

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

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

Plaintiff and Appellant,

— VS. —

LELAND J. THOMPSON,
Defendant and Respondent.

Case No. 8286

FILED
MAY 14 1955
Clerk, Supreme Court, Utah

RESPONDENT'S BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

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

Plaintiff and Appellant,

— vs. —

LELAND J. THOMPSON,
Defendant and Respondent.

STATEMENT OF FACTS

Inasmuch as the respondent-defendant Leland J. Thompson controverts the appellant's statement of facts in certain particulars, he is obliged to make his own statement on controverted matters.

At the outset it must be noted that this action is essentially one in which the defendant seeks to recover money on a contract: namely, a fire insurance policy, even though the appellant corporation initiated the proceedings seeking to have the policy declared void, and to recover, as on quasisi-contract, \$2,000.00 already paid defendant as partial settlement on a fire loss. The plaintiff's defenses to the defendant's claim on the policy are (1) that Mr. Thompson never owned, or before the

renewal of the policy, he had parted with all interest in the insured building, and thenceforth had no insurable interest therein; and (2) that the policy was void by reason of defendant's misrepresentations as to ownership and encumbrances.

Issues were drawn on these affirmative defenses and tried to a jury which brought in a special verdict in favor of Mr. Thompson on all interrogatories propounded by the court.

On the issue of insurable interest the appellant alleged that on December 18, 1951, prior to the policy renewal and the loss Mr. Thompson had "sold and conveyed" the insured building to one Mr. Hardy. Mr. Thompson admitted that he had agreed to sell the building and that he had conveyed the land on which the unattached building was standing but denied that he had sold or transferred the building and asserted that he had possession and right of use plus an agreement with the executory buyer to protect and be responsible for the building until it shall be delivered. He denied the alleged misrepresentations.

In paragraph 4 of his counterclaim upon the policy Mr. Thompson alleged that "*the actual case value of the property so destroyed and subject to the policy of insurance aforesaid at the date of its destruction was: as to the insured building \$2,000*" (R. 8). In its reply the appellant insurance company formally pleaded that "*answering paragraph 4, plaintiff admits the insured building was of the value of \$2,000*" (R. 10). Thus no issue was raised as to the value of the

building for the purposes of settlement of the policy obligation. Both parties tried the case upon the theory that appellant's only contention was that Mr. Thompson had no insurable interest in the building. It is true that some evidence was presented with respect to the value of the building, but this was admissible and was submitted only on the issue of insurable interest, under which it was necessary that Mr. Thompson show that he had a "substantial economic interest." It is obvious that the value of the building is material on whether or not Mr. Thompson's interest was a *substantial* economic interest, and an objection to the evidence on the ground that it was not within the issues could not properly have been sustained.

On page 2 of appellant's brief it is asserted that "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 it paid Mr. Thompson \$2,000 for the loss. This statement is not in accordance with the evidence or the finding of the jury. On the same page appellant states that it was further discovered that at the time the policy was originally procured the defendant was not the owner of the building and had certain encumbrances on other property of which he had not advised the company. This statement also is contrary to the evidence and the finding of the jury.

On page 5 of appellant's brief it is said that "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,” and that he did not own the frame dwelling at the time and that the tractor was mortgaged to the Farm Home Administration which did not appear in the application for the policy. The implication contained in the quoted clause is contrary to the evidence because Thompson did not fill out or complete or sign the application. This was done entirely by Nick H. Topik, the agent for the insurance company (T. 74 and 76; 115-116). Moreover, Thompson told Topik about his contract with the Box Elder County Labor Association at the time he applied for the insurance (T 16). As will be hereinafter shown, Mr. Thompson was at the very least the beneficial owner of the building at the time; and he also told Topik about the loan on the tractor (T 20).

Again on pages 14 and 15 of its brief the appellant declares that Thompson conveyed his entire interest in the building to Mr. Hardy and that no consideration was paid for the privilege Thompson had to keep the possession and use of the building. The statement is further made that this right to the use of the building was revocable at any time by the owner. On page 15 it is further said that the land “and the building itself” had been conveyed to Hardy and was completely within his possession and control. All of these statements are contrary to the evidence and to the findings of the jury. On page 24 of its brief the appellant says that the building is “admittably worth only \$1,000.” That is contrary to the admission of the parties and to the evidence of value which was admitted on another issue. On page 25

of its brief the appellant declares that Thompson was guilty of misrepresentations in at least four respects, (1) failure to reveal true ownership of the frame building and the encumbrance on the tractor; (2) failure to notify the company of the transfer of his interest in the building to Hardy; (3) misrepresentation of the value of the building in the proof of loss, and (4) that after the loss he misrepresented his interest in the building in the formal proof of loss by concealing the fact that he had sold the building. All of these statements are contrary to the evidence and the findings of the jury.

We shall now attempt to summarize the evidence on these controverted points with references to the record.

First, let us consider the transaction between Thompson and the Box Elder County Farm Labor Association by which he acquired the building in question. Thompson acquired the building under a written contract, Exhibit D-4, (T 35). By that contract, Exhibit D-4, the Association agreed to and in fact did move the building onto Thompson's land for a consideration of \$225.00 plus fixtures costing \$20.00. Thompson leased to the Association a plot of ground suitable as a site. The Association permitted Thompson to prepare the building for occupancy and on that he spent a great deal of money. The contract further provides that when the Association declares the labor housing emergency

at an end Thompson might acquire the building permanently upon payment of \$100.00 or actual cost, whichever is highest, and the Association would give Thompson a legal bill of sale. At the time of the fire there was nothing left for Thompson to do before he got the bill of sale (T 36-37; 49).

The building was not fastened in any way to the land owned by Mr. Thompson and which was subsequently sold to Mr. Hardy. It was just set down and propped up on one end by cement blocks. There were no posts nor foundations, nor was there any excavating to adapt the land to the building (T 34). At the time the policy was ordered Mr. Topik was all around the building and "took a look" at it (T 34 and T 77).

At the time the policy was ordered Mr. Thompson told Topik about the contract with the Association and also told him that the Equitable Life and Casualty Company had a mortgage on the land but no interest in the building, and Topik reported the mortgage on the land to appellant's home office (T 16-17; T 66-68; Exhibits D-10 and D-11). It is to be noted that Exhibit D-10 prepared by Topik apparently from information given him by Thompson, shows the real estate mortgage of \$4,000.00 on the land. Although Topik apparently later advised the Company that the mortgage on the land had been paid off, Mr. Thompson never so advised him (T 116). As a matter of fact, sometime after the original insurance policy was issued the defendant became delinquent in his payments on the real estate mortgage and was forced to sell the land to avoid foreclosure

(T 17-18). Accordingly through a real estate agent he sold the farm to Mr. Hardy. At the time the transaction with Hardy was negotiated Hardy was given an alternative offer: he could take the land either with or without the building in question, and if he took the building with the land, the price on the package deal was to be \$1,000.00 more than if he took the land without the building.

