

1958

# Meredith Page and Maurine S. Page v. Federal Security Insurance Co. : Brief of Defendant and Appellant

Utah Supreme Court

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Cotro-Manes & Cotro-Manes; Attorneys for Defendant and Appellant;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

UTAH  
DEC 19 1958  
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**FILED**  
25 1958

MEREDITH PAGE and MAURINE S.  
PAGE,  
*Plaintiffs and Respondents,*

Clerk, Supreme Court, Utah

vs.

FEDERAL SECURITY INSURANCE  
COMPANY, a Utah corporation,  
*Defendant and Appellant.*

Case No.  
8815

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**Brief of Defendant and Appellant**

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**COTRO-MANES & COTRO-MANES**

*Attorneys for Defendant and Appellant*

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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MEREDITH PAGE and MAURINE S.  
PAGE, *Plaintiffs and Respondents,*

vs.

FEDERAL SECURITY INSURANCE  
COMPANY, a Utah corporation,  
*Defendant and Appellant.*

Case No.  
8815

---

Brief of Defendant and Appellant

---

STATEMENT OF FACTS

This action was brought in the Third Judicial District of the State of Utah by the plaintiffs-respondents against the defendant-appellant, Federal Security Insurance Company, seeking to recover the face amount of an insurance policy in the amount of \$11,682.00, which policy was issued by the defendant on the life of Alma M. Page on the 15th day of

December, 1950, with Meredith Page, father of the insured and one of the plaintiffs herein, named as beneficiary thereon, the insured, Alma M. Page, having died on or about the 14th day of August, 1956.

The defendant-appellant filed its answer alleging that the insured, Alma M. Page, prior to his death, elected under the terms of the policy, "Option (B) Reduced Paid-Up Life Insurance", in the sum of \$1443.00.

The matter was heard by the court, sitting with a jury. At the close of plaintiffs' evidence, the defendant made a motion for a directed verdict, which motion was denied by the court. On the 12th day of December, 1957, the jury found in favor of the plaintiffs and against the defendant.

Thereafter, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial, which motions were, on the 3rd day of January, 1958, denied by the court.

On the 14th day of January, 1958, notice of appeal was filed and served by the defendant-appellant, and the cause is now before the court for review.

This action arose from the following transactions, to-wit:

Alma M. Page, on the 6th day of December, 1950, made an application in writing to the Federal Security Insurance Company for an insurance policy known and designated as "Bonus Policy, Participating 20 Payment Life" in the face amount of \$11,682.00, which policy was issued on the 15th day of December, 1950.



The insured was then 24 years of age and unmarried, but on or about the 24th day of February, 1954, he was married to Ruth Jensen, now surviving him. The references made throughout this brief to "Ruth Jensen Page" are to the widow of the insured.

The premium on the policy of insurance was \$400.00 a year, payable on the 15th day of December, each and every year. The premiums were paid on said policy, either by cash or policy loan, from 1950 through December 15, 1954, thus keeping the policy in force until December 15, 1955. .

The policy in question is profit sharing, the insured being entitled to dividends at the end of the second year, as provided in the rider attached to said policy, and likewise provides for cash values.

Mr. Erich Olschewski, referred to hereafter as "Erich" or "Mr. Olschewski," was, at the times mentioned herein, the assistant secretary of the defendant, Federal Security Insurance Company.

### STATEMENT OF POINTS

1. Did the insured, Alma M. Page, prior to his death, deliver his insurance policy to the company?

2. As the policy of insurance does not require the exercising of the options under the non-forfeiture provisions of the policy to be in writing, an oral election is sufficient under the law to effectuate a valid election.

3. Did the insured intend to elect one of the options under the non-forfeiture provisions of the policy, prior to his death?

4. Did the insured, Alma M. Page, prior to his death, elect "Option (B) Reduced Paid-Up Life Insurance," under the non-forfeiture provisions of the policy in question?

5. The court erred in not granting defendant's motion for a directed verdict.

6. The court erred in not granting defendant's motion for judgment notwithstanding the verdict.

7. The court erred in not granting defendant's motion for a new trial.

## ARGUMENT

### POINT ONE

**DID THE INSURED, ALMA M. PAGE, PRIOR TO HIS DEATH, DELIVER HIS INSURANCE POLICY TO THE COMPANY?**

The testimony of Ruth Jensen Page, widow of the insured, and of other witnesses established that the insured and his wife on two occasions visited the home office of the defendant company, Federal Security Insurance Company. The testimony of Ruth Jensen Page clearly points out that her husband, during his lifetime, did deliver to the defendant his life insurance policy.

In speaking of the second visit made by herself and her husband to the company offices, Mrs. Page testified:

"Q. A paid-up insurance. Now while you were there, did you have the insurance policy with you?

