

1955

National Farmers Union Property and Casualty Co. v. Leland J. Thompson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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NATIONAL FARMERS UNION
PROPERTY AND CASUALTY CO.,
a corporation,

Plaintiff and Appellant,

— vs. —

LELAND J. THOMPSON,

Defendant and Respondent.

Case No. 8286

APPELLANT'S BRIEF

FILED

MAR 17 1956

Clerk, Supreme Court

Utah

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NATIONAL FARMERS UNION
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— vs. —

LELAND J. THOMPSON,

Defendant and Respondent.

Case No. 8286

APPELLANT'S BRIEF

NATURE OF THE CASE

This action arose under a fire insurance policy issued by the plaintiff covering certain property located on a tract of land in Box Elder County, Utah. The insurance was intended to cover a frame dwelling, used as a garage, for \$2,000; an Allis Chalmers tractor for \$2,000; and an Allis Chalmers combine for \$2,000. (Exhibit P-3). The premium for the policy was \$23.00 and the insurance was to run from October 26, 1951, to October 26, 1952.

On or about the 26th day of October, 1952, the defendant renewed the policy for the period from October

26, 1952, to October 26, 1953. On November 8, 1952, the foregoing property was destroyed in a fire (R. 1-6). On the 21st day of January, 1953, pursuant to a proof of loss filed by the defendant (Exhibit P-2 and D-14 and 15), the plaintiff paid to the defendant the sum of \$2,000, which was represented to be the value of the frame building. There was some question concerning the identity of the Allis Chalmers tractor and combine and no payment was made for these items at that time (Tr. 88-89).

During the course of the investigation concerning the identity of the combine and tractor, it was discovered that the defendant had sold the frame building prior to the date of the fire, which sale the company had not been informed of at the time the \$2,000 was paid (R. 89-90). It was further discovered that at the time the insurance was originally procured the defendant was not the owner of the building and had certain encumbrances upon the other property of which he had not advised the company.

The plaintiff thereupon brought an action against the defendant to cancel the policy of insurance and to recover the \$2,000 which had been paid (R. 1-3). The defendant answered and counterclaimed for the damage to the tractor and combine (R. 6-9). The case was tried to a jury and submitted to them on special interrogatories. On the basis of their answers to the interrogatories, the court entered judgment for the defendant for the damage to the tractor and combine plus interest (R. 72).

As part of its judgment, the court entered a judgment of no cause of action on plaintiff's complaint (R.

72), but specifically found that the value of the frame building at the time of the fire was \$1,000. The court thereupon entered an additional order granting a new trial on the plaintiff's complaint unless the defendant should file his consent that the judgment on the counterclaim should be reduced \$1,000, the consent to be filed within ten days or by 5:00 P.M. on April 23, 1954 (R. 73).

The defendant did not file his consent, and on April 23, 1954, the court ordered a new trial as to plaintiff's complaint, it appearing to the court:

“* * * That said defendant obtained \$2,000 as insurance from plaintiff on the representation that the building was worth the sum of \$2,000, at the time of said fire when in truth and in fact said building was only worth the sum of \$1,000 at that time; and it further appearing that this court, after making a finding to the effect that said building was only worth \$1,000 at the time of the fire, erred by not entering a judgment that plaintiff recover the sum of \$1,000 on its complaint, and it further appearing that the court committed errors at law in the foregoing respects and that the evidence was insufficient to support the judgment, as entered, and other good cause being shown,” (R. 76).

Subsequently various motions were filed by the parties, and on October 13, 1954, the court entered an order amending the findings by striking the finding “that the value of the building at the time of the fire was One Thousand and No/100 Dollars (\$1,000.00) only.” The court further vacated its order for a new trial. In its reply to the counterclaim of the defendant, the plaintiff

had admitted that the frame building had a value of \$2,000. The court gave as one of its reasons for setting aside the order for a new trial and amending the findings that:

“The court did not have in mind the fact that the parties, by their pleadings, had stipulated to the value of said structure.”

The questions presented by this appeal are then: Did defendant have an insurable interest in the frame building at the time of the fire? Was the policy of insurance void by reason of defendant's misrepresentation as to his ownership of the building and his interest in the combine and tractor? When the evidence showed that the frame building had a value of \$1,000, could the court enter a finding to that effect? And did the court, having entered an order granting a new trial, err in vacating that order some months later?

STATEMENT OF FACTS

It would appear that the facts can best be presented by covering them in a chronological order.

On September 30, 1947, the defendant acquired the frame building described in the insurance policy under a “Veteran Farm Labor Housing Contract” wherein the Box Elder County Farm Labor Association leased the building to Leland J. Thompson for a consideration of \$225.00 and \$20.00 for the fixtures. The Association was to move the building onto the defendant's farm and the defendant leased to the Association a plot of ground on which the building was to be placed (Exhibit D-4, Tr.

15). On October 26, 1951, the defendant applied to the plaintiff for a fire insurance policy on the frame dwelling, the tractor, and the combine. The application for the insurance was taken by a Nick H. Topik, who testified that the application contained all the information given to him by Mr. Thompson (Tr. 74-75). An examination of the application, Exhibit D-10, reveals that Leland Thompson was represented to be the owner of the frame dwelling, the tractor and the combine. As has been pointed out previously, Leland Thompson did not own the frame dwelling at the time, but it was leased from the Box Elder County Farm Association. Moreover, the defendant had a loan on the tractor from the Farm Home Administration, the original amount of which was \$2,500, of which nothing had been said to the agent (Tr. 74-75), and which did not appear in the application for the fire insurance policy (Exhibit D-10).

The plaintiff issued a fire insurance policy covering the above described building and items of equipment showing Leland J. Thompson as the insured, and not showing any encumbrances on the building or the other items of equipment (Exhibit P-3). The term of the policy was from October 26, 1951, to October 26, 1952. The policy insured each of the items for \$2,000 and contained the provision that the company "does insure: Leland J. Thompson and legal representatives, *to the extent of the actual cash value of the property at the time of loss.*"

The policy contained the further provisions:

"The entire policy shall be void if, whether before or after a loss, the insured has wilfully

concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.”

