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WITNESS FOR COMPLAINANT.

COMPLAINANT'S EXHIBIT.

Notice of Appeal.

In Chancery of New Jersey

Between

AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,

Complainant,

and

SARAH CONWAY,

Defendant.

On Bill to Foreclose.

Notice of Appeal.

Complainant, Automobile Insurance Company of Hartford, Connecticut, hereby appeals from the decree dated August 15, 1930, made in the above entitled cause by the Chancellor on the advice of Robert H. Ingersoll, Vice-Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

ARTHUR T. VANDERBILT,
Solicitor of Complainant.

I conceive that there is good cause for appeal in the above entitled cause.

ARTHUR T. VANDERBILT,
Of Counsel with Complainant.

August 23, 1930.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THE AUTOMOBILE INSURANCE COMPANY, a corporation of the State of Connecticut,
Complainant-Appellant,

and

SARAH CONWAY,
Defendant-Respondent.

On Appeal from the Court of Chancery.

Petition of Appeal.

To the Honorable Court of Errors and Appeals in the Last Resort in all causes:

The petition of The Automobile Insurance Company, a corporation, the appellant in the above entitled cause, respectfully shows:

Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Robert H. Ingersoll, dated August 15, 1930, in a certain cause in said Court of Chancery wherein The Automobile Insurance Company, a corporation, is complainant and Sarah Conway is defendant in the following respects, to wit: that said decree orders and adjudges that the mortgaged premises described in the decree be sold to pay complainant the sum of ten thousand four hundred and sixteen dollars and forty-three cents ($10,416.43) with interest; that a writ of *Fieri Facias* issue command-

ing such sale; that the Sheriff pay out of the money arising from said sale to complainant said sum with interest; that in case more money shall be raised than said sum, said excess shall be paid into court; that defendant stand foreclosed from all equity of redemption; and that complainant pay defendant the cost of suit to be taxed.

And petitioner appeals the aforesaid decree of the Chancellor on the ground that the same is erroneous in the following respects:

1. The lower court erred in decreeing that the amount due complainant was only $10,416.43 with interest, instead of $19,000 with interest.

2. The lower court erred in decreeing that the amount due complainant was $8,250.88 with interest, less than the amount claimed by complainant.

3. The lower court erred in allowing to defendant a reduction in the sum of $8,250.88 with interest from the amount due on the mortgage, without any proof in support of said reduction.

4. The lower court erred in allowing to defendant a reduction in the sum of $8,250.88 with interest from the amount due on the mortgage without any pleading in support of said reduction.

5. The lower court erred in finding that the damage by fire to the property was $20,192.90 without any proof to that effect.

6. The lower court erred in finding that complainant's share of the fire loss was $8,250.88 with interest.

7. The lower court erred in decreeing that complainant be paid an amount less than $19,000 with interest, the amount claimed by complainant, on the ground that its earlier decision dated Febru-

ary 25, 1930, and the decree dated February 25, 1930, in favor of complainant were *Res Judicata.*

8. The lower court erred in its finding that defendant was entitled to a credit of $8,250.88 on the ground that the provisions of the policy as to sole and unconditional ownership and/or change of title, interest and possession were violated.

9. The lower court erred in its finding that defendant was entitled to a credit of $8250.88 on the ground that the provision of the policy limiting the time within which actions could be brought under the policy to twelve months, precluded defendant from maintaining an acton on the policy.

10. The lower court erred in failing to decree that there is due complainant the sum of $19,000 with interest.

11. The lower court erred in failing to decree that defendant pay complainant $19,000 with interest and costs.

12. The lower court erred in failing to decree that the mortgaged premises be sold to pay complainant the sum of $19,000 with interest and costs.

13. The lower court erred in failing to decree that defendant be foreclosed from all equity of redemption when the property is sold to satisfy the aforementioned sum due complainant.

14. The lower court erred in failing to decree for complainant in accordance with the proofs in the case.

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel
with Complainant-Appellant.

Bill to Foreclose.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker,
Chancellor of the State of New Jersey:

Complainant, The Automobile Insurance Company, a corporation of the State of Connecticut, having its principal office in the City of Hartford, State of Connecticut, and being duly authorized to transact business in the State of New Jersey, respectfully shows that:

1. On January 5, 1924, Elizabeth Clare Haggenbotham and John Haggenbotham, husband and wife, being indebted to Elizabeth M. Lutz in the sum of $24,000, executed to her a bond of that date to secure that sum, payable at any time within five years from the date of said bond, provided, however, that the sum of $1,500 be paid at the expiration of one year from the date of said bond; $1,500 to be paid at the expiration of two years from the date of said bond; $2,000 to be paid at the expiration of three years from the date of said bond; and the balance of $19,000 to be paid at the expiration of five years from the date of said bond, together with the interest thereon at the rate of six per cent per annum payable semi-annually from the date of said bond.

2. To secure the payment of said bond, said Elizabeth Clare Haggenbotham and John Haggenbotham, her husband, executed to said Elizabeth M. Lutz a mortgage of even date with the bond, and thereby conveyed to her in fee the land hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the

bond; which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon was recorded in the office of the Clerk of Atlantic County in Book 285 of Mortgages, page 276.

3. The mortgaged premises are described as follows:

ALL that certain lot, tract or parcel of land and premises situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING in the Southerly line of Pacific Avenue one hundred fifty feet West from the Westerly line of Providence Avenue; thence extending (1) Southwardly one hundred feet to the Northerly line of a twelve feet wide alley; thence (2) Westwardly by the Northerly line of said alley thirty-five feet; thence (3) Northwardly parallel with Providence Avenue, one hundred feet to the Southerly line of Pacific Avenue; thence (4) Eastwardly along the Southerly line of Pacific Avenue thirty-five feet to the place of BEGINNING.

Said mortgage recites that these premises are "the same premises conveyed unto Elizabeth Clare Haggenbotham (in the name of Elizabeth Claire Haggenbotham) by deed dated January 5, 1924, and intended to be forthwith recorded. Elizabeth Clare Haggenbotham and Elizabeth Claire Haggenbotham being one and the same persons. This mortgage is given to secure a part of the purchase price in said deed mentioned."

4. Said Elizabeth M. Lutz thereafter married Randolph Ross and was thenceforth known as Elizabeth M. Lutz Ross.

5. By assignment in writing, dated September 7, 1929, said Elizabeth M. Lutz Ross assigned said bond and mortgage to complainant; which assignment is now in complainant's possession and is about to be recorded.

6. On March 2, 1925, said Elizabeth Clare Haggenbotham and John Haggenbotham, her husband, conveyed said land by deed of that date to James F. Conway and Sarah Conway, his wife, in fee; which deed was, on March 9, 1925, recorded in the office of the Clerk of Atlantic County in Book 765 of Deeds, page 179.

Any interest which said James F. Conway and Sarah Conway, his wife, may have in said lands is subject to the lien of complainant's mortgage.

7. Said James F. Conway departed this life on July 22, 1927, leaving him surviving said Sarah Conway, his wife.

Any interest which said Sarah Conway may have in said lands is subject to the lien of complainant's mortgage.

8. Said bond and mortgage by its terms fell due on January 5, 1929. Complainant has elected that the whole principal sum with interest shall be now due and payable.

9. Said Elizabeth Clare Haggenbotham, John Haggenbotham, her husband; James F. Conway, Sarah Conway, his wife, or one of them, has always been in possession of the mortgaged premises.

10. There is due upon complainant's mortgage the sum of $19,000 principal, with interest thereon from July 5, 1929.

Bill to Foreclose.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Sarah Conway, who is a defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That an account may be taken of the amount due on complainant's mortgage:

3. That the defendant, Sarah Conway, may be decreed to pay complainant the amount so found due, with interest and costs, by a short day, to be appointed by this Court; and that in default of such payment, she be debarred and foreclosed of all equity of redemption in said lands; or

4. That a decree may be made for the sale of the mortgaged premises to raise, and pay to complainant, the amount so found due on its mortgage, with interest and costs:

5. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

ARTHUR T. VANDERBILT,
Solicitor and Counsel with
Complainant.

Answer and Counterclaim.

IN CHANCERY OF NEW JERSEY.

THE AUTOMOBILE INSURANCE COMPANY, a corporation, Complainant, *and* SARAH CONWAY, Defendant.	On Bill to Foreclose. Answer and Counterclaim.

The answer of the defendant, Sarah Conway.

The defendant, Sarah Conway, answering the Bill of Complaint, says that:

1. Paragraphs one to seven, inclusive, are admitted.

2. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph eight.

3. Paragraph nine is admitted.

4. Paragraph ten is denied.

COUNTERCLAIM.

By way of counterclaim against the complainant, the defendant, Sarah Conway, says that:

1. On or about the twenty-fourth day of March, 1927, your defendant, Sarah Conway, and James F. Conway, her husband, were the owners in fee simple of the lands and premises described in the complainant's bill of complaint herein, which said lands and premises were granted and conveyed to the said defendant, Sarah Conway and James F.

Conway, her husband, as in and by said deed of conveyance, duly executed, acknowledged and recorded, it appears, which said deed is now in the custody of the defendant, Sarah Conway, ready to be produced and proven when and where this honorable Court may direct.

2. On the twenty-eighth day of July, 1927, James F. Conway, the defendant's husband, departed this life and left him surviving, the said defendant, Sarah Conway, his wife.

3. Said premises were purchased subject to a mortgage in the sum of Twenty-four thousand ($24,000) Dollars, executed by Elizabeth Clare Haggenbotham and John, her husband, to Elizabeth M. Lutz (Ross), dated the fifth day of January, 1924, and recorded in the Clerk's Office of Atlantic County in Book 285 of Mortgages, pages 276, &c. Said mortgage has been reduced to the principal sum of Nineteen thousand ($19,000) Dollars.

4. When the defendant, Sarah Conway, and her husband, James F. Conway, purchased the said premises, there was in force a contract of fire insurance thereon, in the sum of Nineteen thousand ($19,000) Dollars, with the Automobile Insurance Company of Hartford, Connecticut, in the name of Elizabeth Clare Haggenbotham, as owner, and Elizabeth M. Lutz (Ross), as mortgagee. The premium on said fire insurance contract was paid to the said Automobile Insurance Company of Hartford, Connecticut. The interest of the said Elizabeth Clare Haggenbotham, in said contract of fire insurance, was duly assigned to the said James F. Conway.

5. Sometime thereafter and prior to the twenty-fourth day of March, 1927, the defendant, Sarah

Conway, and James F. Conway, her husband, contracted with the National Liberty Insurance Company of America for two policies of insurance in the name of the defendant, Sarah Conway and James F. Conway, her husband, in the sum of Twenty-seven thousand five hundred ($27,500) Dollars, on the aforesaid premises.

6. Thereafter, and on or about the twenty-fourth day of March, 1927, a fire occurred at the aforesaid premises and the damage was estimated at the sum of Twenty Thousand One Hundred Ninety-two Dollars and Ninety Cents ($20,192.90).

7. Thereafter, the necessary proofs of loss, according to the terms of the policies of both companies who carried insurance on the said premises, to wit: the Automobile Insurance Company of Hartford, Connecticut, and the National Liberty Insurance Company of America, were duly filed by the defendant, Sarah Conway, with the said Insurance Companies.

8. The defendant thereafter was notified that the fire loss would not be paid, as the Insurance Companies denied liability under their contracts.

9. On or about the thirty-first day of January, 1928, the defendant Sarah Conway instituted suit in the Supreme Court of the State of New Jersey against the National Liberty Insurance Company of America and the Automobile Insurance Company of Hartford, Connecticut. The mortgagee, Elizabeth M. Lutz Ross, also instituted suit against the Automobile Insurance Company of Hartford, Connecticut, in the Supreme Court of the State of New Jersey. Said proceedings were removed from the Supreme Court of the State

of New Jersey to the District Court of the United States for the District of New Jersey, and thereafter, on or about the fourth and fifth days of December, 1928, both cases were tried at the same time and the one against the National Liberty Ins. Co. of America resulted in a disagreement of the jury, and there was a non-suit directed in favor of the Automobile Insurance Company of Hartford, Connecticut, against the defendant Sarah Conway. The rule for judgment has not been signed by the Court, and it is therefore impossible for the defendant Sarah Conway to file an appeal from the decision of the District Court of the United States for the District of New Jersey. A directed verdict for the sum of Nineteen Thousand ($19,000) Dollars was taken against the Automobile Insurance Company of Hartford, Connecticut, by the mortgagee, Elizabeth M. Lutz Ross.

10. The defendant contends that the assignment of the aforesaid mortgage was made and executed to the complainant by Elizabeth M. Lutz Ross, subject to any and all rights of the defendant, to the payment by the said complainant of the sum of Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88) with interest from the 24th day of March, 1927, being the said complainant's pro rata share of the aforesaid fire loss.

11. Because of the disagreement of the jury in the first case of the defendant Sarah Conway against the National Liberty Insurance Company of America, a trial was had on the fifth, sixth and seventh days of March, 1929, resulting in a verdict for the defendant Sarah Conway in the sum of Twenty Thousand One Hundred Ninety-two Dollars and Ninety Cents ($20,192.90).

12. Under the terms of the National Liberty Insurance Company of America's contracts, it is set forth as follows:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto."

As a consequence of the terms of the National Liberty Insurance Company of America's contracts, it refused to pay the entire loss, inasmuch as the Automobile Insurance Company of Hartford, Connecticut, also carried fire insurance contract on the within described premises. The National Liberty Insurance Company of America paid the sum of Eleven Thousand Five Hundred Thirty-two Dollars and Two Cents ($11,532.02), and a demand was made of the Automobile Insurance Company of Hartford, Connecticut, for its pro rata share, or the balance, to wit: Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), but it refused and still refuses to pay the said sum as demanded.

13. The defendant Sarah Conway further says that she has complied with all the terms of the insurance contracts with the complainant and has sustained a loss by fire to her premises described in the complainant's bill of complaint, for which she has not been compensated; that she recovered

a judgment for said loss against the National Liberty Insurance Company of America in the sum of Twenty Thousand One Hundred Ninety-two Dollars and Ninety Cents ($20,192.90), and that the said Automobile Insurance Company of Hartford, Connecticut, is withholding the payment of the said sum due the defendant Sarah Conway, to wit: Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88).

14. The defendant says that she has demanded that the said bond and mortgage should be delivered up to her to be cancelled and voided upon the payment of the sum of Ten Thousand Seven Hundred Forty-nine Dollars and Twelve Cents ($10,749.12), inasmuch as the payment of the sum of Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88) is due from the said Automobile Insurance Company of Hartford, Connecticut. This the said complainant has refused to pay, and up to and including the present time the complainant refuses to surrender the said securities for cancellation and insists upon all the benefits of the aforesaid bond and mortgage.

15. The defendant Sarah Conway further says that she has applied to the complainant and requested it to pay to her the sum of Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), its share of the fire loss on the aforesaid premises, and since the assignment of the said bond and mortgage, reduced to the principal sum of $19,000 on the said premises, by the said mortgagee, Elizabeth M. Lutz Ross, to the complainant, the defendant has requested the said Automobile Insurance Company of Hartford, Connecticut, to deliver up to her the said bond and mortgage, and has always been

ready, willing and able to pay the sum of $10,-749.12, and prior to the filing of this proceeding the defendant tendered the said sum to the complainant, so as the aforesaid bond and mortgage could be cancelled and made void.

16. The defendant Sarah Conway claims that she is the owner in fee and of the equity of redemption of the premises described in the complainant's bill of complaint, and as such is entitled to the pro rata share due under the aforesaid fire loss from the said complainant.

The defendant is without adequate remedy in the Courts of Law, and therefore prays:

1. That the Automobile Insurance Company of Hartford, Connecticut, a corporation of the State of Connecticut, who is the complainant in this suit, may answer this counterclaim and each statement herein made.

2. That the President, Directors and Company of the Automobile Insurance Company of Hartford, Connecticut, may be ordered and directed to surrender the said bond and mortgage, properly endorsed for cancellation, to the defendant, upon the payment of the sum of Ten Thousand Seven Hundred Forty-nine Dollars and Twelve Cents ($10,749.12), less the accrued interest on Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88) from March 24th, 1927.

3. That the said mortgage may be decreed to be cancelled of record and be no longer a lien upon the premises therein described against the said defendant or any person or persons claiming by, from or under her.

ALBERT A. F. MCGEE,
Solicitor for and of Counsel with
Defendant.

Notice.

IN CHANCERY OF NEW JERSEY.

Between THE AUTOMOBILE INSURANCE COMPANY, a corporation, Complainant, *and* SARAH CONWAY, Defendant.		On Bill to Foreclose. Notice.

To Defendant Sarah Conway, or Albert A. F. McGee, her Solicitor:

TAKE NOTICE that on Wednesday, November 6, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply to his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, at the Chancery Chambers at Atlantic City, New Jersey, for an order striking out your counterclaim, and I shall base my application on the following ground:

1. As appears from the face of your counterclaim, in an action in the District Court of the United States for the District of New Jersey wherein you were plaintiff and complainant, The Automobile Insurance Company was defendant, involving the same issues sought to be raised by your counterclaim, the Court directed a non-suit in favor of said Automobile Insurance Company and against you.

2. Your counterclaim does not state facts sufficient to constitute a cause of action against com-

plainant in that the policy mentioned in your counterclaim alleged to have been held by James F. Conway, is not alleged to have insured you.

3. Your remedy at law is adequate and complete.

4. The matters alleged in your counterclaim are not the proper subject of counterclaim.

ARTHUR T. VANDERBILT,
Solicitor of Complainant.

Conclusions.

IN CHANCERY OF NEW JERSEY.

Between

THE AUTOMOBILE INSURANCE Co., a corporation,
Complainant,

and

SARAH CONWAY,
Defendant.

On Bills, &c.
On Notice to Strike.
Conclusions (Oral).

Atlantic City, N. J., February 25, 1930.

Appearances:

For Complainant, ARTHUR T. VANDERBILT, Esq.
For Defendant, ALBERT A. F. MCGEE, Esq.

INGERSOLL, V. C.:

Roughly stated—and I will reserve the right to correct any statement I will make either of fact

or law and, of course, will give counsel a copy when needed. In this case a certain tract of land, upon which a mortgage existed, was purchased by Sarah Conway and her husband James F. Conway. Upon this land, or the buildings constructed on it, was an insurance policy in the sum of Nineteen thousand dollars issued by the Automobile Insurance Company of Hartford, Connecticut, in the name of the grantor to Conway and her husband as owner and payable to the then mortgagee. The cross-counterclaim says: "The interest of the said Elizabeth Claire Hagenbotham in said contract for fire insurance was duly assigned to the said James F. Conway."

Sometime after the purchase Sarah and James Conway contracted with the National Liberty Insurance Company for insurance upon said premises in the sum of $20,500. A fire occurred and the counterclaim alleges the loss to be $20,192.90.

Conway dies. In January, 1928, Conway instituted a suit against the National Liberty Insurance Company of America and the Automobile Insurance Company of Hartford. The mortgagee instituted suit against the Automobile Insurance Company of Hartford, Connecticut.

I don't see that the counterclaim says whether the mortgagee had any rights under the National Liberty Insurance Company of America. I take it that she did not, because it is not alleged that she did.

These suits were removed to the District Court of the United States for the District of New Jersey and were tried. A non-suit was directed in favor of the Automobile Insurance Company of Hartford, Connecticut, against the defendant, Sarah Conway, and against the Automobile Insurance Company of Hartford, Conn., in the sum of $19,000 for the mortgagee, Elizabeth M. Lutz.

Conclusions.

The National Liberty Insurance Company paid the sum of $11,532.02 upon the amount of the judgment, alleging that that is all it was responsible for. The Automobile Insurance Company paid the mortgagee such sum of money as it, under the terms of its contract, was due to the mortgage and took an assignment of the mortgage and now proceeds to foreclose the said mortgage.

The defendant insists, in its counterclaim, that it was entitled to the sum of $8,250.88 from the Automobile Insurance Company by reason of its liability under this policy.

