subsequent events either adding to or decreasing this value.

Section 78-34-15 essentially states that a court must make a final judgment of condemnation describing the property condemned and the purpose of such condemnation and that a copy of this judgment must be filed in the office of the Recorder of the County in which the property is located and "thereupon the property described therein shall vest in the plaintiff for the purpose therein specified".

Finally, Section 78-34-16 was substantially amended in 1967 thereby changing the title from "Possession by Plaintiff Pending Appeal of Further Proceedings--Deposit--Payment, Effect--" to the new title reading "Occupancy of Premises Pending Action--Substitution of Bond for Deposit Paid Into Court--Abandonment of Action by Condemnor". The new 1967 amendment added a specific provision concerning the effects of abandonment of the condemnation action by the condemning

authority. The new statute states:

Condemnor, whether a public or private body, may, at any time prior to final payment of compensation and damages awarded the defendant by the court or jury, abandon proceedings and cause the action to be dismissed without prejudice, provided, however, that as a condition of dismissal condemnor first compensate condemnee for all damages he has sustained and also reimburse him in full for all reasonable and necessary expenses actually incurred by condemnee because of the filing of the action by condemnor, including attorney's fees. (Emphasis added).

Applying this statutory scheme of eminent domain to the facts of this case patently shows that at the time of the fire Kingston had no insurable interest in the warehouse property. This conclusion is based on the following analysis.

When Kingston first purchased the property in 1971, he obviously had an insurable interest in it since, if the property were to be destroyed, the risk of loss would be borne entirely by him.

When the summons was served upon Kingston on July 14, 1975 the value which Kingston could claim for the property was limited to its worth as of that date. It was immaterial whether the value of the property went up or down subsequent to the service of the summons. At that point in time, it is doubtful that Kingston had any insurable interest in the property since he was guaranteed to be paid the full value of the property thus extinguishing any interest which he would

have in it. However, he still retained the right of possession and, under some cases of other jurisdictions, could still claim an insurable interest because of his possessory right.

On August 12, 1975 the Order of Immediate Occupancy was issued by Judge Croft and on August 14 a tender for the full amount of the appraised value was made to the Clerk of the district court. (Ex. A, pp. 30-33).

At this time, three critical events occurred: first, a judicial determination was made as to the value of the property subject to later modification; second, all rights of possession were lost by Kingston; and third, the risk of loss immediately passed to Salt Lake City Corporation.

The Kentucky Court of Appeals in Patrick v. Kentucky Farm Bureau Mutual Insurance Company, 413 S.W.2d 340 (Ct. App. Ky. 1967) explained the significance of this first element of judicial determination of market value. In referring to Kentucky statutes which allow a similar occupancy and payment into a court fund, the court stated:

Thus, it appears that prior to the destruction of the property, appellant had been paid an amount of money which represented a judicial determination of the fair market value of the insured property. This judicial determination was subject to appeal as to its amount, but it is also true that appellant was entitled to and was assured by operation of law that she would receive a judicially determined amount of money representing the fair market value of the property insured.

Since appellant had received a judicially determined amount of money representing the fair market value of the property prior to its destruction or loss and was not entitled to possession of the property at the time of this loss, then it would appear that she would not have an insurable interest in the property. . . . Id at 343.

As to the second element of possession, even though Kingston maintained some of his personal property in the building, the possession of the property was deemed to be that of the City. In City of Rochester v. Greenberg, 244 N.Y.S.2d 100 (Sup. Ct. 1963), the City had condemned real property and obtained an order directing the property owner "to deliver and surrender possession of the property to the City of Rochester on or before June 30, 1961". The property owner did not deliver possession and continued to collect rents from the property. Subsequently, the building collapsed.

The City contended that the owner remained in possession and control of the property and, therefore, that the correct valuation date was after the property had collapsed. The New York Court disagreed. The Court in that case stated:

I have concluded that the city in fact had possession on and after that date although Mrs. Greenberg collected the rents and I have concluded that the rents she did collect in fact are the property of the city and must be by her returned to the city.
Id. at 424.