A. Back home?

Q. No, at the office?

A. Yes. We had it with us.

Q. You had it, and what did you do with it?

A. Erich kept it as far as I remember."

R. 24

Defendant's Exhibit No. 10, a letter obtained from Ruth Jensen Page at the time her deposition was taken, and introduced into evidence at the trial, states without qualification the whereabouts of the policy of insurance on the 3rd day of August, 1955. This exhibit is set forth in full on pages 35 & 36 of this brief. The last paragraph states:

"We shall continue to hold your policy in our possession until we hear from you."

Def's Exhibit No. 10, Ltr  
dtd Aug. 3, 1955, from  
Defendant to Alma M. Page

Under direct examination, Mr. Erich Olschewski, in speaking of the visits made to the company offices by the insured and his wife, testified:

"Q. What did you talk about?

A. As a result of this letter, I might first of all state they had left the policy with me and asked me to give them a letter explaining the various things I recommended for them and upon receipt of that letter in due time, they came back to give me their decision."

R. 37

In the direct examination of Mr. Olschewski with regard to Exhibit No. 10, the record shows:

"Q. Now, I show you what has been marked as defendant's Exhibit 10 and ask you whether you have ever seen that before?

A. Would you restate that please?

Q. I was asking you if you have ever seen it before?

A. Yes.

Q. Does it bear your signature?

A. Yes, it does.

Q. Do you know who dictated the letter?

A. I did.

Q. After you dictated it, what did you do?

MR. COTRO MANES: Will you stipulate that it mailed and received?

MR. RONNOW: Yes."

R. 36

Defendant's Exhibit No. 12, which was introduced into evidence, and which is set forth in full on page 37 of this brief, again states that the defendant had in its possession the insurance policy of Alma M. Page. The first paragraph of this exhibit, the carbon copy of a letter from the defendant to Alma M. Page, states:

"In accordance with your election when in the office on August 8, we return herewith your policy No. 20 PLB 3101."

Def's Exhibit No. 12, Ltr  
dtd Aug. 15, 1955, from  
Defendant to Alma M. Page

The insurance policy mentioned by number in this exhibit

is the same numbered policy as the one introduced by the plaintiffs as Plaintiffs' Exhibit No. 1.

The testimony of Ruth Jensen Page, with regard to the return of the insurance policy by the defendant to herself and her husband, shows:

"Q. Now, after the insurance policy came back from the insurance company,

MR. BUSHNELL: It has not been established whether the policy came back from the insurance company.

A. The policy came back.

MR. BUSHNELL: I withdraw my objection."

R.27

The testimony of Merle Thomas Olschewski, Erich Olschewski's secretary at the time in question, shows that she had the policy in her possession and affixed thereto the rider reducing the policy to paid-up life insurance, and mailed it back to the insured.

"Q. I show you what has been received into evidence, Plaintiffs' Exhibit 1, and ask you to examine it and say whether you have ever seen it before?

A. Yes, I have.

Q. Did you attach, then, the rider to that policy?

A. Yes, I did.

. . . . .

Q. What did you do then?

A. Mailed it to Mr. Page together with the letter of Mr. Olschewski."

R. 86

The only evidence introduced by the plaintiffs to rebut the fact that the deceased Alma M. Page surrendered his policy to the insurance company for endorsement was the testimony of the plaintiff, Meredith M. Page, who, under cross examination, testified:

"Q. All right, you stated a minute ago that you have a strong box at your home, is that correct?

A. Yes.

Q. And that the policy has been inside that box ever since it was issued?

A. That is right.

Q. All this time the policy was in this box?

A. Yes.

Q. Did you ever give it to your son?

A. I have never given it to my son."

R. 102

Considering Defendant's Exhibits 10 and 12, the testimony of the insured's widow, Ruth Jensen Page, and the testimony of the defendant's employees, Mr. and Mrs. Olschewski, there is an overwhelming preponderance of evidence that this policy was in fact delivered to the insurance company by the insured and likewise that it was returned by the company to the insured.

These facts were not controverted. The plaintiffs at no time alleged or plead that Exhibits 10 or 12 were fraudulent.

"Fraud is a matter to be established by clear and

convincing proof . . . Its existence should never rest upon mere suspicion or surmise."

Shaw v. Board of Education,  
38 N. M. 298, 31 P. 2d 993,  
93 A. L. R. 432, 439.

"Where fraud is charged, it must affirmatively be proved by clear and convincing testimony. *It cannot be established upon mere suspicion.*"

Weininger v. Metropolitan Fire  
Ins. Co., 359 Ill. 584, 195 N. E. 420,  
98 A.L.R. 169, 180  
(Emphasis supplied)

The plaintiffs did not object to the introduction of Exhibit 10 (R. 90). They did object to the introduction of Exhibit 12 on the grounds that it was not shown that the letter was ever received by Alma M. Page. The court ruled that this was correct, but allowed the exhibit to be introduced (R. 87).