Motion is now made to strike out the counterclaim. At this time the motion must prevail. First the amount is unliquidated. The fact that there has been a judgment in some court fixing the loss at a figure in a suit in which the complainant was not a party is not binding upon that party as to that company not made a party as to the amount due, therefore the counterclaim is unliquidated as to amount and comes within the prohibition by the courts and is not included within the statute concerning exceptions.

There is another difficulty, and it is unnecessary for me, in view of the finding I have just made, to determine that, and that is whether or not Mrs. Conway has not elected the forum in which her dispute shall be heard. She has brought a suit and, so far as the record is concerned, that suit is still pending. There has been no order for judgment and I say it would make no difference whether the suit was completed or not so far as that election is concerned. There are a number of cases in New Jersey holding that a party is held as having elected when proceedings are brought in a law court which could have been brought in a Court of Chancery. I think *Clarron*

against *Thommessen,* a case arising here, is one of the cases upon that point. I may be wrong as to the title, but that is my recollection.

There is another difficulty which it is unnecessary for me to at this time determine and that is what the situation may be, husband and wife owning a property upon which a building is erected and upon which insurance is carried payable to one. Is that person entitled to that insurance or does the insurance enure to both? And particularly does that question come into existence when the loss has occurred and the responsibility, so far as responsibility and not as to amount, becomes fixed and the party in whom the insurance was named died. What interest and to whom does that right of indemnity pass?

If there is no question about that, it would seem to be unnecessary, under such circumstances, for both to have their names in an insurance policy and yet, as counsel has suggested—off the record, of course—that there are clauses in these insurance policies in the event of all parties in interest not being insured, but that is not before me.

The sole question before me is, as it now stands, is this cross-counterclaim one which states a cause of action against the complainant? I am convinced that it does not. I will strike it and will give the party defendants fifteen days in which to file any amended pleading or to take such other steps as they may be advised necessary.

Order.

IN CHANCERY OF NEW JERSEY

Between

THE AUTOMOBILE INSURANCE COMPANY,
Complainant,

and

SARAH CONWAY,
Defendant.

On Bill to Foreclose.

Order.

This cause being opened to the Court by Arthur T. Vanderbilt, solicitor of complainant, in the presence of Albert A. F. McGee, solicitor of defendant, and Edward Davis, of counsel with him, and the Court having heard the argument of counsel and being satisfied that complainant's motion to strike out defendant's counterclaim should be granted;

It is on this 25th day of February, 1930, ORDERED and DECREED that defendant's counterclaim be and the same hereby is stricken out, with leave to file an amended pleading within 15 days.

Respectfully advised,

ROBERT H. INGERSOLL,
V. C.

Order of Reference.

IN CHANCERY OF NEW JERSEY.

74-637.

Between

THE AUTOMOBILE INSURANCE COMPANY,
Complainant,

and

SARAH CONWAY,
Defendant.

On Bill to Foreclose.

Order of Reference.

This matter being opened to the Court by Arthur T. Vanderbilt, solicitor of complainant The Automobile Insurance Company, and it appearing that the counterclaim heretofore filed by defendant Sarah Conway was stricken out by order dated February 25, 1930, and that said defendant Sarah Conway has not filed an amended pleading within fifteen days after said order in accordance with the leave granted by said order and that issue has been joined, and Albert A. F. McGee, solicitor of defendant Sarah Conway, consenting hereto;

It is on this 19th day of March, 1930, ORDERED that the above entitled cause be referred to the Honorable R. H. Ingersoll, one of the Vice-Chancellors of this Court to hear the same for the Chancellor and to report thereon to him and to

advise what order or decree should be made therein.

E. R. WALKER,
C.

I consent to the making of the above order.

ALBERT A. F. McGEE,
Solicitor of Defendant,
Sarah Conway.

A true copy.

FRED GARRETSON,
Clerk.

Replication.

IN CHANCERY OF NEW JERSEY.

74—637.

Between

AUTOMOBILE INSURANCE COMPANY,
a corporation,
Complainant,

and

SARAH CONWAY,
Defendant.

On Bill to Foreclose.
Replication.

Complainant joins issue on defendant's answer.

ARTHUR T. VANDERBILT,
Solicitor of Complainant.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between

AUTOMOBILE INSURANCE COMPANY,
Complainant,

and

SARAH CONWAY,
Defendant.

On Bill, etc.
Final Hearing.

Atlantic City, N. J.,
April 29, 1930.

Before:

Hon. ROBERT H. INGERSOLL,
Vice-Chancellor.

Appearances:

For the Complainant: ARTHUR T. VANDERBILT, Esq.

For the Defendant: ALBERT A. S. McGEE, Esq., and EDWARD DAVIS, Esq., of the Philadelphia Bar.

RANDOLPH ROSS sworn:

Direct examination by Mr. Vanderbilt:

Q. Mr. Ross, where do you live? A. Asbury Park.

Q. You are the husband of Mrs. Elizabeth M. Lutz Ross? A. Yes.

Q. She is ill and unable to be here? A. Yes, she is.

Q. Do you have charge of her business affairs? A. Yes, I have.

Q. I show you a bond by Elizabeth Claire Higgenbotham and John Higgenbotham to Elizabeth M. Lutz, dated January 5th, 1924, in the sum of $24,000, and a mortgage bearing the same date between the same parties covering the premises on Pacific Avenue in Atlantic City, New Jersey, and recorded in Book 285 of mortgages for Atlantic County, page 276, and ask you if you are familiar with those documents? A. Yes, sir, I am; seen them many times.

(Bond and mortgage received in evidence and marked Exhibits C-1 and C-2.)

Q. I show you an assignment of mortgage from Elizabeth M. Lutz Ross to the Automobile Insurance Company, and ask you if that is your signature at the lower corner, left-hand corner of the page? A. Yes, sir.

Q. Did you act as a notary public; is that your signature endorsed on the back? A. Yes, it is.

Q. Is this at the lower right-hand corner on the face of the instrument the signature of your wife, Mrs. Ross? A. It is.

Q. You saw her sign it? A. I did.

Q. Witnessed her signature? A. Yes.

Q. And took her acknowledgment? A. Yes.

Q. Can you tell us how much was due on that mortgage at the time that the mortgage was assigned at that date which I believe is September 3rd, 1929. A. Nineteen thousand principal, and interest from July 5th, I think the amount, the exact amount was $196.40.

Q. July 5th, what year, Mr. Ross? A. July 5th, 1929, the interest from that date, July 15th, 1929.

The Court: I am wondering if this is a valid assignment. How can husband take the acknowledgment of his wife?

A. A lawyer thought I could and I asked him at the time.

The Court: I have very grave doubt whether the husband can take the acknowledgment of the wife.

Mr. Vanderbilt: If the Court please, it would be good without an acknowledgment.

The Court: That is a different proposition. I am now questioning only the acknowledgment. How can it be good, even if a wife commits a crime in the presence of her husband she is not chargeable with it, certain crimes, and how can the execution of an acknowledgment which only a few years ago had to be acknowledged separate and apart from the husband, I am just wondering?

Mr. Vanderbilt: This, your Honor, is personal property. It is not a conveyance of real property.

The Court: I am not questioning whether the need of an acknowledgment. I am just challenging for the moment the acknowledgment.

(Assignment received in evidence and marked Exhibit C-3.)

Mr. McGee: If the Court please, we just want to enter our formal objection to the offer of that assignment for that reason.

The Court: You may have your formal objection entered.

Mr. McGee: No cross-examination.

By the Court:

Q. I note that there is a consideration, the sum of $19,196.40 as consideration of this assignment. Was that money received in consideration of this assignment? A. You are asking me?

Q. Yes. A. Yes, it was received that date.

Q. Did you receive any loss under an insurance policy at that time? A. No, just was simply the assignment of the mortgage.

Q. Have you ever received a payment for loss under the insurance policy? A. No, we have not.

By Mr. Davis:

Q. Mr. Ross, do you know whether or not this assignment was given in consideration of a loss on an insurance policy? A. No, it was not. They simply stated, in fact the thing was done very quickly.

Q. Will you explain how the thing was done? A. Yes. I think this gentleman or some one from their office called up Mrs. Ross and said, "We want to take over—we are ready to take over, to take over your mortgage by assignment, and we will be down today." She was perfectly willing to assign the mortgage to anyone that would take it over.

Q. Weren't you represented at that time by Mr. McGee? A. We were not, never asked him to represent us.

Q. Didn't Mr. McGee start suit for you against the Automobile Insurance Company? A. He said he was going to include us, but we never authorized him to.

Q. Don't you know whether or not Mrs. Ross signed the complaint or the statement? A. I don't think she ever did, no, sir, never signed anything.

By Mr. McGee:

Q. Mr. Ross, do you say that Mrs. Ross did not authorize me to institute suit for her? Weren't you in Trenton? A. We were there, yes, but then we simply, because you wanted us, as you said, you would be obliged to include her as the mortgagee, but you did it——

Q. Didn't Mrs. Ross say she would like to have her money and wanted us to represent her against the insurance company, or do you know? A. No, we didn't put it that way, because the mortgage wasn't due, she couldn't push the thing.

Q. Yes, but your security was changed, was it not? A. Surely.

Q. And weren't you desirous of having that mortgage reduced even without the suit being brought? A. Yes, we were.

Q. Didn't Mrs. Ross authorize me to represent her? A. I have no knowledge of her making any formal——

Q. You don't recall that? A. We didn't want——

Q. Do you know or don't you know? A. I really know, because we didn't want to pay, she didn't want to put herself responsible for a penny expense.

Q. Not asking you about any expense, Mr. Ross. A. I know, but that was talked over by us, and that is the reason we didn't.

Q. Did you authorize me to institute suit for her? A. No.

Q. Did Mrs. Ross? A. No.

Q. You don't know, or do you know? A. I know we didn't because if we did we would be responsible to you to pay you.

Q. Did I ever submit a bill to you? A. No, you didn't because we never authorized you.

Q. Did I ever tell you that I was going to charge you anything or Mrs. Ross? A. No, but you would have a right to if we had authorized you.

Q. In other words, you are discussing, you are answering this proposition on the basis that there might be a fee charged, is that correct? Are you considering that? A. Not now, because the thing is all passed. In fact, we didn't figure on that, that is the reason I told Mrs. Ross didn't need any.

Q. Didn't I tell both you and Mrs. Ross that inasmuch as the security for your money, for your mortgage, had been changed, and you were desirous of securing a payment from Mrs. Conway on account of that mortgage only, as you wanted to have it reduced to correspond with the security, that we would institute a suit for you, that I would, and you said go ahead? A. I don't remember anything of the kind. You simply said we had to be a party to it, and you took it, and this is the way I understood it.

By Mr. Davis:

Q. Mr. Ross, this mortgage was on the property of which Sarah Conway was the record owner, is that correct? A. She was the record owner at that time, not when Mrs. Ross took it.

Q. A fire occurred? A. Fire occurred, he was the record owner, he is the one we received the interest from.

Q. Do I understand you to say that you never authorized anyone to prosecute a suit for you

against the Automobile Insurance Company? A. We did not, no, because the mortgage was not due.

Q. Were you present in Camden, New Jersey, at the time that this case was first tried before his Honor, Judge Ware? A. Where?

Q. Camden, New Jersey. A. At Camden, I was there, yes.

Q. Didn't you testify in that case? A. I did, yes.

Q. For whom did you testify? A. I testified simply that we were the mortgagee, Mrs. Ross was the mortgagee.

Q. Why did you do that? A. Because we were asked to, that is all. I suppose it was the natural course of events.

Q. You were not testifying on behalf of Mrs. Ross who, I believe, was ill at that time, too? A. Yes, I was, that is right.

Q. Were you there when the Court directed a verdict in favor of Mrs. Ross? A. Yes, I was. They didn't pay her, I supposed they were going to pay her then.

Q. Who paid you? A. Well, they didn't pay it, for some reason or other they didn't——

Q. The Automobile Insurance Company paid you, did they not? A. Only by taking over that mortgage by assignment.

Q. But they paid you nineteen thousand and some odd dollars? A. Surely, by assignment of the mortgage.

Q. And you had a directed verdict against them, too, did you not, that is, your wife did? A. So far as I know we did, yes, but I wondered whether, what happened to it, we never heard why it wasn't paid, I think it was continued or something, so we were very glad to have the chance of assignment.

By the Court:

Q. Do you still hold the judgment against the Automobile Insurance Company for nineteen thousand dollars? A. No, indeed.

Q. What has happened to it? A. What happened to it?

Q. Yes. A. Well, we have a right to assign that mortgage at any time.

Q. I am not asking you that, sir. I have asked you a question. Can you answer it or can't you? A. What was that, now?

(Question repeated.)

A. I don't know what happened to it.

Q. Then you mean to say that you or your wife hold a judgment of nineteen thousand dollars against an insurance company and you don't know what has ever happened to it? A. We don't know whether we had the judgment.

Mr. Vanderbilt: I can refresh his recollection, perhaps, Judge.

By Mr. Vanderbilt:

Q. Do you recall, Mr. Ross, Mr. Black, my associate here, was the one that came down at the time of the execution of the assignment and delivered the draft to you? A. Yes.

Q. Don't you recall at the same time Mrs. Ross executed a cancellation of the judgment? A. No, I didn't. I don't recall that. That she did?

Q. Yes. A. I really don't recall that now. I really don't. Did I take an acknowledgment to that, too? I really don't recall that at all.

Q. That is all.

Mr. Vanderbilt: If I may have permission, your Honor, to introduce a certified copy of the cancellation of the judgment and then, if I may, I would like to take just a minute or two to answer counsel's argument on the motion.

Is it conceded there has been no further payments made?

Mr. McGee: We admit the sum of $19,000 being due on the mortgage.

Final Decree.

IN CHANCERY OF NEW JERSEY.

Between,

THE AUTOMOBILE INSURANCE COMPANY, a corporation of the State of Connecticut,
Complainant,

and

SARAH CONWAY,
Defendant.

On Bill to Foreclose.
Final Decree.

This cause coming on to be heard in the presence of Arthur T. Vanderbilt, solicitor for the complainant, and Albert A. F. McGee, solicitor of the defendant, and the Court having examined the pleadings and having taken proofs orally in open court, and having heard and considered the arguments of counsel thereon;

And it appearing that the fire loss sustained by the defendant, Sarah Conway, on the 24th day

of March, 1927, on the premises described in the complainant's bill of complaint, amounted to the sum of Twenty Thousand, One Hundred Ninety-two Dollars and Ninety Cents ($20,192.90); that the complainant's share of said fire loss amounts to the sum of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), with interest thereon from May 23rd, 1927, to August 14th, 1930, amounting to the sum of One Thousand, Five Hundred Ninety-eight Dollars and Seventy-two Cents ($1,598.72), making a total of Nine Thousand, Eight Hundred Forty-nine Dollars and Sixty Cents ($9,849.60), leaving a balance due the complainant in the sum of Ten Thousand, Four Hundred Sixteen Dollars and Forty-three Cents ($10,416.43), to August 14th, 1930;

And it further appearing that it will be necessary to sell the whole of the mortgaged premises to raise and pay the money due to the complainant, and for that purpose, sale should be made of all that certain lot, tract or parcel of land and premises, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, more particularly described as follows:

BEGINNING in the Southerly line of Pacific Avenue, one hundred fifty feet West from the Westerly line of Providence Avenue; thence extending (1) Southwardly, one hundred feet to the Northerly line of a twelve feet wide alley; thence (2) Westwardly, by the Northerly line of said alley, thirty-five feet; thence (3) Northwardly, parallel with Providence Avenue, one hundred feet to the Southerly line of Pacific Avenue; thence (4) Eastwardly, along the Southerly line of Pacific Avenue, thirty-five feet to the place of beginning.

BEING known as 3512 Pacific Avenue, Atlantic City, New Jersey.

Final Decree.

It is, on this 15th day of August, 1930, ORDERED, ADJUDGED AND DECREED, that the mortgaged premises hereinabove described, be sold as aforesaid, to raise and satisfy the money due to the said complainant, The Automobile Insurance Company, a corporation of the State of Connecticut, that is to say, to pay and satisfy unto the complainant, The Automobile Insurance Company, a corporation of the State of Connecticut, the sum of Ten Thousand, Four Hundred Sixteen Dollars and Forty-three Cents ($10,416.43), together with lawful interest thereon to be computed from August 14th, 1930; and that a Writ of *Fieri Facias* issue for that purpose out of this Court, directed to the Sheriff of the County of Atlantic, commanding him to make sale according to law of the mortgaged premises, hereinabove described, and out of the money arising from said sale, to pay to the complainant, The Automobile Insurance Company, a corporation of the State of Connecticut, or its solicitor, its said debt and interest; and in case more money shall be raised by said sale than shall be sufficient to answer said payment, that such surplus be brought into this Court to abide the further order of this Court, unless previously disposed of by this Court, and that the Sheriff make return without delay of his proceedings by virtue of said writ.

And it is further Ordered, Adjudged and decreed that the defendant stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises, when sold as aforesaid by virtue of this decree.

And it is further Ordered that the said complainant, The Automobile Insurance Company, a corporation of the State of Connecticut, pay to the said defendant, the costs of this suit to be taxed.

ROBERT H. INGERSOLL,
V. C.

Conclusions.

IN CHANCERY OF NEW JERSEY.

Between

THE AUTOMOBILE INSURANCE COMPANY, a corporation of the State of Connecticut,
Complainant,

and

SARAH CONWAY,
Defendant.

On Bill, &c.
Conclusions.
(Not for Print.)

These conclusions are also dispositive of the case of *Conway* v. *Automobile Insurance Co.*, Docket 78, page 428, which case was heard on the same day.

Appearances:

Mr. ARTHUR T. VANDERBILT for Complainant.
Mr. ALBERT A. F. MCGEE for Defendant.

INGERSOLL, V. C.

On the 7th day of January, 1924, The Automobile Insurance Company of Hartford, Connecticut, insured the premises known as 3512 Pacific Avenue, Atlantic City, New Jersey, against loss by fire, to the amount of $19,000.00, said policy being the standard fire insurance policy under the State of New Jersey and others.

One Elizabeth M. Lutz held a mortgage of $19,000.00 upon said premises, and the policy contained a New Jersey standard mortgage clause that "loss or damage, if any, under this policy,

shall be payable to Elizabeth M. Lutz (whose name is now Elizabeth M. Lutz Ross) as mortgagee, as interest may appear''.

On the 2nd day of March, 1925, said lands and premises were conveyed by Elizabeth Clair Haggenbotham and her husband to the said Sarah Conway and her husband, James F. Conway, subject to the operation of the mortgage above referred to in the sum of $19,000.00.

There appears attached to the policy of insurance an endorsement as follows: ''Elizabeth Clare Haggenbotham 3-1-25. James F. Conway is hereafter recognized as assured and owner of the property covered under this policy, subject nevertheless to all the terms and conditions herein contained. Attached to and forming part of policy #2278 Automobile Insurance Company of Hartford, Conn. R. Saslaff, Agents.''

It will be noted that the original policy, after the signatures of the president and secretary, reads: ''Countersigned at Atlantic City, N. J. this 8th day of January, 1924, R. Saslaff, Agent.''

Some time after said purchase and prior to the 24th day of March, 1927, policies were taken out on the said premises in the name of the complainant, Sarah Conway, and her husband, James F. Conway, one policy being #1303 of the National Liberty Insurance Company of America, in the sum of $7500.00 and another policy #1225 in the same company in the sum of $20,000.00, a total amount of insurance in the three policies of $46,500.00.

On or about the 24th day of March, 1927, a fire occurred in the premises known as 3512 Pacific Avenue, and the damage was estimated at the sum of $20,192.90. By reason of the clauses in each of the said policies, which read that ''this

company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto''.