Thus, the Order of Immediate Occupancy shifted the title to possession to the city and at the same time made it

mere tenant at will subject completely to the control of the city. A similar situation occurred in Van Cure v. Hartford Fire Insurance Company, 253 A.2d 663 (Pa. 1969). In that case, the condemning authority initiated a complaint against the property owner and obtained a court order allowing the condemning authority to enter the premises and take possession. At the same time, it tendered a \$37,000 bond into the clerk's depository. The authority permitted the property owner to remain in possession in order to reduce detention damages. A fire destroyed the premises subsequently. The court, in addressing itself to the possessory interest of the property owner, stated the following:

As for any other legal interest in appellant, the only plausible argument made is that her right of possession was interrupted by the fire. However, this right was not enforceable since she remained at the will of the Authority who could have her removed at any time. The Authority allowed her to remain in possession only because it suited its financial interests by reducing detention damages, and no court could order the Authority to continue her possession. Consequently, appellant possessed no legally enforceable interest that could support the policies of insurance. Id. at 666.

The third effect of the order of occupancy was an immediate shift of the risk of loss. The city under the statutory framework of eminent domain became responsible for the property condemnation, with its right of possession. In Chester Litho., Inc.

v. Palisades Interstate Park Commission, 317 N.Y.S.2d 761 (Ct. App. N.Y. 1971), a building was condemned by the Park Commission but the occupants were allowed to remain. Under the laws of New York, an order of immediate occupancy was required since the title passed upon the filing of the action. While the court relied upon the passing of title as its basis for the decision in that case, the language shows that the passing of the right to possession also transfers the risk. The court stated:

If this were a sale in fact, the risk would be upon the purchaser, here the appellants, under either the Uniform Vendor Purchaser Risk Act. . . or the common law. Pursuant to the more stringent statutory provision, the risk passes with either title or possession.

No unfair burden is placed upon appellants, for, if they intend to utilize a condemned building, they have an insurable interest for their protection. Id. at 762-763.

The court consequently held that the risk of loss of the building which was destroyed by fire was entirely borne by the condemnor-appellant. This is in accord with California law which states that the risk of loss to improvements remain on the owner until title, possession, or the right to possession is transferred to the condemnor. California Law Review Committee Recommendation and Study Relating to Taking Possession and Release of Title in Eminent Domain Proceedings, October, 1960, at B-17; see also Van Cure v. Hartford Fire Insurance Company

A.2d 663 (Pa. 1969) (After bond is filed, all risk of loss of condemned property passes to condemnor).

A further consequence occurred as a result of the Order of Immediate Occupancy. From that point on, Salt Lake City Corporation became responsible for the property, even in the event the condemnation proceeding was later abandoned. Section 78-34-16 allows abandonment, but specifically requires the condemnor to compensate the owner for all damages sustained because of the condemnation. Obviously, had the proceeding been subsequently abandoned, the city could not return to Kingston a burned out building without compensating him for his loss.

This Court on two occasions has held that a condemnor is liable for any damages occurring during the time of the condemnation when a subsequent abandonment has occurred. As stated by this Court:

The majority of the decisions hold that the rule that a municipality is not liable for damages sustained by the property owner resulting from the institutions of condemnation proceedings which are subsequently abandoned does not apply in instances of actual damage to the freehold, or when the condemnor takes possession of the property. Moyle v. Salt Lake City, 176 P.2d 882, 885 (Utah 1947) (Emphasis added).

See also North Salt Lake v. Saint Joseph Water and Irrigation Company, 233 P.2d 577 (Utah 1950).

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This position is consistent with cases in other jurisdictions having similar statutes concerning abandonment. In City of Silverton v. Porter, 559 P.2d 1297 (Ct. App. Ore. 1977), the court stated "A condemnor which takes prejudgment possession of property and subsequently elects to abandon its condemnation action is liable in damages to the condemnor both for loss of use of the land and for physical injuries thereto." See also Johnson v. Climax Molybdenum Company, 18 P.2d 929 (Colo. 1942); Van Cure v. Hartford Fire Insurance Company, 253 A.2d 663, 667 (Pa. 1969). ("Appellant contends that since she may have her property returned to her, she has an interest in the preservation of that property. She errs in two respects. After a bond is filed, all risk of loss passes to the condemnor. If the Authority is to return the property, it must make her whole with respect to any damages and losses. Thus, appellant could not sustain any pecuniary loss."); 30 C.J.S. Eminent Domain, Section 339, p. 271.