Hardy decided to take the building with the land at the increased price. However, at the time the transaction was negotiated Thompson explained to Hardy that he did not yet have a formal transfer of the building (T 25). Moreover, at the time the deal was made it was agreed between Thompson and Hardy that Thompson should reserve the possession and use of the building for the storage of his machinery until such time as he could get the machinery conveniently removed and for this he was to make it right with Hardy. At the time of the fire the contract between Thompson and Hardy for the sale of the building was still executory (T 26-28; 33-34; 141-143). In fact Thompson was still in possession of the building and had never turned the keys over to Hardy at the time of the fire (T 34; 141).

Hardy's boy wanted to move his machinery in there in the Fall before the fire, but Hardy told him he could not move Thompson out and testified that even if he wanted to use the building, he would not have pulled Thompson's machinery out (T 146-147).

The land itself was deeded to Hardy on December 18, 1951 (T 32; Exhibit P-3).

In the following summer Thompson had not yet been able to dispose of his machinery and Thompson, feeling that he had perhaps withheld delivery of the building for a reasonable time, went to see Hardy about Thompson's continued use thereof. Under the circumstances existing Hardy indicated he did not need the building and that it was alright for Thompson to go on using it as he had. However, Hardy told Thompson that inasmuch as he was storing implements with gasoline in the building he felt that Thompson should protect and be responsible for the building during the time he possessed and used it, and thereupon Thompson agreed to protect and be responsible for the building while he used it (T 37-38; T 145).

As a result of the loss after this agreement was made Thompson feels that he owes Hardy for the building, and Hardy expects Thompson either to pay for it or replace it no matter what the result of this litigation may be (T 27; T 147-148).

Some time in the late summer or early fall of 1952 the appellant's agent, Nick Topik, came to see Mr. Thompson about the renewal of the policy. He wanted Thompson to give him a check for the renewal and Thompson told him he intended to continue the insurance but he was not able to pay him that day, and he then said to Topik, "I have sold the place but I still have my building there. I still have my machinery there and I am responsible for the building so I think I will still carry the insurance." Topik as agent of the company then advised Thompson as to the proper procedure. He

told Thompson to write a letter and advise the company of what had been done and that if they wanted to issue a new policy, they would do so from headquarters. A little later Thompson followed the advice by writing the letter, Exhibit D-6, to the appellant at its Denver office (which was the office specified on the envelope sent with his premium notice) and sent the letter, with his check for \$19.60 for the premium renewal and the premium notice or receipt, to the company through the regular mails. In that letter Thompson stated to the company, *"I have sold the farm, but I am still using the building for storing my machinery and things until I can move to Idaho, so everything is the same. I am still responsible for the building until I move so I wish to keep the insurance on it. Will you please change the policy accordingly so I will still be protected."* The check, Exhibit D-7, he received in his next monthly bank statement and in due course of mails he received in return from the company the renewal receipt, Exhibit D-8 (T 39-44).

Mr. Jensen, Claims Manager for appellant corporation, testified that when the file on this policy was handed to him after the loss the letter was not contained therein. However, his testimony as to the system for opening mail and filling letters in the company indicates that it is very loose indeed and that there is ample opportunity for such a letter to be misplaced or misfiled. It appears that an average of some four hundred renewal letters are received each business day and opened by two clerks who then pull the files and pass the documents on to underwriters for consideration. In this process letters

commented, “that’s all there is to it, isn’t it?” (T 177).

The appellant corporation excepted to some of the instructions (T 179-80) but nowhere proposed that the issue of the value of the building be submitted to the jury. It should be observed that the exceptions taken to the court’s instructions are not urged here.

The question of insurable interest in the building at the time of obtaining the policy and at the time of the fire loss was submitted to the jury with an instruction that the phrase “insurable interest” is defined as 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 is in the words of the Utah Statutory definition.

Upon the court’s instruction the jury returned a special verdict in answer to the interrogatories as follows:

1. The defendant on September 18, 1951, had “sold *but not conveyed*” the building to Hardy.

2. The fact of said sale or conveyance was not concealed from and was not unknown to the plaintiff or its agent at the time of policy renewal.

3. That the defendant did not misrepresent to the plaintiff that the tractor was free and clear of all encumbrances at the time of applying for the original policy.

4. That at the time of applying for the original policy the defendant did not misrepresent to the plaintiff

or its agent that he owned the frame building in question.

5. That neither the plaintiff company nor its agent relied upon the statements made by the defendant in the proof of loss in making payment to the defendant of the sum of \$2,000.00 on January 21, 1953.

* * * *

8. That at the time the defendant obtained the insurance policy he did not have an insurable interest in the building.

9. That at the time of the fire the defendant did have an insurable interest in the building.

The verdict was unanimous (R 49-50).

Interrogatories 6 and 7 dealt with the values of the machinery and are not relevant here.

Appellant corporation never filed a motion for a new trial.

The conditional order for a new trial (R 73) and the order granting a new trial (R 76) were entered by the court on its own motion entirely without notice to defendant and without any opportunity to be heard as to the propriety thereof before said orders were entered (R 73; 76; 96-97).

Within ten days after the entry of the conditional order and co-temporaneously with the entry of the peremptory order for a new trial the respondent Mr. Thompson filed his written motion to amend the findings

of the court by striking therefrom the court's interpolated finding that the value of the building was \$1,000.00 only and to vacate and set aside the conditional order and the further order for a new trial. After extended argument, both written and oral, these motions were granted and the judgment originally entered on the verdict was reinstated. This appeal followed.

STATEMENT OF POINTS

POINT 1. *The defendant-respondent did have an insurable interest in the insured building at the time the policy was renewed and at the time the loss occurred.*

POINT 2. *The defendant-respondent properly was allowed to retain the \$2,000.00 paid to him by appellant as the value of the building.*

POINT 3. *The defendant-respondent made no misrepresentation, and the policy is valid.*

POINT 4. *The court properly vacated its erroneous order for a new trial on plaintiff's complaint.*

ARGUMENT

POINT 1. *The defendant-respondent did have an insurable interest in the insured building at the time the policy was renewed and at the time the loss occurred.*

At the outset it should be observed that the only question here raised by appellant with respect to Mr. Thompson's insurable interest is concerned with appellant's claim that prior to the renewal of the policy and the loss of the building all of Mr. Thompson's interest therein had been transferred to Mr. Hardy at the same

time the farm was conveyed to him by deed. The theory is that he previously had an insurable interest but parted with it at the time he conveyed the real property.

