1965

Citizens Casualty Company v. George L. Hackett : Brief of Appellant

IN THE SUPREME COU
OF THE STATE OF U

CITIZENS CASUALTY COMPANY,
Plaintiff-Respondent,

— vs. —

GEORGE L. HACKETT,
Defendant-Appe

BRIEF OF A

Appeal From the Judg
Third District Court
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IN THE SUPREME COURT OF THE STATE OF UTAH

CITIZENS CASUALTY COMPANY,
Plaintiff-Respondent,

— vs. —

GEORGE L. HACKETT,
Defendant-Appellant.

Case No. 10334

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This is an action to recover insurance premiums which plaintiff claimed defendant collected and did not remit.

DISPOSITION BEFORE THE TRIAL COURT

The matter was tried before the Court without jury, the Honorable Ferdinand Erickson presiding, on September 29, 1964. The Court rendered Findings of Fact, Conclusions of Law and Judgment December 16, 1964, in favor of the plaintiff in the amount of $4,671.96 plus interest from July 29, 1959 (R. 10-16).

RELIEF SOUGHT ON APPEAL

Defendant, at the outset of the trial, moved the Court to consolidate this case and two companion cases currently pending before the same Court involving the same parties, the same type of insurance coverages and, in the companion cases, naming two additional would-be insureds (R. 32). At the time of that argument, counsel for defendant also moved the Court to dismiss this action on the grounds that the same issues of law in this action had been adjudicated by a decision of the Third District Court, Hon. Merrill C. Faux presiding, in the companion case, Civil No. 127263, constituting res judicata. This motion does not appear in the transcript because the reporter did not report the same but indicates "argument on motion" (R. 32). Counsel for defendant also, at that time, made reference to the pre-trial order which reference is in part reported but not in its entirety (R. 32). The gist of argument of counsel for defendant relative to the pre-trial order was that the undersigned, Gordon A. Madsen, was not present at the pre-trial contrary to the language thereof; that he had not been retained by the defendant, Hackett, to represent him in this matter until after the pre-trial; and that, in fact, the defendant, Hackett, himself had contacted the pre-trial judge to give him the undersigned's name as counsel. The undersigned specifically, at the outset of the trial, in connection with the argument that the law had been determined in the companion case as noted above, reserved as an issue the question of whether or not plaintiff corporation was authorized to write the

alleged insurance coverage in the State of Utah. The Court then indicated it would take the motions under advisement and was pressed by counsel for the defendant for an immediate ruling, or in the alternative for leave to file an Interlocutory Appeal. The motions were then denied, and trial commenced (R. 32 and 33). These motions were renewed at the conclusion of the evidence and again denied (R. 177-8).

Following the trial and the rendering of the decision by the Court as above noted, counsel for defense moved to Alter and Amend the Findings of Fact, Conclusions of Law and Judgment and moved for a New Trial (R. 17-21), again in the motions raising the defense, among others, of res judicata (R. 20). Said motions were denied by the Court (R. 22). From the orders of the Court at the trial, the Judgment, and the Order denying defendant's motions for a New Trial and to Alter and Amend defendant appeals.

STATEMENT OF FACTS

This action was brought by plaintiff-respondent, a New York corporation engaged in the insurance business, before the Third Judicial District Court to compel the defendant-appellant to remit to the plaintiff premiums for alleged long-haul trucking casualty risks of one Nielson Trucking Company in the amount of $9,155.20. Plaintiff alleges that these sums were collected by defendant and, as plaintiff's agent, defendant should have remitted the same to plaintiff (R. 1 and 2). Defendant denied

generally all of the material allegations of plaintiff's Complaint and specifically denied that plaintiff was authorized to engage in the insurance business in the State of Utah (R. 3).

Some time in October, 1958, the defendant agreed to place all insurance needs for Nielson Trucking Company requested by its president, Paul W. Nielson (R. 35, R. 94 and 95). Defendant, Mr. Hackett was an insurance broker writing all kinds of casualty and life insurance under the corporate name and style of G. L. Hackett and Company (R. 94). Nielson required, among other insurance coverages, public liability and property damage on his fleet of trucks which he operated in several western states (R. 35 and 36, R. 95). Defendant, having received the order from Nielson, attempted to place this coverage with plaintiff company and contacted their general agent, Mr. Robert Blum, met with him in Los Angeles October 24, 1958, and in a three-party telephone conversation with Blum, defendant and a Mr. R. E. Bishop, assistant secretary in the home office of plaintiff corporation, plaintiff agreed to write the coverage "pending the receipt of a completed signed application on the part of Nielson Trucking Co. for their review and consideration." (R. 95-96) Considerable testimony was elicited about whether or not the plaintiff company issued "binders" at this time. Some of such testimony will be specifically referred to in the body of the argument of this Brief.