The National Liberty Insurance Company of America paid over to the owners the sum of $11,-532.02 and the Automobile Insurance Company of Hartford, Connecticut, should be responsible for the balance of $8,250.88. The Automobile Insurance Company of Hartford, Connecticut, paid to the said Elizabeth M. Lutz (now Elizabeth M. Lutz Ross) the amount due upon the mortgage held by her amounting to $19,000.00, and took from the said Elizabeth M. Lutz Ross an assignment of said mortgage, which mortgage it is now attempting to foreclose, claiming that they are subrogated to the rights of the said Ross and that inasmuch as James F. Conway was not the owner in fee of the premises, being only a tenant in the entirety, that no amount is due to him from the insurance company.

Although James F. Conway has died since the time of the fire and the payment of $19,000.00 plus has been made by the insurance company to the mortgagee and an assignment taken thereof, $8,250.88 was the amount of enforceable loss to be credited to Conway, he having an insurable interest in the land.

Quoting from the brief of the defendant, citing 26 C. J., 582: ''Where one of two or more joint

owners or owners in common of property insures his interest separately against loss by fire, he is entitled in case of loss to receive and retain the insurance." *Corpus Juris,* however, continues: "In such a case the insurance does not inure to the benefit of the co-tenant." Section 582 *Ibid.*: "A husband and not his wife is entitled to the proceeds of a policy taken out in his favor, notwithstanding she has an interest in the property; and although she in fact owns the property, she cannot, it is held, recover on such a policy." This, of course, is based upon the general rules as to rights to proceeds of a policy, as set out in Paragraph 581, 26 C. J., 434: "As the policy is a personal contract between the insurer and the insured, and not a contract which in any sense runs with the property, the insurance money is generally payable to the person whose interest is covered by the policy, without regard to the nature and extent of his interest in the property, provided he had an insurable interest at the time of making the contract and also at the time of the loss." *Weinberger* v. *Agricultural Insurance Co.,* 80 N. J. L. 202.

And it can make no difference in equity whether this payment was actually made by the insurance company before or after the death of Mr. Conway for the loss and the responsibility of the insurance company accrued in his life time. The complainant must, therefore, credit upon the said mortgage the sum for which it was responsible to the insured, James F. Conway, at the time of the fire, and a decree will be so advised. Mrs. Conway will, by this method, have received all the full payment for the damages suffered by fire, which was fixed at $20,192.90, by the payment of $11,-532.02, the balance due from the National Liberty

Insurance Company of America and by the payment on account of the mortgage in the sum of $8,250.88, the proportionate amount due to her husband, James F. Conway, and paid on account of the mortgage.

The act of Mr. and Mrs. Conway in taking out additional insurance immediately reduced the liability of each company proportionately, as provided for in the policies. It will be noted that there is no assignment of the insured's interest in this policy to the Conways, nor to either of them, although there appears the endorsement above quoted.

Justice Van Syckel, in *Millville Mutual Marine and Fire Insurance Company* v. *Mechanics' and Workingmen's Building and Loan Association,* 43 N. J. L., 652, speaking for the Court of Errors and Appeals at page 658, said, after stating the facts and conditions both:

> "In this aspect of the case it is manifest that the insured was justified in drawing the inference that nothing more was necessary to be done on his part to continue the life of the policy. Until notice was given to him to do some further act, he had a right to rest securely upon the agent's assurance. The company cannot thus lull their policy-holder into a false security, and take advantage of an omission on his part thereby induced, to work a forfeiture of their contract."

The insurance company makes no claim, however, that Saslaff, the agent of the company, exceeded his authority in attaching said clause to the policy, and in the absence of proof it will be assumed that his authority is conceded.

Exhibit C-1.

WARRANT FOR SATISFACTION OF JUDGMENT.

To the Clerk of the United States District Court of the District of New Jersey:

WHEREAS, Elizabeth M. Lutz Ross heretofore, to wit, on this 31st day of May in the year of Our Lord One Thousand Nine Hundred Twenty Nine, obtained final judgment in the United States District Court for the District of New Jersey against The Automobile Insurance Company for $19,000 with interest from May 24, 1927, and costs, as by the record thereof may appear;

AND WHEREAS, Elizabeth M. Lutz Ross received satisfaction for the same, these are, therefore, to desire and authorize you to enter an acknowledgment of satisfaction upon the record of the said judgment, and for your so doing this shall be your sufficient warrant and discharge in that behalf.

IN WITNESS WHEREOF, Elizabeth M. Lutz Ross hereunto set her hand and affixed her seal the seventh day of September in the year of Our Lord One Thousand Nine Hundred Twenty-nine.

ELIZABETH M. LUTZ ROSS.

Signed, sealed and delivered
in the presence of
RANDOLPH ROSS.

Acknowledgment.

STATE OF NEW JERSEY, }
MONMOUTH COUNTY, } ss.:

BE IT REMEMBERED, That on this seventh day of September in the year of our Lord, One Thousand Nine Hundred Twenty-nine before me the subscriber, a Notary Public of New Jersey, personally appeared Elizabeth M. Lutz Ross, who, I am satisfied, is the person named in, and who executed the foregoing instrument, and I, having first made known to her the contents thereof, she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

RANDOLPH ROSS,
Notary Public, N. J.

DISTRICT COURT OF THE UNITED STATES OF AMERICA

DISTRICT OF NEW JERSEY.

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original Warrant on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, in said District, this 5th day of May, nineteen hundred and thirty.

GEORGE T. CRANMER,
Clerk, District Court, U. S.

By L. M. ZARP,
Deputy.

New Jersey Court of Errors and Appeals

Between AUTOMOBILE INSURANCE COMPANY, Complainant-Appellant, and SARAH CONWAY, Defendant-Respondent.	*On Appeal From Chancery (First Case).*
Between SARAH CONWAY, Individually and SARAH CONWAY, as Executrix of the Estate of James F. Conway, Deceased, Complainants-Respondents, *and* THE AUTOMOBILE INSURANCE COMPANY, of Hartford, Connecticut, Defendant-Appellant.	*On Appeal From Chancery (Second Case).*

BRIEF OF APPELLANT.

Statement of Case.

In the case of Automobile Insurance Company against Conway (hereafter called first case), appellant filed a bill to foreclose a mortgage on which there was due $19,000.00 with interest. Respondent, Sarah Conway, filed an answer admitting every material allegation of the bill save the allegation as to the amount due which she denied (S. C., p. 9).

Respondent also filed a counterclaim which was, on motion of appellant, stricken out (S. C., p. 21). At the final hearing appellant proved the amount due on its mortgage to be $19,000.00 with interest. Indeed, after appellant had submitted its proof, respondent admitted the amount due upon the mortgage (S. C., p. 32, l. 12).

Despite the fact that every material allegation of the bill was admitted by respondent in its pleading except the amount due, which was proven by appellant and admitted in open court by respondent to be $19,000.00, Vice Chancellor Ingersoll advised a final decree adjudging that complainant was entitled to $10,416.43, which sum included interest to August 14, 1930 (S. C., pp. 32-34).

In order to understand the error committed by the Vice Chancellor, it is necessary to consider the case of Conway against Automobile Insurance Company (hereinafter called second case).

After Vice Chancellor Ingersoll had advised an order striking respondent's counterclaim, she filed an independent bill setting forth substantially the same facts as those contained in the counterclaim. The facts contained in this bill may be summarized as follows:

Elizabeth Claire Haggenbotham was the original owner of the mortgaged premises referred to in the first case and Elizabeth Lutz Ross held a mortgage on the premises.

Appellant, Automobile Insurance Company, issued a policy naming Mrs. Haggenbotham as assured and Mrs. Ross as mortgagee, insuring said persons against loss by fire to the extent of $19,000.00.

Mrs. Haggenbotham then conveyed the property to respondent, Sarah Conway, and James F. Conway, her husband, as tenants by the entirety.

After the transfer the following endorsement was placed on the policy (S. C., p. 30, ll. 30-40):

> "James F. Conway is hereafter recognized as assured and owner of the property covered under this policy, subject nevertheless to all the terms and conditions herein contained.
>
> Attached to and forming part of policy #2278. Automobile Insurance Company of Hartford, Connecticut.
>
> R. Saslaff,
> Agents."

Mr. and Mrs. Conway then procured two policies from the National Liberty Insurance Company totalling $27,500. These policies named Mr. and Mrs. Conway as assureds and owners.

In March, 1927, the insured premises were damaged by fire, and the second bill alleges that the damages were "estimated" (S. C., p. 11, l. 26) at $20,192.90. After the fire, Mr. Conway died, and respondent, Mrs. Conway, and the mortgagee, Mrs. Ross, instituted an action at law against appellant. In that action respondent, Mrs. Conway, was nonsuited, and a verdict was directed in favor of Mrs. Ross (S. C., p. 12). Appellant paid the mortgagee, Mrs. Ross, and took an assignment of her bond and mortgage under its right of subrogation, and thereafter instituted foreclosure proceedings on the bond and mortgage (first case).

Respondent, Mrs. Conway, then instituted suit against the National Liberty Insurance Company and obtained a verdict in March, 1929, of $20,192.90. Because of the pro rata clause in its policies, the National Liberty Insurance Company paid only $11,532.02, which was accepted by respondent, Sarah Conway. Respondent's bill then states that because of her verdict of $20,192.90 against the National Liberty Insurance

Company and because that company paid only $11,532.02, appellant is liable to respondent for the sum of $8,250.88 with interest and accordingly prays that (1) the pending foreclosure action be restrained; (2) that appellant surrender its bond and mortgage upon payment of $10,749.12 less interest on $8,250.88 from March 24, 1927; (3) that appellant may be decreed to pay all money due from it to complainant and for other relief.

Immediately after it was served with the foregoing bill of complaint in the second suit and an accompanying order to show cause, appellant served a notice of motion to dismiss the bill of complaint on the various grounds stated therein and for other relief (S. C., p. 45). This motion was returnable on April 29, 1930, the day upon which the final hearing in the first case took place.

On April 29, 1930, appellant presented its proof in the first case, and at the same time its motion in the second case was argued. At the close of counsel's argument the Vice Chancellor reserved decision and briefs were submitted on behalf of the parties.

Some time thereafter the Vice-Chancellor filed his conclusions, which failed to pass upon the pending motion but constituted final dispositions of both cases. The decree in the second case orders that respondents be allowed a credit of $9,849.60; that appellant surrender the bond and mortgage upon payment of $10,416.43 with interest from August 14, 1930, and that appellant pay costs.

This final decree was entered (1) without any proof whatsoever being produced on behalf of complainants-respondents, (2) without giving defendant-appellant any opportunity to answer or furnish proofs, (3) while a motion to dismiss the bill of complaint was pending and undecided, and (4) without considering the numerous defenses

available to defendant, and apparent from a reading of the bill of complaint.

Appellant has duly filed and served notices and petitions of appeal in both cases and in view of the interrelation between the cases will present the points dealing with both cases in this brief.

Specification of Grounds of Appeal.

The grounds of appeal relied upon by appellant in the first case may be summarized as follows:

1. The Trial Court erred in decreeing that the amount due complainant-appellant was only $10,416.43 with interest from August 14, 1930, instead of $19,000.00 with interest as appears from the proofs and record in the cause.

2. The Trial Court erred in failing to decree that there was due appellant $19,000.00 with interest and costs and in failing to decree that the property be sold to pay said sum and that respondent be foreclosed from all equity of redemption.

The grounds of appeal relied upon by appellant in the second case may be summarized as follows:

1. The lower court erred in entering a final decree (a) without any testimony or other proof to substantiate the bill of complaint; (b) without giving defendant-appellant an opportunity to be heard, and (c) while a motion to dismiss the bill of complaint was pending and not disposed of.

2. The lower court erred in failing to dismiss the bill of complaint on the following grounds: (a) the remedy at law was adequate and complete, and the bill was without equity; (b) the interest of James F. Conway was not sole and unconditional owner as required by the terms of the policy made

a part of the bill of complaint; (c) there was a change of title interest or possession contrary to the express terms of the policy made a part of the bill of complaint; (d) suit was not started within twelve months as required by the terms of said policy; and (e) respondents by bringing an action at law which resulted in a nonsuit and by filing a counterclaim in the first case on the same facts set forth in their bill, which counterclaim was stricken are precluded from maintaining their bill of complaint.

ARGUMENT.

POINT I.

The Trial Court erred in refusing to decree in the first case that there was $19,000.00 with interest due appellant and that the mortgaged premises be sold to pay said sum.

Appellant, Automobile Insurance Company, as holder of a bond and mortgage on the property now owned by respondent, Sarah Conway, filed a bill to foreclose. Respondent filed an answer admitting all of the material allegations except the amount alleged to be due (S. C., p. 9). A counterclaim filed with the answer was stricken by order of the Vice-Chancellor (S. C., p. 21). A final hearing was held to ascertain the amount due and the proofs furnished by appellant showed that there was $19,000 plus interest due appellant on the bond and mortgage (S. C., pp. 24-32). At the conclusion of the hearing respondent admitted the amount due on the mortgage:

> "Mr. McGee: We admit the sum of $19,000.00 being due on the mortgage" (S. C., p. 32, l. 12).

Despite the fact that defendant-respondent denied in its pleading only the amount due and subsequently withdrew that denial and admitted the amount due to be $19,000, and despite the fact that the undisputed proof showed that the amount due was $19,000 with interest, the Vice-Chancellor without any warranty rendered a decree that complainant-appellant was entitled only to $10,-416.43 with interest from August 14, 1930. The complete disregard by the court below of the pleadings, proofs and admissions of defendant-respondent requires a reversal of the decree rendered in the first case. *Trainor* v. *Le Beck, 101 N. J. Eq. 823, 139 Atl. 16* (*E. & A., 1927.*)

> "The decree must conform to the case made by the pleadings, as well as to the proofs. *Wood* v. *Cox, 92 N. J. Eq. 307, 113 A. 501; Black* v. *Keiley, 23 N. J. Eq. 358, 3 N. J. Digest Annotated, p. 4786, par. 335* (*a*); *8 N. J. Dig. Ann., p. 841.* The decree will, for this reason, be reversed."

Not only did the Trial Court ignore the pleadings, proofs and admissions in entering its decree, but also violated the well established rule that a court of equity must confine itself to the issues raised by the pleadings. In *Jones* v. *Davenport, 45 N. J. Eq. 77, 81* (*Ch., 1889*), Vice-Chancellor Van Fleet, said:

> "The principle is authoritatively settled, that a decree or judgment, on a matter outside of the issue raised by the pleadings, is a nullity, and is nowhere entitled to the least respect as a judicial sentence. *Munday* v. *Vail, 5 Vr. 418; Reynolds* v. *Stockton, 16 Stew. Eq. 211.*"

Accord: *Improved B. & L. Ass'n.* vs. *Larkin, 88 N. J. Eq. 52* (*Ch., 1917*); *Marshman* vs. *Conklin, 21 N. J. E. 546* (*E. & A., 1870*); *Watkins* vs. *Mil-*

ligan, 37 N. J. Eq. 435 (Ch., 1883); Reynolds v. *Stockton, 43 N. J. Eq. 211 (E. & A., 1887).* The pleadings raised the sole issue as to the amount due on the mortgage. At the hearing the amount due was proved by undisputed evidence and was admitted by defendant-respondent to be $19,000.00. It is clear that no decree other than a decree in favor of complainant-appellant in the sum of $19,000.00 with interest can properly be entered in the first case.

It is respectfully submitted that the decree rendered in the first case should be reversed with instruction that a decree be entered in favor of complainant-appellant in the sum of $19,000 with interest and costs.

POINT II.

The Trial Court erred in entering a final decree in the second case (a) without testimony or other proof to substantiate the bill of complaint; (b) while a motion to dismiss the bill of complaint was pending and not disposed of and (c) without giving defendant-appellant any opportunity to answer and furnish proofs.

Immediately after the bill of complaint in the second case was filed appellant served and filed a notice of motion to dismiss the complaint and for other relief (S. C., p. 45). Appellant's motion was returnable April 29, 1930, at which time the matter was argued and briefs submitted. The Court reserved decision. The next step was the filing by the lower court of its conclusions on the entire case which constituted a final disposition of the cause and a final decree was rendered thereon (S. C., p. 47).

(1) It is too well settled to warrant extended discussion that the filing and service of the notice of motion by appellant stayed proceedings in the cause.

The Chancery Act (*P. L. 1915, p. 196, s. 59*) provides as follows:

> "Objections by Motion. All objections to pleadings must be made by motion.
>
> Five days' notice of such motion must be given within the time limited for filing and answering pleading, and the notice must state the particular grounds of objection. The notice suspends, until the motion is disposed of, the running of the time to answer or reply."

Chancery rule 75 is to the same effect and it is uniformly recognized that the notice of motion suspends proceedings until the motion is disposed of. *Kocher & Trier, Chancery Practice, p. 193, s. 350.* See also the earlier statute as to the effect of a demurrer, referred to in *Vanderbeck* v. *Perry, 30 N. J. Eq. 78* (*Ch. 1878*) and *Dickinson, Chancery Practice, p. 163, note 13.*

Appellant's motion was never decided and while still undisposed of, the court below filed its conclusions which constituted a final determination of the cause in favor of complainants-respondents. A final decree in favor of complainants-respondents was entered upon the basis of the Court's conclusions. This was clearly erroneous.

(2) Not only did the lower court ignore appellant's motion and the effect thereof, but disregarded all precedent and authority in entering its decree without any testimony or other proof to establish the bill of complaint. See *Wood* v. *Cox, 92 N. J. Eq. 307, 113 Atl. 501* (*Ch. 1921*) where Chancellor Walker said:

> "There can be no relief on facts not proved to exist, and which are not admitted. *Black* v. *Keiley,* 23 N. J. Eq. 358."

(3) The lower Court never furnished appellant any opportunity to answer and furnish proofs but rendered its conclusions which were dispositive of the entire cause in favor of complainants and entered the final decree thereon while appellant awaited a decision on its motion. Here again the lower Court's action was so clearly erroneous as to warrant no further discussion here.

It is respectfully submitted that the final decree entered by the court below without proof, without appellant having been given any opportunity to answer and furnish proofs and while appellant's motion was undisposed of, was erroneous and should be reversed.

POINT III.

The Trial Court erred in its findings that the premises were damaged by fire to the extent of $20,192.90 and that appellant was liable for $8,250.88 with interest as a result thereof.

The Trial Court found that the mortgaged premises were damaged by fire to the extent of $20,192.90 and that appellant was liable for $8,250.88 with interest from May 23, 1927, as a result thereof. The decrees in both cases are necessarily based on those findings which were made without any proof whatsoever.

Even if it should be assumed that every allegation of the bill in the second case were proved by actual testimony, the findings by the Trial Court were without any justification. The bill of complaint alleges that in an action between Sarah Conway and the National Liberty Insurance Company a verdict was rendered against the National Liberty Insurance Company for $20,192.90. The bill further alleges that because of the *pro rata*

clause in its policy the National Liberty Insurance Company paid only $11,533.02. Complainant concludes, therefore, that appellant is liable for balance, namely $8,250.88 with interest. With this conclusion, the Vice Chancellor agreed and entered decrees accordingly. The error in the Vice Chancellor's conclusion is so apparent that I hesitate to do more than state the facts. The only possible basis upon which the Court could have found the damage to be $20,192.90 and appellant liable for the $8,250.88 with interest is that the verdict rendered against the National Liberty Insurance Company was *res judicata* as against appellant, Automobile Insurance Company. Appellant was not a party to the suit by Sarah Conway against National Liberty Insurance Company. Indeed, Sarah Conway had earlier sued appellant at law and had been nonsuited. Under these facts, can there be any doubt that the result of the case against the National Liberty Insurance Company is in no manner binding upon appellant; it was merely *res inter alias actus.*

> *East Jersey Water Co.* v. *City of Newark, 96 N. J. Eq. 231, 125 Atl. 578, 582 (Ch. 1924)* affirmed in *130 Atl. 557 (E. & A. 1923).*
>
> "The doctrine of *res adjudicata* is that the parties must be the same in both cases."