It is contended that the testimony of Ruth Jensen Page, widow of the insured, did show that the letter had in fact been received.

"Q. I'll show you what has been marked defendant's Exhibit 12 and ask you to read that and tell me whether or not you have ever seen the original of that letter?

A. I'm afraid I didn't read it too well if we did get it.

Q. Well, did you ever see a letter like that?

A. Do I have to say yes or no?

Q. Yes, if you did see it or didn't we want the truth.

A. I think it was something like it I was reading."

R. 72

On cross examination by plaintiff's counsel, Mrs. Page testified:

"Q. Do you remember honestly reading or receiving the Exhibit which is marked No. 12?

A. As I said, not the wordings, but I remember talking that it was fixed the way we wanted it when the policy came back.

. . . . .

Q. Do you recall whether you said you read it or did your husband read it?

A. I believe we read it together."

R. 29

Mrs. Merle Olschewski testified that she transcribed Exhibit 12 from her shorthand notes, typed it on letterhead stationery, gave it to Mr. Olschewski for signing, and thereafter placed the letter in the envelope with the policy of insurance, sealed the letter in the envelope with the policy of insurance, stamped the envelope and mailed it to the insured, Alma M. Page, (R. 85, 86). She was not cross-examined by plaintiffs' counsel.

"It is generally recognized that a presumption of the due receipt of a letter or of a communication through the mails arises upon proof that such letter or communication properly addressed to the addressee and properly stamped with sufficient postage thereon was mailed . . . ."

20 Am Jur 196, Evidence, Sec. 196,  
citing Utah case of Campbell v.  
Gowans, 25 U. 268, 100 P. 397.

With the exception of the statement by Mr. Meredith



Page, one of the plaintiffs herein, to the effect that he never gave his son, Alma Page, the insured, the insurance policy and that the policy was in the strong box continuously from the time it was issued until after his son's death, all evidence showed that the policy was in fact possessed by the insured, Alma M. Page, who left it at the company offices with Mr. Olschewski. Three witnesses and two written documents substantiate this fact, as opposed to the statement of the plaintiff, Meredith.

"While a jury may not arbitrarily disbelieve a witness and reject his testimony, neither are they bound to accept a fact as established merely because he testifies to it, when the circumstances render its existence, or the testimony of the witness, improbable or doubtful."

Leavitt v. Thurston,  
38 U. 351, 113 P. 77.

" . . . the documentary proof, if inconsistent with the oral testimony, is controlling . . . "

Sachs v. Ohio Nat. Life Ins. Co.,  
148 F. 2d 128 (7th Cir. 1945).

## POINT TWO

AS THE POLICY OF INSURANCE DOES NOT REQUIRE THE EXERCISING OF THE OPTIONS UNDER THE NON-FORFEITURE PROVISIONS OF THE POLICY TO BE IN WRITING, AN ORAL ELECTION IS SUFFICIENT UNDER THE LAW TO EFFECTUATE A VALID ELECTION.

The insurance policy in question, Plaintiffs' Exhibit 1,

specifically spells out the necessity of written requests by the insured to effectuate certain changes under the policy, that is: (a) change of beneficiary, (b) request for automatic premium loan privilege, (c) revocation of automatic premium loan privilege.

The contract is silent as to the necessity of a written request for the election of any of the options known as Options A, B, and C. Thus, where the contract is silent as to the necessity of a written election, the court cannot insert or read into the option provision the word, "written."

"An insurance contract must be construed without disregarding words or clauses used, or inserting words or clauses not used."

29 Am Jur 173, Insurance, Sec. 157

"The court has no power to interpolate into the agreement between an insurer and the insured a condition or stipulation not contemplated either by law or by the contract between the parties."

29 Am Jur 173, 174  
Insurance, Sec. 157

The contract of insurance is not ambiguous and therefore the courts are bound to interpret it as written.

" . . . and as there is no ambiguity in the contract, it must be given effect as written. As has often been said, 'Courts are without authority to rewrite contracts'." Citing cases.

Summers v. Travelers Insurance Co.,  
109 F. 2d 845 (8th cir. 1940)  
127 A.L.R. 1336.

The options given the insured are for his benefit and the

exercising of the options are with him; and where it is not required that written acceptance of the option be made, then in that event an oral acceptance is sufficient.

“ . . . a verbal acceptance of an option is sufficient when the option does not require a written acceptance.”