Defendant received a deposit premium of $1,000.00 from Nielson on October 3, 1958, (Exhibit P-1; R. 40)

and defendant wrote other coverages for Nielson relating primarily to cargo liability, to bonds, etc. (Exhibits P-6, D-7, P-12; R. 37, 65, 70, 85). Considerable discussion and correspondence was had between the defendant and plaintiff's agent, Blum, regarding plaintiff's would-be coverage which will be treated in detail hereafter (Exhibit D-19; P-15). A document purporting to be a policy of insurance, dated April 6, 1959, was at last delivered by plaintiff April 7, 1959 (Exhibit P-17). Plaintiff cancelled the policy the same date, April 7, 1959 (Exhibit P-16). The notice of cancellation was dated March 6, 1959, so plaintiff gave notice of intent to cancel the coverage some one month prior to the delivery of the policy. Defendant thereafter placed coverage, effective May 1, 1959, with Central Casualty Insurance Company (Exhibit P-12; R. 100).

Nielson Trucking Company in 1960 went into involuntary receivership and Exhibit P-12, which constitutes a running ledger of Nielson Trucking's account with G. L. Hackett and Company, shows a balance due and owing by Nielson in the amount of $3,285.75, for which defendant made a claim in the receivership (Exhibit P-13). While Exhibit P-12 shows all coverages, bonds, etc., written for Nielson, the peculiar type of coverage claimed to have been underwritten by the plaintiff and actually subsequently carried by Central Casualty insurance Company were to have a premium rate computed on a formula derived from the gross receipts reported by Nielson. These gross receipt reports were, during the course of defendant's dealings with Nielson,

often tardy, sometimes as much as four months late. The premiums paid by Nielson were also delinquent and sometimes said premium payment checks were not honored at the bank and needed re-processing (Exhibit D-4; R. 49, 74-5). These payments were unsegregated or unitemized, and were tendered to pay on coverages needed by Nielson (excepting some bonds) computed by Nielson on gross receipts (R. 72, 76, 65-6).

While there was considerable testimony introduced relative to plaintiff's premium rate, other coverages with Fireman's Fund and other insurers,etc., defendant-appellant maintains that the above constitutes a summary of the pertinent facts and will refer to such other testimony as is incidentally necessary in the course of its argument hereafter.

ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO DISMISS

(A) ON THE GROUNDS OF RES JUDICATA

The pertinent law, appellant maintains, on this issue has been adopted by this court in the following cases:

Knight v. *Flat Top Mining Company* (1957) 6 Utah 2d 51, 305 Pac. 2d 503. In that case this Court, in an

opinion written by Justice Wade, adopted Section 178, 30 Am. Jur., page 920, as follows:

> "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action. * * *"

In the later decision of *In Re the Town of West Jordan* (1958) 7 Utah 2d 391, 326 Pac. 2d 105, 106, the Court cites additionally and adopts as law 30 Am. Jur., Judgments, Section 363:

> "A final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action. If, however, the two suits do not involve the same claim, and cause of action, such effect will not be ordinarily given to the prior judgment. In this respect, it is worthy of notice that there must be not only identity of subject matter, but also of the cause of action, so that a judgment in a former action does not operate as a bar to a subsequent action where the cause of action is not the same, although each action relates to the same subject matter. * * *"

In the same connection this Court held in the case of *East Millcreek Water Company, et al.* v. *Salt Lake City*

(1945), 108 Utah 315, 159 Pac. 2d 863, 866: [and more recently repeated in the cases of *Wheadon* v. *Pearson* (1962), 14 Utah 2d 45, 376 Pac. 2d 946, 947, with emphasis supplied as follows:]