And

“The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it to the best possible order, furnish a complete inventory of the destroyed damaged and undamaged property, showing in detail quantities, cost, actual cash value and the amount of loss claimed; and within sixty days after the loss, * * * the insured shall render to this Company a proff of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of loss, the interest of the insured and all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of the property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy.”

On December 8, 1951, the defendant sold the real property on which the frame building in question was located to John M. Hardy and his wife. (Tr. 17). As to whether the building was to be part of the sale, defendant testified starting on page 23 of the transcript:

“Q. I said did you sell the barracks building which was burned in the fire to Mr. Hardy along with the land on December 18, 1951?”

“A. The house was to go along with the deal, but Mr. Hardy understood that the title wasn’t clear on the building and was to be turned over to him at the time it was cleared up with the Labor Association of Box Elder County.

* * * * *

“Q. You sold your interest in the building to Mr. Hardy at the time you sold the land, didn’t you?

“A. How could I sell it to him until the time I got the deeds to it?

“Q. Well, you sold him what part you owned in it, if anything. Did you own anything in the building at that time?

“A. I didn’t own only my interest in it.

“Q. Did you sell Mr. Hardy your interest at that time, Mr. Thompson?

“A. The only thing I’ll say is that it was to go along with the deal.

“Q. By that do you mean when it was to go along, that Mr. Hardy was to acquire your interest in the deal; is that what you mean?

“A. He was to acquire the building along with the land.”

On that same point, Mr. John M. Hardy testified on page 140 of the transcript:

“Q. Where and when was this barracks building discussed between you as to its being concerned in the deal?

“A. Well, at the time we were dealing on the place.

* * * * *

“Q. Now, what was said with respect to this barracks building?

"A. Well, I had an option of buying it with or without the barracks on.

"MR. HANSON: Bying the land with or without; is that what you mean?

"A. Buying the land with or without the barracks on it, and we done quite a bit of corresponding on that.

"Q. And when the deal was finally consummated, did you take it with or without?

"A. I was to get the building with the place.

"Q. How did you pay for the place?

"A. I assumed a mortgage on it and paid Mr. Thompson for his equity."

As to the price paid for the building, the defendant testified on page 47 of the transcript:

"Q. * * * Now, taking you back again to the time that you had the negotiations with Mr. Hardy about the sale of the property or the land, did Mr. Hardy pay you anything additional for the building other than your equity in the land?

"A. He paid me the price that we agreed on the whole thing.

"Q. Well, just tell me what it was. Did he pay you anything additional for the building over and above the price of the land, and if so how much?

"A. If he hadn't taken the building there was supposed to be a thousand dollars less.

"Q. In other words, he paid you a thousand dollars for the building; isn't that right?

"A. He paid me a thousand dollars for it with the building on, yes."

At the time the frame building was sold, Mr. Hardy gave Mr. Thompson permission to use the building. On that point Mr. Hardy testified beginning on page 140 of the transcript:

Q. Now, then, was anything said about Mr. Thompson's use of that barracks building?

"A. Yes.

"Q. What?

"A. He had his machinery there, and he wanted to use the barracks until he could get his machinery—he was talking at that time of getting another place and to move it up there. I told him it was all right, because I had no occasion to use the building at that time.

"Q. And that was before the deal was consummated; is that right?

"A. That's right."

On page 143 of the transcript, Mr. Hardy testified:

"Q. Now, after you had taken possession of the rest of the place, did Mr. Thompson talk to you any further about holding onto this barracks building longer, or otherwise about it?

"A. Yes, he did.

"Q. Was there any further discussion about that before you closed the deal?

"A. Well, right at the time we were talking about it, and he said he wanted possession. I said I had no occasion to use the building, it was all right at that time for him to go on and use it until he could move the machinery.

"Q. And it was there after you told him that

was all right for him to continue to use it there; was there anything further said at the time you closed the deal?

“A. Not at that time.

“Q. That was the entire deal with respect to the building at that time?

“A. As I remember it. I had no occasion to use the building, and he wanted to use it, and it was perfectly all right with me at that time when we were talking about the deal.”

On cross-examination, Mr. Hardy was asked at page 146 of the transcript:

“Q. If you wanted to make any use of the building other than putting machinery where Mr. Thompson had his, you would have done so, wouldn't you?

“A. Well, as I stated, I had no occasion to.

“Q. If you had occasion, you would have done so?

“A. Yes, but I don't—

“Q. If you had had any reason, for instance, to put some hand tools or to store something in the part of the building not occupied by the machinery, you would have gone down and done it, wouldn't you?

“A. I suppose anybody would have done that.

“Q. You were just allowing Mr. Thompson to keep the machinery in there until it was sold?

“Q. Isn't that so?

“A. That's how farmers works. Sure it is.”

On the question of whether anything was paid for the privilege of storing the equipment in the building, the defendant told John P. Gatfield, the person who investigated this loss, that there was nothing said between Mr. Thompson and Mr. Hardy in respect to any rental or any kind of a charge for this convenience. On or about October 15, 1952, after the defendant had sold the building, the defendant mailed a check for \$19.60 (Exhibit D-7) to the Company with a renewal premium receipt extending the coverage afforded by the policy to October 26, 1953 (R. 41). At the same time, the defendant claims that he mailed a letter (Exhibit D-6) informing the Company that he had sold the building.

Milo M. Jensen, claims manager for the plaintiff, testified that he had examined the file on Mr. Thompson's insurance policy and that he did not find any letters or letter like Exhibit D-6 in the file; that the Company did not know that the building had been sold to Mr. Hardy until the summer of 1953 when they got a report to that effect from the adjusting firm in Salt Lake City telling the Company that they had just learned that Mr. Thompson was not the owner of the building (R. 53). Mr. Jensen testified further that it was the practice of his Company upon receiving such a notice to contact the owner and have him execute an assignment of the policy to the new owner (P-16).

