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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

10

FRANK C. EVANS and EMMA
B. EVANS,

Plaintiffs,

v.

THE LONDON ASSURANCE
CORPORATION,

Defendant.

Action at Law.
Notice of Appeal.

20

To Henry M. Evans, Esq., Attorney of Plaintiffs:

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

FRENCH, RICHARDS & BRADLEY,
Attorneys of Defendant.

30

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

10	FRANK C. EVANS and EMMA B. EVANS, <p style="text-align: right;"><i>Plaintiffs,</i></p> <p style="text-align: center;">v.</p> THE LONDON ASSURANCE CORPORATION, <p style="text-align: right;"><i>Defendant.</i></p>	}	Judgment Record. Action at Law. On Postea. Henry M. Evans, Attorney.
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20 The London Assurance Corporation, the defendant in this cause was summoned to answer unto Frank C. Evans and Emma B. Evans the plaintiffs therein in an action at law upon the following complaint:

(Summons issued February 1, 1928.)

COMPLAINT.

30 Plaintiffs, Frank C. Evans and Emma B. Evans, of the Borough of Oaklyn, County of Camden and State of New Jersey, say:

1. On the twentieth day of August, 1923, the defendant, The London Assurance Corporation, of London, England, a foreign corporation authorized to carry on the business of insurance against loss by fire in New Jersey, caused to be made a certain pol-

icy of insurance in writing whereby in consideration of the payment of the sum of twenty-one dollars premium by the plaintiffs, the receipt whereof was thereby acknowledged, the said defendant undertook and promised the said plaintiffs that it, the said defendant, would insure the plaintiffs against loss or damage by fire to the amount of three thousand dollars and would make good to the plaintiffs any such loss or damage as should happen by fire not exceeding the sum of three thousand dollars for the term of five years from August 18, 1923, on and in respect of certain premises then and now the property of the plaintiffs, in the said policy described as a frame building situate 350 Hillside Avenue, Camden, New Jersey, with adjoining and communicating additions and extensions thereto, including the foundations, gas and water pipes and fixtures and apparatus, chandeliers, plumbing and wall decorations and all permanent fixtures as part of the building, including those for heating and lighting, window and door screens, fences and awnings; the said loss and damage to be estimated according to the actual cash value of the said property at the time said loss or damage should happen and to be paid by the said defendant within sixty days after due notice and proof of such loss or damage made by the said plaintiffs in conformity to the conditions of the policy should have been received at the office of the said defendant; and in the said policy sundry provisos, conditions, prohibitions and stipulations were and are contained and were and are thereto annexed, as by the said policy reference being thereunto had, will more fully appear.

2. At the time of the making of the said policy of insurance by the said defendant and at the pres-

ent time the plaintiffs were and are interested in the said insured premises and property in the said policy mentioned and described as aforesaid to a large amount, to wit; in excess of the sum of three thousand dollars.

10 3. That the said premises and property herein-above referred to and in the said policy mentioned and thereby intended to be insured, after the making of the said policy and within the period of five years from August 18, 1923, to wit; on the fifteenth day of September, 1927, were burned and consumed and destroyed by fire, whereby the said plaintiffs then sustained damage and loss to a large amount, to wit: to the amount of more than three thousand dollars, so assured on the said premises and property so burned and consumed.

20 4. Said premises and property in the said policy mentioned and intended to be thereby insured at the time of the making of the said policy were not nor at any time since have been insured in any other company.

30 5. The said premises and property in the said policy mentioned were duly described in the said policy and not otherwise than they really were or so as to cause the said insurance to be effected upon a lower premium than ought to have been.

6. Plaintiffs did, after the said loss and damage, to wit: On or before the eleventh day of November, 1927, give notice in writing of said loss and make due proof of the same to the said defendant as required by the said policy and in conformity with all of the requirements of the said policy and of the statutes applicable thereto.

7. Plaintiffs have in all particulars complied with, performed and observed all of the conditions, provisos, restrictions, terms, prohibitions and stipulations of the said policy on their part to be complied with, performed and observed according to the form and effect of the said policy.