See also the leading case of *Bigelow* v. *Old Dominion Copper Mining & Smelting Company, 225 U. S. 110, 56 Law. Ed. 1009 (1912)*, and the numerous cases collected in *34 C. J. 973.*

The Vice Chancellor in striking out the counterclaim in the first case recognized that the judgment against the National Liberty Insurance Company did not affect appellant, saying (S. C., p. 19, ll. 17-25):

> "Motion is now made to strike out the counterclaim. At this time the motion must prevail. First the amount is unliquidated. The fact that there has been a judgment in some court fixing the loss at a figure in a suit in which the complainant was not a party is not binding upon that party as to that company not made a party as to the amount due, therefore the counterclaim is unliquidated as to amount and comes within the prohibition by the courts and is not included within the statute concerning exceptions."

The decrees in both cases are necessarily based upon the Vice Chancellor's later conclusion that the fire damage was $20,192.90 and that appellant was liable for $8,250.88 with interest as a result thereof. The damage caused by fire was necessarily an unliquidated amount, and before it could be ascertained the submission of proof would be necessary. Admittedly no proof was submitted, and the Court clearly erred in assuming that the extent of damage was $20,192.90 and that appellant was liable for $8,250.88 with interest as a result thereof.

It is respectfully submitted that the lower Court erred in its findings that the premises were damaged by fire to the extent of $20,192.90, and that appellant was liable for $8,250.88 with interest as a result thereof, and the decrees should accordingly be reversed.

POINT IV.

The lower Court erred in refusing to dismiss the bill of complaint in the second case.

(1) RESPONDENTS' REMEDY AT LAW WAS ADEQUATE AND COMPLETE AND THE BILL OF COMPLAINT WAS WITHOUT EQUITY.

Respondent's bill is merely a suit upon a fire insurance policy to recover for damage caused by fire and to apply the amount recovered, if any, on a mortgage being foreclosed by the insurance company. Under established principles, it is clear that such action cannot be maintained in a court of equity.

(A) It is well settled that an action for unliquidated damages for breach of contract cannot be maintained in equity. *Grunt* v. *Olsen, 101 N. J. Eq. 506, 144 Atl. 870 (E. & A. 1929); Bailey* v. *B. Holding Co., 7 N. J. A. R. 414, 144 Atl. 870 (E. & A. 1929); Alpaugh* v. *Wood, 45 N. J. Eq. 153 (E. & A. 1888); Norton* v. *Sinkhorn, 63 N. J. Eq. 313 (E. & A. 1907)*. In *Rosenberg* v. *Century Plainfield Tire Co., 110 Atl. 516 (Ch. 1920)* Vice Chancellor Fielder very pointedly stated the established rule to be as follows:

> "A demand for unliquidated damages is not cognizable in this court. *Norton* v. *Sinkhorn, 61 N. J. Eq., 508, 48 Atl. 822.*"

In *Wood* v. *Hillsborough Mutual Fire Assurance Ass'n, 4 Atl. 662 (N. J. Ch. 1886)*, Chancellor Runyon sustained a demurrer to a bill to recover upon a fire insurance policy on the ground that a court of equity has no jurisdiction over such actions. To the same effect see *Graham* v. *Phoenix Insurance Co., 77 N. Y. 174 (1879)*.

Respondents' bill merely seeks to recover damages from appellant for breach of its contract of fire insurance. From the foregoing authorities it is obvious that such an action must be maintained in a court of law and is not within the jurisdiction of a court of equity. Respondents may contend that since the foreclosure suit (the first case) was nearing a conclusion, a court of equity should entertain an action which is ordinarily cognizable solely at law in order to avoid the foreclosure before respondent's action at law is determined. Similar contentions have been uniformly overruled by our Court of Chancery. *Cashin* v. *Alamac Hotel Co., 98 N. J. Eq. 432 (Ch. 1925)*; *Security B. & L.* v. *Grande, 6 N. J. A. R. 476, 140 Atl. 580 (Ch. 1928)*. In the last cited case Vice Chancellor Backes ordered a counterclaim to a foreclosure action, setting forth facts similar to those set forth in respondent's bill stricken and said:

> "The counterclaim offers no defense in bar. It is dilatory in nature; *i. e.*, that the complainant should wait until the owner recovers from the insurance company on its promise to pay to the mortgagee, and as to which it is defenseless. There are three answers, each self-sufficient: The insurance policy does not equal the mortgage debt; the mortgage is due, and the complainant cannot be halted to put the owner in funds to discharge the debt (*Cashin & Co.* v. *Alamac Hotel Co., 98 N. J. Eq. 432, 121 A. 117*)."

Respondents might also contend that since they seek to apply the damages sought in the second case to the mortgage being foreclosed in the first case, the bill should be entertained by a court of equity. The law is well settled otherwise. *Corson* v. *Bailey, 98 N. J. Eq. 323 (E. & A. 1925)*; *Commonwealth Title* v. *N. J. Lime Co., 86 N. J.*

Eq. 450 (E. & A. 1916); Trotter v. *Heckser, 40 N. J. Eq. 612 (E. & A. 1885).* In *Alpaugh* v. *Wood, 45 N. J. Eq. 153 (E. & A. 1888)*, the Court said:

> "In this contention the appellants are plainly in the right. The position was this: the complainants in chancery complained that the defendants in that proceeding had broken a certain stipulation of their contract, the remedy for which was in a court of conscience; the defendants claimed that the complainants, on their part, had failed to fulfill a certain other stipulation of the same agreement, whereby great loss had ensued, such latter breach of contract being devoid of all equitable characteristics, except such as inhere in every purely legal cause of action. When, therefore, the vice-chancellor decided this latter subject, he passed upon a purely legal demand for unliquidated damages. Such a matter is not cognizable in a court of equity, as has been directly decided by this court in the recent case of *Trotter* v. *Heckscher, 13 Stew. Eq. 612.*"

Respondent's right being a purely legal one for unliquidated damages arising from an alleged breach of contract, their remedy at law is adequate and complete, the bill of complaint is without equity and should be dismissed.

(2) THE BILL OF COMPLAINT DISCLOSES ON ITS FACE THAT IT IS NOT BROUGHT WITHIN 12 MONTHS AFTER THE FIRE AS REQUIRED BY THE TERMS OF THE POLICY.

The policy upon which the bill in the second case is brought provides that:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity * * * unless commenced within 12 months next after the fire" (S. C., p. 43, ll. 25-30).

The fire occurred on March 24, 1927 (S. C., p. 11, ll. 23-26), but the suit was not instituted until April 17, 1930 (S. C., p. 6), more than three years after the fire. It is well settled that a suit on a standard fire insurance policy may not be maintained unless instituted within twelve months after the fire. *Ignazio* v. *Fire Association, 98 N. J. L. 602 (Sup. Ct., 1923); Petrullo* v. *Mechanics Insurance Co. of Philadelphia, 4 N. J. Misc. 586, 133 Atl. 706 (Sup. Ct., 1926)*. And where it appears from a bill of complaint that suit has been barred by lapse of time it may be dismissed on motion.

Wallace v. *Coward, 79 N. J. Eq. 243 (Ch., 1911)*:

> "Where it appears on the face of the bill that complainant's right of action is barred by the statute of limitations, a demurrer for that reason will lie. *Bird's Administrator* v. *Inslee's Executors* (Chancellor Zabriskie, 1873), *23 N. J. Eq. (8 C. E. Gr.) 363; Myers* v. *Fridenberg* (Chancellor Magie, 1905), *70 N. J. Eq. (4 Robb.) 3*. And, on general demurrer, the presumption of payment of a bond and mortgage arising from lapse of time (twenty years) will be sustained in the absence of allegations explaining or excusing the delay. *Olden* v. *Hubbard* (Chancellor Runyon, 1881), *34 N. J. Eq. (7 Stew.) 85*, and cases examined by me, cited in *Blue* v. *Everitt (1897), 55 N. J. Eq. (10 Dick.) 329.*"

Since it appears from the bill of complaint in the second case that it was barred by the one year limitation contained in the policy, the bill should have been dismissed.

3. THE BILL OF COMPLAINT DISCLOSES ON ITS FACE THAT THE ASSURED WAS NOT THE SOLE AND UNCONDITIONAL OWNER AND THAT THERE WAS A CHANGE OF TITLE, INTEREST OR POSSESSION RENDERING THE POLICY VOID.

The policy upon which the bill of complaint in the second case is based contains the following provision:

> "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership; * * * or if any change other than by death of an insured take place in the interest, title or possession of the subject of insurance" (S. C., p. 38).

The policy issued by appellant originally named Elizabeth Clare Haggenbotham, as owner and assured (S. C., p. 31). Mrs. Haggenbotham sold the insured property to Sarah Conway and James F. Conway, her husband (S. C., pp. 8, 9). Subsequent to the transfer to title to Sarah Conway and James F. Conway, her husband, the following endorsement was placed on the policy:

> "James F. Conway is hereafter recognized as assured and owner of the property covered under this policy subject nevertheless to all the terms and conditions herein contained. Attached to and forming part of policy #2278 Automobile Insurance Company of Hartford Conn.
>
> R. SASLAFF, Agents."

It is well settled that this endorsement had the same effect as the issuance of a new policy to James F. Conway would have. *Cooley, Briefs on Insurance, p. 2400; Richards, Insurance, p. 354; Vance, Insurance, p. 636,* and see cases collected in *26 C. J. 134.*

The law is equally well settled that a standard policy containing the provision that it shall be void if assured's interest is other than sole and unconditional ownership, is void where the policy names the husband alone as assured whereas the property is owned by husband and wife as tenants by the entirety.

In *Schroedel* v. *Humbolt Fire Insurance Co., 158 Pa. 459,* the Court held that where a policy was issued in the name of the husband, and title was in the name of husband and wife, it was void and there could be no recovery thereon. In *Western Assurance Co.* v. *White, 171 Ark. 733, 286 S. W. 864,* the Court cited *Buttlar* v. *Rosenblath, 42 N. J. Eq. 651,* for the doctrine (now well established in this state) that a wife's interest in property held by the entirety was equal to the husband's and held that a policy naming the husband as assured is void if title is in the husband and wife. The Court said:

> "The language, 'unconditional and sole ownership', appearing in the policy sued on, has been many times defined in the textbooks on insurance and in the reported cases as follows: 'An insurance ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition.' *Royal Ins. Co.* v. *Shirley, Miss.—, 106 So. 884.*
>
> Under this definition, a tenant by the entirety does not qualify as a sole owner. Indeed, we have found no case holding that a tenant by the entirety was a sole owner, and entitled to recover as such, where the policy of insurance required that the insured be the sole owner. The rule is stated to the contrary in *26 C. J. chapter on Fire Insurance, s 219, p. 180,* where it is said: 'When the title is in husband and wife jointly, the husband cannot insure as sole and unconditional or absolute owner.'

> We have examined the cases cited in the note to the text quoted, and we find they fully sustain the text. * * *
>
> We conclude, therefore, that appellee was not the sole and unconditional owner of the property, and, as it was not shown that the insurance company had waived this provision of the policy, it follows that a right to recover on the policy was not shown. *2 Joyce, Ins. s 1048A; 6 Cooley, Briefs on Ins. s 1382 (J); Clawson* v. *Citizens' Mut. F. Ins. Co., 121 Mich. 591, 80 Am. St. Rep. 538; 80 N. W. 573; Schroedel* v. *Humboldt F. Ins. Co., 158 Pa. 459, 27 Atl. 1077; Ostrander, Fire Ins. s 63; Aetna Ins. Co.* v. *Resh, 40 Mich. 241; Genesee Falls Permanent Sav. & L. Asso.* v. *United States F. Ins. Co., 16 App. Div. 587, 44 N. Y. Supp. 979; Moore* v. *Moore, ... Ark. ....., 281 S. W. 657.''*

There are numerous cases to the same effect. *Aetna Insurance Co.* v. *Resh, 40 Mich. 241; Commercial Mutual Fire Ins. Co.* v. *Crawford, 219 N. Y. S. 103; Genessee Falls Bank* v. *Fire Ins. Co., 44 N. Y. S. 979; Palm* v. *National Ben Franklin, 43 Pa. Co. Ct. 689.*

In *Reed* v. *The Fireman's Insurance Company of Newark, N. J., 81 N. J. L. 523 (1910)*, the Court of Errors and Appeals assumed that where a standard policy names the husband alone it is void, if title is in both husband and wife.

Indeed, under the doctrine accepted in our state that unambiguous provisions of the standard fire insurance policy are to receive their plain meaning, *Mick* v. *Corporation of Royal Exchange, 87 N. J. L. 607, 611 (E. & A. 1915); Del Guidici* v. *Importers & Exporters Insurance Company, 98 N. J. L. 435 (E. & A. 1922); Kupfersmith* v. *Delaware Insurance Company, 84 N. J. L. 271, 275 (1912)*. It is equally well established that a violation of the sole and unconditional ownership provision avoids the policy (*Ordway* v. *Chace,*

57 N. J. Eq. 478 (Ch. 1899); Milliken v. *Woodward, 64 N. J. L. 494 (Sup. Ct., 1900)*, it is clear that the policy naming James F. Conway alone was void and no recovery could be had thereon. It cannot possibly be said that James F. Conway was the sole and unconditional owner when admittedly his wife had an equal interest of ownership, he being only a tenant by entirety.

Respondents may contend that the endorsement to James F. Conway did not have the same effect as the issuance of a new policy. Such contention, however, can not aid respondents for the original policy was avoided by the change of title, interest or possession under the express terms of the policy. See *Levin* v. *State Assurance Co., 7 N. J. A. R. 447, 144 Atl. 797 (E. & A. 1929); Grunauer* v. *Westchester Fire Ins. Co., 72 N. J. L. 289 (E. & A. 1905); Ploczek* vs. *St. Paul Ins. Co., 91 Atl. 812 (N. J. Ch. 1911)*.

The endorsement to James F. Conway alone is, of course, no recognition of a change of title to Sarah Conway and James F. Conway. Respondents may further contend that the bill alleges that appellant's agent knew of the change of title and accordingly appellant may not assert that as a defense. There was, of course, no proof of knowledge and a careful reading of the bill of complaint fails to disclose any allegations that appellant's agent knew that the transfer of title was to Sarah Conway and James F. Conway. The bill does allege that appellant's agent was told that Mrs. Haggenbotham had conveyed title to the property (S. C., p. 10, l. 20) but nowhere is it alleged that he was told that title was transferred to Sarah Conway and James F. Conway. Indeed, the endorsement to James F. Conway clearly indicates that he was advised that James F. Conway was the new owner.

Even if the bill had alleged that appellant's agent knew of the transfer to Mr. and Mrs. Conway and such allegation had been proved, respondent's action on the policy as now constituted would have to fail. It is well settled that in the absence of reformation (and the bill of complaint does not seek reformation) the agent's knowledge is immaterial and cannot affect appellant's liability. *Franklin Fire Insurance Co.* vs. *Martin, 40 N. J. L. 568 (E. & A. 1878); Hanson* vs. *National Liberty Fire Insurance Company of America, 100 N. J. L. 215 (Sup. Ct. 1924).* Since the bill of complaint discloses on its face that the assured was not the sole and unconditional owner and that there was a change of title, interest or possession rendering the policy void, the bill of complaint should be dismissed.

4. (a) RESPONDENT, SARAH CONWAY, HAVING BROUGHT AN ACTION AT LAW RESULTING IN A NONSUIT ON THE POLICY WHICH IS THE BASIS OF THE BILL OF COMPLAINT, HAS ELECTED HER REMEDY AND IS PRECLUDED FROM MAINTAINING THE BILL OF COMPLAINT IN THE SECOND CASE.

Respondents' bill of complaint sets forth that respondent, Sarah Conway, and Mrs. Ross, mortgagee, instituted an action at law on the policy issued by appellant which resulted in a nonsuit against Sarah Conway and a directed verdict in favor of Mrs. Ross (S. C., p. 12).

It is submitted that by bringing an action at law on the policy, Sarah Conway has elected her remedy and is precluded from maintaining the suit in the second case. In *McMichael* v. *Barefoot, 85 N. J. Eq. 139 (E. & A. 1915)* defendant had obtained several judgments against complainant. Complainant then instituted an action at law for conspiracy in obtaining the judgments and was nonsuited. Complainant then filed a bill to re-

strain the collection of the judgments. Vice Chancellor Leaming said:

> "The difficulty that confronts me is that the fact is indisputable that in the law court complainant herein was nonsuited; the law court, in the exercise of what this court must consider a sound judgment, nonsuited him. An application to be relieved from that nonsuit, which has been made to the law court, in behalf of complainant herein, has been refused, for reasons that were by that court deemed adequate. This court is now asked by complainant to sit in judgment over the law court and to determine that it has not done its duty; to determine that the law court either should not have allowed the nonsuit, or should have relieved against it."

In *Rourke* v. *Rourke, 77 N. J. Eq. 181 (Ch. 1910)*, Chancellor Walker said:

> "In the case at bar the election has been made in favor of the action at law, and the complainant having proceeded to a finality in the action before the justice, before preferring the application in this court, she must certainly be held thereby to have elected to stand upon the legal remedy."

Assuming that respondent, Sarah Conway, originally had a right to proceed in equity, she elected to proceed at law and was there nonsuited. She should be bound by her election and the bill of complaint in the second case should be dismissed.

4. (b) The alleged cause of action set forth in respondents' bill is *res adjudicata.*

In a counterclaim filed in the first case on behalf of Sarah Conway, the same facts constituting the alleged cause of action in the second case were set forth (S. C., p. 9). The counterclaim was stricken out by the Vice Chancellor with leave to

amend within fifteen days (S. C., p. 21). The counterclaim was never amended and no appeal was ever taken from the order of the Vice Chancellor. It is submitted that the determination of the Vice Chancellor on appellant's motion to strike the counterclaim is *res adjudicata* and is dispositive of the bill of complaint in the second case, which should accordingly be dismissed.

5. Finally, appellant's motion to dismiss the bill of complaint raised several additional points, which, along with the points already considered, were not disposed of by the lower court.

(a) Although Mrs. Conway is nowhere mentioned in the policy, she is named individually as one of the complainants. It is clear that since she is nowhere mentioned in the policy she has no right to maintain any action thereon in her individual capacity. *Kase* v. *Hartford Fire Insurance Co., 58 N. J. L. 34 (Sup. Ct. 1895); Flanagan* v. *The Camden Mutual Insurance Co., 25 N. J. L. (Sup. Ct. 1856); Hanson* v. *National Liberty Fire Insurance Co. of America, 100 N. J. L. 215 (Sup. Ct. 1929).*

Since Sarah Conway is not named in the policy she has no interest therein in her individual capacity and her name should be stricken as complainant.

(b) In the bill of complaint Sarah Conway, as executrix, sues to discharge property not owned by her from the lien of the mortgage. It is clear that since the mortgaged premises are not part of the estate of James F. Conway, deceased, the executrix could not be required to make a tender even of the amount which respondents admit to be due to appellant.

It is accordingly clear that any action by the executrix should be at law for damages and not to discharge property not owned by her from the lien of a mortgage.

In summary of Point IV it is respectfully submitted that since (1) respondents' remedy at law was adequate and complete and the bill of complaint was without equity, (2) the suit was not brought within twelve months as required by the terms of the policy, (3) assured was not sole and unconditional owner and there was a change of interest, title and possession rendering the policy void, (4) respondent, Sarah Conway, elected to pursue her remedy at law thereby precluding any subsequent action in equity, (5) the dismissal of respondent, Sarah Conway's counterclaim in the first case is *res judicata,* (6) Sarah Conway, individually, is improperly joined as complainant since she is not named in the policy, and (7) the remedy, if any, of Sarah Conway, as executrix, must be at law, the bill of complaint should accordingly be dismissed.

POINT V.