On November 8, 1952, the fire occurred in which the property concerned was either totally destroyed or damaged.

John P. Gatfield testified that he was employed by the Scott Wetzel Company of Salt Lake City as an insurance adjuster and that he investigated this fire loss (Tr. 88). He testified that in the course of his investigation, he had difficulty in correlating the numbers on the equipment with the serial and motor numbers on the insurance policy, but that the claim for the loss of the building itself was paid at the insistence of Mr. Topik and Mr. Thompson (R. 189). He first learned of the sale of the frame building about two or three weeks after the insurance company had issued their draft for \$2,000 through another insurance company in the course of their investigation, the other insurance company having had insurance on a Mack truck which was stored in the building. He then arranged for an interview with Mr. Thompson, in which Mr. Thompson told him that he had sold his farm and that the building had been included in the sale (Tr. 90). At that time Mr. Thompson never mentioned anything about having given notice to the company of the sale of the building (Tr. 91). On January 31, 1953, Leland Thompson received the bill of sale to the frame dwelling from the Box Elder Farm Labor Association (Exhibit D-5). On July 31, 1953, the plaintiff started its action to recover the \$2,000 paid for the frame building and at the beginning of the trial tendered to the defendant the return of the insurance policy premium paid as a renewal of the policy from October 26, 1952, to October 26, 1953 (Tr. 1).

STATEMENT OF POINTS

POINT I. THE DEFENDANT DID NOT HAVE AN INSURABLE INTEREST IN THE FRAME DWELLING AT THE TIME THE INSURANCE POLICY WAS RENEWED OR THE LOSS OCCURRED.

POINT II. ASSUMING DEFENDANT DID HAVE AN INSURABLE INTEREST IN THE FRAME BUILDING, THE LIMIT OF HIS RECOVERY FOR THE LOSS THEREOF IS THE ACTUAL VALUE OF THE FRAME BUILDING.

POINT III. THE INSURANCE POLICY WAS VOID BY REASON OF DEFENDANT'S MISREPRESENTATIONS.

POINT IV. THE COURT ERRED IN VACATING ITS ORDER FOR A NEW TRIAL ON PLAINTIFF'S COMPLAINT.

ARGUMENT

POINT I. THE DEFENDANT DID NOT HAVE AN INSURABLE INTEREST IN THE FRAME DWELLING AT THE TIME THE INSURANCE POLICY WAS RENEWED OR THE LOSS OCCURRED.

The applicable Utah Statute, *Section 31-19-4, Utah Code Annotated 1953*, provides:

“(1) No contract of insurance on property or on any interest therein or arising therefrom, shall be enforceable except for the benefit of persons having an insurable interest in the things 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.”

We have not been able to find a decision where the

courts have construed the words, “substantial economic interest”.

That an insured must have an insurable interest at the time he takes out a contract of insurance and at the time of loss is basic. Otherwise, the contract, rather than being an agreement to indemnify the insured for any loss he might suffer, becomes a mere gambling contract wherein the assured stands to gain upon the happening of a certain event. As is said in *Volume 4 of Appleman's Insurance Law and Practice*, at page 99:

“The insured must be the owner of the property at the time he takes out the insurance and at the time of loss, by the majority rule, and however defective such allegations of interest may be, they must be proved. Nor can the character of the insured's interest be changed between the date of insurance and the date of loss without the consent of the insurer.

“A fire contract, or other property insurance, is considered a personal contract in that the hazards which the company elects to assume are hazards concerned with the contracting individual—his character, moral qualities, and the like—the insurance running to the individual rather than upon the property. If the insured, then, parts with an interest in the property prior to loss, it is not covered. It is not necessary to have a specific by-laws to the effect that a transfer or sale of the property avoids protection; a sale by the insured between the date of the policy and the date of the loss is considered to avoid protection.”

As we have seen from the evidence the defendant,

Leland J. Thompson, conveyed his entire interest in the frame dwelling, which was the subject of the insurance policy in this case, to John M. Hardy. The most that can be said was that Leland Thompson had permission from Mr. Hardy to keep his equipment in Mr. Hardy's building, which permission could have been withdrawn at any time. No consideration was paid for the privilege.

Did the mere privilege or license to store the machinery in the building constitute a "substantial economic interest," when it was revokable at any time by the owner of the building? Of course, the argument will be made that Leland J. Thompson was the bailee or had possession of the building. This, however, is not borne out by the evidence which shows that the land on which the building was located and the building itself had been conveyed to John M. Hardy and was completely within his possession and control. This is further borne out by the fact that the defendant considered it necessary to secure Mr. Hardy's permission to keep the equipment in the building, and further the evidence shows that Mr. Hardy was free to use the building and to store his own tools and machinery therein.

In *Fidelity & Phoenix Fire Ins. Co. of New York v. Raper*, 6 So. (2d) 513 (Ala.) a sublessee erected a building on land without the permission of the lessor. There was no permission relative to placing improvements on the land. The court held that the building became the property of the original lessor and the person who bought the building from the sublessee had no insurable interest. The court said:

“On these uncontradicted facts, plaintiff, if he had an interest at all, is merely a trespasser or tenant by sufferance; that is to say, the plaintiff had no right which he could enforce so far as the building was concerned and he could have been arrested at any time. He did not even have the right of possession except as a squatter or trespasser would have.

“The law is clear that a person with no interest in land other than that of a tenant by sufferance, or trespasser, has no insurable interest in the property.”

In *Kanefsky v. National Commercial Mutual Fire Ins. Co.*, 35 Atl (2d) 766 (Penn.), where a person was in possession of property under an unenforcible parol contract to convey the property to him, the “unconditional and sole ownership” of the policy in said

“Insurable interest in property imparts an interest which can be enforced at law or in equity.”