12 Am Jur 534, Contracts, Sec. 39

### POINT THREE

DID THE INSURED INTEND TO ELECT ONE OF THE OPTIONS UNDER THE NON-FORFEITURE PROVISIONS OF THE POLICY, PRIOR TO HIS DEATH?

The testimony of the widow, Ruth Jensen Page, established that the motive of the insured and herself in going to the insurance company offices was to discontinue the policy as a \$400.00 per year premium payable insurance contract. On direct examination in regard to the visits made to the company offices by herself and the insured, Mrs. Page testified:

“Q. What did you and your husband go there for?

A. To have our policy discontinued.

Q. To have your policy discontinued?

A. We didn't want it any more. We wanted it as a paid up insurance.”

R. 21

On cross-examination regarding these visits to the company offices, Mrs. Page testified:

“Q. Let me ask you, did I understand your testimony correctly—you went in and arranged so that you would not have to make any more payments?

A. We were worried because we had borrowed on it and we had enough to do with payments on the farm, and we couldn't see how we could make such a payment.

Q. Then, the purpose for going in was to stop making payments?

A. We couldn't make any payments.

Q. You wanted to make arrangements so that you wouldn't have to make any further payments?

A. Yes."

R. 30

Mr. Erich Olschewski, on direct examination, testified:

"Q. In connection with this policy, did you have occasion during the year of 1955 to see Alma M. Page at your office?

A. Yes.

Q. Do you recall what month it was?

A. August.

Q. And who was with him?

A. His wife."

R. 35

At this point it is important to recognize that this policy was paid by a single premium each year of \$400.00 (R. 46), payable on the anniversary date of the policy which was December 15 of each year (Plaintiffs' Exhibit 1). The premium due on December 15, 1954, had been paid by a policy loan and the policy was in full force and effect with no additional premium due until December 15, 1955 (R. 54), which date was over four months in the future from the time of the con-

versations testified to by Ruth Jensen Page and Mr. Olschewski, and corroborated by Exhibits 3, 4, 10 and 12.

Defendant's Exhibit 10 corroborates the testimony of Ruth Jensen Page in regard to the desire of her husband, the insured, to apply for one of the options available to him under the policy.

"I have looked into the matter discussed as to the alternatives available and advisable in applying the non-forfeiture values of your policy.

"Again I'm sorry that you feel that you are unable to continue with this full program."

Defendant's Exhibit No. 10  
Ltr, dtd Aug. 3, 1955, from  
Defendant to Insured.

The evidence was uncontroverted that the insured, Alma M. Page, went to the insurance company offices of his own free will four months prior to the expiration of his policy of insurance. The evidence and testimony established beyond a reasonable doubt that his motive in going there was to do something about his insurance policy. From the evidence adduced the only conclusion that can be drawn is that the insured intended to elect one of the three options available under his policy of insurance.

#### POINT FOUR

DID THE INSURED, ALMA M. PAGE, PRIOR TO HIS DEATH, ELECT "OPTION (B) REDUCED PAID-UP LIFE INSURANCE," UNDER THE NON-FORFEITURE PROVISIONS OF THE POLICY IN QUESTION?

The evidence introduced in this matter established, and was not controverted, that the insured and his wife, Ruth Jensen Page, visited the office of the insurance company shortly prior to August 3rd, 1955, and again on the 8th day of August, 1955 (R. 20, 21, 35, 37, and Defendant's Exhibits 10 and 12).

It is important to note that the testimony of the insured's widow, Ruth Jensen Page, while uncertain as to the unimportant details (unimportant, at least, to the insured and his wife at the time of the transaction), is positive as to what the insured decided to do with regard to the election of one of the options available to him under the provisions of the policy.

The plaintiffs attempted to capitalize upon these uncertainties in her testimony, but it should be remembered that over two years had elapsed between the time the visits were made to the offices of the defendant insurance company and the election made of one of the options and the time her testimony was given. The uncertainty as to detail is only normal and lends itself to the belief of her testimony. How many of us can recall the details of transactions two years old?

Ruth Jensen Page testified:

"Q. Now, after you received this letter, did you and your husband discuss about the life insurance?"  
(The letter referred to is Defendant's Exhibit 10, Ltr Dated August 3rd, 1955.)

"A. Yes.

Q. And what did you do afterward, if anything?

A. We decided on the paid-up insurance."

R. 23

"Q. This gentleman here? And do you recall what was said at that time to Erich?" (Referring to the second visit made by the insured and Mrs. Page to the company offices.)

"THE COURT: That calls for a yes or no answer.

A. Yes.

Q. Well, what was it?

A. Can I answer it?

Q. You don't have to give us word for word, just the substance as far as you can remember. What recollection you have as to what your husband and you said?