8. Although more than sixty days have elapsed since the notice and proof of the said loss, as aforesaid, the said defendant have not paid nor made good 10 to the plaintiffs the said loss.

9. Defendant, although often requested, has not kept with the said plaintiffs the agreement aforesaid contained in the said policy, but has refused and does refuse to comply therewith.

Plaintiff demands as damages \$3,000, with interest from January 10, 1928.

HENRY M. EVANS,

20

Attorney for Plaintiffs.

(Filed Feb. 15, 1928.)

ANSWER.

The defendant, The London Assurance Corporation, says that:

30

FIRST DEFENSE.

It denies the truth of the matters contained in the complaint.

SECOND DEFENSE.

The policy No. L. U. 6036500 issued by the defendant to plaintiffs contained a provision that said entire policy unless otherwise provided by agreement endorsed thereon or added thereto should be void 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. After the issuance of said policy, to wit, in May, 1927, the plaintiffs agreed in writing to convey to Eugene D. Black the insured premises and plaintiffs received a large part of the purchase price therefor and said Eugene D. Black was by said plaintiffs put into possession of said premises. No agreement to such change either in interest, title or possession was endorsed on said policy or added thereto and the policy became and is void.

THIRD DEFENSE.

After the issuance of said policy and prior to said fire Eugene D. Black became the equitable owner of said premises and went into possession thereof.

FRENCH, RICHARDS & BRADLEY,
Attorneys for Defendant.

30 (Filed Feb. 20, 1928.)

ORDER TO AMEND ANSWER.

This matter being opened to the Court by French, Richards & Bradley, attorneys of the defendant, and it appearing, that at the trial of this case before Honorable Frank B. Jess and a jury on November 28th, 1928 (a juror being thereafter withdrawn) a motion was made to this Court by the said French, Richards & Bradley, attorneys of defendant, to amend the third defense of the defendant's answer filed herein, which motion was held in abeyance by said trial Court and which motion has hereafter been argued by counsel for the respective parties hereto and good cause appearing therefor. 10

It is on this tenth day of August, A. D. 1929, on motion of French, Richards & Bradley, attorneys of the defendant, ordered, that the third defense to defendant's answer be and the same is hereby amended to read as follows: 20

“3. In and by the policy of insurance upon which suit is brought, it is provided *inter alia* as follows:

‘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.’

Defendant is informed, believes and expects to be able to prove at the time of trial, and therefore avers that on September 15, 1927, the plaintiffs herein were not the sole and unconditional owners of the property intended to be insured by the policy upon which suit is brought but that the sole and unconditional owner thereof 30

was one Eugene D. Black and that the said plaintiffs had not on September 15, 1927, any insurable interest in the insured premises.”

It is further ordered, that said amendment of the pleadings herein shall have the same legal force and effect as if said motion had been granted by the Court at the time said motion was made.

FRANK B. JESS,
Judge.

10

Entered August 12, 1929.

On motion of

FRENCH, RICHARDS & BRADLEY,
Attorneys for Defendant.

REPLY.

20 The reply of the plaintiffs to the answer of the defendant is as follows:

REPLY TO SECOND DEFENSE.

1. Plaintiffs say that as to the terms of the said policy they refer to the same.
2. They deny that said Eugene D. Black was put
30 into possession of said premises.
3. They deny that said policy became and is void.

REPLY TO THIRD DEFENSE.

1. They deny the allegations of the third defense.

OBJECTIONS TO SECOND DEFENSE.

Plaintiffs will object at the trial of the above cause, unless the same be sooner disposed of by the Court, that the matters set forth in the second defense of the defendant do not constitute a defense to the action.

10

OBJECTIONS TO THIRD DEFENSE.

Plaintiffs will subject at the trial of the above cause, unless the same be sooner disposed of by the Court, that the matters set forth in the third defense of the defendant do not constitute a defense to the action.