In conclusion, it is respectfully submitted that the decree entered in the first case should be reversed with instructions to enter a decree for appellant for $19,000 plus interest and costs for the reasons argued under Point I; and that the decree in the second case should be reversed for the reasons set forth in Points II and IV, and that the finding of $20,192.90 damages and $8,250.88 liability against appellant should be set aside for the reasons presented in Point III.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Solicitor and Counsel of Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between THE AUTOMOBILE INSURANCE COMPANY, of Hartford, Connecticut, a corporation of the State of Connecticut, *Complainant-Appellant,* and SARAH CONWAY, *Defendant-Respondent.*	On Appeal from Chancery. (First Case.)

Between SARAH CONWAY, individually, and SARAH CONWAY, as executrix of the Estate of James F. Conway, deceased, *Complainants-Respondents,* and THE AUTOMOBILE INSURANCE COMPANY, of Hartford, Connecticut, a corporation of the State of Connecticut, *Defendant-Appellant.*	On Appeal from Chancery. (Second Case.)

BRIEF OF APPELLEE.

STATEMENT OF FACTS.

Prior to March 2, 1925, one Elizabeth Clare Haggenbotham was the owner of premises 3512 Pacific Avenue, Atlantic City, New Jersey. She had thereon a first mortgage of $19,000.00 which was held by Elizabeth M. Lutz Ross. To protect the interest of the mortgagee, she placed with the Automobile Insurance Company of Hartford, Connecticut, a fire insurance policy in the sum of $19,000.00. This policy was placed on January 7, 1924, and had in it the usual mortgagee clause, making the entire amount of a loss payable to the aforementioned Elizabeth M. Lutz Ross; as is customary in such cases the policy of insurance itself was turned over to the mortgagee and remained continuously in her possession, although the full premium of fire insurance was paid by the mortgagor.

On or about March 2, 1925, James F. Conway purchased premises 3512 Pacific Avenue, Atlantic City, New Jersey, from Elizabeth Clare Haggenbotham and a deed of conveyance was executed to James F. Conway and Sarah Conway, as tenants by the entireties. Immediately, in order to advise the Automobile Insurance Company of the fact that title was no longer in the name of Elizabeth Clare Haggenbotham, the agent of the Automobile Insurance Company was notified, and R. Saslaff, an agent of the Automobile Insurance Company, sent the following notice to Mr. Conway:

> "JAMES F. CONWAY is hereafter recognized as insured and owner of property covered under this policy, subject nevertheless to all the terms and conditions herein contained.

Attached to and forming part of policy #2278, AUTOMOBILE INSURANCE COMPANY of Hartford, Conn.

R. Saslaff,
Agent.''

The policy, of course, was always in the possession of Mrs. Ross and the notice herein referred to was sent to Mr. Conway, after proper notice had been given by him, in accordance with the provisions of the policy, of the transfer of the property, so that the complainant had complied with all the terms of that policy.

Subsequently, additional insurance was taken out by James F. Conway and Sarah Conway, with the National Liberty Insurance Company, totaling $27,500.00. This was subsequent to March 2, 1925, and any loss was to be payable directly to James F. Conway and Sarah Conway.

On March 24, 1927, a fire occurred at 3512 Pacific Avenue, with a loss estimated at $20,192.90. The necessary proofs of loss were filed with both the National Liberty Insurance Company and with the Automobile Insurance Company. After the fire occurred, to wit, on July 28, 1927, James F. Conway died, and by his last will and testament appointed Sarah Conway executrix.

The Automobile Insurance Company refused to pay Mrs. Ross, in accordance with the policy, so that suit was instituted by Elizabeth M. Lutz Ross as real plaintiff, and Sarah Conway as nominal plaintiff, against the Automobile Insurance Company of Hartford, Connecticut. At the same time suit was instituted by Sarah Conway in her own right against the National Liberty Insurance Company. One counsel represented both companies and

both cases were tried together, on or about December 4th or 5th, 1928, in the United States District Court before his Honor, William Clark. Prior to the case going to the jury, a verdict was directed in favor of Mrs. Ross, mortgagee, on the Automobile Insurance Company, and it was agreed that in view of the fact that Sarah Conway had no interest in the money that was to be obtained as a result of this suit, that she was to be non-suited. The jury, however, disagreed upon her claim against the National Liberty Insurance Company. It is to be noted that, at the trial of this case, no testimony was introduced by the Automobile Insurance Company to indicate that they had any defense against the said Sarah Conway as mortgagor, and no evidence of any kind was introduced to indicate that any attempt would be made to deny any liability as far as Sarah Conway was concerned.
dicate that any attempt would be made to deny any liability as far as Sarah Conway was concerned.

Subsequently the cases were tried again before his Honor Judge Fake on March 5th, 6th and 7th, 1929. At that time the records disclosed that the case against the Automobile Insurance Company and the case against the National Liberty Insurance Company were listed, but before trying the case, the attention of the Court was called to the fact of the proceeding before Judge Clark, so that counsel proceeded against the National Liberty Insurance Company, with a result that a verdict was obtained in favor of Sarah Conway, in the sum of $20,192.90.

Due to the fact that the policy of the National Liberty Insurance Company contained the usual pro rata clause, they paid only $11,532.02, claiming that the balance of the verdict, to wit: $8,250.88 was a proportionate sum which was due and owing from

the Automobile Insurance Company of Hartford, Connecticut, under its policy on the property.

On account of this pro rata clause, Sarah Conway was compelled to accept from the National Liberty Insurance Company, the sum of $11,532.02, leaving a balance due from the defendant, the Automobile Insurance Company, in the sum of $8,250.88. A demand was made on the Automobile Insurance Company for this sum, but they refused to pay it and subsequently, without the consent of Sarah Conway and without ever having obtained a judgment on the record, the Automobile Insurance Company induced the mortgagee to accept from it the sum of $19,000.00 and make an assignment to it of the first mortgage of $19,000.00 which she held on premises 3512 Pacific Avenue, Atlantic City, New Jersey, so that the Automobile Insurance Company with no judgment in its favor, as was testified to by Mr. Ross before the Vice-Chancellor, became the holder of this mortgage. (See S. C. pages 27-31.) Thereupon Sarah Conway made a tender to the Automobile Insurance Company of the difference between $8,250.88 and $19,000.00 and demanded the satisfaction of the mortgage. The Automobile Insurance Company refused to do this and instituted foreclosure proceedings.

Thereupon Sarah Conway filed her bill in equity to compel the Automobile Insurance Company to accept the balance which she claims is due it, to wit: $10,749.12 and satisfy the mortgage, which to date they have refused to do.

The bill of complaint specifically sets forth the amount of credit claimed by Sarah Conway, that the loss was specifically the amount definitely determined by a jury, that no defense against her was at any time ever set forth by the Automobile In-

surance Company, and that by foreclosing on this valuable property, they will receive back the $19,000 which they advanced to Mrs. Ross, the mortgagee, and step out, without paying a single cent on this loss. For these reasons, Sarah Conway filed her bill in equity, asking for equitable relief under the circumstances outlined. She specifically avers that she has complied with all the terms of the policy placed by the Automobile Insurance Company.

When the appellant started foreclosure proceedings an answer and counter-claim was filed by the appellee, setting forth the facts as herein given. Realizing that this was not the proper procedure under the law, the appellee then filed a verified bill in equity, asking for equitable relief. To this bill of complaint, the appellant filed a motion to strike out the bill. An argument was had before Vice-Chancellor Ingersoll upon the bill in equity, counsel agreeing that these were the facts, as the records indicate. Thereafter, the complainant's bill was sustained and an opinion was filed by Vice-Chancellor Ingersoll setting forth his reasons and ordering the appellant to give the appellee credit for the sum specified. (See S. C. p. 49, l. 9 on.) No contradiction can be made of the facts as set forth in the bill in equity. The only question therefore before the Court is as to the legal implications flowing from these facts.

ARGUMENT.

The Court of Errors and Appeals has before it a situation similar to the one presented in the case of *Palmer v. Niagara Fire Insurance Co.*, decided

November, 1916, reported in 87 N. J. E. page 347, and decided by the Court of Errors and Appeals. That also was a bill in equity to compel the insurance company to satisfy a mortgage under practically similar circumstances. The case came up on appeal from the Court of Chancery, the lower court case being reported as *Palmer v. McFadden,* 86 N. J. Eq., page 377.

The case of *Palmer v. Niagara Fire Insurance Co.,* 87 N. J. Eq. page 347, has the following to say:

> "The complainant was the owner of real estate, in Elizabeth, N. J.; on March 11, 1911 she executed a bond and mortgage thereon to McFadden, as guardian to secure the payment of $3500. Then she procured insurance on the property from three companies aggregating $14,500 among which was a policy from the Niagara Fire Insurance Company for $350. This was the only policy containing the usual standard mortgagee clause with the right of subrogation upon payment of the amount due to the mortgagee; McFadden foreclosed his mortgage and on December 19, 1913, obtained his decree for $3225, with interest. A fire occurred on December 20, 1912, completely destroying the insured premises. Suit at law upon the other policies required the Scottish Insurance Company to pay complainant $2400 for its proportionate share of the loss and the Northern Insurance Company to pay $2150 for its share.
>
> "The proportion which the Niagara Company would have had to pay to the complainant under the policy devoid of the mortgagee clause as its contribution to the loss was conceded to be $1388.16. Having paid the mortgagee the full claim of $3416.67 it now insists that so far as

this complainant is concerned, it has overpaid upon the policy the difference between its proportionate share of liability under a policy devoid of the mortgagee clause, and its actual payment to the mortgagee amounting to $2022.51 and to that extent it claims the right to exercise and enforce its privilege of subrogation. To that end it obtained from the mortgagee an assignment of his securities, a final decree and an agreement of subrogation, and in the attempt to enforce its claim is opposed by the complainant who filed this bill to enjoin the insurance company from enforcing its demand. The bill seeks also to compel the surrender of the bond and mortgage for cancellation as well as to compel the company to pay the complainant the difference between the face of the policy and the amount paid to the mortgagee. The insurance was effected by the complainant at her own expense, payable to her subject to the usual mortgagee clause. It must be obvious that the claim of the complainant if acceded to, would result in her enrichment by this investment over and above, to the extent of $2,770.85. *And since fire insurance is conceded to be a method of indemnity for loss and not a speculation for gain or gamble,* the effort to reconcile these conflicting claims upon equitable principles must be pursued with that fundamental doctrine in mind. *Insurance Company v. Bailey,* 13 Wall U. S. 616; *Fire Ins. Association v. Schellenger,* 85 N. J. E. 144.

The rights of the mortgagee and the status of the mortgagor under this policy were radically different so far as the liability of the company was concerned. In the former case its lia-

bility was coextensive with the amount of the mortgage, where the policy was sufficiently large to cover it, not exceeding the liability of the company to the mortgagor. *Eddy v. Corp.,* 143 N. Y. 311; *Franklin Savings v. Insurance Co.,* 119 Mass. 240.

In the latter instances, the extent of the company's liability depended upon the extent to which all the co-insurers under the clause for that purpose were legally obligated to contribute to the loss. *Wiggin v. Insurance Co.,* 18 Pick. 145; 14 R. C. L. 482.

Having determined the liability of the company to the mortgagor it must accordingly be limited regardless of what might be its liability to the mortgagee.

The result is that the limit of the complainants' recovery upon the policy in a court of law would be the company's pro rata share of the actual loss based upon the co-insurance clause of the policy. It is apparent, therefore, that the two liabilities inherent in the policy are totally distinct and independent and productive of different results in each instance. *Hastings v. Insurance Co.,* 73 N. Y. 141.

The rights of the mortgagor must be determined not by the claim of the mortgagee upon the policy but by the legal right accorded to the mortgagor and upon that principal only can the liability of the company in this instance be predicated.

The right of the company to be subrogated to the rights of the mortgagee under the provisions of the policy being manifest (Hare v. Headley, 54 N. J. E. 534), *the equitable doctrine of subrogation must be so effectuated as*

> *to do equity between the parties according to their legal rights, as herein indicated by crediting upon the decree the sum which the complainant would be entitled to receive from the company under the co-insurance provision of the policy with interest.* To that extent the decree appealed from will be modified and in other respects reversed."

The doctrine of the above case is cited in 26 *C. J.* paragraph 626 (note):

> "That the owner of the equity of redemption or the mortgagor (which in our case would be Sarah Conway), is entitled to a credit to the extent of the pro rata share which the company would have been obliged to pay to the mortgagor, upon an adjustment of a loss between the company and its co-insurers."

We must bear in mind that no doubt has ever been raised as to the validity of a policy issued to Elizabeth Clare Haggenbotham, the former owner. When the property in question was purchased by James F. Conway, deceased, and the appellee, all that the policy required was notification that there had been a change of ownership. There is no doubt that the ownership of Haggenbotham, the former owner, was sole and unconditional, so that the policy was perfectly good and valid. The policy contains the following clause (see p. 37, S. C., l. 28 on, and page 38, S. C., l. 4):

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; * * *."

Therefore, if there was a change in the interest, title or possession of the subject of insurance, the policy became invalid *unless otherwise provided,* by the agreement on the part of the insurance company. There was a change of ownership and the insurance company was notified of that change and that was the only obligation that the policy provides in such an event. The insurance company by agreement of its own agent, agreed to recognize James F. Conway as owner, as the endorsement (on page 30 of S. C., ll. 29 to 41, incl.) shows:

> "James F. Conway is hereafter recognized as assured and owner of the property covered under this policy, subject nevertheless to all the terms and conditions herein contained.
>
> Attached to and forming part of policy #2278, AUTOMOBILE INSURANCE COMPANY of Hartford, Conn.
>
> R. Saslaff,
> Agent."

As said by Justice Von Syckel in *Millville Mutual Marine & Fire Insurance Co. v. Mechanics' & Workingmen's B. & L. Ass'n.,* 43 N. J. L. 652, speaking for the Court of Errors and Appeals, at page 658, after stating the facts and conditions both:

> "In this aspect of the case, it is manifect that the insured was justified in drawing the inference that nothing more was necessary to be done on his part to continue the life of the policy. Until notice was given to him to do some further act he had a right to rest securely upon the agent's assurance. The company cannot thus lull their policy-holders into a false security and take advantage of an omission on his part, thereby induced to work a forfeiture of their contract."

The appellant became aware of the change of ownership which is all that the policy calls for under such circumstances. They, therefore, cannot use this change in defiance of the provisions of their own policy as a means of effecting a forfeiture of the policy, which is what the appellant is seeking to do. The situation might have been different if suit had been instituted by Haggenbotham, the former owner, and the defense was that her interest was not sole and unconditional.

The reason for this provision in policies of insurance is fully discussed in L. R. A. 1918, E., on page 375, as follows:

> "Provisions of the kind under the circumstances (referring to sole and unconditional ownership) are recommended to protect the insurance companies from paying losses to those who have, in fact, not sustained them and who really have nothing at hazard, and whose interest thereunder is that if the event insured against shall happen. They refer only to the substantial ownership rather than to the strictly legal title and are satisfied if the insured interest is of such a character that he will sustain the entire loss if the property is destroyed and the rule is well settled that such conditions are sufficiently complied with if the insured has the equitable title to the property."

All of the cases cited by the appellant under Point IV, Subdivision thereof #3, pages 17-18-19-20 and 21 of the appellant's brief, are cases referring to the issuance of original policy, and not cases where the original policy was valid and subsequently assigned. The question in this case revolves around the assignment and the consent to that assignment.

In 26 *C. J.*, paragraph 15, page 122, the following is given as the law under facts similar to ours:

> "The consent to an assignment of a policy to a purchaser of the property inures to the benefit of a co-owner although his name is not expressly mentioned. When requesting a consent to an assignment, assignee need not state the nature of his interest."

It is, of course, necessary to notify the insurance company of a change of title, and the moment they consent to that change all the terms of the policy have been complied with. The reason for this requirement is given in 26 *C. J.*, paragraph 15, page 231, and the cases therein cited:

> "The object of conditions against change in title or interest is to provide against changes which might furnish a motive to destroy the property or diminish the interest or watchfulness of insured in protecting it against fire, and dealings with the property which are not calculated to produce such an effect, will not void the policy."

In passing, it may be interesting to note that there are of record cases which hold that the provisions as to title was satisfied in the original issuance of the policy where the purchase money for the real estate was furnished by the husband but the property was conveyed to husband and wife jointly.

Malley v. Frye, 21 App. D. P. C. 105, 1903.

It has been held that where husband and wife are tenants by entirety, the husband may insure the property as his own. *Clawson v. Citizens Insurance Co.,* 121 Mich. 591, 80 N. W. 573, also *Moitke v. Milwaukee Mech. Ins. Co.,* 113 Mich., p. 166.

In the case of *Vivar v. Knights of Pythias,* 52 N. J. L. 401, the Court said:

> "If the representations do not mislead or induce the contract, they should not be allowed to void the policy."

In the case of *Palstine Insurance Company v. Boyd,* a case decided in the Court of Civil Appeals of Texas, 1899, it was held that the consent of the insurance company to transfer fire policy to a purchaser of the property insured, inures to the benefit of a co-owner, although his name is not expressly mentioned.

It would, therefore, appear that the argument raised by the appellant is merely a technical theory to defeat and avoid the policy and declare a forfeiture.

The appellant in his argument (see brief of appellant, Point IV, Subdivision 1), states that the respondent's remedy at law was adequate, and complete, and that the bill of complaint discloses on its face that it was not brought within twelve months after the fire, as required by the terms of the policy.

In Appellant's Brief, Point IV, Subdivision 4a, he argues that the appellant brought an action at law which resulted in a non-suit on the policy, which is the basis of the appeal of complaint, and is therefore precluded from maintaining the bill in this case. In Appellant's Brief, Point IV, Subdivision 4b, appellant states that the alleged cause of action set forth in respondent's bill is *res adjudicata.*

We group these various points together because they indicate a misapprehension of the actual facts of the case. It is admitted and it is impossible of denial, that both cases, to wit, the case of Sarah Conway against the National Liberty Insurance

Company and the case of Elizabeth M. Ross and Sarah Conway against the Automobile Insurance Company were tried together by the same counsel. They were in effect one action. There was a directed verdict as to Ross, the mortgagee, the holder of the mortgage in question, originally in the sum of $24,000 and since reduced by payment to $19,000.00, and a verdict in favor of Sarah Conway against the National Liberty Insurance Company in the sum of $20,192.90. A non-suit was entered by agreement in the case of Sarah Conway who was joined with Ross as a plaintiff, in the case against the Automobile Insurance Company, for the obvious reason that Sarah Conway had no money interest in that case. All that she could depend upon were her rights of subrogation under her policy. Since no defense was offered against Sarah Conway and since there was no inkling of any defense against Sarah Conway on the policy containing the mortgagee clause, her rights would have to be adjudicated by the general theory of subrogation, as set forth in the case of *Palmer v. Niagara Fire Insurance Co.*, 87 N. J. E. page 347, quoted before. The record of the trial before the Federal Court cannot be contradicted, nor can the averment as to that record in the bill of equity be denied, nor is it denied. When the appellee took out additional insurance from the National Liberty Insurance Company, it immediately reduced the liability of each company proportionately, as provided for in the policies, but that Act did not destroy the policy of the Automobile Insurance Company as far as the appellee was concerned. The appellant cannot depend upon a mere empty denial as to liability against the mortgagor. Her rights are definitely stipulated in the mortgagee clause attached to the policy of the appellant, reading as follows:

MORTGAGEE CLAUSE.

"Loss or damage, if any, under this policy, shall be payable to Elizabeth M. Lutz as mortgagee (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; PROVIDED, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

PROVIDED, also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy, or increase of hazard which shall come to the knowledge of the said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee), shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may as its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of her claim.

Dated January 8, 1924.

Attached to and forming part of policy No. 2278 of

THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Agency at Atlantic City, N. J. R. Saslaff, for Company."

(See S. C., pages 34 and 35.)