A. We just told him what we wanted and he still tried to ask us to stay on, but . . .

Q. What did you say you wanted?

A. A paid up insurance.

Q. A paid up insurance . . . "

R. 24

"Q. Now, will you tell us what you received from the Insurance Company through the mails?

A. I said I thought we received a piece of paper with the insurance saying that it was paid up insurance."

R. 25

"Q. Did you and your husband talk about it, the insurance policy, after it came back from the Insurance Company?

A. No, I don't think so.

Q. At no time?

A. I saw the paper that I thought was with it. I don't know if it was attached.

Q. Where was the paper which you saw?

A. With the insurance when it came back."

R. 26

"Q. Now, after this policy came back, did you and your husband discuss the insurance policy?

A. No, not after it was fixed the way we wanted it."

R. 27

On cross-examination, Ruth Jensen Page testified:

"Q. Do you remember honestly reading or receiving the exhibit which is marked No. 12?

A. As I said, not the wordings, but I remember talking that it was fixed the way we wanted it when the policy came back."

R. 29

"Q. Can you explain the ways which Mr. Olschewski arranged the policy so that you wouldn't have to make any more payments?

A. No, I'm not quite sure. I know that we decided to take the paid up insurance. I can't recall the different ways."

R. 31

The witness, Ruth Jensen Page, was asked one question on re-direct examination:

"Q. Mrs. Page, do you remember the amount of insurance on the paid-up insurance policy?

A. One thousand four hundred something."

R. 32

The testimony of Ruth Jensen Page was never impeached by either her own testimony or by the testimony of any other



witness. She stands as an independent and disinterested party who has nothing to gain or lose in this law suit; and, as the person who was closest to the deceased insured, certainly knows what transpired and what the insured elected to do. The plaintiffs never did discredit the honesty or veracity of this witness. Her testimony, while uncertain as to detail, stands firm and positive as to the elected option of the deceased insured.

“Though a witness is uncertain as to either the observation or the recollection of a fact concerning which he is asked to testify, and gives his testimony qualified by a phrase or phrases expressive of something less than a positive degree of assurance, the admissibility of his evidence is not affected thereby.”

4 A.L.R. 979, annotation,  
Citing cases

“Generally, testimony given by a disinterested witness, who is in no way discredited by other evidence, to a fact within his own knowledge, which is not in itself improbable or in conflict with other evidence, is to be believed; and in many cases it is said that the facts so given are to be taken as legally established.”

20 Am Jur 1030, Evidence,  
Sec. 1180, citing cases.  
Sec. 8 A.L.R. 796 annotation  
Jones, Commentaries on evidence,  
Vol. 6, P. 4887, Sec. 2467

“Unless the witness is impeached or his testimony is against the ordinary and usual course of nature, or for some other adequate reason is clearly not worthy of belief, the courts are bound to consider it in arriving at their conclusions.”

Utah Commercial & Savings Bank v. Fox,  
44 U. 323, 140 P. 660, 663.

"While juries are given great latitude in deducing inferences from established facts, they, nevertheless, are not permitted to base an inference upon an inference. Nor may they, without any reason overturn legal presumptions or arbitrarily disregard the positive statements of witnesses . . . If juries were permitted to do that, then court trials and the rules of evidence would become a mere delusion and a snare."

Karren v. Blair, 63 U 344  
225 P. 1094, 1096

"Under usual circumstances uncontroverted testimony of credible witnesses may not arbitrarily be disregarded by the trier of facts."

Cottrell v. Grand Union Tea Co.,  
5 U. 2d 187, 299 P. 2d 622.

"However, where facts are proved by uncontroverted testimony of competent disinterested witnesses and there is nothing inherently unreasonable nor any **circumstances which** would tend to raise doubt of its truth, it should be taken as established. Refusal to do so is an arbitrary disregard by the trier of the facts."  
Citing authority.

Jones v. California Packing Corp.,  
121 U. 612, 244 P. 2d 640.

Defendant's Exhibit 12 was never directly assailed as being fraudulent nor as having been written at a later date than as shown on the letter.

Defendant's Exhibit 3, which was received in evidence, states, in the handwriting of Mr. Erich Olschewski:

"8-8-55 - Elected Paid-Up for \$1443.00."

Def's Exhibit 3,  
Policy Data Sheet from  
Records of Defendant company

Mr. Olschewski testified that he placed this writing on the sheet, or card, at the time that the insured and his wife were in his office on the 8th day of August, 1955, and elected to take the paid-up insurance (R. 39). He further testified that the notation in red pencil, "Reduced Paid-Up," which appears on this card was likewise placed thereon by him at this time (R. 40), and that the red penciled notation, "Reduced Paid-Up," which appears on Defendant's Exhibits 2 and 4, the premium record card and the dividend record card, respectively, kept by the defendant with regard to the policy in question, were made by him at that time (R. 40, 41).