In *Price v. United Pacific Casualty Co.*, 56 Pac. (2d) 116, (Ore.), under a burglary policy providing that insurance should apply to all property owned by husband or any permanent member of his household, the husband was held without an insurable interest in a diamond ring, and hence not entitled to maintain an action on the policy for theft of the ring for his own benefit. Says the court:

Insurable interest in property is created only through ownership, rightful possession, acquisition of lien, or in a similar manner, and cannot be created through contract between insured and insurer, since such contract would be a mere wagery agreement.”

Holmes v. Grange Fraternal Fire Insurance Association, 228, Pac. (2d) 889 (Cal.), held:

“Where fire insurance policy issued by defendant Fraternal Fire Insurance Association was issued to plaintiff’s husband on realty which he contracted to purchase prior to his marriage, the fact that property constituted wife’s home at the time the policy was issued and that she filed a declaration of homestead gave her no title or insurable interest in property.”

Sweeny v. Franklin Fire Insurance Company, 20 Pa. 337, (Penn.) held:

“One who was a stockholder and a creditor of an unincorporated company which erected a house on land belonging to the State of Delaware, without license or shadow of title from the State, had no insurable interest in the house, though he claimed by relinquishment and transfer from most of the stockholders to the creditors and was in possession at the time of effecting the insurance and at the time of the destruction of the premises.

“The rule is valuable and well-founded that he who has no interest can have no insurance. That he must show his interest and that is the extreme measure of his recovery are correlaries of the rule, without this, insurance would soon become a mere system of gambling. These principles are sufficient to affirm the judgment.”

In *Baldwin v. State Insurance Company*, 15 N. W. 300 (Iowa), a son took a policy of insurance on property belonging to his father with a view to prevent creditors of his father from garnishing the fund in case of loss. Said the court:

“We come then, to inquire whether W. E. Baldwin, son, can recover. He certainly cannot recover for his own benefit. It is conceded he did not suffer by the loss and has no beneficial interest in the policy. Can he recover for the benefit of E. T. Baldwin (father)! To this proposition we think it sufficient to say that the policy by express terms limits the rights of recovery thereunder to W. E. Baldwin’s interest in the property.”

In *Davis v. Bremer County Farmers Mutual Fire Insurance Association*, (Iowa) 134 N. W. 860, a policy was issued May 22, 1908, to Mrs. William Blume, covering her dwelling house and farm buildings. On October 26, 1908, she sold the property to the plaintiff Davis, and on November 13, 1908, she executed an assignment of said policy to him, which assignment was consented to by endorsement thereon by the secretary of the company. On November 9, 1908, four days prior to the assignment, the assured’s property was destroyed by fire. The court said:

“* * * The three elementary principles of fire insurance which, working together, bring about this inevitable result are, first, that a policy of fire insurance is a contract of indemnity, and if, at the time of the loss, the holder of the policy has no right, title or interest to, or in the property insured, he cannot recover anything under his contract of insurance, where the damage to or destruction of the property results in no injury to him; second, that the purchaser of the property, taking it prior to the loss, is not a party to any contract of insurance between the former owner and the insurer, and therefore is not entitled to

recover under the contract; and, third, that the contract of fire insurance, being personal in nature, cannot be transferred by the insured to another, save in accordance with the provisions of the contract itself, involving the express or implied assent of the insurer, or a valid contract of the insurer that it shall become liable to the new owner. These elementary propositions are not dependent on any stipulation, conditions or limitations of the contract itself, but result from the very nature of the contract, though, of course they may be superseded or waived by the provisions in the contract, or by a new valid contract or agreement subsequently made.

* * * *

“The invalidity of the policy after the attempted transfer thereof by Mrs. Blume to the plaintiff in connection with the conveyance of the property was not the result of any forfeiture on account of conditions subsequent, the contract of insurance came to an end because the subject matter of the contract—that is, the insurable interest of Mrs. Blume—had ceased to exist. * * *”

Thus it is seen that the plaintiff as a matter of law was entitled to recover the \$2,000 it had paid to the defendant by reason of the destruction of the frame dwelling. This is true regardless of any misrepresentation on the part of Mr. Thompson, which we will discuss later, and regardless of whether he notified the company, as he claims, of the sale of the building. It is brought about by the simple proposition that he had transferred any interest he owned in the building to Mr. Hardy prior to the date of the fire and, therefore, at the time of the fire suffered no loss.

POINT II. ASSUMING DEFENDANT DID HAVE AN INSURABLE INTEREST IN THE FRAME BUILDING, THE LIMIT OF HIS RECOVERY FOR THE LOSS THEREOF IS THE ACTUAL VALUE OF THE FRAME BUILDING.

Presupposing, for the purposes of discussion, that the defendant did have an insurable interest in the frame building, it is submitted that the limit of his recovery for the loss is the actual value of the building. On this point the defendant testified that he sold the land to Mr. Hardy, who had the option of taking the land with or without the building, and that he wanted \$1,000 for the building. It is also the testimony of John M. Hardy that he paid the defendant \$1,000 for the building.

It is true that in paragraph two of its reply to defendant's counterclaim, plaintiff admitted the value of defendant's building was \$2,000. However, in paragraph four of the reply, it was alleged that the \$2,000 was paid out on the basis of a proof of loss submitted by the defendant. The whole theory of the plaintiff's complaint was that defendant had misrepresented his interest in the building and was not entitled to the \$2,000, he had received. The court did find that the defendant had misrepresented the value of the building in the proof of loss and that the value of the building was \$1,000, and that the defendant was entitled to only \$1,000 of the \$2,000 he had received from the plaintiff for the destruction of the building.

Viewed as a whole, it appears that the defendant's interest in the building and whether or not he was entitled to received the \$2,000, was an issue in the law suit

and therefore that the finding that he was entitled to receive only \$1,000 was within the issues raised by the plaintiff.