HENRY M. EVANS,
Attorney for the Plaintiffs.

(Filed March 2, 1928.)

20

JUDGMENT.

This cause was tried before Judge Frank B. Jess, November 28, 1928, at the Camden Circuit. The trial was opened with a jury; the jury was withdrawn and the case submitted to the Court for decision without a jury on the evidence already taken and on briefs to be filed. 30

The Court rendered a general verdict on September 16th, 1929, against the defendant and in favor of the plaintiff for the sum of three thousand dollars, with interest from December 27, 1927, amounting to three hundred and thirteen dollars, making a

total of three thousand three hundred and thirteen dollars.

Whereupon it is adjudged that the plaintiffs, Frank C. Evans and Emma B. Evans do recover of the said defendant, The London Assurance Corporation, the sum of three thousand three hundred and thirteen dollars damages together with
 \$3,313.00 their costs which have been taxed at the
 67.62 sum of sixty-seven dollars and sixty-two
 10 ————— cents making in the whole the sum of
 \$3,380.62 three thousand three hundred and eighty
 dollars and sixty-two cents.

Judgment signed and entered October 7, 1929.

WM. S. GUMMERE,
C. J.

I, Fred L. Bloodgood, clerk of the Supreme Court
 20 of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this thirtieth day of December, A. D. nineteen hundred and twenty-nine.

(Seal) FRED L. BLOODGOOD,
Clerk.

TESTIMONY.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

	_____		10
FRANK C. EVANS, <i>et al.</i> ,	}	Action at Law.	
v.			
THE LONDON ASSURANCE CORPORATION.			

November 28, 1928.

	_____		20
APPEARANCES:			
For the plaintiffs, HENRY M. EVANS, ESQ., JOSEPH H. CARR, ESQ.			
For the defendant, FRENCH, RICHARDS & BRADLEY, ESQS., HORACE M. SCHELL, ESQ.			

Before JESS, J., and a jury.

30

(Mr. Carr opens the case for the plaintiff to the jury.)

(Mr. Schell opens the case for the defendant to the jury.)

THE CASE FOR THE PLAINTIFF.

EMMA EVANS, SWORN.

By Mr. Carr:

Q. Mrs. Evans, where do you live now?

A. 26 Oswego Avenue, Audubon.

10 Q. Are you the wife of Frank C. Evans?

A. I am.

Q. And you are one of the plaintiffs in this case?

A. I am.

Q. Mrs. Evans, I ask you to look at this paper which I show you and tell me what that paper is.

A. That is the deed to my home that burned down.

Mr. Carr: The witness refers to a deed, Andrew Papshon and wife to Frank C. Evans and Emma

20 B. Evans. That is you, is it, Mrs. Evans?

The Witness: Yes, sir.

Mr. Carr: Recorded in book 542 of deeds, page 150, August 18, 1923. I offer that deed in evidence.

The Court: It may be marked.

(Said paper is marked Exhibit D1.)

30 Q. Now, Mrs. Evans, was that property insured against fire on or about the 18th day of August, the day you bought the property?

A. It was I think on the 20th day of August.

Q. I show you a paper numbered in the upper corner LU 6036500, purporting to be a fire insurance

policy issued by the London Assurance Corporation, and ask you to look at that and tell us what that is.

A. That is my insurance policy for the house that burned down.

Mr. Carr: I wish to note on the record that the policy is dated August 20, 1923, for five years, from August 18, 1923, to August 18, 1928, for three thousand dollars insurance, and is in the name of Frank C. and Emma B. Evans. I would like to offer the policy in evidence. 10

The Court: It may be marked in evidence.

(Said paper is marked Exhibit P2.)

Q. Did you pay the premium on that policy, Mrs. Evans?

A. I did.

Q. Is that the receipt for the premium? (Showing witness paper.) 20

A. Yes, sir.

Mr. Schell: There is no question about that.

Mr. Carr: It is admitted then that the premium was paid?

Mr. Schell: Yes.

Mr. Carr: I will offer the receipt in evidence, if the Court please. 30

The Court: All right; it will be marked.