It would seem to be a sufficient answer to this contention that the question of this transfer (or "conveyance" as it was styled by the court) to Hardy was submitted to the jury under proper instructions which, as they are not here attacked, constitute the law of the case, and *the jury specifically found that the building was not "conveyed" to Mr. Hardy when the real estate was conveyed. To make assurance doubly sure the jury as the trier of the fact also specifically found that Mr. Thompson did have an insurable interest in the building both at the time he obtained the policy and at the time of the fire (T 28).* It is readily apparent from the record that these findings are amply supported by the evidence.

It is very apparent that the building in question was not and never was intended to be a part of the real property. It was never affixed to the land in any way. No foundations or posts or other installations were made which would indicate any intention that the building should be there permanently. The land was not excavated in any way to accommodate it. When installed it was installed on land leased by the Labor Association from Mr. Thompson. At the time Mr. Thompson was forced to sell the land and was negotiating for the sale of the same he was still contemplating hauling the building off and it was treated strictly as a temporary building and his personal property.

Then when Mr. Thompson was forced to sell his farm he debated whether or not he would sell the building when he sold the real estate and he considered hauling it away, but finally decided to give the purchaser the choice of buying the building with the farm in a package deal, because it would have cost him at least \$1,000.00 to haul the building to Idaho and \$500.00 to haul it to his other home in Tremonton. Nevertheless, at the time Thompson's deal with Hardy was negotiated and in consideration of the mutual agreements made, including the immediate conveyance of the real property, it was agreed between the parties that Mr. Thompson should *reserve* to himself the building in question with the right to the use and occupation and the possession thereof until such time as he could conveniently move his machinery. The keys were not delivered and possession was not given of this personal property. Hardy testified that he never did get possession of the building. After some time and because Hardy had not made a transfer of his title and possession of the building Mr. Thompson and Mr. Hardy further agreed that title, possession and right of use of the building should continue to be reserved, but that in view of some delay *Mr. Thompson should protect and be responsible for the building*, obviously so that he could either make delivery or pay the value of the same when the time came to execute the executory contract of sale.

Another motivating factor in Thompson's reservation of this building was his feeling as a layman that all of the technical formalities incident to his transaction with the Labor Association should be completed before

he delivered a bill of sale. But whatever the motivating factor, it is clear that the parties intended merely an executory contract to sell this building to Mr. Hardy as personal property at such time as he could move his machinery out of the building. This was the status at the time of the fire loss.

Respondent is not quite clear just wherein appellant contends Mr. Thompson's rights in the premises fails to meet the statutory definition of an insurable interest as set out in Section 31-19-4, Utah Code Annotated 1953, wherein it is said that the phrase 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." Even if the jury had not found that Thompson had not "conveyed" the building to Hardy, nevertheless it is clear that Thompson had a legal obligation to Hardy to deliver the possession of the building when he was through with it, and for his failure to perform this obligation he would be liable to Hardy for the full value of the building for breach of his contract to deliver the same pursuant to the contract to sell. Moreover, he had the use and possession thereof for his own benefit and an agreement to protect and be responsible for it to Hardy.

Under the uncontroverted facts, therefore, Thompson had an insurable interest under any one of the following theories:

1. He was the owner of the building subject only to a contract to sell and deliver the same.

2. He was a bailee of the building having the right to the beneficial use thereof at the time of the loss.

3. He was a bailee of the building obligated by contract to protect and be responsible for the same.

4. As a seller who had not delivered, he had a substantial economic interest in the safety and preservation of the building because its loss would leave him liable to Hardy for the value thereof.

The Utah statutory definition of “insurable interest” is merely declaratory of the common law, as appears from the following text quoted from 44 CJS INSURANCE, Section 175b:

“In general a person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against.

“Great liberality is indulged in determining whether a person has anything at hazard in the subject matter of the insurance, and any interest which would be recognized by a court of law or equity is an insurable interest. Thus, the interest of insured may be personal or as a representative of the rights of others; and while neither legal nor equitable title is necessary, a person must have such a right or interest as the law will recognize and protect. Different persons may have separate insurable interests in the same property.

“‘Particular Interests.’ Persons held to have an insurable interest in property include persons having the custody of, and responsibility for, the property, such as bailees, * * * Whether or not a vendor has an insurable interest depends on whether he has made an absolute *transfer or has retained a lien on some rights or liabilities in respect to the property.*”

(Italics provided.)

In this case, it is clear that the jury was correct in finding that Mr. Thompson retained an insurable interest as a vendor because he had not made an absolute transfer but had retained the right to the beneficial use of the building and had made himself liable for its protection and for the delivery thereof at the end of the period of his use.

Again in 44 CJS INSURANCE, Section 183, it is said that:

“Any bailee or person having custody of property and responsible for it may take fire insurance in his own name for the benefit of himself and the bailor, and may recover not only a sum equal to his own interest in the property by reason of any lien for advances or charges, *but the full amount named in the policy up to the value of the property;*”

(Italics supplied.)

Again it is said that one having the care, custody or possession of property for another even without liability and without any pecuniary interest therein may, nevertheless, obtain insurance on such property for the benefit

of the owner and the insurance will so inure on the subsequent adoption of the insurance even after the happening of a loss. See

44 CJS INSURANCE, Section 185,
Notes 20 and 21.

However, in this case, it is not necessary to go so far in order to support a judgment for the defendant, for in our case, the jury was clearly justified in finding that Mr. Thompson had an insurable interest in his own right by reason of being the owner subject only to an executory contract to sell, or that he was in possession and entitled to the beneficial use thereof or that he was in possession and legally obligated to account for the building or the value thereof to Mr. Hardy. In this connection, see

44 CJS INSURANCE, Section 180,
reading in part as follows:

“Any title to, or interest in, property, whether legal or equitable, and however slight or uncertain in duration, will support a contract of fire insurance on the property. The term ‘interest’, as used in the phrase ‘insurable interest’, is *not* limited to *property or ownership* in the subject matter of the *insurance*; where the interest of insured in, or his relation to, the property is such that he will, or may, be benefited by its continued existence or suffer a direct pecuniary loss from its destruction or injury by fire, his contract of insurance will be upheld, although he has no title, either legal or equitable, no property right or interest, no estate, no lien, and no possession or right of possession. Thus an insurable interest in property may arise from some liability which

insured incurs with relation thereto, although he is not in possession of the property, and has no interest therein beyond the danger of pecuniary damage from the loss of the property by reason of such assumed liability. Such liability may arise by force of statute or by contract, or may be fixed by law from the obligations which insured assumes * * * The principle, stated supra 223, that insurance is a personal contract, does not imply that, in order to recover, insured must have a *personal interest* * * *

* * * “The fact that an owner of property may be able to reimburse himself from other sources in case of its destruction is no reason for denying to him an insurable interest in the property.”