Even were this not the case, it appears that the issue as to the value of the building was tried without objection and by the express or implied consent of the parties, and that this issue was therefore before the court even though not alleged in the pleadings. *Rule 15 (b) of the Utah Rules of Civil Procedure* provides:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform with the evidence and to raise the issues may be made, upon motion of any party at any time, even after judgment; but failure to so amend does not effect the results of the trial of these issues. Where evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in making his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.”

In this case, since the evidence came from the defendant's own witnesses, it is difficult to see how he would have been prejudiced by the evidence. Moreover, no objection was made to the admission of this evidence

and no request for any continuance was made.

In discussing Rule 15 (b) of the Federal Rules of Practice and Procedure, which is the same as Rule 15 (b) of the Utah Rules of Civil Procedure, *Baron and Holtzoff* in their book on *Federal Practice and Procedure*, Vol. 1, at page 914, have this to say:

“Rule 15 (b) sanctions amendments to conform to the proof (1) when issues not pleaded are tried by consent, express or implied, and (2) when evidence is objected to as not within the issues made by the pleadings, but the presentation of the merits will be aided and the opposing party not prejudiced by the amendment. * * *

“A motion to amend to conform to proof may be made and granted at any time after presentation of the evidence has begun, and is frequently allowed during the course of trial after the close of testimony, and even after return of verdict, or entry of judgment, or appeal or after remand.
* * *

“Amendments to conform to the proof are permitted in order to bring the pleadings into line with the issues actually developed at the trial even though the issues were not adequately presented by the pleadings as originally drawn. Issues not raised by the pleadings which are tried by the express or implied consent of the parties, are treated in all respects as if raised in the original pleadings. A party impliedly consents to the introduction of issues not raised in the pleading by failure to object to the admission of evidence relating thereto, unless he is not represented by counsel. * * *

“In accordance with the liberal policy ex-

pressed in subdivision (b) the courts have exercised wise discretion in allowing amendments to conform to proof, even to the extent of permitting recovery on a different theory of liability than that on which the case was tried. In some cases amendments have been allowed to set up new issues, interpose new defenses, or conform the pleadings to the verdict of the jury.

“The right to amend to conform to proof is necessarily dependent upon the individual facts and circumstances, and the action of the court in granting or denying such leave is not subject to review except for abuse of discretion. Because of the fact that an action may be finally disposed of on a motion for summary judgment, if facts appear in an affidavit in support of thereof which would justify amendment of the complaint, it has been held that there may be grounds for treating the complaint as though it were already amended to conform to such facts. Formal amendment of the pleadings is not always necessary as the court may, if the evidence so warrants, consider them as amended to conform thereto, and failure to file amended pleadings subsequently does not affect the result of the trial of issues consented to by the parties. * * *”

As was said in *Winn v. Romney*, 63 Utah 120, 222 Pac. 709:

“There is one other point of more or less significance vigorously urged by the plaintiffs. In his original answer to plaintiff’s complaint filed September 25, 1922, three months before the trial, defendant denied the existence of any trust whatever. This point is relied on as indicating the disingenuousness of defendant concerning the trust alleged in his amended answer filed a few days

before the trial. If this were the only point in the case, the court would not be inclined to regard it as of controlling importance. Pleadings are usually framed by attorneys, and clients ordinarily, though sometimes imprudently, attach their signatures to pleadings proposed by their counsel without careful scrutiny as to their actual contents. Besides this, counsel oftentimes, especially in the early pleadings of a case, misconceive the real cause of action or defense and perhaps desire to raise some technical questions, on its facts incompatible with the actual fact. For these reasons, it would be unfair to always treat the statements or denials in a pleading as binding admissions when offered as evidence in the case."

The trial judge, after hearing all the evidence in the case, was convinced as a matter of law that the value of the building was \$1,000. Not wanting to invade the province of the jury and to substitute its opinion for that of the jury, the court granted a new trial on plaintiff's complaint unless the defendant should consent to a reduction of his judgment by \$1,000. This was a valid exercise of the court's power to order a new trial on the ground that the verdict was excessive. As has been seen from an examination of the pleadings and orders in the case, he later set aside the order for a new trial under the misconception that he was bound by the plaintiff's admission in his reply that the value of the building was \$2,000. As has been seen, his first action was correct.

What the defendant is now attempting to do is recover \$2,000 for a building admittedly worth only \$1,000 because of what, at the most, is only a technical defect in the pleadings. Granting for the purpose of this point

only, that defendant had an insurable interest, justice requires a decree that the finding that the building was only worth \$1,000 and that the plaintiff is therefore entitled to recover \$1,000 of the \$2,000 already paid, be reinstated.

POINT III. THE INSURANCE POLICY WAS VOID BY REASON OF DEFENDANT'S MISREPRESENTATIONS.

It appears from the evidence in this case that the defendant, Leland Thompson, was guilty of misrepresentation in at least four respects: First, he failed to reveal the true ownership of the frame building or the encumbrance on the tractor at the time he applied for the insurance; Second, he failed to notify the company of the transfer of his interest in the frame building to John M. Hardy at the time the building was sold; Third, he misrepresented the value of the building in the proof of loss to be \$2,000 and accepted the \$2,000 check in payment for the same when according to his own testimony he had sold the building for \$1,000 some months earlier; and Fourth, after the loss he misrepresented his interest in the building both to the insurance adjuster and in the formal proof of loss by concealing the fact that he had sold the building some months prior to the actual loss.

The requirement that an insured disclose his interest in the insured property is vital. As has been said in *Appleman* in his work on *Insurance Law and Practice*, Volume 4, beginning on page 298:

“If the insured has failed to disclose his title, as required by a condition of the policy, or has disclosed a false title, he cannot recover on the

contract. The policy condition renders the contract void for failure to make such a disclosure, it amounting to a concealment of a material fact. And this is true though such failure was unintentional. A few cases, however, hold that unless fraud was practiced, failure to disclose will not affect the validity of the contract.