(Said receipt is marked Exhibit P3.)

Q. When was the fire, Mrs. Evans?

A. On the 15th day of September, 1927.

Q. 1927?

A. Yes, sir.

Q. I show you a paper bearing date at the top April 26, 1927, purporting to be signed by Emma B. Evans, and ask you what that paper is?

A. That is the agreement that was made out between Mr. Black, my husband and myself for the
10 home at Oaklyn.

Q. Is that your signature on the back of the agreement?

A. Yes, sir, it is.

Q. And also is that your signature on the endorsement?

A. Not on there.

Q. Oh, you did not sign on the back?

A. Not down there, no.

20 Mr. Carr: I offer the agreement in evidence.

Mr. Schell: Now, if the Court please, I do not object to the agreement between Eugene D. Black and Mr. and Mrs. Evans and the receipt endorsed on the front of the agreement, but I do object to that portion of the agreement dated September 16, 1927, as an agreement between Frank Evans and Eugene D. Black, made after this fire had occurred, as the rights of the parties under this contract, if
30 any, had attached prior to that time, and as to that portion of this agreement I object to it.

Mr. Carr: All right, I will offer it then with the understanding that so much as is dated the day after the fire shall be considered not for the record, not admitted.

The Court: All right then, it will be admitted then with that understanding.

(Said paper is marked exhibit D4.)

Q. Mrs. Evans, are you able to state why the settlement that was mentioned in this agreement was not made on July 2, 1927?

Mr. Schell: I object. 10

The Court: The objection is overruled.

(Exception noted for the defendant.)

Q. Answer that yes or no, Mrs. Evans.

A. No, not exactly, I am not.

Q. Mrs. Evans, did you ever deliver possession of that property to anyone?

Mr. Schell: I object. 20

A. I did not.

Mr. Schell: I object; the contract speaks for itself, if the Court please, and provides specifically as to when possession is to be given, and shows upon its face that the consideration which was to be paid for possession was paid on the date called for in the agreement.

30

Mr. Carr: No, Mr. Schell is mistaken —

Mr. Schell: I am not mistaken, anything of the sort.

The Court: I want to see the agreement.

Mr. Carr: Mr. Schell has the wrong property; the property that the payments were made for is the other property; he has got it just reversed from what happened.

Mr. Schell: No, I haven't got it reversed.

10 Mr. Carr: The payments called for by that agreement were on the other property, not on this property.

The Court: Where is there any provision in the agreement that possession is given on the date of the agreement? I do not see the provision that you refer to, Mr. Schell.

20 Mr. Schell: No, sir, I think I am in error, if the Court please, but I object to the question because it is a conclusion, calls for a conclusion and not for a statement of fact.

The Court: I think the witness may testify as to just what was done. I think that is true, that possession might be entirely a legal question.

Mr. Carr: I am entirely content to agree with the defendant that possession is a matter of conclusion, yes, sir, I am entirely willing to agree to that.

30 Mr. Schell: She may testify if she knows what was done.

Q. Mrs. Evans, was settlement ever made for that property?

A. What do you mean, the old property?

Q. For either property?

A. No, it was not.

Q. Did you ever—when I say “you” I mean you, yourself—did you ever deliver the keys to anyone?

A. No, I, myself, did not.

Q. Did you ever put anybody in that property?

A. No.

Q. Did you ever sign a deed for it?

A. No.

Cross-examination.

10

By Mr. Schell:

Q. Now, Mrs. Evans, when did you move out of the premises 350 Hillside Avenue?

A. The 28th day of May, 1927.

Q. The 28th day of May? Where did you move?

A. 322 Landis Avenue, Oaklyn.

Q. And 322 Landis Avenue, Oaklyn, is the property mentioned in the agreement which has been produced to you, which has been produced here in court?