Under this mortgagee clause, it was necessary for the insurance company to show that no liability existed as to Sarah Conway. Since the case was tried before a jury, and the jury found in favor of Sarah Conway, against the National Liberty Insurance Company, on the claim growing out of the same fire, how can it be argued that anything could be shown to effect the liability of the Automobile Insurance Company against Sarah Conway on this

same policy? Having recovered against the National Liberty Insurance Company, the appellee showed that her claim was valid and the appellant not having introduced any evidence which could affect the situation, and both cases having been tried together, the burden rested upon the Automobile Insurance Company, the appellant, to pro rate with the National Liberty Insurance Company. It cannot be argued that the non-suit was *res adjudicata,* being entered, as it was under the circumstances indicated.

In the case of *Penrose v. Absecon Land Co.,* 94 N. J. E. 436, decided in the Court of Errors and Appeals, the Court said:

> "As to the matter *sub judice* being *res adjudicata* by virtue of the judgments in the Supreme Court, the adequate answer is that both records show a non-suit and therefore conclude nobody. *Beckett v. Stone,* 60 N. J. L. 23; *Longstreet v. Phila.,* 39 Id. 36; *Snowhill v. Hillyer,* 9 Id. 38."

It is, therefore, obvious that, keeping in mind the fact that both these cases were tried together, the non-suit as far as Sarah Conway was concerned, was not a dispensation of her rights, but simply an admission that suit should have been instituted in that case in the name of the mortgagee alone. It has been held that a case may be brought on the standard policy of insurance containing the mortgagee clause in the name of the mortgagee alone. *Building & Loan Ass'n. v. Insurance Co.,* 28 Sup. Ct. 341 (Penna.).

If the Automobile Insurance Company had a defense against the mortgagor, it was its duty under the mortgagee clause to prove it. That they had

no such defense is evidenced by the fact that the appellee obtained a verdict and a subsequent verdict against the National Liberty Insurance Company in the sum of $20,192.90. The National Surety Company paid only the sum of $11,532.02 on the theory that since the appellee had taken an additional policy, they pro rated with the Automobile Insurance Company. Having pro rated in this fashion, the Automobile Insurance Company cannot defeat its policy by taking an assignment of the mortgage of $19,000 and then proceeding to foreclose on the mortgage in the full sum. To do so would be to encourage a subterfuge and permit the Automobile Insurance Company to escape from paying the amount under the pro rata clause of $8,250.88. The Automobile Insurance Company's policy had a double protection; it protected the mortgagee and at the same time protected the mortgagor. The theory is fully set forth in the case of *Palmer v. Niagara Fire Ins. Co.*, N. J. E. 87, page 347.

Could it be argued that if suit had been started by the mortgagee alone, and a recovery had, that the only duty on the part of the appellant was to take over the mortgage and not consider the mortgagor? This is the doctrine being submitted by the appellant and a mere statement of it shows how inequitable it would be, and how unfair. It would give the mortgagor absolutely no protection in spite of the payment of premium for a protection such as the appellee seeks to enforce.

The appellant also raises the point that the damages are not liquidated. This obviously is not the case. It can under no circumstances be considered as a new action. The bill of equity filed in this case from which an appeal has been taken, is not a new action, it is an attempt to compel the appellant to

pay its just share under the old action, wherein the appellee obtained a verdict in the sum of $20,192.90. Otherwise, it would be possible for an insurance company in the ordinary standard mortgagee policy to take an assignment of a mortgage in every case lulling the insured into a false sense of security and then pronouncing the novel doctrine that any action taken by the insured to protect its interests is starting a new suit, or that damages are not liquidated.

It is to be remembered that the appellee in this case made a check to the Automobile Insurance Company in the sum of $10,749.12 and demanded a satisfaction of the mortgage. The appellant refused to satisfy the mortgage. It was then left for the appellee either to file a bill in equity to compel the satisfaction of the mortgage, or to ask for credit in the event that the insurance company first started to foreclose. The appellant having instituted foreclosure proceedings, before the appellee filed a bill in equity, to satisfy the mortgage upon the payment of the balance which he claims due, there was nothing left for the appellee but to file a bill in equity asking for credit on the mortgage in the sum of $8,250.88. This is a responsibility which the appellant cannot escape on mere technical grounds.

Nor does it follow that because originally the appellee filed a counter-claim to the proceedings that such an action was *res adjudicata.* This cannot be seriously argued for the Vice-Chancellor in disposing of the counter-claim in the so-called first case, decided that the proper procedure was not by a counter-claim and thereupon the appellee filed her bill in equity to obtain the proper procedure in a case of this kind.

In Point IV, Subdivision 5a, the argument is raised

by the appellant, that Mrs. Conway, the appellee, is nowhere mentioned in the policy. James F. Conway died subsequent to the date of the fire, to wit: July 28th, 1927. It is stated in the policy (see S. C. page 43, l. 31 to 35 incl.) as follows:

> "Whenever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured * * *"

The reason for this is fully given in 26 C. J. foot note, page 444 and cases therein cited:

> "A temporary administrator of the insured can collect the loss under a fire insurance policy where the fire occurs after the latter's death and if necessary, commence an action for that purpose."

The appellant further contends that it is beyond the scope of the executrix's authority to tender the sum of $10,749.12 to the insurance company, (see Brief of Appellant, page 23, under Point IV, Subdivision 5b), towards the liquidation of the mortgage debt on the premises located at 3512 Pacific Avenue, Atlantic City, N. J. It is submitted that this is not within the province of the appellee to set up as a contention, in as much as the only parties affected would be the legatees and devisees of the creditors. As all of the debts of the estate had been paid, it leaves only therefore, the legatees and devisees to successfully interpose such an objection. In as much as the executrix is the sole legatee and devisee, the courts have held repeatedly in this State that her interest cannot be affected in as much as it is for her mutual benefit. The reason for this is fully given in the case of *William H. Birkholm, appellant, v. Hannah A. Wardell, et al, respondents,* 42 N. J. E., page 337:

> "It is obvious that the objection is without weight in this case. Although the personal estate was indeed not bound for the payment of the interest upon the mortgage, the payment should be allowed as between these parties. The appellant for whose benefit it was made surely cannot complain of it."

It would therefore seem that there is no weight to Point IV of the appellant's brief, which is after all the gist of the case.

As far as Point III is concerned, namely, that the trial Court erred in its findings that the premises were damaged by fire to the extent of $20,192.90 and that appellant was liable for $8,250.88 with interest, as a result thereof, there might be weight to such an argument if the cases had not been tried together. It is not true, as stated on page 11 (eleven) of the appellant's brief, that Sarah Conway had earlier sued the Automobile Insurance Company at law and had been non-suited. Such is not the fact. Both suits were instituted at the same time, were tried together. It was not a case of suing the National Liberty Insurance Company separately and afterwards suing the Automobile Insurance Company. There was one fire and the rights of all parties were determined at one time.

It is true that there was a disagreement of the jury and the necessity of a subsequent trial, but this did not affect the primary situation, namely, that all proofs were submitted at one time. The amount of the loss having been definitely fixed in the Federal Courts, it was binding upon all parties and the appellant cannot at this time take advantage of the situation and claim that the trials were separate, involving different parties. The subject-matter was the

same, the fire loss was the same, the proofs were the same and the defense, if any, were the same and were offered by both insurance companies at the same time.

As to Point I of appellant's brief, it is true that it was admitted that the mortgage was originally in the sum of $24,000, since reduced by payment to the sum of $19,000, but there was no admission that this represented the only responsibility of the appellant, as stated, but there was a two-fold obligation on the part of the appellant—one towards the mortagor—the necessity of paying the full amount of $19,000; this was admitted; and the other obligation was towards the mortgagee, which obligation they have never met.

The Court below did confine itself to the issues raised by the pleadings upon the admitted facts and simply applied the doctrine of equity in disposing of the issues flowing from the admitted facts.

As far as Point II is concerned, that a final decree was entered in the second case without testimony and without giving the appellant an opportunity to answer and furnish proofs, it is submitted that the case was decided upon the pleadings and upon such proofs, all taken into open court, as was necessary to dispose of the matter. All the facts are matters of record and cannot be contradicted. The only questions are the rights and liabilities flowing from these admitted facts. It was purely a question of law.

Both cases were tried together at a final hearing on April 29th, 1930, instead of as contended by the appellant that there was a final hearing as to the first case and an argument on the motion in the second case, (see Appellant's Brief, page 4). Both cases were considered as at a final hearing. Nowhere does it appear in either State of the Case

that there was a notice of final hearing as to either the first or second case, but both were to be considered as at final hearing and were disposed of in this manner. The proofs that were presented were all that would or could be presented by either the appellant or the appellee. Therefore it appears and follows that it was a final hearing in both the first and second case, and as such, the Court has made its determination and decided in its conclusions accordingly.

I submit that the appellant has had its day in court, and that the findings of the Court of Chancery on all points were finally established by the determination of the case.

I further submit that the appellant agreed that there was a fire insurance policy; that there was an assignment of the fire insurance policy; that there was a fire and that there was a loss sustained thereby, and that the loss was in the sum of $20,192.90 and that the appellee received the sum of $11,533.02 from the National Liberty Insurance Company; that there is a balance due the appellee amounting to $8,250.88, which was not paid. Therefore the appellee was entitled to a credit of $8,250.88 on the mortgage of $19,000.00, which had been assigned to the appellant, so as to prevent a forfeiture of appellant's policy of fire insurance.

I respectfully submit that the said decree is agreeable to equity and the same may be affirmed, with costs to be taxed, in favor of the appellee.

Respectfully submitted,

ALBERT A. F. McGEE,
Solicitor for and of Counsel with Appellee.

INDEX.

Notice of Appeal.

In Chancery of New Jersey

Between SARAH CONWAY, individually, and SARAH CONWAY as executrix of the estate of James F. Conway, deceased, Complainant, *and* AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, Defendant.	On Bill to Foreclose. Notice of Appeal.

Defendant, the Automobile Insurance Company of Hartford, Connecticut, hereby appeals from the decree dated August 15, 1930, made in the above entitled cause by the Chancellor on the advice of Robert H. Ingersoll, Vice-Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

ARTHUR T. VANDERBILT,
Solicitor of Defendant.

I conceive that there is good cause for appeal in the above entitled cause.

ARTHUR T. VANDERBILT,
Of Counsel with Defendant.

August 23, 1930.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

SARAH CONWAY, individually and SARAH CONWAY, executrix of the estate of James F. Conway, deceased,
Complainants-Respondents,

and

THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation of the State of Connecticut,
Defendant-Appellant.

On Appeal from the Court of Chancery.

Petition of Appeal.

To the Honorable Court of Errors and Appeals in the Last Resort in All Causes:

The petition of The Automobile Insurance Company of Hartford, Connecticut, a corporation, the appellant in the above entitled cause respectfully shows:

Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Robert H. Ingersoll, dated August 15, 1930, in a certain cause in which Sarah Conway, individually and Sarah Conway, executrix of the Estate of James F. Conway, deceased, are complainants and The Automobile Insurance Company of Hartford,

Connecticut, a corporation of the State of Connecticut is defendant in the following respects, to wit: that said decree orders and adjudges that the complainants be allowed a credit of nine thousand eight hundred and forty-nine dollars and sixty cents ($9,849.60); that said decree orders and adjudges that defendant deliver up for cancellation the bond and mortgage referred to in said decree upon payment to defendant of the sum of ten thousand, four hundred and sixteen dollars and forty-three cents ($10,416.43) with interest from August 14, 1930; that said decree orders and adjudges that defendant pay to complainants the costs of suit.

And petitioner appeals the aforesaid decree of the Chancellor on the ground that the same is erroneous in the following respects:

1. The lower court erred in decreeing that complainants be allowed a credit of $9,849.60 with interest from August 14, 1930.

2. The lower court erred in decreeing that defendant deliver up for cancellation the bond and mortgage referred to therein.

3. The lower court erred in decreeing that defendant pay to complainant the costs of suit.

4. The lower court erred in entering the final decree without any proof in the cause.

5. The lower court erred in entering a final decree while defendant's motion that the bill of complaint be dismissed was pending and undecided.

6. The lower court erred in entering the final decree above referred to without furnishing to defendant an opportunity to answer and submit proofs.

7. The lower court erred in failing to decree that the bill of complaint be dismissed on the ground that complainants' remedy at law was adequate and complete.

8. The lower court erred in failing to dismiss the bill of complaint on the ground that the decree dated February 25, 1930, in a cause wherein appellant was complainant and complainant, Sarah Conway, was defendant is *res judicata* and dispositive of this cause.

9. The lower court erred in failing to decree that the bill of complaint be dismissed on the ground that the matters set forth were proper matters in the pending foreclosure action wherein this appellant was complainant and complainant, Sarah Conway, was defendant.

10. The lower court erred in finding that the damage by fire to the property was $20,192.90 without any proof to that effect.

11. The lower court erred in finding that defendant's share of the fire loss was $8,250.88.

12. The lower court erred in failing to enter any order on the motion by defendant to dismiss the complaint and for other relief.

13. The lower court erred in failing to decree that the bill of complaint be dismissed on the following grounds:

(a) Because complainant's remedy at law is adequate and complete.

(b) Because the bill of complaint does not state a cause of action in equity.

(c) Because it appears from the bill of complaint that the interest of James F. Conway was not sole and unconditional as required by the terms of the policy made a part of the bill of complaint and that said policy was void.

(d) Because there was a change of title, interest and possession contrary to the express terms of said policy thereby rendering said policy void.

(e) Because suit was not started within twelve months as required by the terms of said policy.

14. The lower court erred in failing to order that defendant be allowed the relief sought by the notice of motion returnable April 29, 1930.

15. The lower court erred in entering the final decree in the cause without any testimony or other proof to substantiate the bill of complaint.

16. The lower court erred in failing to dismiss the bill of complaint on the ground that the nonsuit rendered in the action between Sarah Conway and defendant in the action in the United States District Court was *res judicata* and dispositive of the bill of complaint.

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel
with Defendant-Appellant.

Order to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between

SARAH CONWAY, individually, and SARAH CONWAY, executrix of the estate of James F. Conway, deceased,

Complainants,

and

THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation of the State of Connecticut,

Defendant.

On Bill, etc.

Order to Show Cause.

This matter being opened to the Court by Albert A. F. McGee, solicitor for the complainants, and the Court having read the Bill of Complaint in the above entitled cause and the affidavit thereunto annexed,

IT IS, on this 17th day of April, A. D. 1930, ORDERED that the defendant, The Automobile Insurance Company of Hartford, Connecticut, a corporation of the State of Connecticut, show cause before the Chancellor, at the Chancery Chambers, Fifth Floor, 1421 Atlantic Avenue, Atlantic City, New Jersey, on Tuesday, the 29th day of April, A. D. 1930, at ten o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, why the said defendant, The Automobile Insurance Company of Hartford,

Connecticut, should not be restrained and enjoined according to the prayer of said bill.

It is further Ordered that a true copy of the bill of complaint, affidavit attached thereto and the Order to Show Cause, based upon said bill and affidavit, certified by the solicitor of the complainants, be served upon the defendant, The Automobile Insurance Company of Hartford, Connecticut, either personally or upon its solicitor, within five days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

R. H. INGERSOLL,
V. C.

A true copy.

ALBERT A. F. MCGEE,
Sol. of Complainants.

Complaint.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainants, Sarah Conway, individually, and Sarah Conway, executrix of the estate of James F. Conway, deceased, of the City of Ventnor City, County of Atlantic and State of New Jersey, respectfully show that:

1. On or about the 28th day of July, 1927, the said James F. Conway departed this life leaving

a last will and testament, dated the 21st day of May, A. D. 1923, which was duly admitted to probate on the 26th day of August, 1927, in the Surrogate's Office of Atlantic County. Said James F. Conway, in and by said last will and testament, appointed Sarah Conway, executrix of his last will and testament. The said executrix, Sarah Conway, qualified and entered into her duties as executrix of the estate of James F. Conway, deceased. The said James F. Conway, deceased, left him surviving as his heirs at law and next of kin, the following: Sarah Conway, widow, James Conway, a son, Mary Gertrude Conway, a daughter, Sarah Conway Conlan, a daughter, James J. Conway, a son, Aloysius Conway, a son, Joseph Conway, a son, and Ignatius Conway, a son, all of whom are of full age.

2. On or about the 24th day of March, 1927, the complainants, and her deceased husband, James F. Conway, were the owners in fee simple, as tenants by the entireties, of the following described tract of land and premises, more particularly described as follows:

> ALL that certain lot, tract or parcel of land and premises, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:—
>
> BEGINNING in the Southerly line of Pacific Avenue, one hundred and fifty feet Westwardly from the Westerly line of Providence Avenue; and extending thence (1) Southwardly, one hundred feet to the Northerly line of a twelve feet wide alley; thence (2) Westwardly, by the Northerly line of said alley, thirty-five feet; thence (3) Northwardly, parallel with Providence Avenue, one hundred feet to the Southerly line of Pacific

Avenue; thence (4) Eastwardly along the Southerly line of Pacific Avenue, thirty-five feet to the place of beginning.

BEING known as 3512 Pacific Avenue, Atlantic City, New Jersey.

Said land and premises were granted and conveyed to the said complainants, Sarah Conway, and her husband, James F. Conway, as in and by said deed of conveyance, dated the 2nd day of March, 1925, duly executed, acknowledged and recorded in the Clerk's Office of Atlantic County, in Book of Deeds # 765, Page # 179 &c., it does more fully appear.

3. Said premises were purchased subject to a mortgage in the sum of Twenty-four Thousand ($24,000) Dollars, executed by Elizabeth Claire Haggenbotham and John, her husband, to Elizabeth M. Lutz Ross, dated the Fifth day of January, 1924, and recorded in the Clerk's Office of Atlantic County, in Book 285 of Mortgages, Page 276 &c. Said mortgage has been reduced to the principal sum of Nineteen Thousand ($19,000) Dollars.

4. Sometime prior to the purchase of the said premises by the complainants and her husband, James F. Conway, and on or about the 7th day of January, 1924, Elizabeth Claire Haggenbotham secured from The Automobile Insurance Company of Hartford, Connecticut, a contract of insurance, being Policy #2278, in the sum of Nineteen Thousand ($19,000) Dollars, and the said Policy was made payable to Elizabeth M. Lutz Ross, as mortgagee. A copy of said policy and endorsements thereon, is attached hereto and marked Exhibit "A". The said policy of insurance was taken out

for the purpose of protecting the mortgage of Nineteen Thousand ($19,000) Dollars, held by Elizabeth M. Lutz Ross, and in view of the fact that the entire amount of the losses, if any were incurred, would be payable to the aforementioned Elizabeth M. Lutz Ross, it remained continuously in her possession. The full premium on said fire insurance policy was paid to The Automobile Insurance Company of Hartford, Connecticut, at or about the time that the said policy was issued, to wit: on or about the 7th day of January, 1924. The aforementioned Elizabeth Claire Haggenbotham conveyed the said property to your complainants and her husband, James F. Conway, as hereinbefore stated, and in accordance with the custom, the said James F. Conway notified the agent of the Automobile Insurance Company of Hartford, Connecticut, that the said Elizabeth Claire Haggenbotham had conveyed her interest in the said property and that said notice was given in accordance with the provisions of the policy and your complainants are advised and therefore aver that said Automobile Insurance Company of Hartford, Connecticut, received actual notice of the transfer of the said property, and that the terms of the said policy had been fully complied with.

5. Your complainants further aver that at the time of the purchase, an adjustment was made by your complainants and her husband, James F. Conway, for the premium of the said policy and that after said settlement, the said policy of insurance continued to remain in the possession of said Elizabeth M. Lutz Ross, as mortgagee, and continued so to remain up until the time of the matters hereinafter complained of.

6. Sometime thereafter, and prior to the 24th day of March, 1927, the complainants and her hus-

band, James F. Conway, contracted with the National Liberty Insurance Company of America, for two policies of insurance on the hereinabove described premises in the name of the complainant, Sarah Conway, and her husband, James F. Conway, one policy being #1303, in the sum of Seventy-five Hundred ($7500) Dollars, and another policy #1225, in the sum of Twenty Thousand ($20,000) Dollars, making a total sum of Twenty-seven Thousand, Five Hundred ($27,500) Dollars. The premiums on these policies were paid and the same remained in force and effect up to March 24th, 1927, and thereafter.