Even an insurance carrier, without any vestige of title or right in the building, has an insurable interest and may *reinsure* the same, because it is “responsible” for a loss thereof.

The adjudicated principles applicable to this case as above quoted from Corpus Juris Secundum have been very recently considered in the modern and authoritative insurance text, Appleman: Insurance Law and Practice. In the hope that it will be of some assistance to the Court we will quote briefly this text writer’s statements of the principles under consideration.

4 Appleman: Insurance Law & Practice,
§2123:

“The usual rule customarily followed is that an insurable interest exists when the insured derive pecuniary benefit or advantage by the preservation or continued existence of the property

or will sustain pecuniary loss from its destruction. Reasonable expectation of benefit from preservation of property is thus sufficient; or liability to loss from damage to it will be sufficient.

“A right of property is *not* an essential ingredient of insurable interest; any limited or qualified interest, whether legal or equitable, or any expectancy of advantage is sufficient.”

4 Appleman: Insurance Law & Practice,
§2181: .

“Both the vendors and purchasers of property have an insurable interest therein * * *”

“The vendor retains an insurable interest in the property under many circumstances. If, of course, he has parted with no possession, there is little question on this point. The same is true where the seller * * * has reserved title, or possession, or has not yet made conveyance to the vendee.”

4 Appleman: Insurance Law & Practice,
§2211:

“Bailed property is generally regarded as held in trust in the view of insurance law. In this sense, the expression ‘trust’ is treated as possession of property of others for which the assured can be called to account. For this reason any person in custody of property and responsible for it, may take insurance in his own name, and in the event of a loss may recover the full value of the amount named in the policy up to the value of the property.

“A bailee is generally stated to have an insurable interest which he may insure for himself and the bailor. He may also insure such goods

up to the full value thereof, holding the remainder, after deducting his own loss, as a trustee for the bailor.”

These principles have been settled in the law of insurance for a long time and the only modification discernable in the latter cases are an increasing tendency to allow the widest latitude in the definition of an insurable interest in order to hold valid the policy in recognition of the very complicated property and contractual interests to which modern civilization and modern commerce and industry have given rise. One of the best discussions and reviews of leading cases defining insurable interests is to be found in the Michigan case of

Crossman v. American Insurance Company
of Newark, 164 Northwestern 428, LRA
1918A, 390.

We believe a careful reading of that case will be of great assistance to the Court.

Again in the case of

Ferguson v. Pekin Plow Company (Missouri
1897) 42 Southwestern 711,

it is said:

“Nothing is better settled than that agents, wharfingers, warehouseman, commission merchants *and others having the custody of and being responsible for property* of their principals or consignors, may insure such property in their own names, and may in their own names recover, not merely to the amount of their commissions or charges on such property, *but the full amount of the policy, up to the value of the property.*”
[citing cases]

It will be remembered that the evidence before the jury for consideration in determining whether or not Mr. Thompson had an insurable interest in the building in question was to the effect that although Mr. Thompson had made a deal to sell the building to Mr. Hardy, he had made an arrangement with Mr. Hardy that he would have for an indefinite period the beneficial use and occupation of the building upon the specific understanding and agreement that Mr. Thompson would be responsible for and would protect the building. Even if the Court should be of the opinion that as a matter of law the property in the building had passed to Mr. Hardy, nevertheless, Mr. Thompson had retained a beneficial interest and entered into a contractual obligation to be responsible for the building, and under the authorities referred to was entitled to insure the same for the full amount even though between himself and Mr. Hardy he might hold part of the proceeds as trustee for Mr. Hardy.

The case of

Bird v. Central Managers Mutual Insurance
Company (Oregon) 120 Pac. 2nd 753,

is in point. There a corporation's sales manager merely borrowed the corporation's automobile and agreed that he would be personally responsible or liable for the damages thereto. The Oregon Court held that the sales manager who had thus borrowed the car had an insurable interest therein and could recover from the insurance company the full value of the car when it was destroyed.

See also the case of

Aktiebloget M. Bank v. Hanover Fire Insurance Company, 208 New York Supplement 173 (later reversed on other grounds)

where it was held that one giving a covenant of indemnity to a bonding company which was issuing a bond to secure release of a ship from a writ of attachment had an insurable interest in the attached property even though he had no title whatsoever thereto, because he was bound to make a payment to the bonding company if the property was destroyed so that it could not be returned into the attaching officer's custody if the attachment was held valid.

See also the case of

Dublin Paper Company v. Insurance Company of North America, 63 Atlantic 2d 85, 8 ALR 2d 1393.

There certain policies of fire insurance were issued in such form as not to be affected by the making of a contract to sell the insured property and were also so drawn as not to cover the interest of the vendee. After the issuance of these policies the insured made a contract to sell the property. Shortly after this contract of sale was made a rider was issued for the policy increasing the amount of the insurance. Thereafter the property was destroyed by fire, but before the loss had been paid the insured received payment of the purchase money from his vendee so that he had in fact received his full purchase price and so far as he was concerned had got out of the property the amount he had contracted

to sell it for. The Court held that *the insurance was on the property and not upon the payment of the balance of the purchase price*, and accordingly the insurer was not relieved of liability by the making of the contract of sale and the payment of the purchase price, but the insurance company must pay the loss to the insured who would hold the amount as trustee for the vendee. It is to be noted that the statement that an insurance policy is personal is not to be construed to defeat an insurance policy on property under circumstances such as those in the case mentioned. It is submitted that this case is exactly in point and in favor of Mr. Thompson's position.

In the case of

Waring v. The Indemnity Fire Insurance
Company (New York 1871) 45 New York
606, 6 Am. R. 146,

the plaintiff sold oil to various vendees, and received the purchase price in full. The oil was stored in a warehouse and complete delivery made by delivery of warehouse certificates, etc., but the place of storage had not been changed. The plaintiff seller insured the oil "sold but not removed" in his own name. It was destroyed by fire, and the defendant insurance company refused to pay on the policy upon the ground that the seller who had parted with title and received the purchase price had no insurable interest. The New York Court of Appeals held that the plaintiff as agent or occupant could insure and recover the full value of the property. The Court said:

“The right is put upon the fact that, having possession of the property exclusive as to all but the owner, to whom they are responsible, they have the right to protect the loss, so that it or its value may be rendered to the owner when he calls for his own.”