A. The agreement, yes.

Q. Did you leave any of your property at all in 350 Hillside Avenue?

A. What, anything that belonged to us in any way at all?

Q. Yes.

A. No.

Q. You took everything out?

A. Everything out except—well, I did leave shades on the house. 30

Q. You left what?

A. Shades on the house.

Q. Were they included in the sale to Mr. Black?

A. The shades? No, they were not mentioned, and window screens were left also.

Q. Would the shades or screens at 350 Hillside Avenue fit the windows at 322 Landis?

A. No, they did not.

Q. So they would not have been of much value to you anyhow, would they?

A. I wouldn't have bothered taking them away anyhow.

Q. You don't know what your husband did as far as 350 Hillside Avenue is concerned after you moved
10 to Landis Avenue, do you?

A. No.

Q. You don't know whether he delivered the keys to Mr. Black or not, do you?

A. Yes, I know that.

Q. When did he give the keys to Mr. Black?

A. He gave the keys to Mr. Black three days to a week after we moved in at 322 Landis Avenue.

Q. Within three days to a week after you moved in he gave the keys of Hillside Avenue to Mr. Black?

20 A. To Mr. Black.

Mr. Carr: Now, it is agreed that the loss here is in excess of the insurance—it is not necessary for us to prove our loss?

Mr. Schell: We admit that if there is any right to recover, if the Court please, that it is for three thousand dollars with interest from the 27th day of December, 1927.

EUGENE D. BLACK, SWORN.

By Mr. Carr:

Q. Where do you live, Mr. Black?

A. 22 Ormond Avenue, Oaklyn.

Q. Are you the party named in an agreement dated April 26, 1927, marked exhibit P4?

A. I am.

10

Q. Did you ever take possession of premises 350 Hillside Avenue, Mr. Black?

Mr. Schell: Just a moment; that is objected to.

The Court: Yes, the objection is sustained.

Q. Did you ever go in the property 350 Hillside Avenue, Mr. Black, after April 26, 1927?

A. I did.

20

Q. How often?

A. Once.

Q. When?

A. About a week after I had the key, to take a party up there and show them the house, that wanted to buy it, from Williamstown.

Q. Did you spend any money on the house?

A. I did not.

Q. From whom did you get the key, Mr. Black?

A. I think Mr. Evans gave me that.

30

Q. At your request?

A. I asked for it go to in so I could go in and see about making repairs, and to show it to these people at the same time.

Q. Did you do anything about repairs?

A. I did not.

Q. Why not?

Mr. Schell: I object to that.

Mr. Carr: No, I think that is a proper question, if the Court please, why he did not make repairs. Certainly this man knows whether he had possession of the property or not in the sense that he would know whether he had a right to do those things or not.

10 The Court: I will overrule the objection.

(Exception noted for the defendant.)

Q. Answer the question.

(Question repeated.)

20 A. The house was not in my possession to do any repairs yet.

Mr. Schell: I move that be stricken out, if the Court please; that is a conclusion on the part of the witness.

30 Mr. Carr: I think he certainly knows whether he had a right to put repairs on the property, and I can't very well prove the conversation that he had with Mr. Evans because Mr. Black is not a party and the insurance company was not present, but I can show what he did and did not do and why; the Court has already ruled on that.

Mr. Schell: I have no objection to that. They "why" is the mental gymnastics of the witness himself. He may show what he did do or didn't do, but when you get the answer why, it is a legal con-

clusion on the part of the witness that he did not have possession.

The Court: What was the motion, to strike out?

Mr. Schell: The motion is to strike out the answer, your Honor.

The Court: I will deny the motion and say to the jury at this time that they may take that statement 10 of the witness as a statement made by a layman that he did not have possession, not as a statement of legal conclusion. That question may arise and have to be determined either by the Court or by the jury from all the facts.

(Exception noted for defendant.)

Cross-examination.

20

By Mr. Schell:

Q. Mr. Black, when did you say you got the key?

A. Why, I think it was just about a week as near as I can remember, about a week after Mr. Evans went out of the place.

Q. And except for the window shades and the screens, the property was absolutely vacant when you went up there?

A. Yes, I couldn't tell you even anything about the screens; I never looked to see whether there were any screens there. 30

Q. Well, I grant for the sake of argument that they were. You had the privilege of renting that property at that time, didn't you?