Thus, it is obvious that the Order of Immediate Occupancy eliminated any insurable interest Kingston may have had prior to the entry of the order. The value that Kingston was to receive for the property was fixed regardless of whether the property was improved or destroyed. The fire could have no effect upon the ultimate condemnation award.

Likewise, while Kingston may have been using the building

as a "shelter and protection for the merchandise inside" (Appellant's brief, p. 12), such shelter is certainly not within the "substantial economic interest" requirement of the statute. His only economic interest was in the property contained in the building which was not insured under this policy. To hold otherwise would allow a tenant to insure his landlord's building or a trespasser to insure a building in which he sleeps at night. Such insignificant "interests" do not give rise to a recovery from insurance.

Finally, even had the entire condemnation proceeding been abandoned, Section 78-34-16 of the Utah Code specifically requires the condemning authority to make the owner whole once again. It goes without saying that Salt Lake City could not have abandoned the condemnation proceeding and turned the ruined building back to Kingston without compensating him for its diminished value.

The criteria enumerated in the Hill case by this Court that a person must profit by or gain some advantage by the building's continued existence or suffer some loss or disadvantage by its destruction is applicable to Kingston and his interest in the warehouse building. Kingston had neither potential gain nor potential loss.

At the time of the fire, Kingston's only claim to the building was a bare legal title. (Appellant's brief, pp. 12-

13). But as this court stated in the Hill case, "[I]t is immaterial whether he has. . .any title in. . .the property itself." Hill v. Safeco Insurance Company, 448 P.2d 915, 917 fn. 2. The Kentucky Court of Appeals likewise stated:

It is true that at the time of the destruction of the insured property, appellant had a legal title to it, but the fact that the name insured had a legal title to the insured property is not conclusive of the existence of insurable interest as the trial court correctly discerned as evidenced by its citation of Cook's Adm'r. v. Franklin Fire Insurance Company, 224 Ky. 360, 6 S.W.2d 477. Patrick v. Kentucky Farm Bureau Mutual Insurance Company, 414 S.W.2d 340, 342 (Ct. App. Ky. 1967).

Kingston's legal title to the property was immaterial. For example, unlike a vendor who holds such title as a security interest in the property and who is entitled to insure his interest until such time as he is obligated to convey legal title, Jelco, Inc. v. Third Judicial District Court, 511 P.2d 739 (Utah 1973), Kingston had no security interest in the property. He had already been paid the assessed value of the property and could only argue that he was entitled to more money. There was no continued contract in which he had any right to reclaim the property as in a real estate agreement or a mortgage. Likewise, had the city abandoned the property, he would have been returned to his original condition and compensated for any damage done during the interim which again did not require any security interest to be held in it.

legal title.

Therefore, an analysis of the specific facts and statutes in this case amply supports the trial court's conclusion that plaintiff Kingston had no insurable interest in the warehouse at the time the fire occurred.

B. The Authorities Cited By Plaintiff Are Generally Distinguishable Upon The Facts Or Statutory Laws.

As noted earlier in this brief, the particular statutory scheme upon which a decision is based is of crucial importance in this type of case. A cursory reading of the authorities cited by plaintiff may give the impression that this exact problem now facing this court has been decided in a number of jurisdictions in favor of plaintiff's position. However, a close analysis of these cases generally reveals distinguishing facts or statutory law which make these authorities inapplicable. It should be reiterated once again that the question presented on this appeal has never been decided under Utah statutes by this Court and, therefore, cases in other jurisdictions cited by both sides or cases of this Court in previous decisions may or may not be helpful.

The Hill v. Safeco Insurance Company case cited by Appellant (Appellant's brief, p. 4) has already been cited by Respondent in this brief as defining the standard to be applied in determining whether an insurable interest exists. A close

examination of the facts in Hill show that there was a substantial interest in the preservation of the building by the insured far beyond anything claimed by the plaintiff Kingston and his interest in the warehouse which was destroyed. In Hill, the insured-deceased, through whom the estate claimed the insurable interest, had deeded the building (his house) to his wife. By will, his wife gave the insured a life estate in the home. This Court found:

[H]e had a life estate therein established by a will executed by Lila, a right of occupancy of the premises and a few other little unmentionable incorporeal hereditaments.
448 P.2d at 916.