> "* * * there are two kinds of cases where the doctrine of res judicata is applied: In the one the former action is an absolute bar to the maintenance of the second; it usually bars the successful party as well as the loser; it must be between the same parties or their privies; *it applies not only to points and issues which are actually raised and decided therein but also to such as could have been therein adjudicated,* but it only applies where the claim, demand or cause of action is the same in both cases. *In such case the courts hold that the parties should litigate their entire claim, demand and cause of action, and every part, issue and ground thereof* and, if one of the parties fails to raise any point or issue or to litigate any part of his claim, demand or cause of action and the matter goes to final judgment, such party may not again litigate that claim, demand or cause of action or any issue, point or part thereof which he could have but failed to litigate in the former action. On the other hand where the claim, demand or cause of action is different in the two cases then the former is res judicata of the latter only to the extent that the former actually raised and decided the same points and issues which are raised in the latter." (Cases cited)

The appellant herein maintains that a prior and companion case involving the same two litigants had reached a final judgment in District Court resolving the pertinent issues of fact before the Court here and such judgment did, in fact, therefore, constitute res judicata.

The case to which appellant makes reference and the pertinent extracts therefrom which appellant wishes this Court to take judicial notice of pursuant to Section 78-25-1 (3), Utah Code Annotated, 1953, is *Citizens Casualty Company of New York* v. *Keith J. Coons and George Hackett,* Third District Court, Civil No. 127263. That case went to trial January 15, 1962, Judge Merrill C. Faux presiding. Following the trial the Court entered its Findings of Fact, Conclusions of Law and Judgment on the 17th of April, 1962. The Court there found in Findings 9, 10 and 11 as follows:

> "9. Plaintiff contended that a binder was issued by plaintiff. But there was no evidence of such an insurance binder having been issued by plaintiff, and it was not shown that plaintiff had ever granted to defendant, George Hackett, authority to bind the plaintiff on insurance risks.
>
> 10. The policy in question was form No. 380 C-3-58. This form had never been filed with the office of the Utah State Insurance Commissioner, as required by 31-19-9, Utah Code Annotated, 1953.
>
> 11. The purported insurance policy bore the counter-signature of one R. E. Bishop, who is a resident of the state of New York. It was stipulated by the parties that the said R. E. Bishop has never been licensed in any capacity by the insurance Commissioner of the state of Utah."

In its Conclusions of Law the Court found:

> "1. No contract of insurance ever became effective and plaintiff is not, therefore, entitled to collect a premium.

3. Defendant, George L. Hackett, is entitled to judgment against plaintiff; no cause of action."

Counsel for plaintiff in that action then filed a Motion for New Trial. Said Motion has never been argued or disposed of and the Court's Findings of Fact, Conclusions of Law and Judgment therefore constitute a binding and final adjudication in the matter.

Appellant wishes to point out here that not only were the same parties before the Court in the *Coons* case, the same issues of law and fact were there presented with two incidental exceptions:

1. Co-defendant, Keith J. Coons was also made a party in the former action while the alleged insured in this action was not named as a party defendant, and

2. The insurance policy form in the *Coons* case was numbered 380 C-3-58, while the policy in this case bears the form number of 582-1-56. Appellant further, however, requests this Court to take judicial notice of the certificate supplementally filed herein by the State Insurance Commissioner which indicates that neither of pursuant to Section 78-25-1 (3) and in accordance with the office of the State Insurance Commissioner. Appellant requests this Court to take such notice of this public record from the Insurance Commissioner's office both pursuant to Section 78-25-1 (3) and in accordance with its holding in *American Fork Irrigation Company* v. *Linke,* (1951) 121 Utah 90, 239 Pac. 2d 188.

Appellant therefore contends that whether or not the *Coons* case, this present case and a third action

brought by the plaintiff against this defendant and another co-defendant, could and should have been consolidated, the above cited law is determinative and the pertinent issues of fact that are controlling here had already been finally adjudicated. As noted in the above Statement of Facts, defendant at the outset of the trial moved to dismiss on this ground and it was reversable error on the part of the Trial Court to deny said motion.

(B) ON THE JURISDICTIONAL GROUND THAT PLAINTIFF HAD NO STANDING IN COURT.

Section 31-19-9 (1), Utah Code Annotated, 1953, provides as follows:

> "(1) No insurance policy form, other than a surety bond form or application form, where written application is required, or rider form, pertaining thereto shall be issued, delivered, or used unless it has been filed with and approved by the commissioner."