A. There was nothing ever said about renting.

I would not rent a property until I had it in my possession.

Q. You are sure you did not have the privilege of renting it?

A. No, I didn't have no privilege; there was never nothing said about that.

Q. Nothing said about it? The Evans moved in 322 Hillside Avenue with your permission?

A. Yes.

10 Q. I meant, 322 Landis Avenue?

A. Landis Avenue.

Q. With your permission, and at the same time or within a week after that time they delivered the keys to Hillside Avenue to you, and you had a prospective customer that you were taking up there to look at the property, had you?

20 Mr. Carr: I object; there is nothing to show that they did. Mrs. Evans said she had nothing to do with it.

Mr. Schell: Very well. Mr. Evans delivered the keys to you within a week after they moved into Landis Avenue, and at that time you took a prospective customer up to see the property?

30 A. He did not deliver the keys to me; I went up there and got them. What I mean, there are two ways of delivering, whether he came to my place or whether I went up there and got them, that is all.

Q. Who handed the keys to you?

A. Mr. Evans.

Q. All of your dealings were with Mr. Evans?

A. Practically, yes.

By Mr. Carr:

Q. Now, what did Mr. Evans say to you or you say to Mr. Evans when you asked for the keys?

A. I told him I had a prospect to take up and look at the house.

Q. Yes, go on.

A. And they came up, I think it was —

Q. No, give us the rest of the conversation; was that all that was said? 10

A. That was practically all that was said that I can remember of.

Q. Was anything said about renting?

A. No.

Q. Anything said about repairing?

A. I don't think there was anything said to Mr. Evans about repairing.

Q. Did you ever put anybody in the property?

A. I did not.

20

By Mr. Schell:

Q. You were contemplating making repairs, though, weren't you?

A. After they were deeded to me, I intended to make some alterations to it.

Q. After it was deeded to you?

A. After I got my deed.

By Mr. Carr:

30

Q. You were not going to do anything with it until you got some right to go in there, were you?

A. No.

Mr. Schell: Just a moment, I object to that; that is a conclusion.

Mr. Carr: Well, we can't eliminate every part of this case by saying it is a conclusion. He said before he did not make repairs because he did not have possession.

The Court: We will strike out the last question and answer and let the answer that he made to your inquiry stand.

10

FRANK C. EVANS, SWORN.

By Mr. Carr:

Q. Mr. Evans, where do you live?

A. 26 Oswego Avenue, Audubon.

20 Q. A little louder, please, so everybody can hear you.

A. 26 Oswego Avenue, Audubon.

Q. You are the husband of the lady that was on the stand a little while ago?

A. Yes.

Q. And one of the plaintiffs in this case?

A. Yes, sir.

30 Q. Did you ever give—if the Court please, I am going to repeat that same question; don't answer this until the Court has ruled—did you ever deliver possession of 350 Hillside Avenue to Mr. Black?

Mr. Schell: I object to that.

The Court: The objection is sustained.

(Exception noted for the plaintiff.)

Q. Did you ever give the keys of that property to Mr. Black?

A. Yes, sir.

Q. What was said by you to him at that time, if anything?

A. I told him he could take the keys and go and take renters and buyers to look at the house, told him he could go and look at the house.

Q. Was that all the conversation that you had?

A. Yes, sir.

10

Cross-examination.

By Mr. Schell:

Q. Now, Mr. Evans, in answer to Mr. Carr's question as to what you said to Mr. Black, you changed the answer when the stenographer asked you to repeat; your first answer was that you gave him the keys and told him he could take renters and buyers to the property, didn't you?

20

A. That is what I said, yes.

Q. I show you a paper, Mr. Evans, dated the 27th day of October, 1927, and ask you whether or not that is your signature appearing upon that paper?

A. Yes, sir.

Mr. Schell: I offer that for identification.