Defendant's Exhibit 4, the dividend record card, shows the dividends, both bonus and participating, which were paid on this policy. It is to be noted that prior to the dividend payment made on December 15, 1955, none of the bonus dividends or participating dividends were ever less than \$20.00. The last two bonus dividends were for \$48.99 and \$56.00, respectively, and the participating dividend paid December 15, 1954, was for \$36.33.

Defendant's Exhibit 9, a dividend check made payable to the insured, Alma M. Page, dated December 22, 1955, and showing endorsements and clearing house stamps dated January 11, 1956, shows that the amount paid for participating dividends in the year 1955 was only \$4.75.

During the years 1950 through 1954, the face amount of the policy was \$11,682.00. However, prior to the anniversary of the policy in December of 1955, defendant contends, the policy was reduced in face amount to only \$1,443.00, thus accounting for the reduction in participating dividend from

\$36.33 paid December 15, 1954, to \$4.75 paid December 15, 1955.

The dividend check for \$4.75, Defendant's Exhibit 9, was notice to Alma M. Page of the change in the face amount of his policy, and the fact that the insured accepted the check and did not contest the obviously drastic reduction in dividends shows that he well knew of the reduction in the face amount of his policy.

"But when insured was, after repeated notice, informed that the policy had been indorsed for \$1,955.00 term insurance and the length of that term and of this application of the dividends accrued he took no steps to indicate any dissent or objection to what had been done . . . This brings up the question whether he did not consent to or acquiesce in, all that is involved in the indorsement on the policy. We think it should be said that he did."

Dougherty v. Mutual Life Ins. Co.  
of N.Y., (226 MA 570) 44 S.W. 2d 206.  
Cited with approval in Scutten v.  
Metro Life Ins. Co., 68 S.W. 2d 60,  
retrial, 81 S.W. 2d 313.

The plaintiffs attempted at great length to discredit Defendant's Exhibit No. 3, the policy data sheet, as being contradictory of other exhibits and of what the company did with regard to the election made by the insured. Plaintiffs' counsel pointed out that the notation, "Lapsed 9-16-55," on the bottom of Exhibit No. 3, was contrary to the notation, "8-8-55 Elected Paid-Up for \$1443.00," appearing in the upper portion of the exhibit and to defendant's proposed Exhibit 6, a report to the reinsurance company, wherein it is shown that the Page

policy lapsed on "7-15-55." An examination of Exhibit 6 shows that the date of this report is September 16, 1955, the same date appearing on the bottom of Exhibit 3.

In regard to the report to the reinsurance company, the proposed Exhibit 6, Mr. Olschewski testified:

"THE COURT: . . . Ask him if he can explain why the word 'lapsed' was used.

Q. Can you?

A. Yes. To notify them to discontinue his reinsurance premium payments.

Q. All right. And that is the meaning of the word 'lapsed' as far as this report is concerned?

A. Yes."

R. 71, 72

Plaintiffs attempted to confuse the jury by trying to show inconsistencies in the defendant's records introduced as exhibits, but the testimony of the defendant's secretary, Mr. Olschewski, explained the entries. The court erred in not allowing the introduction of Defendant's Exhibit No. 6, on the grounds that this exhibit explained entries on Exhibit No. 3.

## POINT FIVE

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

Under Rule 50, Utah Rules of Civil Procedure, it is permitted for either party to an action to move for a directed verdict upon the close of the evidence offered by the opponent.

Upon the close of plaintiffs' evidence, the defendant moved the court for a directed verdict (R. 115) on the grounds that as a matter of law, as the defendant had met the burden of proof and the plaintiffs had not introduced competent evidence to rebut defendant's evidence, there was no question of fact to be decided by the jury and any deliberation by them would be speculative in nature.

The defendant had established beyond any doubt the insured's election of one of the options contained in the policy of insurance. As a matter of law, this election fixed the rights of the parties.

"The offer is contained in the policy contract, and is from the company to the insured; the option is in the insured and not the company, and his acceptance completes the contract; the company has no right to accept or reject; its obligation to pay is absolute . . . The cases, as far as we are advised, are at one in holding that the rights of the parties are fixed when an option given by a policy is exercised by the insured."

Pacific States Life Ins. Co. v.  
Bryce, 67 F. 2d 710 (10th Cir.  
1933) 91 A.L.R. 1446.