Here, the plaintiff Kingston had none of the rights found important by this Court in the Hill case. Kingston had no life estate in the warehouse, in fact, he had no estate whatsoever. He had no right of occupancy to the premises as the right existed entirely with the city pursuant to the court order.

The Stuart case decided by this Court and cited by Appellant (Appellant's brief, pp. 4-5) involved the interpretation of Utah statutes concerning the transfer of automobile title. This Court found that the sellers of the automobile had failed to comply with the requirements of the statute concerning sale and that therefore the heirs retained an interest in the car since it had not been legally sold. In this case, however, the eminent domain statutes have been complied with and the

entry of the Order of Immediate Occupancy transferred possession of the building and risk of loss to the city, thereby precluding any insurable interest of Kingston. For this reason, the Stuart case dealing with an automobile is not relevant to the interpretation of the eminent domain procedure.

The Thompson case cited by Appellant (Appellant's brief, pp. 5-6) is the only case decided by this Court as to the interpretation of the insurable interest statute. A close reading of the Thompson case shows that Thompson was in a far different position than plaintiff Kingston in the present case. In Thompson, there were numerous facts representing "a substantial economic interest" that are not present in the instant case. The insured in Thompson had:

(1) Obtained an agreement with the new owner for retaining possession of the buildings.

(2) The insured had obligated himself to the new owner to protect the buildings from loss.

(3) Both the insured and the new owner expected that the use of the building would be paid for by the insured-prior owner.

(4) The insurance company had been made aware of the sale and agreed to accept the renewal premium in the insured's name.

Comparing the elements of "interest" in Thompson to the

elements of "interest" in Kingston we see they are substantially different. In Thompson, there was an agreement to occupy the premises, but in this case, there was an order divesting possession. In Thompson the insured had a duty to protect and pay rent while in this case there was neither an obligation to protect nor any offer to pay. In Thompson the insurance company knew of the change of ownership and agreed to continue coverage--here there was no such knowledge on the part of defendant. The defendant-respondent submits that the only interest plaintiff Kingston had in the warehouse was in the insurance proceeds should the warehouse be destroyed by fire. Such an interest does not constitute an insurable interest under Section 31-19-4 Utah Code Annotated.

The respondent submits that the Thompson case is dispositive of the present situation and clearly sets forth the purpose of the statute requiring "insurable interest", the purpose being that public policy does not allow an individual to gamble upon the destruction of something that he has no interest in. If such were not the requirement underlying the principle of insurable interest, it would always be to a condemned man's benefit to see his condemned building destroyed by fire.

The Irwin case cited by Appellant (Appellant's brief, p. 7) is distinguishable on the fact that the case involved

the abatement of a nuisance--not a condemnation of a building with just compensation. In addition, the insurance company had full knowledge of the court orders abating the nuisance but continued the policy in effect. In the instant case, the property was only taken after compensation was paid for it and there is no evidence that the insurance company was aware that the building had been condemned.

The Rosenbloom case (Appellant's brief, p. 7) reaches its result based upon one section of the New York Insurance Law and one section of the New York Real Property Law. Both statutes concern the sale of property by contract and the effects such contracts have upon fire insurance and risk of loss. Since these statutes do not concern condemnation nor are similar Utah statutes involved in the present case, the cited authority is inapplicable.

Likewise, Illinois statutes were at issue in the American National Bank case relied upon by Appellant (Appellant's brief, p. 8). The city had filed a petition for condemnation, but had made no tender of the purchase price nor obtained any order of possession. The Illinois statute only required the payment of the property owner's expenses for an abandonment to occur and did not require damages to be paid for any loss. Such statutes and procedure is once again inapplicable to the present controversy.