This case is obviously exactly in point and indeed goes even farther than it is necessary to go here in order to affirm the judgment of the Court below.

An extensive annotation on the subject of insurable interest is set out in

8 ALR 2nd, Page 1408, and following.

It appears that the cases there digested which are in point uniformly support Mr. Thompson's position.

Again in the case of

Millville Aerie No. 1836 F.O.E. v. Weatherbie, (New Jersey Equity), 88 Atl. 847,

it was held that where a vendor obtains insurance on property in his own name, notifying the insurance company of the sale contract, and the property is destroyed, he may recover from the insurance company on the policy, even though he holds the insurance proceeds as trustee for the vendee as between the vendor and the vendee.

Finally the case of

Rice Oil Company v. Atlas Assurance Company, 102 Federal 2nd 561,

decided by the Circuit Court of Appeals for the Ninth Circuit and based on the law of Montana, is in point and

in favor of Mr. Thompson. There an oil company sold certain property but reserved possession and use of certain buildings and equipment constituting personal property located on the land until full payment of the purchase price was made by the extraction of oil from the land or until operation of the real property ceased to be profitable. A fire occurred and the buildings and equipment were destroyed and the vendor company sued on the insurance policies which it had procured on the personal property. The court commented that under the contract the seller had agreed to deliver the insured property to the buyer at the end of the term for which it had reserved the beneficial use and that it might be liable to the buyer for the value of the property. It held that there was a bailment of the property which was in effect held in trust within the purview of insurance law and that it had a duty to exercise ordinary care for its preservation which would give rise to a liability to the buyer if this duty was not discharged and that *this duty required the insuring of the property*. The court accordingly held that the insured in this case had such a relationship to the property that it would be benefitted by its continued existence and that it would suffer a direct pecuniary injury by its loss and that it had an insurable interest therein even though it had no legal or equitable title. The court's discussion of the problem will, we are sure, be very helpful to this court in its consideration of the problem in the case at Bar. The case is in point and supports Mr. Thompson's position.

Under the evidence, under the findings of the jury and under the law Mr. Thompson at all relevant times

had an insurable interest in the building authorizing him to insure the same and to collect insurance up to the full value of the building. The findings and judgment are correct and should be affirmed.

POINT 2. *The defendant-respondent properly was allowed to retain the \$2,000.00 paid to him by appellant as the value of the building.*

In the second section of its argument the appellant makes the obvious point that the limit of Mr. Thompson's recovery on the policy is the actual cash value of the frame building at the time of loss. This is in accord with the policy and no issue exists between the parties as to that bald statement. However, appellant then illogically and without any basis in fact or law proceeds to a conclusion that Mr. Thompson should refund to appellant \$1,000.00 out of the \$2,000.00 voluntarily paid to him by the company as settlement for his loss of the building. Here the parties again part company.

Appellant declares, and we agree, that Mr. Thompson is entitled to the actual cash value, and then appellant in its reply, formally admits that the *actual cash value* of the building was \$2,000.00. As we have shown, the issue of the cash value of the building and the amount of the recovery was not tendered or tried in this case. As the records show, the appellant all through the trial of the case reiterated that the only issue was the insurable interest of Mr. Thompson. Even after the court and counsel had carefully and after extended conferences worked out the issues of fact to be submitted to the jury, and had reduced them to the interrogatories

which were later propounded, the appellant declared that so far as the counterclaim was concerned the issues of value of the destroyed *machinery* constituted “all there was to it.”

Appellant quotes Rule 15 (b) of the Utah Rules of Civil Procedure to the effect that when issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated as if they were raised by the pleadings, and seeks thereby to interject the cash value of the building into the issues when that had been formally removed by a formal admission that the value was \$2,000.00.

We respectfully submit that there is no express or implied consent to try this issue to be found anywhere in the record. True, as we pointed out in our Statement of Facts, some evidence as to value was presented, but this was properly presented and received upon the issue of “insurable interest,” to show that the economic interest of Mr. Thompson was a “substantial” one, as required by the Statute defining the phrase “insurable interest.” For an economic interest to be “substantial,” the interest must have some value which is economic, and an expression of that value in terms of dollars as well as in terms of utility is a proper way to show that the interest is “substantial,” and that the building in fact was an asset, and not just a shack constituting a liability to which no substantial economic interest could attach.

Moreover, just as soon as the trial court, inadvertently overlooking the formal admission of value, drafted

the court's finding of value upon the finding of the jury on the other issues which were tried, Mr. Thompson promptly moved to amend the findings by striking the court's finding therefrom as being beyond the issues of fact tried (R 77-78, Paragraph 2). Appellant in its brief cites authority to the effect that a party impliedly consents to the introduction of issues not raised in the pleadings by failure to object to the admission of evidence relating thereto. However, an examination of the cases cited in support of the text quoted discloses that in all of those cases the evidence admitted without objection was not admissible on any other issue which was already present in the case. Here, as we have pointed out, the evidence in question was admissible on another issue, so that no implied consent could arise either from the failure to object to this evidence or from the presentation of such evidence as bearing on the other issue which was set up by the pleadings and tried.

There was no implied consent to try the issue of the amount of recovery for the loss of the building. Issues should not be broadened to cover facts formally admitted on any such equivocal record as the one here presented by the appellant. To do so would only create great confusion.

However, even if the Court were to decide that the issue had been tried by the implied consent of the parties and that it was proper for the trial court to make a finding thereon, still the finding which the trial court first drafted into the jury's verdict, and then later struck therefrom, is not supported by the evidence. The only

evidence on which the court could base a finding of a value of the building in the sum of \$1,000 was the fact that in the package deal between Mr. Hardy and Mr. Thompson \$1,000 was allowed for the building. However, it must be remembered that under the uncontroverted evidence this was not relevant, material or competent evidence on the issue of the market value of the building for the reason that the sale was one in which *Mr. Thompson was forced to sell against his will to avoid a foreclosure*, and was not a transaction between a willing buyer and a willing seller, neither of whom was compelled to make a transaction. The transaction is not one which is relevant to the fair cash or market value of the building in question under all of the established rules.

See

State, ex rel McKelvey v. Styner, (Idaho)
72 Pac. 2nd 699;

Kansas City and G. Railway Company v.
Haake (Missouri) 53 Southwestern 2nd
891, 84 ALR 1477;

Richer v. Burke (Oregon) 34 Pac. 2nd 317;

Pittsburgh, etc. Railway Company v. Gage
(Illinois) 121 Northeastern 582;

and

Coos Bay Logging Company v. Barclay
(Oregon) 79 Pac. 2nd 672.

On the other hand all of the relevant evidence which might be considered in determining the value of the property is to the effect that the building was reasonably worth more than \$2,000.