The above case cites the case of Lipman v. Equitable Life Assur. Society, 58 F. 2d 15, 18 (4th Cir. 1932), wherein the Court stated:

"Since the insured had the option to surrender her **policy and take the cash surrender value** on October 10th, there can be no question but that the rights of the parties became fixed and insured became entitled to the cash surrender value, and nothing more, when she exercised the option. It was not necessary that defendant do anything. There was a meeting of the

minds of the parties when the insured accepted the continuing offer of the company evidenced by the option."

The election by the insured of the option made the instant case a matter of law and not a matter of fact for the jury to speculate upon. The court acknowledged this by its Instruction No. 8, wherein it instructed the jury:

"You are instructed that delivery of the policy of insurance to the insurance company by the insured, with request that it issue to him a reduced paid-up life insurance policy constitutes an election."

As set forth in Points 1, 3, and 4 of this brief, the evidence established that the insured did surrender his policy, did request information about the options, and did elect "Reduced Paid-Up" insurance.

Barron and Holtzoff, in their work, Federal Practice and Procedure, Vol. 2, p. 754, Sec. 1071, said:

"It is a well established principle of the common law that although questions of fact must be decided by the jury and may not be reexamined by the court, the question whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law to be decided by the court."

In the case now before the court, the plaintiffs introduced no evidence by testimony or otherwise which directly rebutted defendant's evidence that the insured did in fact deliver his policy to the company and did elect to take "Reduced Paid-Up" insurance.

"Where the evidence upon any issue is all on one side or so overwhelming on one side as to leave no

room for doubt what the fact is, the court should give a preemptory instruction to the jury." Citing cases.

Coen v. American Surety Co. of N. Y.,  
120 F. 2d 393 (8th Cir. 1941).  
Pennsylvania R. Co. v. Chamberlain,  
288 U.S. 333, 53 S. Ct. 391,  
77 L. Ed. 819.

"In the Federal courts where the evidence in favor of one party is so overwhelming that the judge in the exercise of sound discretion would be obliged to grant a new trial if the jury rendered a verdict in favor of the other party, it is his duty to direct a verdict." Citing cases of Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed 819; Daroca v. Metropolitan Life Ins Co., et al, CCA 5th, 121 F. 2d 919. ". . . the rule of practice to the effect that a mere scintilla of evidence is sufficient to require submission to the jury has never obtained in the Federal Courts."

White v. New York Life Ins Co.,  
145 F. 2d 504 (5th Cir. 1944).

## POINT SIX

### THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The defendant moved the court for judgment notwithstanding the verdict and, in the alternative, a motion for a new trial (R. 125). Under the Utah Rules of Civil Procedure such a motion is proper, and the court, while having denied a motion for a directed verdict, may enter judgment notwithstanding the verdict.



“ ‘ . . . that because the court cannot direct a verdict one way, it may not set aside a verdict the other way is erroneous. Indeed, as distinctly pointed out by Judge Lurton, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former there is no weighing of plaintiff's evidence with defendant's. It is only a sufficiency of plaintiff's evidence to support a burden ignoring defendant's evidence. In the latter it is always a comparison of opposing proofs.’ ”

General America Life Ins. Co. v.  
Central Nat'l Bank, 136 F. 2d 821, 823  
(6th Cir. 1943), Citing Felton v. Spiro,  
78 F. 2d 576, 582 (6th Cir. 1897).

Barron and Holtzoff in their work, Federal Practice and Procedure, Vol. 2, p. 774, Sec. 1079, have stated:

“The court has power to enter judgment notwithstanding the verdict only for one reason—the absence of any substantial evidence to support the verdict.”

The annotation on “Motion for Judgment Notwithstanding the Verdict,” found in United States Supreme Court Reports, 85 L. Ed. 155, 311 U.S., gives the background and basis for such a motion.

In the case of Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350 (4th Cir. 1941), the court goes into the historical background and examines many of the cases on the subject. The court ruled:

“In such a motion” (to set aside the verdict) “it is the duty of the judge to set aside the verdict and grant a new trial if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon

evidence which is false, or will result in a miscarriage of justice even though there may be substantial evidence which would prevent the direction of a verdict."

In the instant case, the weight of the evidence was overwhelmingly in favor of the defendant, and on the basis of this weight the court properly should have granted defendant's motion for a judgment notwithstanding the verdict.

The court, in its instruction No. 9, stated:

"The burden is upon the defendant insurance company to prove to your satisfaction by a preponderance of the evidence, that at about the time indicated above in this instruction, the insured, Alma M. Page, did elect to change the policy referred to in paragraph one of this instruction, that he notified the insurance company of such election, and that the company did make the change in the policy . . . "

The defendant, as shown in Points No. 1, 3 and 4, did overwhelmingly prove all of the elements enumerated in this instruction.