“Even though no representation was made by the insured, he has been held to be under a duty to see that all warranties are in proper form, and even though the insurer may not have inquired into the state of the title or the insured may have made no statement relevant thereto, a policy clause stating that the contract shall be void if the insured’s interest is less than sole or unconditional ownership controls. Many states have held that by merely accepting a policy with such a provision contained therein, the insured warrants the truth thereof. There have been holdings to the contrary, however, particularly where the insured is shown to have been ignorant of the policy conditions.

“Where the insured purports to state the facts concerning title or ownership, he must state them correctly, and any definite false statements made relevant thereto or any positive misrepresentations, will avoid protection under the policy. This is, of course, particularly true where the misrepresentation was made with actual intent to deceive, or it increased the risk of loss, but it has been stated that representation that the insured’s title is by deed does not imply that such ownership is perfect and unconditional.

“Where either a misrepresentation or concealment appears as to the sole and unconditional ownership provision, or as to title generally, the

majority of courts have held good faith or lack of knowledge to be of no defense. Even lack of knowledge of such condition, or regarding it as non-essential, would not relieve the insured under that rule. A few courts have held to the contrary where no intent to deceive appeared, and the failure was not intentional and fraudulent.

“The reason for the adopting of such stringent rules by the majority of courts is that the representation is considered highly material to the risk.”

Much of the evidence of the defendant went to the question of whether or not the misrepresentation of the defendant was made in good faith. Whether the misrepresentation was made in good faith or not, the fact that a misrepresentation was made avoids the policy. As stated in 29 *Am. Jur. on Insurance* at 425:

“The general rule is that in the absence of statute, the fact that a misrepresentation was made in good faith, or as a result of inadvertence, mistake, negligence or ignorance, will not preclude it from being deemed material and a cause for the avoidance of the policy procured in reliance upon it. If such a misrepresentation induces the insurer to assume a risk which otherwise it would not have taken, at least not at the premium charged, there is a legal ground of avoidance and actual fraud need not be established since it is not a material factor in the avoidance of the contract under such circumstances. * * *”

What is true as to the original policy is also true as to the renewal. As is said on page 426 of the same volume:

“The general holding is that in the absence of

a new application or anything showing a different intention, the renewal of a fire insurance policy is impliedly made on the basis that statements in the original application or policy are still accurate and operative."

The case of *Eklund v. Metropolitan Life Insurance Co.*, 89 Utah 273, 57 Pac. (2d) 362, involved an action on an industrial life policy. In her application for insurance the plaintiff had stated that she had not been under the care of any physician within three years which was not true. The court held the policy to be void and said:

"In the applications for insurance, as heretofore set out, the assured stated that she had never been under treatment in any hospital; that she had not been under the care of any physician within three years; she declared that these statements were true and complete and that any misrepresentations would render the policy void. These statements were false. Her application for the first policy was made November 2, 1933, less than a month after the last day she had been treated by Dr. Quick. The application for the second policy was made the 31st of January, 1934, two days after the assured had been treated by Dr. Tauffer at the Salt Lake General Hospital. These statements which the assured made were material to the risk. The policies were issued without physical examination of the assured. Whether the company would issue the policies was dependent upon the answers of the assured. The utmost good faith to answer truthfully was required of her. On the assumptions that the statements in the applications were true, the policies were issued. By making the false representations, which the assured did, the company was misled to its prejudice.

Whether we class the statements made by the assured as representations or warranties, the same result is reached so far as the facts of this case are concerned. If a representation is material to a risk and likewise knowingly false, it will be as potent for rescission of the contract embodied in the policy as if the untrue statement was made in form of a warranty (Numerous cases cited)."

Another point which the defendant attempts to raise by the evidence in this case is that the defendant, although he was not the owner of the property, held the property for John M. Hardy, and therefore should be entitled to recover. While persons who hold property for other persons might have a right to recover under such a policy, a full disclosure of their interest is required.

"The holder of the naked legal title to property, who has no beneficial interest therein, has been held not to be the sole and unconditional owner within the meaning of a policy provision. It has also been stated that property held in trust or on commission must be insured as such or the policy would be void. In applying such rules, the courts have denied recovery to an agent for an undisclosed principal, where the policy provided the insured had sole and unconditional ownership. The same result has followed where principal ownership is in the ward of insured. Thus, a suit brought by the insured as trustee for his children, alleging he held the property in trust for them, has been held to have been properly dismissed.

"Property held in trust by the insured for a church congregation is not owned by such insured in compliance with such a policy requirement. And where the insured, upon receiving the property,

had given a written agreement to reconvey the property if indemnified for certain liabilities for which the property had been given as security, his interest is that of trustee or creditor, which must be specifically disclosed, where the policy so provides. On the other hand, a grantor who has conveyed such property in trust to pay debts to a third person has no such title as will enable him to recover.

“It has been held that where the plaintiff takes title to certain lots in trust for himself and others, with the agreement that he is to manage and sell the property and divide the proceeds, he is not the sole owner of the lots. The same is true where one holds property in trust for herself and her sister.” Vol. 4 *Insurance Law and Practice*, Appleman, pages 323-4.

Nor should we lose sight of the insured's misrepresentation as to the equipment being free from any encumbrances as such a misrepresentation has the same effect as a misrepresentation as to the ownership of the frame dwelling. As is said in Volume 4, *Insurance Law and Practice*, Appleman, page 377:

“A provision in a policy that the insurer shall not be liable if the property is encumbered is reasonable and valid rendering the contract void upon the violation of such condition. The insurer has a right to stand on the terms of the policy and refuse to pay any loss occurring.