Appleman, in his extensive treatise on insurance law and practice, Volume 19, Section 10531, with reference to compliance by foreign insurers with regulatory statutes in the insurance field says the following:

> "It has been held by a very substantial number of cases that a policy issued by an insurer which has not been admitted to do business within a state, or which is issued by it prior to receiving a certificate of authority, is absolutely void. Such contracts have been considered unlawful. And a similar result of unenforceability has attached to policies solicited or written by agents who have not complied with the state laws.

"The better rule would seem to be that such contracts are held void so far as the insurer is concerned, and the courts will not permit the insurer to maintain an action based upon such an unlawful contract. . . ." pp. 218-219

". . . No recovery can be had by an unlicensed insurer upon premium notes, or for premiums, dues, or assessments, even though the collection of such assessment is sought by the company's receiver. And a foreign insurer which was not licensed but which was doing business within the state could not have a release of a trust deed wrongfully made by its agent set aside.

"Such an insurer has also been denied the right to recover upon the note or bond of a local agent. Other cases, feeling this result a bit drastic, have reached a contrary result, particularly where the only failure of the company was to publish a periodical report. Of course, in any event, the persons paying such premiums to the agent would retain a right of action to recover them back, so the more drastic result would not mean that the agent could pocket such premiums with impunity." pp. 220-222.

"The weight of recent authority is to the effect that the insurance company cannot, itself, rely either upon its own lack of authority or violation of law as a defense to an action upon an insurance contract, or upon a lack of authority or violation of law by its agents. The courts are not prone to penalize an insured, ignorant of the company's lack of authority, for the company's misconduct, or to deprive him of the protection for which he has paid. Nor is such a policyholder considered to be in pari delicto with the company or its agents." pp. 224-226

The Texas case of *Denton* v. *Ware,* (1949) 228 S.W. 2d 867, 871 announced that view in the following language:

> "It is true that, as the prerequisite to the right to engage in the insurance business or the right of foreign insurance companies to do business in this state, the statutes requiring charters and permits must be complied with, but these statutes are for the protection of the citizens of the state who may deal with such companies. It is also true that such companies and their agents are subject to penalties if the statutes are violated and it is generally held that they *cannot enforce collection of premiums by suit;* but when they have collected such premiums and delivered policies of insurance, those insured under them are entitled to recover on the policies in the event they incur the losses against which they are insured." (Emphasis added)

See also *Home Forum Ben. Order* v. *Jones,* 20 Tex. Civ. App. 68, 48 S.W. 219; *Hartford Fire Ins. Co.* v. *Galveston, H. & S. A. Railway Co.,* Tex. Com. App., 239 S.W. 919.

The South Carolina case of *Ballentine* v. *Covington* (1918), 96 S.E. 92 is one where a foreign insurance company whose selling agent in South Carolina had failed to comply with some qualifying insurance statutes, took promissory notes as payments for premiums on a policy written with the foreign insurance company. The Court refused to permit collection on the promissory notes. The opinion reads in part:

> "The contract of insurance was made in violation of law, and this court will not lend its aid to

enforce a contract made in violation of law. The object of the insurance statutes are not for revenue only, but to protect the public from fraud and imposition and not to allow unfit and improper persons to solicit insurance for companies whose solvency is doubtful and the persons insured are not getting the protection paid for. In this case we will leave the parties where we find them, and decline to enforce the contract."

Also in accord is the Minnesota case of *Seamans* v. *Christian Brothers Mill Co.*, Minn. (1896), 66 Minn. 205, 68 N.W. 1065, 1066. In this case a receiver of an insolvent Wisconsin Mutual Insurance Company sought to recover premiums from a Minnesota corporation in a Minnesota court. It was held that non-compliance with Minnesota insurance statutes regulating insurers precluded recovery. The court said:

"But, as before stated, it depends on the laws and public policy of such state whether or not it will thus enforce the contract. The laws and public policy may be such as to destroy this comity and prohibit such enforcement of the contract. We are of the opinion that the laws and public policy of this state in reference to the insuring of property are of this character. The restrictions in our statutes are so many, and the repressive character of the legislation such, that we must hold this to be the public policy of this state. This seems also to be the character of the insurance legislation in Iowa and Michigan, as appears by the cases of Seamans v. Zimmerman (Iowa), 59 N.W. 290, and Seamans v. Temple Co. (Mich.), 63 N.W. 408, where this same receiver was defeated in attempts to collect unpaid premiums from citizens of those states. . . . Neither is this

decision in conflict with Ganser v. Insurance Co., 34 Minn. 372, 25 N.W. 943, where it was held that the insured can recover the loss even though the insurer has not complied with the statutory requirements so as to be authorized to do business in this state. The very object of these statutory provisions is the protection of the insured, and the parties are not in pari delicto."