7. The defendant and the National Liberty Insurance Company of America, held between them, fire insurance contracts on the aforesaid premises, totalling the sum of Forty-six Thousand, Five Hundred ($46,500) Dollars.

8. On or about the 24th day of March, 1927, a fire occurred at the within described premises, known as 3512 Pacific Avenue, Atlantic City, New Jersey, and the damage thereto was estimated at the sum of Twenty Thousand, One Hundred Ninety-two Dollars and Ninety Cents ($20,192.90). Thereafter the necessary proofs of loss, according to the terms of the policies of both Insurance Companies who carried insurance on the aforesaid premises, to wit: the defendant, and the National Liberty Insurance Company of America, were duly filed by one of the complainants, Sarah Conway, with the said Insurance Companies.

9. On or about the 31st day of January, 1928, Sarah Conway, as nominal plaintiff, joined with Elizabeth M. Lutz Ross as a real plaintiff and instituted a suit against The Automobile Insurance Company of Hartford, Connecticut, in the

Supreme Court of the State of New Jersey. The said proceedings were removed from the Supreme Court of the State of New Jersey to the District Court of the United States for the District of New Jersey. On or about the 4th or 5th days of December, 1928, the said case was tried before His Honor Judge William Clark and resulted in a directed verdict in favor of the mortgagee, Elizabeth M. Lutz Ross, against the Automobile Insurance Company of Hartford, Connecticut, in the sum of Nineteen Thousand ($19,000) Dollars; and in further view of the fact that the full sum of Nineteen Thousand ($19,000) Dollars was payable to the said Elizabeth M. Lutz Ross, as mortgagee, in accordance with the mortgagee clause of the said policy, as reference to said policy hereto attached will indicate.

It was agreed that a non-suit should be entered as to Sarah Conway, nominal plaintiff, because of the fact of the said Sarah Conway, complainant, having no interest in the aforementioned sum of Nineteen Thousand ($19,000) Dollars. Your complainant, Sarah Conway, avers that at the trial of the said cause, no testimony was introduced by the defendant to indicate that they had any defense against the said Sarah Conway, as mortgagor, and no evidence of any kind was introduced to indicate that any attempt would be made to deny any liability as far as your complainant, Sarah Conway, was concerned. Your complainant, Sarah Conway, has been advised and therefore avers that said suit should have been instituted in the name of Elizabeth M. Lutz Ross only.

Your complainant, Sarah Conway, further avers that on or about the date that suit was instituted against the defendant, a suit was insti-

tuted by your complainant, Sarah Conway, in her own name, against the National Liberty Insurance Company of America, in the Supreme Court of this State, and the said proceedings were removed from the Supreme Court of this State to the District Court of the United States for the District of New Jersey, and the said case was tried at the same time that the action against the defendant was tried, and resulted in a disagreement of the jury, necessitating another trial on the 5th, 6th and 7th days of March, 1929, which case was tried before His Honor, Judge Guy L. Fake, and resulted in a verdict for Sarah Conway, in the sum of Twenty Thousand, One Hundred Ninety-two Dollars and Ninety Cents ($20,192.90).

10. The said National Liberty Insurance Company of America, in spite of said verdict, paid only the sum of Eleven Thousand, Five Hundred Thirty-two Dollars and Two Cents ($11,532.02) on account of the pro rata clause contained in said policy reading as follows:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto."

and the said National Liberty Insurance Company of America claimed that the balance of the verdict, to wit: the sum of Eight Thousand Two

Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), was a proportionate sum which was due and owing from the Automobile Insurance Company of Hartford, Connecticut, under its said policy and for its pro rata share of this fire loss. On account of this pro rata clause, your complainant, Sarah Conway, was compelled to accept from the National Liberty Insurance Company of America, the sum of Eleven Thousand, Five Hundred Thirty-two Dollars and Two Cents ($11,532.02), leaving a balance due from the defendant, in the sum of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88). A demand was made of The Automobile Insurance Company of Hartford, Connecticut, for the said sum, but the said Company refused and still refuses to pay the said sum or any part thereof; and thereafter the said Automobile Insurance Company of Hartford, Connecticut, without the consent of your complainant, Sarah Conway, paid to Elizabeth M. Lutz Ross, the sum of Nineteen Thousand ($19,000) Dollars, and secured from her an assignment of the aforesaid mortgage of Nineteen Thousand ($19,000) Dollars, secured upon your complainant's premises, and as hereinafter more fully set forth, instituted foreclosure proceedings, in spite of a tender made upon the defendant herein of the balance due it, and a demand for the satisfaction of the mortgage as hereinafter more fully set forth.

11. Your complainants further aver that by paying Elizabeth M. Lutz Ross and taking said assignment, the defendant was bound under the said contract of insurance, to recognize the rights of your complainants thereunder and to give proper credit to your complainants for their interest.

12. Your complainants further aver that James F. Conway died on or about the 28th day of July, 1927, several months after the fire loss took place at the aforesaid premises; and your complainants further aver that all the terms of the insurance contract with the defendant have been complied with, and that the assignment hereinbefore mentioned of the mortgage on the said property, was taken for the purpose of instituting foreclosure proceedings and evading the payment by The Automobile Insurance Company of Hartford, Connecticut, of the amount due from it to the complainants.

13. Because of the recovery of a judgment in the sum of Twenty Thousand, One Hundred Ninety-two Dollars and Fifty Cents ($20,192.50), by your complainant, Sarah Conway, against the National Liberty Insurance Company of America, and since the payment by the said Company of the sum of Eleven Thousand, Eight Hundred Thirty-two Dollars and Two Cents ($11,832.02), there is due from the said defendant, a definite balance of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), for the reason that the said contract of The Automobile Insurance Company of Hartford, Connecticut, contains the following clause:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property, * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto."

because of which the complainant, Sarah Conway, could not collect any sum greater or less than the balance, to wit: Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88).

14. On or about the 7th day of September, 1929, the mortgagee, Elizabeth M. Lutz Ross, assigned the bond and mortgage in the sum of Nineteen Thousand ($19,000) Dollars, which she held against the said premises located at 3512 Pacific Avenue, Atlantic City, New Jersey, to the defendant. This assignment was without the consent of your complainants, and the defendant took this assignment knowing full well that it could recover the aforementioned sum of Nineteen Thousand ($19,000) Dollars from your complainants, in view of the fact that the value of the said property was considerably in excess of the mortgage of Nineteen Thousand ($19,000) Dollars.

15. On or about September 14th, 1929, defendant filed a bill in this Honorable Court for the purpose of foreclosing the said bond and mortgage of Nineteen Thousand ($19,000) Dollars, on the aforesaid premises, in spite of the tender made by the complainants herein, of the balance due the said defendant company.

16. Prior to the foreclosure proceedings and at various times thereafter, the complainants tendered to the defendants the sum of Ten Thousand, Seven Hundred Forty-nine Dollars and Twelve Cents ($10,749.12), with interest, for the purpose of securing a cancellation of the said mortgage, and has demanded that the said bond and mortgage should be delivered up to them to be cancelled and voided upon the payment of the said sum, the complainants claiming credit for the balance due them of Eight Thousand, Two Hundred

Fifty Dollars and Eighty-eight Cents ($8,250.88), under and by virtue of the contract of insurance entered into with the defendant, the aforesaid Automobile Insurance Company. The defendant refuses to surrender the said securities for cancellation and insists upon all the benefits of the aforesaid bond and mortgage, and continues its proceedings in this Honorable Court. The reason the said defendant refuses to accept the sum tendered is to evade the payment of the sum of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), due the complainants from the defendant. Your complainants aver, by taking an assignment of the said mortgage and by foreclosing on the said mortgage, the defendant will have received back the sum of Nineteen Thousand ($19,000) Dollars, advanced by it to Elizabeth M. Lutz Ross, and will make absolutely no payment to your complainants herein, in spite of the fact that the said policy of insurance was for the benefit, not only of the mortgagee, but also for the benefit of your complainants; and in spite of the fact that the pro rata clause hereinbefore mentioned, places upon the defendant the duty to pay under the contract, its proportionate share to your complainants; and in spite of the fact that at no time has the defendant shown that the complainants herein were not justly entitled to the proceeds of the policy, in accordance with the terms thereof.

17. Because of the proceedings under the bill for the foreclosure of the aforesaid bond and mortgage, and also for the further reason that the defendant will not account to the complainants for the amount due on said contract of insurance, the complainants will suffer an irreparable loss

and damage, because of the fraudulent withholding of the payment of its pro rata share of the fire loss, to wit: the sum of Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88).

18. The complainants contend that the defendant should allow them a credit of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88) and that the defendant should accept the aforementioned sum of Ten Thousand, Seven Hundred Forty-nine Dollars and Twelve Cents ($10,749.12), being the tender made to it, and cancel said bond and mortgage.

Complainants, being without adequate remedy at law, therefore pray:

1. That the defendant, Automobile Insurance Company of Hartford, Connecticut, a corporation of the State of Connecticut, may answer each and every allegation of this complaint.

2. That the defendant, Automobile Insurance Company of Hartford, Connecticut, and its president and directors be enjoined and restrained from proceeding with the foreclosure of the mortgage in the sum of Nineteen Thousand ($19,000) Dollars on the premises located at 3512 Pacific Avenue, Atlantic City, New Jersey, until the final determination of this proceeding.

3. That the president, directors and Company of the defendant Company, may be ordered and directed to surrender the said bond and mortgage, properly endorsed for cancellation, to the complainants, upon the payment of the sum of Ten Thousand, Seven Hundred Forty-nine Dollars and Twelve Cents ($10,749.12), less the accrued interest on Eight Thousand, Two Hundred Fifty

Dollars and Eighty-eight Cents ($8,250.88) from March 24th, 1927.

4. That a decree may be made directing the defendants, Automobile Insurance Company of Hartford, Connecticut, its president and directors, to deliver up for cancellation, the bond and mortgage on the said premises located at 3512 Pacific Avenue, Atlantic City, New Jersey, and that said bond and mortgage may be decreed to be cancelled of record and be no longer a lien upon the premises therein described against the said complaniants, or any person or person claiming by, from or under same, and that the said decree may direct the said defendant to dismiss the proceeding now pending in the Court of Chancery for the foreclosure of the said bond and mortgage.

5. That the defendant, Automobile Insurance Company of Hartford, Connecticut, may be decreed to account to the complainants for all monies, interest and costs that may be found to be due the complainants from the defendant, and that the said defendant be further decreed to pay to the complainants such sum or sums of money that may be found due them.

6. That the complainants may have such further and other relief as may be equitable and just.

7. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

ALBERT A. F. MCGEE,
Solicitor for and of Counsel
with Complainants.

A true copy.

ALBERT A. F. MCGEE,
Solicitor of Complainants.

Affidavit of Sarah Conway.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } ss.:

SARAH CONWAY, of full age, being duly sworn upon her oath, according to law, deposes and says that:

1. I am the complainants mentioned in the above entitled cause, namely, Sarah Conway, individually, and Sarah Conway, executrix of the estate of James F. Conway, deceased.

2. On or about the 28th day of July, 1927, the said James F. Conway departed this life leaving a last will and testament, dated the 21st day of May, A. D. 1923, which was duly probated on the 26th day of August, 1927, in the Surrogate's Office of Atlantic County. Said James F. Conway, in and by his last will and testament, appointed me as executrix thereof. I qualified and entered into my duties as executrix of the estate of James F. Conway, deceased. The said James F. Conway, deceased, left him surviving as his heirs at law and next of kin the following: myself, widow, James Conway, a son, Mary Gertrude Conway, a daughter, Sarah Conway Conlan, a daughter, James J. Conway, a son, Aloysius Conway, a son, Joseph Conway, a son, and Ignatius Conway, a son, all of whom are of full age.

3. On or about the 24th day of March, 1927, I and my deceased husband, James F. Conway, were the owners in fee simple, as tenants by the entireties, of the following described tract of land and premises, more particularly described as follows:

ALL that certain lot, tract or parcel of land and premises, situate, lying and being in the

City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING in the Southerly line of Pacific Avenue, one hundred and fifty feet Westwardly from the Westerly line of Providence Avenue; and extending thence (1) Southwardly, one hundred feet to the Northerly line of a twelve feet wide alley; thence (2) Westwardly, by the Northerly line of said alley, thirty-five feet; thence (3) Northwardly, parallel with Providence Avenue, one hundred feet to the Southerly line of Pacific Avenue; thence (4) Eastwardly, along the Southerly line of Pacific Avenue, thirty-five feet to the place of beginning.

BEING known as 3512 Pacific Avenue, Atlantic City, New Jersey.

Said land and premises were granted and conveyed to me and my husband, James F. Conway, as in and by said deed of conveyance, duly executed, acknowledged and recorded in the Clerk's Office of Atlantic County, in Book of Deeds #765, Page #179, &c., it does more fully appear, being dated March 2nd, 1925.

3 (a). Said premises were purchased subject to a mortgage in the sum of Twenty-four Thousand ($24,000) Dollars, executed by Elizabeth Claire Haggenbotham and John, her husband, to Elizabeth M. Lutz Ross, dated the Fifth day of January, 1924, and recorded in the Clerk's Office of Atlantic County, in Book 285 of Mortgages, Page 276, &c. Said mortgage has been reduced to the principal sum of Nineteen Thousand ($19,000) Dollars.

4. Some time prior to the purchase of the said premises by me and my husband, James F. Con-

way, and on or about the 7th day of January, 1924, Elizabeth Claire Haggenbotham secured from The Automobile Insurance Company of Hartford, Connecticut, a contract of insurance, being Policy #2278, in the sum of Nineteen Thousand ($19,000) Dollars, and the said Policy was made payable to Elizabeth M. Lutz Ross, as mortgagee. A copy of said policy and endorsements thereon is attached hereto and marked Exhibit "A". The said policy of insurance was taken out for the purpose of protecting the mortgage of Nineteen Thousand ($19,000) Dollars, held by Elizabeth M. Lutz Ross, and in view of the fact that the entire amount of the losses, if any were incurred, would be payable to the aforementioned Elizabeth M. Lutz Ross, it remained continuously in her possession. The full premium on said fire insurance policy was paid to the Automobile Insurance Company of Hartford, Connecticut, at or about the time that the said policy was issued, to wit: on or about the 7th day of January, 1924. The aforesaid Elizabeth Claire Haggenbotham conveyed the said property to me and my husband, James F. Conway, as hereinbefore stated; and in accordance with the custom, the said James F. Conway notified the agent of the Automobile Insurance Company of Hartford, Connecticut, that the said Elizabeth Claire Haggenbotham had conveyed her interest in the said property and that said notice was given in accordance with the provisions of the policy and I am advised and therefore aver that said Automobile Insurance Company of Hartford, Connecticut, received actual notice of the transfer of the said property, and that the terms of the said policy had been fully complied with.

5. I further aver that at the time of the purchase, an adjustment was made by me and my husband, James F. Conway, for the premium of the said policy and that after said settlement, the said policy of insurance continued to remain in the possession of said Elizabeth M. Lutz Ross, as mortgagee, and continued so to remain up until the time of the matters hereinafter complained of.

6. Some time thereafter, and prior to the 24th day of March, 1927, I and my husband, James F. Conway, contracted with the National Liberty Insurance Company of America, for two policies of insurance on the hereinabove described premises in the name of the said James F. Conway, and myself, one policy being #1303 in the sum of Seventy-five Hundred ($7500) Dollars, and another policy #1225, in the sum of Twenty Thousand ($20,000) Dollars, making a total sum of Twenty-seven Thousand, Five Hundred ($27,500) Dollars. The premiums on these policies were paid and the same remained in force and effect up to March 24th, 1927, and thereafter.

7. The defendant and the National Liberty Insurance Company of America, held between them, fire insurance contracts on the aforesaid premises, totalling the sum of Forty-six Thousand Five Hundred ($46,500) Dollars.

8. On or about the 24th day of March, 1927, a fire occurred at the within described premises, known as 3512 Pacific Avenue, Atlantic City, New Jersey, and the damage thereto was estimated at the sum of Twenty Thousand, One Hundred Ninety-two Dollars and Ninety Cents ($20,192.90). Thereafter the necessary proofs of loss, according to the terms of the policies of both Insurance Companies who carried insurance on the afore-

said premises, to wit: the defendant, and the National Liberty Insurance Company of America, were duly filed by me, in my own name, with the said Insurance Companies.

9. On or about the 31st day of January, 1928, I, as nominal plaintiff, joined with Elizabeth M. Lutz Ross as real plaintiff and instituted a suit against The Automobile Insurance Company of Hartford, Connecticut, in the Supreme Court of the State of New Jersey. The said proceedings were removed from the Supreme Court of the State of New Jersey to the District Court of the United States for the District of New Jersey. On or about the 4th or 5th day of December, 1928, the said case was tried before His Honor Judge William Clark and resulted in a directed verdict in favor of the mortgagee, Elizabeth M. Lutz Ross, against the Automobile Insurance Company of Hartford, Connecticut, in the sum of Nineteen Thousand ($19,000) Dollars; and in further view of the fact that the full sum of Nineteen Thousand ($19,000) Dollars was payable to the said Elizabeth M. Lutz Ross, as mortgagee, in accordance with the mortgagee clause of the said policy, as reference to said policy hereto attached will indicate.

It was agreed that a non-suit should be entered as to me, nominal plaintiff, because of the fact of my having no interest in the aforementioned sum of Nineteen Thousand ($19,000) Dollars. I aver that at the trial of the said cause, no testimony was introduced by the defendant to indicate that they had any defense against me, as mortgagor, and no evidence of any kind was introduced to indicate that any attempt would be made to deny any liability as far as I was concerned. I have been advised and therefore aver that said suit

should have been instituted in the name of Elizabeth M. Lutz Ross only.

I further aver that on or about the date that suit was instituted against the defendant, a suit was instituted in my own name, against the National Liberty Insurance Company of America, in the Supreme Court of this State, and the said proceedings were removed from the Supreme Court of this State to the District Court of the United States for the District of New Jersey, and the said case was tried at the same time that the action against the defendant was tried, and resulted in a disagreement of the Jury, necessitating another trial on the 5th, 6th and 7th days of March, 1929, which case was tried before His Honor, Judge Guy L. Fake, and resulted in a verdict for me in the sum of Twenty Thousand, One Hundred Ninety-two Dollars and Ninety Cents ($20,192.90).

10. The said National Liberty Insurance Company of America, in spite of said verdict, paid only the sum of Eleven Thousand, Five Hundred Thirty-two Dollars and Two Cents ($11,532.02) on account of the pro rata clause contained in said policy reading as follows:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto".

And the said National Liberty Insurance Company of America claimed that the balance of the verdict, to wit: the sum of Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), was a proportionate sum which was due and owing from the Automobile Insurance Company of Hartford, Connecticut, under its said policy and for its pro rata share of this fire loss. On account of this pro rata clause, your complainant, the affiant herein, was compelled to accept from the National Liberty Insurance Company of America, the sum of Eleven Thousand, Five Hundred Thirty-two Dollars and Two Cents ($11,532.02), leaving a balance due from the defendant, in the sum of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88). A demand was made of The Automobile Insurance Company of Hartford, Connecticut, for the said sum, but the said Company refused and still refuses to pay the said sum or any part thereof; and thereafter the said Automobile Insurance Company of Hartford, Connecticut, without my consent, paid to Elizabeth M. Lutz Ross, the sum of Nineteen Thousand ($19,000) Dollars, and secured from her an assignment of the aforesaid mortgage of Nineteen Thousand ($19,000) Dollars, secured upon the premises hereinbefore described, and as hereinafter more fully set forth, instituted foreclosure proceedings in spite of a tender made upon the defendant herein of the balance due it, and a demand for the satisfaction of the mortgage as hereinafter more fully set forth.