“The existence of a mortgage upon the insured property is generally considered material to the risk, particularly if considered a warranty. The hazard is considered to have been increased, particularly if the insurer in accordance with the

usual conduct of its business, would not have issued the policy had it known of the encumbrance. Michigan stated bluntly that the existence of any substantial encumbrance on property is a material fact whether the statements of the insured are made warranties or not. Missouri stated even more flatly that it makes no difference whether the concealment was material to the risk. Tennessee, however, has considered the failure to disclose a lien or mortgage, is not a circumstance material to the risk and will not avoid the policy.

“The acceptance by the insured of a policy containing such a restriction as to encumbrances is binding upon him, as he is considered to be charged with knowledge of such condition. If there is a definite and positive misrepresentation, there is little question as to the result. Even where no positive representation is made however, this result might still be followed. * * *”

The policy in this case contained the provision:

“This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.”

It also contained the following provision:

“The insured shall give immediate written notice to this company of any loss * * * and within sixty days after the loss * * *, the insured shall render to this company a proof of loss, signed and sworn to by insured, stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured,

and of all others in the property, the actual cash value of each item, etc.”

There is no question that the insured has been guilty of misstating his interest or concealing the interest of others in the property which is the subject of this insurance. Moreover he has attempted to recover \$2,000 for a building on which he himself placed a value of \$1,000.

Nor can there be any question that the ownership of the building or other representations which were made were material to the risk. There has been no attempt to deny that the misrepresentations were made and the only evidence offered has been an attempt to explain why. Such being the case, the entire contract should be held to be void and the plaintiff to be entitled to recover the \$2,000 paid under the policy.

POINT IV. THE COURT ERRED IN VACATING ITS ORDER FOR A NEW TRIAL ON PLAINTIFF'S COMPLAINT.

The judgment on the special verdict in this case was entered on April 13, 1954. On that same date an order was entered giving notice to the plaintiff that the court would grant the new trial unless the plaintiff consented on or before April 23, 1954, that the judgment on the counterclaim should be reduced by \$1,000 (R. 72-3). The consent not having been filed on April 23rd, an order was entered granting a new trial (R. 76).

On September 28, 1954, the court gave notice that he intended to enter an order vacating the order for a new trial, and on October 13, 1954, six months after the entry of the original judgment in this action, the court

entered an order vacating the order for a new trial and amending the findings.

Rule 59 (d) of the *Utah Rules of Civil Procedure*, which confers upon the court the power to grant a new trial of its own motion, which was done in this case, provides :

“Not later than ten days after the entry of judgment the court of its own initiative may order a new trial for any reason which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.”

Thus it is seen that the court may not enter an order for a new trial upon expiration of more than ten days after the entry of the judgment. Rule 6 (b) of the *Utah Rules of Civil Procedure* provides that in certain instances the court may extend the time in which certain action may be taken, but expressly provides :

“But it may not extend the time for taking any action under Rules * * * 59 (b), (d), and (e) * * * except to the extent that under the conditions stated in them.”

Provisions of these rules were adopted from the Federal Rules of Procedure and the specific provisions involved herein are the same. As to the power of the court to grant a motion for a new trial after the ten day period, *Barron & Holtzoff, Federal Practice and Procedure*, Vol. 3, page 241, have this to say :

“The ten day limit cannot be enlarged under Rule 6 regarding enlargement of time. It applies as well to new trials granted on the initiative of the court under subdivision (d) of this rule. The

trial court may not of its own initiative grant a new trial after the ten day limitation has expired. If an appeal has been perfected to the court of appeals, the subsequent filing of a motion for a new trial is not timely.”

Nor can the court’s jurisdiction be extended by the filing of any motion by the plaintiff:

“The seasonable serving of a motion for new trial did not operate to extend the ten day limit within which trial court grant new trial on its own initiative, and hence granted new trail could not be sustained where motion itself was insufficient, merely because court stated, as additional grounds for granting new trial, that court was not satisfied with the verdict. *Marshal’s U.S. Auto Supply v. Cashman*, C.C.A. 10th, 1940, 111 Fed. (2d) 140, certiorari denied 61 S. Ct. 26, 311 U.S. 667, 85 L. Ed. 428.

“Where ground of inadequacy of damages had not been assigned in any of plaintiff’s motions but trial judge stated in his opinion damages were inadequate and for that reason amended motion for new trial was granted only as to the amount of damages, the judge acted in initiative of court within subdivision (d) of this rule and not on motion under subdivisions (a), (b) thereof, so that an order granting a new trial which was not made within ten days after entry of judgment was not timely. *Freid v. McGrath*, 1942, 133 Fed. (2d) 350, 76 U.S. App. D.C. 388, mandate recalled 135 Fed. (2d) 833, 77 U.S. App. D.C. 385.

“The time limitation with respect to making of motions for new trial, applies as well to new trials granted on the court’s initiative, even though a motion for a new trial has already been

seasonably filed on other grounds, *McDonalds v. Dykes*, D.C. Pa. 1947, 6 F.R.D. 569.”

Of course, if the court does not have any jurisdiction to enter an order granting a new trial upon the expiration of ten days after the entry of judgment, then the court does not have any jurisdiction to modify its order granting a new trial after the expiration of that period, or to set such an order aside. A case particularly in point, which arose prior to the enactment of the new Utah Rules of Civil Procedure, but which deals specifically with the power of the court to modify or vacate its order granting a new trial is *Luke v. Coleman*, 38 Utah 383, 113 Pac. 1023. In that case, the facts are as follows: On the 25th day of September, 1908, the plaintiff filed in the District Court a written notice of motion for new trial. The motion was heard and submitted on the 17th day of October, and on the 28th day of that month, was overruled. On the 19th day of December, the plaintiff petitioned the court to grant a rehearing and reargument of plaintiff's motion for a new trial. On the 21st day of December, defendant filed a motion to strike plaintiff's petition for want of jurisdiction. The motion to strike was denied and on the 26th day of December, the petition was submitted, and on the 3rd day of June, 1909, was also denied. The question was whether or not the petition for rehearing suspended the finality of the judgment. The court had this to say:

“But the plaintiff urges that the finality of the judgment was suspended by the subsequent filing of his motion or petition for a rehearing, and until the overruling of it on the 3rd day of

June, 1909, we think the District Court had not the power to entertain such a motion. It is unknown to our practice. In California where the practice relating to new trials is similar to ours, it has been firmly established that the court has no power to reopen the question of granting or denying a motion for a new trial after disposing of it. (Holtum v. Greif, 144 Cal. 521, 78 Pac. 11; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Egan v. Egan, 90 Cal. 15, 27 Pac. 22; Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306, 416; Coombs v. Hibberd, 43 Cal. 152). In the first case the court said:

“‘The question, then, is as to the power of the trial court to vacate an order granting or denying a new trial after it has once been regularly made and entered. The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely, or by inadvertence, they may be set aside on the proper showing (Cases cited), and, if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth (Cases cited); but subject to these exceptions, the order is reviewable only on appeal, and, the decision of the trial court having once been made after regular submission of the motion, its power is exhausted. * * * It is *functus officio*.’

“‘In the second case it was said: ‘The function of this rule is that the modes in which a decision may be reviewed or prescribed by statute, and the courts are not at liberty to substitute other modes in their place. * * *’

“In the next place, the power of the District Court to rehear and reexamine the cause was once invoked by plaintiff’s first application for retrial. After the application was denied, to then also permit her petition to rehear and reexamine the order denying the motion is in effect to allow the limit of time within which a motion for a new trial may be made to be enlarged and to render the proceedings after judgment interminable. There must be some point where litigation in the lower court terminates, and the losing party turned over to the appellate court for redress (*Coombs v. Hibberd*, *supra*).* * *”

The court gave as its authority for setting aside the order for a new trial, Rule 60 of the Utah Rules of Civil Procedure. This rule provides among other grounds that a final order of judgment may be set aside for mistake, inadvertence, surprise or excusable neglect.

It is submitted that the mistake, inadvertence, surprise or excusable neglect referred to is that of the nature set out in *Luke v. Coleman*, where the order entered does not actually represent the order of the court and has been prematurely entered or entered due to inadvertence or mistake. However, the court having determined to grant a new trial on one date, cannot thereafter come along six months later and vacate its order granting a new trial. Such a procedure would only encourage the losing party to harass the trial court after the determination of a matter to the extent that the court finally in desperation or otherwise reverses itself. Litigation must end somewhere, and in this case it should have ended with the granting of a new trial.

CONCLUSION

Pursuant to an application representing the defendant, Leland Thompson, to be the owner of the property free from any encumbrances, the plaintiff issued its policy of insurance insuring the defendant against loss by fire to a frame dwelling, an Allis Chalmers tractor, and an Allis Chalmers combine. On November 8, 1952, a fire occurred in which the above described property was damaged or destroyed. Upon presentation of a proof of loss by the defendant representing the defendant to be the owner of the frame dwelling and that the same was of value of \$2,000, the plaintiff paid to the defendant the sum of \$2,000.

Subsequent to the loss and the payment of the \$2,000, the plaintiff discovered that the defendant was not the owner of the frame dwelling at the time of the loss, but that the same had been sold to John M. Hardy on December 18, 1951. An action was brought to recover the \$2,000, and upon the trial of that action, it was further discovered that the frame dwelling was not owned by the defendant at the time the application for insurance was made, but was leased from the Box Elder County Farm Labor Association, and that the Allis Chalmers tractor was not free from encumbrances but there had been a loan on the tractor at the time, neither of which situations had been revealed to the plaintiff. At the time of the trial it also developed from evidence procured from the defendant's own witnesses that the frame dwelling did not have a value of \$2,000, but that its actual value was \$1,000. The case was submitted to the jury upon a special

verdict, and as a result of that verdict, judgment was entered upon the defendant's counterclaim for the damages to the tractor and combine and a judgment of no cause of action was entered on plaintiff's complaint. The court found as a matter of law that the verdict was excessive by \$1,000, this being the amount the defendant had been overpaid on the value of the building and ordered a new trial on plaintiff's complaint provided the defendant did not consent to reduce the judgment by that amount. Upon refusal of the defendant to accept that amount, the court ordered a new trial on plaintiff's complaint. Six months later the court set aside this order and the finding that the verdict was excessive and reinstated the original judgment.

The misrepresentations made by the defendant as to the ownership of the property and any encumbrances thereon were material to the risk, and by reason of the same, the policy was void, which leads us to the conclusion under the authorities cited in this brief that defendant was not entitled to recover anything by his counterclaim, that the judgment on that counterclaim should be set aside and another judgment entered that plaintiff should recover back from defendant \$2,000 paid under the policy.

The plaintiff is entitled to the return of its \$2,000 for another reason, namely, that when the defendant sold his entire interest in the building, his interest in the building ceased and he no longer had an insurable interest under the policy of insurance, which was vital to his

recovery. If we are to assume that the policy was not voided by the misrepresentations and that the defendant did have an insurable interest in the frame building, the fact still remains that the limit of his recovery was the \$1,000 actual value of the building, the same being the price for which he sold the building, which the buyer was willing to pay for the same. This issue was raised by the pleadings, and a finding by the court on this issue was proper, especially in view of the liberal policy announced by the Utah Rules of Civil Procedure, which state that issues not raised by the pleadings, which are tried by the express or implied consent of the parties, shall be treated in all respects as if they had been raised by the pleadings.

The trial court recognized this and granted a new trial to the plaintiff upon its complaint, providing that the defendant would not consent to a reduction of the judgment by the \$1,000, which in his opinion the plaintiff was entitled to recover. The defendant not consenting, the new trial was ordered, only to be set aside by the court six months later, which action we respectfully submit was beyond the jurisdiction of the court.

Respectfully submitted,

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