The plaintiff herein, in its own Complaint, at paragraph 3, appears to admit that it did not have the authority to underwrite the coverage in question but affirmatively alleges

> "The Utah Commissioner of Insurance did not recognize the limited purpose for which the defendant was appointed, namely — for countersigning purposes and the plaintiff was obliged to support the coverage for the Nielsen Trucking Company (R. 1).

In view of the *Coons* case noted above and further in view of plaintiff's failure to comply with Section 31-19-9 as evidenced by the certificate of the Insurance Commissioner supplementally filed herein, this plaintiff is not entitled to use the Utah courts to collect its would-be premiums.

POINT 2

THE EVIDENCE FAILED TO SUPPORT THE JUDGMENT OF THE COURT IN THAT NO CONTRACT OF INSURANCE WAS EVER CONSUMMATED GIVING RISE TO A CAUSE OF ACTION.

On the issue of the existence of an insurance contract, plaintiff having called the defendant as his wit-

ness on direct examination, proposed the following questions and received the following answers:

> "Q. And in that connection did you contact the Citizens Casualty Co. of New York, the Plaintiff in this action?
>
> A. Contacting their general agent Mr. Robert Blum.
>
> Q. And after contacting him did you receive any communications like a telegram or letter from Citizens Casualty Company of New York?
> A. I did.
>
> Q. Will you produce those communications?
> A. Yes.
>
> Your Honor, I must have that in another file.
>
> MR. MADSEN: Here.
>
> A. Thanks. No, I didn't issue the binders. They would happen, Mr. Arnovitz. I flew to Los Angeles and met with their general agent of 10-24-58. Mr. Blum and in a three-way conversation between him and with myself listening on the line to Mr. R. M. Bishop at the home office in New York. Mr. Bishop as a result of that telephone call, which I paid for, and the receipt of which is right here, caused a wire to be sent to our office in Salt Lake City, saying that they would bind the coverage pending receipt of the completed signed application on the part of Nielson Trucking Co. for their review and consideration.
>
> Q. I see. And did you send in that application?
> A. Airmail, special delivery from Los Angeles, yes, sir." (R. 95-6)

There was considerable discussion subsequently between plaintiff's representatives and defendant about

whether plaintiff could take the coverage and if so, at what premium, the first of these being as follows:

> A. And after that application went in and binders had been sent, then what did you do about collecting premiums on that policy?
>
> A. I didn't do anything about collecting premiums on that policy, because the company had not advised us what their rate would be, but on deposit of the rate that we had with Nielson pending receipt of the premium to be charged by company, we waited for their information on what those rates would be and receipt of a policy. They had to formulate the rates in New York. I had nothing to do with that. (R. 96-7)

He was later asked about conversations had with plaintiff or its officers, etc., in connection with arriving at an agreeable premium and he responded that there were "many" conversations.

> "Q. Did you have any other subsequent conversations with either Mr. Bishop or any agent of the company in New York?
>
> A. Many.
>
> Q. And what were those conversations related to?
>
> A. Why we hadn't received the policy, why we hadn't had communication and why we hadn't been advised what the rate was and when we could expect the policy.
>
> Q. Did you have any conversation or conversations with Mr. Blum?
>
> A. I did." (R. 157-158)

Two letters were introduced, marked Exhibits "P-15" (from Bishop) and "D-19" (from Blum), which provided in their pertinent paragraphs respectively as follows:

> "The only other item to be cleared is the Neilson Trucking Company. This matter was held in abeyance pending a discussion with Mr. Blum because of the change in our reinsurance facilities for the primary layer. Since this market has evaporated it would be our intention to issue the policy at the manual rate of approximately $4.84 and then permit your office time to replace the coverage so that we could terminate our filings on this account also. About all we could do is to reiterate the importance of clearing these matters up promptly." (Exhibit "P-15")

> "The Citizens have not yet produced this policy and I am becoming concerned because of the time lapse and the premium that is due. I have not heard further from them but I wonder if you would be kind enough to photostat the old Mid-Union policy and send it to me and I will send it to them, asking one more time for them to issue this contract. I do not understand this situation but needless to say, it upsets me. $15,000 premiums with no policy become a matter of worry and in my case, disgust." (Exhibit "P-19")

On cross-examination by his own counsel, the following exchange occurred.