The Supreme Court of the State of Utah, in the case of Bentley v. Brossard et al, 33 U. 396, 94 P. 737, held:

"Instructions to a jury are the law of the case, which the jury must follow whether the instructions are in fact correct; and, where a verdict is in disregard of instructions, it should be set aside by the trial court."

## POINT SEVEN

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL.

The defendant made a motion for a new trial in the alternative to its motion for a judgment notwithstanding the verdict (R. 125), and stated the grounds for the motion.

In the case of *Garrison v. United States*, 62 F. 2d 41 (4th Cir. ) the court pointed out:

“Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice.”

In the case now before the court, the clear weight of the evidence favored the defendant and upon the court's decision not to grant a directed verdict or a judgment notwithstanding the verdict, it should have granted a new trial. The refusal to do so was error and an abuse of the court's sound discretion.

## CONCLUSION

The plaintiffs, by introducing the policy of insurance on the life of the deceased insured, with no rider attached to the policy showing that the policy had been reduced to paid-up life insurance established a prima facie case, and the burden fell upon the defendant to prove that the insured had, prior to his death in 1956, elected the option of reduced paid-up insurance.

The defendant successfully met this burden and established, by not only a preponderance of evidence but by the overwhelming weight of the evidence, that the insured had, prior to his death, (a) intended to elect one of the options

under the non-forfeiture provisions of the policy, (b) delivered his insurance policy to the defendant insurance company, and (c) elected "Option (B) Reduced Paid-Up Life Insurance" under the non-forfeiture provisions of the policy in question.

The testimony of Ruth Jensen Page, the widow of the insured, the testimony of the defendant's employees, and the documentary evidence introduced by the defendant established the defendant's claim beyond a reasonable doubt; and therefore:

1. The court erred in not granting defendant's motion for a directed verdict, on the ground that the plaintiffs did not introduce sufficient evidence rebutting defendant's evidence to merit the submission of the matter to a jury.

2. The court erred in not granting defendant's motion for judgment notwithstanding the verdict, on the ground that the verdict was not in accordance with the weight of evidence.

3. The court erred in not granting defendant's motion for a new trial, on the ground that a manifest injustice was done by not giving defendant an opportunity to have this matter heard before another jury.

On the basis of the evidence adduced at the trial, defendant is entitled to judgment in its favor.

Respectfully submitted,

COTRO-MANES & COTRO-MANES  
*Attorneys for Defendant and Appellant*

FEDERAL SECURITY INSURANCE COMPANY

NEWHOUSE BUILDING

Salt Lake City 1, Utah

August 3, 1955

Mr. and Mrs. Alma M. Page

Riverton

Utah

Dear Mr. and Mrs. Page:

I have looked into the matter discussed as to the alternatives available and advisable in applying the non-forfeiture values of your policy.

Again I'm sorry that you feel that you are unable to continue with this full program. As explained to you before, there is a considerable forfeiture by discontinuing this contract at this juncture. While if you see the program through, it will prove very profitable to your investment besides the insurance coverage. However, I assume that you are giving this your careful consideration.

One option available is the reduced paid-up insurance as we discussed, and if this option is elected at this time, we can offer you a paid-up policy for the amount of \$1443.00.

Another choice is to reissue your policy in two separate policies in such amounts as would make it convenient for you to keep one of them in force and permit the other to lapse with the privilege of reinstating it when convenient.

You may, of course, surrender your policy completely for its present cash value. You have paid five annual premiums, the last annual premium paid by a policy loan. The cash values at the end of the fifth year, which will be December 15, 1955, come to \$71.00 per \$1,000 face amount or a total of \$829.42 minus the present loan against the policy of \$421.05.

Of these three propositions we recommend either of the first two mentioned, and we hope to hear from you as to your decision.

We remind you again that this policy is a very unusual and exclusive Bonus Contract. I note that dividends have already been totaling \$210.45 which needless to say is a very liberal and gratifying percentage, and which dividends would continue and undoubtedly increase yearly in proportion to the premium amount continued.

We shall continue to hold your policy in our possession until we hear from you.

Sincerely yours,

/s/ E. Olschewski

E. Olschewski

Assistant Secretary

EO/km

August 15, 1955

Mr. Alma M. Page  
Riverton, Utah

Dear Mr. Page:

In accordance with your election when in the office on August 8, we return herewith your policy No. 20 PLB-3101. Please note that we have attached thereto our endorsement certifying that we have applied the Paid-Up Option for the face amount of \$1,443, being effective as of August 8, 1955.

Your contract is now fully paid-up and will not require any further premium payments. Dividends will continue in proportion to the reduced face amount as set forth in the provisions of the policy.

We hope that we may be able to serve you further in the future.

Sincerely yours,

FEDERAL SECURITY INS. CO.

E. Olschewski  
Assistant Secretary

EO/mrt