The Virginia statutory scheme in Home Insurance Company v. Dalis referred to by Appellant is also distinguishable. (Appellant's brief, pp. 9-10). Under Virginia law, a certificate is filed estimating the value of the property to be condemned. The parties then have sixty days to agree to a fair price before an actual condemnation proceeding has begun. No judicial determination whatsoever had been made in the Dalis case at the time the fire occurred. The court relied upon the fact that any condemnation action could be nullified and therefore held that even though title under the Virginia statute had originally passed upon the filing of the certificate, the fact that it was defeasible kept the risk of loss with the property owner. The court in that case stated:

Until the right of the State Highway Commissioner to have the certificate invalidated and to abandon the condemnation proceeding had expired, the plaintiffs would have a pecuniary interest in protecting the buildings against loss by fire. Thus, plaintiffs had an interest in the buildings that they needed to protect against loss, and they had an insurable interest in them when they were destroyed by fire. 141 S.E.2d at 724.

These statutes are, of course, different from the Utah statutes where no such loss would have occurred even had abandonment taken place because of the obligation to compensate the owner for damages.

Finally, the Oregon case of Fenter v. General Accident

Fire and Life Assurance Corporation, is also distinguishable upon its facts. The case involved the sale of real property for a failure to pay taxes and had nothing to do with condemnation proceedings. The trial court sustained a demurrer to the complaint wholly as a matter of law holding that the plaintiffs failed to show any interest in the property destroyed at the time of the fire. The Oregon Supreme Court held that there was a possibility that the plaintiff had been damaged from the fire, but stated it could not measure the probability of such loss from the mere allegations of the complaint. The court concluded, "He should have an opportunity to prove what he stood to lose, and what loss he actually suffered, as a result of the fire." 484 P.2d at 314.

This same question might be asked in the instant case. What evidence is there that Kingston stood to lose anything or actually suffered a loss as a result of the fire. It is evident from the statutory eminent domain procedure that Kingston could suffer no loss whatsoever regardless of the building's fate.

Finally, the remaining arguments of Appellant should be answered. Appellant states that a double recovery is permissible since defendant insurance company agreed to insure the building and that disallowing a claim by plaintiff would amount to a "windfall" to the insurance company by allowing

it to "avoid payment for a loss which it voluntarily insured against." (Appellant's brief, pp. 13-14). It should be noted, however, that unlike the Thompson case, there is no evidence that the defendant insurance company was aware that the building had been condemned. Thus, it is hardly fair to say that the company had accepted premiums to insure the condemned building and now was trying to avoid its obligation. The policy was issued on May 10, 1975, over three months before the condemnation proceedings began.

Additionally, the plaintiff argues that had it not been for the anticipated insurance settlement in this case, plaintiff would not have settled for the amount finally agreed to with the City. (Appellant's brief, p. 13). This argument must be termed incredible. Plaintiff initiated this lawsuit against defendant Great Southwest Fire Insurance Company on January 23, 1976. (R., pp. 2-3). Some five months later, while this action was still pending and while defendant insurance company had still refused to make any payment on the claim, plaintiff settled with Salt Lake City stipulating that it was "a reasonable settlement for the value of the property sought to be condemned." (Exhibit A, pp. 79-80). The fact that the city assigned any interest it may have in the fire insurance policy certainly does not indicate that the amount settled upon was reduced in any way by the hoped for insurance.

proceeds. It is ludicrous to assume that respondent is responsible for any settlement agreed upon by plaintiff which was less than the actual value of the property. Had plaintiff sincerely believed he was entitled to more money, he could have litigated his beliefs in the condemnation action. It must, therefore, be assumed just as the stipulation states, that the \$48,500 paid to plaintiff was indeed a "reasonable settlement."

CONCLUSION

Without extensively reviewing the numerous authorities cited by both sides in this controversy, it can be simply said that plaintiff Kingston neither suffered nor could suffer any loss from the destruction of the warehouse building. The statutory procedure of eminent domain adequately protects a property owner from loss and places the burden upon the condemning authority especially after an Order of Occupancy has been obtained.

To allow the recovery to plaintiff in this case would amount to a true "windfall" since plaintiff has already been fully compensated for the complete value of the building. While it is true that courts generally construe policies against the insurance company and in favor of the insured, it is also true that courts must adhere to the public policy of insurable interest in order to prevent a wagering on disaster