> By Mr. Madsen:
>
> Q. Did Citizens Casualty Company ever send you a bill or a statement for this policy which was delivered April 7, 1959?
>
> A. Never.

Q. Either before or after the delivery of the policy?

A. No.

Q. Well, the first contact you had in the way of billing for said policy is that which you received from Mr. Nordby of Nielson Trucking after they billed Nielson?

A. Yes. (R. 150)

Later in connection with the Bishop letter (Exhibit P-15):

Q. Was this the first comment relating to rate other than the agreed upon three dollar and some rate that you had in your phone conversation as of October previously?

A. Yes .

Q. And this letter as of February they're still indicating some question in their mind as to what rate, if any, they are going to charge; is that correct?

A. Yes. (R. 160)

And further:

Q. Now, then, Mr. Hackett, have you — I believe you have already testified to this, but I am not now sure. Did they ever, Citizens Casualty, the Plaintiff here, ever submit a statement to you as to what premiums you should be collecting on this policy during any of this time period?

A. Never. (R. 161)

Finally:

"Q. Then you say the policy in question was in fact issued April 7th, 1959?

A. The 6th.

Q. Had you in fact notified Citizens of the cancellation of the policy?

A. Yes.

Q. All right. In what manner?

A. I called him long distance phone and told them of the absence of any policy, in spite of our repeated effects [efforts] to obtain this policy that I had sought the advice of legal counsel as to what to do, because after all we had to produce a policy and we hadn't yet had one and upon the lawyer advising me, checking with the state, they found in fact they could not issue such a policy, they had never made their filings and that was the reason why we hadn't received the policy.

Q. Without telling us what was said or not were you in fact contacting the State Insurance Commissioner regarding this specific policy or proposed coverage?

A. I was.

Q. And is this what led to your phoning as you just related?

A. Yes." (R. 160-61)

Moreover, the record is explicit on the question as to whether or not the defendant was or had been acting as plaintiff's agent. His testimony in that connection was uncontroverted:

Q. Did they ever give you a contract in agency, appointing you their agent?

A. No.

Q. Were you acting as their agent or an independent broker as and when you made the coverage. When you talked to Mr. Blum were you acting as agent in the sense of a general agent?

A. At the time I talked to Mr. Blum, I was acting as independent broker. (R. 161-2)

In this area appellant maintains the applicable law is found in 29 Am. Jur. 587 at Section 196 and reads as follows:

> "It is no doubt true, however, that where there is simply an offer to insure, without acceptance, or where anything is left open for future adjustment as to amount or duration of risk, *or as to premiums,* no contract to insure exists. It must clearly appear that all the elements essential to a valid contract are agreed upon. There must be an offer and acceptance of a complete contract to insure." (Emphasis added)

This view was adopted in the recent California case of *Fyn* v. *Northwest Casualty Co., et al.* (1960, 301 Pac. 2d 869, 872. There, the court said:

> "In Byrne v. Prudential Ins. Co. of America, Mo., 88 S.W. 2d 344, 346, the court said: 'While a contract of insurance has some features which distinguish it from an ordinary commercial contract, yet in general respects it is like any other contract and is governed by the same rules.' 32 C. J. p. 1091. It is essential to the making of a contract of insurance as it is to any other contract that there be 'an agreement, or meeting of the minds of the parties' thereto. 32 C. J. p. 1095."

See also *Western Assur. Co.* v. *McAlpin,* 23 Ind. App. 220, 55 N.E. 119, 77 Am. St. Rep. 423; *Mallard* v. *Hardware Indem. Ins. Co.,* (Tex. Civil App.) 216 S.W. 2d 263.

There was clearly, from the above testimony no "meeting of minds" between plaintiff and defendant on

the essential element of premium to be charged. In that connection, the defendant testified that the monies received from Nielson were carried on two ledgers entitled "note account" and "open account."

> Q. And that your own books carried this account as an open account and a note account; is that correct?
>
> A. Yes.
>
> Q. But you applied all of those receipts on subsequent insurance or concurrent insurance then in force; is that correct?
>
> A. Yes. (R. 163)

And again:

> Q. And in that instance you did not so answer, but your testimony today is that those funds as they were received were kept in open account and applied on insurance coverages you wrote for Nielson Trucking Company?
>
> A. Yes.
>
> Q. Less your commissions?
>
> A. Yes. (R. 164)

There being no agency expressly granted to defendant as noted above and there being no finalized contract of insurance ever consummated, plaintiff has no cause of action on which to base a suit for premiums and the Trial Court erred in finding to the contrary.