11. I further aver that by paying Elizabeth M. Lutz Ross and taking said assignment, the defendant was bound under the said contract of insurance, to recognize the rights of your com-

plainant, and affiant herein, thereunder and to give proper credit to me for my interest.

12. I further aver that James F. Conway died on or about the 28th day of July, 1927, several months after the fire loss took place at the aforesaid premises; and I further aver that all the terms of the insurance contract with the defendant have been complied with, and that the assignment hereinbefore mentioned of the mortgage on the said property, was taken for the purpose of instituting foreclosure proceedings and evading the payment by The Automobile Insurance Company of Hartford, Connecticut, of the amount due from it to me.

13. Because of the recovery of a judgment in the sum of Twenty Thousand, One Hundred Ninety-two Dollars and Fifty Cents ($20,192.50) by me against the National Liberty Insurance Company of America, and since the payment by the said company of the sum of Eleven Thousand, Eight Hundred Thirty-two Dollars and Two Cents ($11,832.02), there is due from the said defendant, a definite balance of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), for the reason that the said contract of The Automobile Insurance Company of Hartford, Connecticut, contains the following clause:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property, ... than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or

condition written hereon or attached or appended hereto."

because of which, I could not collect any sum greater or less than the balance, to wit: Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88).

14. On or about the 7th day of September, 1929, the mortgagee, Elizabeth M. Lutz Ross, assigned the bond and mortgage in the sum of Nineteen Thousand ($19,000) Dollars, which she held against the said premises located at 3512 Pacific Avenue, Atlantic City, New Jersey, to the defendant. This assignment was without my consent, and the defendant took this assignment knowing full well that it could recover the aforementioned sum of Nineteen Thousand ($19,000) Dollars from me, in view of the fact that the value of the said property was considerably in excess of the mortgage of Nineteen Thousand ($19,000) Dollars.

15. On or about September 14th, 1929, defendant filed a bill in this Honorable Court for the purpose of foreclosing the said bond and mortgage of Nineteen Thousand ($19,000) Dollars, on the aforesaid premises, in spite of the tender made by me herein, of the balance due the said defendant company.

16. Prior to the foreclosure proceedings, and at various times thereafter, I tendered to the defendant the sum of Ten Thousand, Seven Hundred Forty-nine Dollars and Twelve Cents ($10,749.12), with interest, for the purpose of securing a cancellation of the said mortgage, and have demanded that the said bond and mortgage should be delivered up to me to be cancelled and voided upon the payment of the said sum, I claiming

credit for the balance due me of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), under and by virtue of the contract of insurance entered into with the defendant, the aforesaid Automobile Insurance Company. The defendant refuses to surrender the said securities for cancellation and insists upon all the benefits of the aforesaid bond and mortgage, and continues its proceeding in this Honorable Court. The reason the said defendant refuses to accept the sum tendered is to evade the payment of the sum of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), due me from the defendant. I aver, by taking an assignment of the said mortgage and by foreclosing on the same, the defendant will have received back the sum of Nineteen Thousand ($19,000) Dollars, advanced by it to Elizabeth M. Lutz Ross, and will make absolutely no payment to me, in spite of the fact that the said policy of insurance was for the benefit, not only of the mortgagee, but also for my benefit; and in spite of the fact that the pro rata clause hereinbefore mentioned places upon the defendant the duty to pay under the contract its proportionate share to me; and in spite of the fact that at no time has the defendant shown that I was not justly entitled to the proceeds of the policy, in accordance with the terms thereof.

17. Because of the proceedings under the bill for the foreclosure of the aforesaid bond and mortgage, and also for the further reason that the defendant will not account to me for the amount due on said contract of insurance, I will suffer an irreparable loss and damage, because of the fraudulent withholding of the payment of its pro rata share of the fire loss, to wit: the sum

of Eight Thousand Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88).

18. I contend that the defendant should allow me a credit of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), and that the defendant should accept the aforementioned sum of Ten Thousand Seven Hundred Forty-nine Dollars and Twelve Cents ($10,749.12), being the tender made to it, and cancel said bond and mortgage.

SARAH CONWAY.

Sworn to and subscribed before me this 16th day of April, A. D. 1930.

ELEANOR CAMPBELL,
Notary Public of New Jersey.

A true copy.

ALBERT A. F. McGEE,
Solicitor of Complainants.

Exhibit A.

3-1-25.

ELIZABETH CLAVE HAGGENBOTHAM.

JAMES F. CONWAY is hereafter recognized as assured and owner of the property covered under this policy, subject nevertheless to all the terms and conditions herein contained.

Attached to and forming part of policy ♯2278 AUTOMOBILE INSURANCE COMPANY of Hartford, Conn.

R. SASLAFF,
Agents.

Exhibit A.

No. 2278

THE AUTOMOBILE INSURANCE COMPANY

OF HARTFORD CONNECTICUT

Amount, $19,000:— Premium, $226.10.

Rate 1.40—15%

In Consideration of the Stipulations herein named and of Two Hundred Twenty-six and 10/100 Dollars Premium, does insure ELIZABETH CLAVE HAGGENBOTHAM for the term of Five Years from the 7th day of January, 1924, at noon, to the 7th day of January, 1929, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Nineteen Thousand and 00/100 Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

ELIZABETH CLAVE HAGGENBOTHAM.

$19,000:—On the brick and frame building and additions adjoining and communicating, foundations, extensions and connections thereto with railings, fences and all permanent fixtures contained in or belonging to same; glass of every description, in doors and windows, wall and ceiling decorations, steam, gas and water pipes, heating, plumbing, gas fitting, lighting, ventilating and electrical apparatus; also to cover on all appurtenances and appliances to said building while occupied exclusively for dwelling purposes by not exceeding two families.

Situate #3512 Pacific Avenue, Atlantic City, N. J.

IT IS UNDERSTOOD AND AGREED: That contracts of sale may be executed or delivered, foreclosure pro-

ceedings instituted, or that above buildings may stand on leased ground without prejudice to this insurance.

That this insurance covers awnings, doors and window screens and storm doors and windows, while attached to above described building, or while stored in any building upon the above described premises.

PRIVILEGES GRANTED: To remain unoccupied a portion of each year;

To effect other insurance without notice until required;

To make additions, alterations and repairs, same to be covered hereunder.

To use not exceeding one quart of gasoline, naphtha or benzine for domestic purposes in each housekeeping apartment.

To do such work and use such materials, articles and supplies as are usual to the business of any tenant or tenants of this building.

To remain vacant during any change of tenants or while awaiting a tenant, not exceeding six consecutive months at any one time in any one year;

To use steam, hot water, coal stoves, hot-air furnaces or grates, gas, kerosene oil and electricity for light, heat, cooking and power (kerosene oil lamps and stoves to be filled and trimmed by daylight only).

Loss, if any, payable to Elizabeth M. Lutz, as mortgagee interest may appear.

N. J. Standard Mortgagee clause without full contribution attached.

DYNAMO CLAUSE.—If dynamos, exciters, lamps, motors, switches or other electrical appliances or devices are covered under this policy, this company shall not be liable for any electrical injury or

disturbance, whether from artificial or natural causes, unless fire ensues, and then for loss by fire only.

Electrical Clause.—Permission is granted under this policy for the use of electric current when certificate has been issued by the City Electrical Inspectors, or by the Underwriters' Association of the Middle Department, and while the condition of same is maintained.

Lightning Clause (New Jersey Standard).—This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property, this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not.

Attached to and made part of Policy No. 2278 Automobile Insurance Company.

R. Saslaff
Agent

Aetna Service Office
Guarantee Trust Bldg.
Atlantic City, N. J.

DWG. 6-1-22-1000
N. Y., N. J., CONN., N. C. AND R. I. STANDARD

Exhibit A.

MORTGAGEE CLAUSE.

Loss or damage, if any, under this policy, shall be payable to Elizabeth M. Lutz as mortgagee [or trustee] as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; PROVIDED, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

PROVIDED also, that the mortgagee [or trustee] shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of the said mortgagee [or trustee] and unless permitted by this policy, it shall be noted thereon and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee [or trustee] any sum for loss or damage

under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may as its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of her claim.

Dated January 8, 1924.

Attached to and forming part of policy No. 2278 of

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT.

R. SASLAFF for Company.

Agency at Atlantic City, N. J.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or rep-

resentative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS POLICY.—This policy is in a stock corporation.

IN WITNESS WHEREOF, this company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized manager or agent of the company at Atlantic City, N. J.

J. W. BARDEN
Secretary.

M. B. BRAINARD
President

Countersigned at Atlantic City, N. J.
this 8th day of January, 1924.

R. SASLAFF
Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having

been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within de-

scribed premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection,

riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

Exhibit A.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such

new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured)

living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

Exhibit A.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Whenever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage".

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Exhibit A.

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONN.

MORGAN B. BRAINARD, President

[ENDORSEMENT]

STANDARD FIRE INSURANCE POLICY OF THE STATES OF CONNECTICUT, NEW JERSEY, RHODE ISLAND AND IDAHO.

Expires January 7th 1929.
Bldg.
Property #3512 Pacific Ave.
Amount, . . $19,000.—
Premium, . . $226.10.

ELIZABETH CLAVE HAGGENBOTHAM.

No. 2278
Agency No. N. J.-256

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD CONNECTICUT
AETNA
LIFE

AETNA SERVICE OFFICE,
308-309 Guarantee Trust Building,
Atlantic City, N. J.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

Notice.

IN CHANCERY OF NEW JERSEY.

Between SARAH CONWAY, individually, and SARAH CONWAY, Executrix of the Estate of James F. Conway, Deceased, Complainant, *and* THE AUTOMOBILE INSURANCE COMPANY, of Hartford, Connecticut, a corporation of the State of Connecticut, Defendant.	On Bill, &c. Notice.

To: Albert A. F. McGee, Esq., Solicitor of Complainant.

SIR:

TAKE NOTICE that on Tuesday, April 29, 1930, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the Chancellor at the Chancery Chambers, Atlantic City, New Jersey, for an order,

(1) That Sarah Conway, individually, be dropped as a party complainant, because she is improperly joined as such party in that she has no interest in the cause of action set forth in the bill of complaint.

(2) That the allegations of the third paragraph of the paragraph numbered 9 of the bill of complaint be stricken out because impertinent.

Notice.

(3) That the allegations of paragraph 10 be stricken out because impertinent.

(4) That said bill of complaint be dismissed because complainant's remedy at law is adequate and complete.

(5) That said bill of complaint be dismissed because it does not state a cause of action within the jurisdiction of this court.

(6) That said bill of complaint be dismissed because there is no equity in said bill.

(7) That said bill of complaint be dismissed because it appears therefrom that the interest of the assured, James F. Conway, was not sole and unconditional as required by the terms of the policy made a part of the bill of complaint.

(8) That said bill of complaint be dismissed because suit has not been started within twelve months as required by the provisions of said policy.

(9) That said bill of complaint be dismissed because there was a change of interest, title and possession contrary to the terms of said policy.

ARTHUR T. VANDERBILT,
Solicitor of Defendant.

Service of a copy of the within Notice of Motion is hereby acknowledged this 22nd day of April, 1930.

ALBERT A. F. MCGEE,
Solicitor for Complainants.

Final Decree.

IN CHANCERY OF NEW JERSEY.

Between

SARAH CONWAY, individually, and SARAH CONWAY, executrix of the Estate of James F. Conway, deceased,

Complainants,

and

THE AUTOMOBILE INSURANCE COMPANY, a corporation of the State of Connecticut,

Defendant.

On Bill, etc.
Final Decree.

This cause coming on to be heard in the presence of Albert A. F. McGee, solicitor for the complainants, and Arthur T. Vanderbilt, solicitor for the defendant, and the Court having examined the pleadings and having taken proofs orally in open court, and having heard and considered the arguments of counsel thereon;

And it appearing to the satisfaction of the Court that the complainants are entitled to the relief prayed for by them;

It is on this 15th day of August, 1930, ORDERED, ADJUDGED and DECREED that the said complainants be allowed a credit of Eight Thousand, Two Hundred Fifty Dollars and Eighty-eight Cents ($8,250.88), with interest thereon to August 14th, 1930, amounting to the sum of One Thousand, Five Hundred Ninety-eight Dollars and Seventy-two

Cents ($1,598.72), making a total of Nine Thousand, Eight Hundred Forty-nine Dollars and Sixty Cents ($9,849.60), on the mortgage owned by the defendant, The Automobile Insurance Company, a corporation of the State of Connecticut, in the principal sum of Nineteen Thousand Dollars ($19,000), with interest thereon amounting to the sum of One Thousand, Two Hundred Sixty-six Dollars and Three Cents ($1,266.03), making a total amount of Twenty Thousand, Two Hundred Sixty-six Dollars and Three Cents ($20,266.03), to August 14th, 1930.

And it is further Ordered, Adjudged and Decreed that the defendant, The Automobile Insurance Company, a corporation of the State of Connecticut, deliver up for cancellation the bond and mortgage on the following described lot, tract or parcel of land and premises, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, more particularly described as follows:

> Beginning in the Southerly line of Pacific Avenue, one hundred fifty feet West from the Westerly line of Providence Avenue; thence extending, (1) Southwardly, one hundred feet to the Northerly line of a twelve feet wide alley; thence (2) Westwardly, by the Northerly line of said alley thirty-five feet; thence (3) Northwardly, parallel with Providence Avenue, one hundred feet to the Southerly line of Pacific Avenue; thence (4) Eastwardly along the Southerly line of Pacific Avenue, thirty-five feet to the place of beginning.
>
> Being known as 3512 Pacific Avenue, Atlantic City, New Jersey.

upon the payment by the complainants to the defendant of the sum of Ten Thousand, Four Hun-

dred Sixteen Dollars and Forty-three Cents ($10,416.43), with interest thereon from August 14th, 1930;

And it is further Ordered that the said defendant, The Automobile Insurance Company, a corporation of the State of Connecticut, pay to the complainants the costs of this suit to be taxed.

ROBERT H. INGERSOLL,
V. C.

Conclusions.

IN CHANCERY OF NEW JERSEY.

Between

THE AUTOMOBILE INSURANCE COMPANY, a corporation of the State of Connecticut,
Complainant,

and

SARAH CONWAY,
Defendant.

On Bill, &c.
Conclusions.
(Not for Print.)

These conclusions are also dispositive of the case of *Conway* v. *Automobile Insurance Co.*, Docket 78, page 428, which case was heard on the same day.

Appearances:

Mr. ARTHUR T. VANDERBILT for Complainant.
Mr. ALBERT A. F. MCGEE for Defendant.

Conclusions.

INGERSOLL, V. C.

On the 7th day of January, 1924, The Automobile Insurance Company of Hartford, Connecticut, insured the premises known as 3512 Pacific Avenue, Atlantic City, New Jersey, against loss by fire, to the amount of $19,000.00, said policy being the standard fire insurance policy under the State of New Jersey and others.

One Elizabeth M. Lutz held a mortgage of $19,000.00 upon said premises, and the policy contained a New Jersey standard mortgage clause that "loss or damage, if any, under this policy, shall be payable to Elizabeth M. Lutz (whose name is now Elizabeth M. Lutz Ross) as mortgagee, as interest may appear".

On the 2nd day of March, 1925, said lands and premises were conveyed by Elizabeth Clair Haggenbotham and her husband to the said Sarah Conway and her husband, James F. Conway, subject to the operation of the mortgage above referred to in the sum of $19,000.00

There appears attached to the policy of insurance an endorsement as follows: "Elizabeth Clave Haggenbotham 3-1-25. James F. Conway is hereafter recognized as assured and owner of the property covered under this policy, subject nevertheless to all the terms and conditions herein contained. Attached to and forming part of policy #2278 Automobile Insurance Company of Hartford, Conn. R. Saslaff, Agents."

It will be noted that the original policy, after the signatures of the president and secretary, reads: "Countersigned at Atlantic City, N. J. this 8th day of January, 1924, R. Saslaff, Agent."

Some time after said purchase and prior to the 24th day of March, 1927, policies were taken out on the said premises in the name of the complain-

ant, Sarah Conway, and her husband, James F. Conway, one policy being #1303 of the National Liberty Insurance Company of America, in the sum of $7500.00 and another policy #1225 in the same company in the sum of $20,000.00, a total amount of insurance in the three policies of $46,500.00.

On or about the 24th day of March, 1927, a fire occurred in the premises known as 3512 Pacific Avenue, and the damage was estimated at the sum of $20,192.90. By reason of the clauses in each of the said policies, which read that "this company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto".

The National Liberty Insurance Company of America paid over to the owners the sum of $11,-532.02 and the Automobile Insurance Company of Hartford, Connecticut, should be responsible for the balance of $8,250.88. The Automobile Insurance Company of Hartford, Connecticut, paid to the said Elizabeth M. Lutz (now Elizabeth M. Lutz Ross) the amount due upon the mortgage held by her amounting to $19,000.00, and took from the said Elizabeth M. Lutz Ross an assignment of said mortgage, which mortgage it is now attempting to foreclose, claiming that they are subrogated to the rights of the said Ross and that

inasmuch as James F. Conway was not the owner in fee of the premises, being only a tenant in the entirety, that no amount is due to him from the insurance company.

Although James F. Conway has died since the time of the fire and the payment of $19,000.00 plus has been made by the insurance company to the mortgagee and an assignment taken thereof, $8,250.88 was the amount of enforceable loss to be credited to Conway, he having an insurable interest in the land.

Quoting from the brief of the defendant, citing 26 C. J., 582: "Where one of two or more joint owners or owners in common of property insures his interest separately against loss by fire, he is entitled in case of loss to receive and retain the insurance." *Corpus Juris,* however, continues: "In such a case the insurance does not inure to the benefit of the co-tenant." Section 582 *Ibid.*: "A husband and not his wife is entitled to the proceeds of a policy taken out in his favor, notwithstanding she has an interest in the property; and although she in fact owns the property, she cannot, it is held, recover on such a policy." This, of course, is based upon the general rules as to rights to proceeds of a policy, as set out in Paragraph 581, 26 C. J., 434: "As the policy is a personal contract between the insurer and the insured, and not a contract which in any sense runs with the property, the insurance money is generally payable to the person whose interest is covered by the policy, without regard to the nature and extent of his interest in the property, provided he had an insurable interest at the time of making the contract and also at the time of the loss." *Weinberger* v. *Agricultural Insurance Co.,* 80 N. J. L. 202.

Conclusions.

And it can make no difference in equity whether this payment was actually made by the insurance company before or after the death of Mr. Conway for the loss and the responsibility of the insurance company accrued in his life time. The complainant must, therefore, credit upon the said mortgage the sum for which it was responsible to the insured, James F. Conway, at the time of the fire, and a decree will be so advised. Mrs. Conway will, by this method, have received all the full payment for the damages suffered by fire, which was fixed at $20,192.90, by the payment of $11,532.02, the balance due from the National Liberty Insurance Company of America and by the payment on account of the mortgage in the sum of $8,250.88, the proportionate amount due to her husband, James F. Conway, and paid on account of the mortgage.

The act of Mr. and Mrs. Conway in taking out additional insurance immediately reduced the liability of each company proportionately, as provided for in the policies. It will be noted that there is no assignment of the insured's interest in this policy to the Conways, nor to either of them, although there appears the endorsement above quoted.

Justice Van Syckel, in *Millville Mutual Marine and Fire Insurance Company* v. *Mechanics' and Workingmen's Building and Loan Association,* 43 N. J. L., 652, speaking for the Court of Errors and Appeals at page 658, said, after stating the facts and conditions both:

> "In this aspect of the case it is manifest that the insured was justified in drawing the inference that nothing more was necessary to be done on his part to continue the life of the policy. Until notice was given to him to do some

further act, he had a right to rest securely upon the agent's assurance. The company cannot thus lull their policy-holder into a false security, and take advantage of an omission on his part thereby induced, to work a forfeiture of their contract."

The insurance company makes no claim, however, that Saslaff, the agent of the company, exceeded his authority in attaching said clause to the policy, and in the absence of proof it will be assumed that his authority is conceded.