Mr. Gatfield, the experienced claims adjuster for the appellant himself determined that the value was in excess of the insurance coverage of \$2,000. The estimates of a carpenter were to the effect that it would take more than \$2,500 to replace the building and the owner was of the opinion that it was of substantial economic value, to-wit, somewhere around \$3,000, even though at forced sale he was willing to sell it for less to avoid the expense of moving it away and to get his money so that he could avoid a deficiency judgment in a foreclosure sale.

It is apparent from the entire record that the appellant considered the issue of fair cash value closed by the pleadings until after the court, through inadvertence and mistake, drafted a finding onto the jury's verdict. Then the appellant immediately and gratefully accepted the trial court's error as manna from heaven and thence hitherto has pursued the matter.

But the fact is that the issue was settled by the pleadings and there is no evidence to justify any different finding even if the matter were to be opened for testimony. The judgment should be affirmed as against this attack.

There is another and additional reason why Mr. Thompson properly was allowed to retain the \$2,000 paid to him as the value of the building. The court will recall from the Statement of Facts that this figure was arrived at by the appellant's adjuster, Mr. Gatfield, before anyone consulted with Mr. Thompson about the value of the building, and the company's representatives made out

the check and sent it to and delivered it to Mr. Thompson without any question whatsoever. Obviously this payment was made voluntarily and if there was any misunderstanding on the part of the appellant the misunderstanding was the result of its own negligence or inattention. Under these circumstances this voluntary payment cannot be recovered.

Slack v. National Bank of Commerce, 9 Utah 193, 30 Pac. 746;

Richey v. Clarke, 11 Utah 467, 40 Pac. 717.

Apparently the court, at the time it inadvertently made the finding of \$1,000 in value, considered that Mr. Thompson's economic interest in the building at the time of the loss was only the amount of the consideration paid on contract to sell some eleven months before. However, this was not the fact. As has been shown by the authorities cited under the previous section, Mr. Thompson was entitled to insure and collect insurance on the entire cash value of the building even though he had in fact been paid. He must still settle with Mr. Hardy for his failure to deliver the building under their agreement, and the indications are that Mr. Thompson may well have to pay Mr. Hardy in excess of \$2,000 when he settles with him, as Mr. Hardy under the Sales Act is entitled not to his money back, but to the value of his bargain, which under the evidence may be as high as \$3,000.

After further and mature consideration the trial court very properly allowed Mr. Thompson to retain the full \$2,000 paid him by the appellant.

POINT 3. *The defendant-respondent made no misrepresentation, and the policy is valid.*

Appellant contends that the policy was void because of certain misrepresentations listed by appellant on page 25 of its brief.

This is essentially the defense of fraud. It is well established that one asserting that the making of a contract, particularly a written contract, was induced by fraud must establish such fact by clear and convincing evidence, and that if the evidence is not clear and convincing, a mere preponderance of the evidence is not sufficient.

17 CJS CONTRACTS, Section 605, Pages 1257-8;

Hanson v. Mutual Finance Corporation, 84 Utah 579, 37 Pac. 2nd 784;

Wiley v. First National Bank, 257 Northwestern 214.

Where such a defense is interposed to an insurance contract the rule formerly was in Utah that every element of fraud, including the element of intent to deceive and defraud, must be proved by the person asserting such fraud, on whom the burden of proof as above outlined rests.

New York Life Insurance Company v. Grow, 103 Utah 285, 135 Pac. 2nd 120.

However, in 1947, that rule was modified by statute. *Section 31-19-8, Utah Code Annotated 1953*, in effect provides that where misrepresentation has been shown, the burden shifts to the insured to show that the misrepresentation

sentation was not made with intent to deceive. However, the burden is still upon the plaintiff in this case to show, *by clear and convincing evidence*, that the misrepresentations alleged were in fact made and that they were material and that they were in fact relied on.

Moreover, *Section 31-19-8, Utah Code Annotated, 1953*, specifically provides that no oral or written misrepresentation or warranty made in the negotiation of an insurance contract by the insured or in his behalf shall be deemed material "or defeat or avoid the contract or prevent it attaching," unless such misrepresentation is made with the intent to deceive.

The question of the making of misrepresentation as alleged by the plaintiff was tried to the jury and submitted to it by the court. Similarly the question as to whether or not the appellant here relied upon the statements made by Mr. Thompson in the proof of loss in making payment to Mr. Thompson of the sum of \$2,000 was tried to and submitted to the jury by the court. The jury its special verdict found as a matter of fact that no misrepresentations were made as to the ownership of the building or as to the encumbrances on the tractor and this verdict is supported by the evidence as has been shown. Far from establishing misrepresentation by clear and convincing evidence the plaintiff failed to establish it by even a preponderance of the evidence. The jury further found that the fact of the sale of the building was not concealed from or unknown to the plaintiff, and this is in accordance with the evidence that Mr.

Thompson reported that sale in writing received at the appellant's Denver Office and apparently lost by appellant there.

Appellant relies upon a provision in the policy to the effect that the policy should be void if the insured "wilfully" conceals or misrepresents any material fact or circumstance. This clause is directly contrary to the provisions of the statute last quoted and cannot be given any force or effect. But if it were to be given effect, still it will not avail the appellant, for there is absolutely no evidence of any "willful" concealment or misrepresentation. The only incorrect statement ever made by Mr. Thompson to the company was certainly not material. It is contained in the Proof of Loss prepared by appellant and signed by Thompson without reading. It reported a mortgage on the building to the Davis County Bank, when in fact there was no mortgage. The statement as to the value of the building is modest and correct, and even if it were not, it was induced by the appellant's adjuster who arrived at his own value and submitted the proof of claim according to all of the evidence. The most that can be said is that Thompson agreed with the appellant's representatives as to the value. And, as has been said, the jury found on competent evidence that the company did not in any way rely on this representation in making settlement. It relied upon the findings of its own adjuster. Moreover, under the evidence it could not be said that a representation of value at \$2,000 was a willful misrepresentation.

Mr. Thompson has acted honestly and justly

throughout the transaction. He spent money for insurance and he is entitled to the proceeds. The policy is not void for any misrepresentation willful or otherwise.

POINT 4. *The court properly vacated its erroneous order for a new trial on plaintiff's complaint.*

From what has been said heretofore, it is now very apparent that the trial court erred in ordering a new trial unless Mr. Thompson should remit \$1,000 out of the \$2,000.00 paid him in settlement of the insurance on the building. The jury had found that the payment was not obtained by any misrepresentation; it is apparent that the payment was voluntarily made, and the court inadvertently and by mistake made a finding as to the value of the building when that was not an issue before the court. Appellant made no motion for a new trial but seeks now to profit by perpetuating the error of the trial court which the trial court itself in its discretion corrected.