POINT 3

DURING THE PERIOD IN ISSUE THERE WAS NO EVIDENCE SHOWING ANY LOSS

SUSTAINED, CLAIM MADE OR BENEFIT PAID UNDER THE WOULD-BE POLICY AND DEFENDANT-APPELLANT HAS A LIABILITY TO REFUND THE PREMIUM TO THE WOULD-BE INSURED RATHER THAN THE PLAINTIFF.

An annotation found at 29 A.L.R. 2d 171 collects the rather numerous cases dealing with the liability of an insurance agent to the insured with respect to procurement, contents, terms and coverages of insurance policies. At pages 203 and 204, in the annotation, the cases relative to damages are collected and indicate that where in fact the would-be insured suffers no loss or makes no claim pursuant to the supposed policy, the insured's damages are limited to the premium paid. This view is adopted in Am. Jur. at 29 Am. Jur. Insurance, page 562, paragraph 163, as follows:

> "As to the measure of liability of an insurance agent or broker for his faiure to procure insurance, where a loss is suffered by the intending insured, the rule is that the damages should be equal to the amount that would have been due under the policy provided it had been obtained. *However, where no loss occurs, the measure of damages is the amount paid as the premium.*" (Emphasis added)

Our own insurance code adopts this view at Section 31-19-24 (3), Utah Code Annotated, 1953, as amended:

> "No person shall willfully or negligently fail to *return* to the person entitled thereto, within a reasonable length of time, any sum collected as pre-

> mium for insurance in excess of the amount actually spent for insurance applicable to the subject on account of which the premium was collected." (Emphasis added)

The record is absent *any* evidence showing that any loss was sustained during the purported time period of October, 1958, to April, 1959, that plaintiff claims coverage was extended. It was equally absent *any* evidence of claims made by Nielson Trucking Company pursuant to any policy of insurance.

The record is, on the other hand, clear that Nielson retained defendant to obtain and keep in effect all insurance coverages needed by Nielson, and defendant so attempted to do. In fact, the record discloses that all monies received by defendant from Nielson Trucking Company were in fact ultimately applied on insurance coverages with companies other than the plaintiff.

> Q. And that in fact as the coverage continued and the relationship with Nielson continued, these coverages were paid for and all of the money received from you was in fact applied on insurance coverage?
>
> A. Right.
>
> Q. Based upon policies which were in fact in effect?
>
> A. Yes.
>
> Q. All others than Citizens Casualty?
>
> A. Yes. (R. 166)

Counsel for plaintiff on re-direct examination further inquired into the matter as follows:

> Q. If Your Honor will indulge me just a moment — Are you holding any funds in trust for the Plaintiff as a result of the issuance of this policy, Mr. Hackett?
>
> A. No.
>
> Q. Would you tell us what disposition was made of the funds you collected from Mr. Neilson?
>
> A. They apply as set forth in the letter.
>
> Q. In other words, the funds that were paid on the policy of the Citizens Casualty Company, you applied on the policy of the Central Casualty Company?
>
> A. Right. (R. 176)

As noted in the Statement of Facts above, at the termination of defendant's dealings with Nielson Trucking Company defendant had in fact expended some $3,000.00 more on insurance coverage than Nielson paid for and was compelled to file a claim for said amount with the receiver of Nielson Trucking Company.

In summary, the plaintiff in this action arrived at a premium purportedly due it by inference. That is, it sought to show (A) the total money paid by Nielson to defendant, (B) to estimate the premium allocable to other coverages in force during the time period in question, and (C) to demand that the balance of A minus B was due the plaintiff as its "earned premium." There is no evidence in the record showing any computation on the part of plaintiff of its proposed rate or premium due

or earned other than Exhbit "P-15" quoted in Point 2 above, wherein plaintiff's officer quoted a figure rather tentatively. Considered in view of the law cited above not only does the defendant not have a duty to remit anything to plaintiff but likewise, pursuant to the statute above quoted, has a liability to refund to Nielson any premium paid which did not purchase insurance coverages. Appellant, of course, maintains that all premiums paid by Nielson did purchase insurance coverages as the testimony above indicates. But, for the purpose of argument of this point, it wishes to illustrate that during the time period defendant attempted to get coverage by the plaintiff, defendant himself was personally and considerably exposed by way of liability to Nielson. That is, had Nielson experienced a loss, having turned all of his insurance matters over to the defendant, Nielson could have held defendant personally responsible and plaintiff, of course, could have claimed no policy in force since none had been delivered and since a premium had never been agreed upon. Now, however, there being no loss, no risk or no claim made, plaintiff is a Johnny-come-lately wishing in this action to obtain would-be premiums having never assumed any actual risk.