The court itself found that the finding of fact inserted by the court was made and the orders for new trial based thereon entered inadvertently under the erroneous impression that there was an issue of fact to be determined as to the value of the frame structure in question, and that the court did not have in mind the fact that the parties by their pleadings had stipulated to the value of the structure (R 113).

The original orders of the Court granting a new trial were erroneous even if there had been an issue to be tried on the value of the building. There was no reason to subject Mr. Thompson and the State to the ex-

pense and trouble of a re-trial on all issues merely because one issue had been omitted. Even if the orders had been otherwise correct, they should have limited the new trial to the trial of the sole issue of the value of the building, which was the only matter then left undetermined or in doubt so far as the jury or the trial court was concerned. However, as we have seen, the orders were inadvertently entered under a misapprehension as to the state of the pleadings, and within ten day after their entry and the entry of the court's finding as to value which was grafted onto the verdict of the jury, Mr. Thompson moved to strike the court's finding from the verdict of the jury and to vacate the orders for a new trial (R 77-79). At the same time and in the alternative Mr. Thompson moved for an order to limit the new trial to the question of value, but that of course is moot now. Upon reviewing the whole thing and considering extensive written arguments the trial court concluded that it was in error and itself corrected the error and reinstated the judgment and vacated the orders for a new trial.

Perhaps it should also be observed that respondent's motions were filed within ten days after the filing of the findings of fact and judgment.

Now appellant contends that the trial court, having made an inadvertent error, had no jurisdiction to correct it and assigns error to the order of the court correcting its inadvertent error. Appellant in support of that strange position cites authority to the effect that when a motion for a new trial has been *denied* and the

ten day period allowed by statute or rule for the making of the motion has elapsed, the court's jurisdiction has terminated and it cannot thereafter grant a new trial. Appellant then baldly and without justification concludes that, if after the court has denied a new trial and the time for filing a motion has lapsed the court cannot then grant a new trial, the converse is also true, and that where the court has granted a new trial and retained the jurisdiction of the cause thereby it cannot thereafter exercise the retained jurisdiction to vacate the order granting a new trial and reinstate the original judgment. The authorities relied on by the appellant here are based on facts which are the exact opposite of the facts existing in the case at bar.

The appellant also contends that there is no authority in the Utah Rules of Civil Procedure which would authorize the court to vacate the orders for a new trial in question. Let us consider this proposition first. As we have shown, the orders for a new trial and the finding of the court were entered in the absence of Mr. Thompson and his counsel and without any notice or opportunity to be heard. Under these circumstances, the Rules specifically provide that the order may be vacated with or without notice. Rule 7 (b) (2) of the Utah Rules of Civil Procedure declares that: "Except as otherwise specifically provided by these Rules, any order made *without notice to the adverse party* may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice."

There is no specific prohibition in the Rules against the vacating of an order for a new trial made without notice or opportunity for hearing and in the absence of the party against whom the order was made. This Rule therefore specifically grants to the trial court the discretionary power which the court exercised and it should not be disturbed by this court.

The motion of Mr. Thompson to amend the findings was made within ten days after entry of the judgment and pursuant to Rule 59 (b) providing that "upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." Here again the court has specific authority and jurisdiction granted to it to amend the finding which it inadvertently and erroneously grafted onto the verdict, and having amended the findings by striking the improper declaration of fact on a settled issue, the very basis for the new trial failed and it would be idle to go through the motions of a new trial upon issues that have been settled from the beginning.

In its argument that the court had lost jurisdiction to do anything except retry the case by reason of having entered its erroneous orders for a new trial the appellant cites and relies upon the Utah case of

Luke v. Coleman, 38 Utah 383, 113 Pac. 1023, which held that an application for a rehearing of an order of the trial court *denying* a motion for a new trial does not affect the running of the time for taking appeals, which begins to run when the order denying the

motion for a new trial is entered. It is true that the Supreme Court in its decision in that case used some general language commenting that in California it is established that the trial court has no power to reopen the question of granting or denying an order for a new trial after disposing of it. However, reference to the cases cited indicates that all of those cases were, like the Luke case, cases where the motion for new trial had been *denied* so that the original judgment was made final and the jurisdiction of the trial court finally terminated and exhausted, and there was nothing more remaining in the case upon which the trial court could exercise its jurisdiction.

An entirely different question is presented where, as here, a new trial has been *granted*. By the granting of a new trial the court has acted to *retain* jurisdiction over the case by an order which is interlocutory rather than final in its character. The case instead of becoming dead reverts to the trial calendar, and while there the court, of course, has jurisdiction of all aspects of the case and can entertain any motions made with respect thereto.

Accordingly it is the general rule that an order *granting* a new trial may be reconsidered, modified or vacated by the court at any time and the court has full and plenary power to act in the premises. The Supreme Court of Massachusetts only a few years ago had occasion to pass upon this precise question in the case of

DeLuca v. Boston Elevated Railway Company, 45 NE 2d 463,

in which a motion for a new trial was first granted and then, on motion by the opposite party, vacated. The Court says:

“There was no error in vacating the order allowing the motion for a new trial. This order recites that the motion for a new trial had been ‘allowed by mistake,’ but the nature of the ‘mistake’ does not appear. This, however, is immaterial. Obviously there had been no entry of final judgment. Before the entry of such a judgment it was within the power of the trial judge to make the records of the court conform to the facts by striking therefrom an order that did not conform to the decision intended by him to be made, or, even if the order entered did so conform, it was within the power of the trial judge to reconsider his decision and, if he concluded that it was erroneous, to correct the error. And he could correct a mistake or error of either kind without further hearing or notice to the parties. *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 388, 389, 99 N.E. 221; *Waucantuck Mills v. Magee Carpet Co.*, 225 Mass. 31, 33, 113 N.E. 573; *Conway v. Kenney*, 273 Mass. 19, 23, 172 N.E. 888; *Jamnback v. Aamunkoitto Temperance Society, Inc.*, 273 Mass. 45, 50, 172 N.E. 884; *Peterson v. Hopson*, 306 Mass. 597, 602, 29 N.E. 2d 140, 132 ALR 1; *Fine v. Commonwealth*, 312 Mass. 252, 254-260, 44 N.E. 2d 659. The distinction between the power of a judge to correct a clerical error and his power to correct a *judicial error where a final judgment has been entered, is without application to a case like the present where the case has not passed beyond the power of the court by reason of the entry of a final judgment.* See *Karrick v. Wetmore*, 210 Mass. 578, 579-580, 97 N.E. 92; *Kingsley v. Fall River*,

280 Mass. 395, 397, 398, 182 N.E. 841; Prenguber v. Agostini, 289 Mass. 222, 223, 193 N.E. 743.”

The Supreme Court of Kansas in the case of

Farmers and Merchants National Bank of
El Dorado v. Wright, 157 Pac. 1178,

likewise carefully made the distinction to which attention is here directed. In that case a motion for a new trial was granted. Several months thereafter a motion to vacate the order granting a new trial was filed and sustained and it was held that the granting of the new trial, being within the jurisdiction of the court, retained the case on the docket and the court therefor had jurisdiction to make orders therein, including the order vacating the previous order granting a new trial. The plaintiff in that case contended that it was improper and beyond the court's jurisdiction to vacate the order granting a new trial and relied on the cases of

Kingman v. Chubb, 55 Pac. 474, affirmed in
Missouri Pacific Railway Company v. Mayberry, 64 Pac. 981.