POINT 4

THE ALLEGED BINDER WAS INVALID BECAUSE NO POLICY WAS DELIVERED WITHIN 150 DAYS FROM THE EFFECTIVE DATE.

Section 31-19-21 (2), Utah Code Annotated, 1953, as amended, provides:

> "No binder shall be valid beyond the issuance of the policy as to which it was given or beyond 150 days from its effective date, whichever period is shorter."

Exhibit "P-17," the alleged policy in question, shows on its face that notwithstanding it was to be a 12-month policy, it covers a period from October 27th, 1958, to April 7th, 1959, and it also shows on its face that it was counter-signed at Salt Lake City, April 6th, 1959, by one R. E. Bishop. (As noted heretofore, Mr. Bishop is not a qualified resident agent for plaintiff company and did not, in fact, sign the document in Salt Lake City.) Simple arithmetic shows that the effective date, being October 27th, 1958, is 162 days from the issuance date of the policy April 6th, 1959.

Accordingly, whatever binder, if any, plaintiff may have issued, the same became ineffective or expired before any policy came into being.

POINT 5

THE COURT ERRED IN CONSTRUING THE PRE-TRIAL ORDER SO NARROWLY AS TO RELIEVE THE PLAINTIFF OF ITS BURDEN OF PROOF RAISED BY THE PLEADINGS.

The Pre-Trial Order in this action (R. 5), which appellant maintains is inconsistent on its face, states:

> "At the time of pretrial it was stipulated that the pleadings formed the issues in this matter.

> The sole issue is whether or not the defendant has misappropriated certain moneys to which the plaintiff claims it is entitled to." (R. 5)

As noted heretofore, the undersigned first entered an appearance on behalf of the defendant at the time of trial, notwithstanding language in the Pre-Trial Order that the undersigned was present at the Pre-Trial; and, as also indicated heretofore, the undersigned, at the outset of the trial, referred to the inconsistency of said Pre-Trial Order and moved that the issues in fact be broadened sufficiently to include all those raised by the pleadings. The Trial Court, however, as indicated by the Memorandum Decision and later by the Findings of Fact, Conclusions of Law and Judgment, restricted the trial to one issue as follows:

> "1. That the plaintiff is an insurance corporation of the State of New York and has a Certificate of Authority from the State of Utah to transact within the State of Utah the business of property, marine and transportation and general casualty, excepting glass and surety insurance; that the Pretrial Order did not make any issue as to plaintiff's authority to transact insurance business in the State of Utah; that the sole issue stated in the Pretrial Order is whether or not the defendant has misappropriated monies to which the plaintiff claims it is entitled to." (R. 10)

By so narrowly construing the issue the Court therefore *assumed* that an agency existed between defendant and plaintiff. It further *assumed* that plaintiff had the authority to underwrite the coverage in question in the State of Utah. And it further apparently *assumed* to

be true the allegations of paragraph 3 of the Complaint wherein plaintiff complains that sanctions were imposed on it by the Utah Insurance Commission compelling it to assume such coverage. All of these matters were expressly denied by the Answer and, in fact, formed as issues by the pleadings.

While Exhibit "P-14" indicates that some initial telegrams to the Utah Public Service Commission and Interstate Commerce Commission, reputed to be binders, were sent in October, 1958, by plaintiff, there is no evidence of *any* dealings by the plaintiff with the State Insurance Commissioner. Such narrow construction by the Court of the issues obviously constituted prejudicial error in that all the issues above noted were expressly raised by defendant's Answer and properly, therefore, framed by the pleadings.

CONCLUSION

Defendant-appellant, for the foregoing reasons, does therefore respectfully move that this Court reverse the Judgment of the court below and remand the case with instructions that the same be dismissed or that, in the alternative, a new trial be had.

Respectfully submitted,

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