In commenting on this contention and the authority relied on the Kansas Court says :

“While it is true that the syllabus states that, when a motion for new trial has been heard and decided, the court has no jurisdiction to reconsider at a subsequent term, the facts were that the *motion was denied*, and at a subsequent term reconsidered and granted. *Here we have the opposite*. Under the changed Code the motion granting the new trial was properly acted upon at chambers, *and from that time forward the case*

remained on the docket ready for trial at the proper time, and the court had jurisdiction to make such orders as were proper. Had there been an application to amend pleadings, no question could well arise as to the jurisdiction to grant such application whether at the next succeeding term or later. The case being rightly on the docket, the vacation of the order granting a new trial, while appealable if erroneous, was not void for want of jurisdiction."

This case was later followed and affirmed by the Kansas Court in

Steward v. Marland Pipeline Co., 297 Pac.
708,

where it was held that a trial court at a subsequent term may set aside an order at a previous term granting a new trial.

Moreover, it is the general rule in the absence of limitation by statute that the court may set aside an order made with respect to a new trial and rehear the motion with respect thereto. See

Kentucky C. R. Company v. Smith, 20 S.W.
392, 18 LRA 63;

Gulf, C and SFR Company v. Muse, 207 S.
W. 897, 4 ALR 613;

Browning v. Hoffman, 103 S.E. 484.

and the annotations set out in

Annotated Cases, 1913 B 485, 487, and
Annotated Cases, 1917 C 1151.

Finally it should be said that the effect of the Luke case is much weakened by the decision of the Utah

Supreme Court in

Lund v. Third Judicial District Court, 90
Utah 433, 62 Pac. 2d 278,

where it was held that a renewed motion for a new trial may be considered after the first motion has been disposed of where the ruling on the first motion was produced by mistake, inadvertence or excusable neglect. It is submitted that on the record here that case is exactly in point as appears from the face of the record.

Finally, we have to submit to the court a case which is exactly in point and is controlling in Utah. This is the case of

Bateman v. Donovan, 131 Fed. 2d 759,

decided by the Ninth Circuit Court of Appeals on November 13, 1942 under the Federal Rules of Civil Procedure. It will be recalled that Utah adopted the Rules of Civil Procedure under date of November 30, 1949 to be effective on January 1, 1950, and under familiar rules of construction when a statute or rule is adopted from another jurisdiction the decisions of the courts of the other jurisdictions previously handed down with respect thereto are adopted with the rules or statutes and are binding on the Courts of Utah.

In the *Bateman* case a judgment was entered on a verdict by the jury. Within ten days thereafter the appellant submitted a motion for a new trial which was granted. Thereafter, and some forty-seven days later, the appellee made a motion to vacate the order granting a new trial and the court upon consideration of the ap-

pellee's motion set aside and vacated the order granting a new trial. On appeal this order vacating the order granting a new trial was cited as error. The Circuit Court held that as regards an order granting a new trial after verdict, such order being interlocutory and not final, since it leaves the case undisposed of, and the parties before the court, it may be set aside as erroneously granted, and this may be done even after expiration of the term. It was held that the lower court was acting within the scope of its power in vacating the order for a new trial. This case is in point and controlling and this court has the right, power and duty to vacate the orders granting a new trial herein.

It should also be observed that under *Rule 60* of the *Utah Rules of Civil Procedure* relief may be granted from a judgment, order or proceeding entered through inadvertence or mistake. Moreover, errors in judgment, orders and other parts of the record "arising from *oversight* or omission may be corrected by the court at any time of its own initiative or on the motion of any party * * *" These Rules also grant specific authority to the court to vacate the orders granting a new trial which were erroneously and inadvertently entered as a result of a mistake as to the state of the record.

We have observed that it would be unjust and unreasonable to require Mr. Thompson, who is not a rich man, to submit to the expense of an entirely new trial before he should have an opportunity to present his grievance to this court for review. For that reason also we feel that the trial court must have jurisdiction to

vacate its erroneous orders granting a new trial. This court has held that where an order of the trial court erroneous in point of law requires a litigant to submit to a trial which could not have any valid effect upon the rights of the parties, the Supreme Court would require the vacation of the order by mandamus if necessary. This necessarily presupposes the jurisdiction of the trial court to enter the desired corrective order, for mandamus will not lie unless the tribunal being compelled has both jurisdiction and a legal duty to do the required act. This point came before this court in a case involving venue. In that case, which is very similar to the case at bar in its principles, the trial court granted a motion for a change of venue and thus purportedly divested himself of jurisdiction to proceed with the matter, and the Supreme Court granted mandamus to compel him to recall the order and reinstate the case upon his own trial docket. See

Hale v. Barker, 70 Utah 284, 259 Pac. 928.

See also

Phillips Petroleum v. Davis, (Okl.) 147 Pac.
2d 135.

Under the law as it exists in this state the trial court very properly corrected its inadvertent error and mistake by vacating its erroneous orders for a new trial.

Perhaps we should add one additional bit of authority for logical completeness. It is the established rule in Utah as elsewhere that it is improper and erroneous for the court to make a finding outside the issues as settled by the pleading.

Neuberger v. Robbins, 37 Utah 197, 106 Pac.
933;

Skeen v. Van Sickle, 15 Pac. 2d 344;

Guiaque v. Salt Lake City, 42 Utah 89, 129
Pac. 429.

The trial court properly vacated its erroneous orders
for a new trial on plaintiff's complaint.

CONCLUSION

From what has been said in this brief it is respectfully submitted that it is very apparent there is no error in the record as it comes to this court and that the judgment of the trial court below as reinstated by the court's order entered on October 13, 1954 should be affirmed with costs to respondent.

Respectfully submitted,

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