(Said paper is marked Exhibit D1 for identification.)

30

Q. Now, Mr. Evans, the statements contained in this paper which has just been marked D1 for identification are correct?

A. They are to a certain extent in one way; I done

the best I could at that time under the conditions; I was troubled, worried.

Mr. Carr: I think the witness ought to be allowed to read it over.

Mr. Schell: I thought he had read it over. Those papers on the back, Mr. Evans, I think are just estimates; you need not be concerned with those; to
10 my recollection they are estimates that you obtained, are they not, for the reconstruction of that building?

A. Yes.

Q. You need not be concerned with those; we admit the loss is in excess of three thousand dollars. What I want to know is whether or not the facts contained in these first two pages are a correct statement of the facts as you swore to them on that occasion?

A. Yes, sir.

20 Q. Now, you moved out of Hillside Avenue on May 28th?

A. Yes, sir.

Q. And you moved into Landis Avenue?

A. Yes, sir.

Q. And took all your furniture with you?

A. Yes, sir.

Q. And after that date you resided in the property on Landis Avenue?

A. Yes, sir.

30 Q. Now, when did you give the keys to Mr. Black?

A. Well, about three days to a week, something like that.

Q. And after you had moved into Landis Avenue, Mr. Black had the property on Hillside Avenue to do as he pleased, didn't he?

A. Well, to take renters and buyers there to look at it.

Q. You remember being examined under oath in the office of Mr. Bradley on the 2nd of November, 1927?

A. Yes, sir.

Q. Do you remember my asking you a question: "Q. Did you leave any of your effects in the property on Hillside Avenue?" and you answered, "No, sir." That is correct?

A. Yes.

Q. I asked you the question, "So Mr. Black had 10 the property after May 28th to rent it or do with it whatever he wanted to? A. That is, as far as possession is concerned, of course, not a deed." You so answered it?

A. Yes, I believe I did.

Q. That is so, isn't it?

A. No, sir.

Q. It is not so?

A. No, sir.

Q. But you do testify this paper was sent to you 20 for you to sign and swear to it, wasn't it, Mr. Evans?

A. Yes, sir.

Q. And you came into Mr. Bradley's office to read it?

A. Yes, sir.

Q. And you signed it?

A. Yes, sir.

Q. And you swore to it before Mr. Bradley?

A. Yes, sir. 30

Q. Did you say anything to him at that time that that answer was not a correct statement of what you had so testified to?

A. There was one question there that was asked me that went like this: "Was Mr. Black or you to receive the rent?" The man that asked me that question, it seemed as though he wanted to answer

that question that he had asked me, too; I can remember —

Q. Where does that appear in this examination, Mr. Evans? You find me any question in there in reference to rent, who was to receive it. You signed that paper and swore to it; look over it.

A. It is not on there.

Q. Oh, it is not there?

A. No, sir, it is not.

10 Q. There is no question about its being your signature on here, is it, Mr. Evans?

A. No, sir.

Q. No question about your swearing to the correctness of this statement before Mr. Bradley?

A. No, sir.

Q. And there is no question but what you made that statement at the time of this examination, is there?

A. What statement do you mean?

20 Q. In answer to the question, "Q. So that Mr. Black had the property after May 28th to rent it or do with it whatever he wanted to do? A. That is, as far as possession was concerned, of course, not a deed." You said that, didn't you?

A. Yes, sir, I said that.

Q. And that is so, isn't it?

A. No, sir, not possession.

Q. Well, is it true that you answered the question that way?

30 A. Yes, sir.

Q. That is right, then he asked you the question, "Q. I mean, if he obtained a tenant for the property after May 28th, there was no objection to his putting the tenant in possession? A. No, sir, that was his privilege." You said that, didn't you?

A. No, sir.

Q. You didn't say that?

A. I don't believe I did.

Mr. Carr: If the Court please, this was in November, 1927, and I think he is entitled to have this shown to him before he is asked whether he said it or not. I would not remember what I said myself over a year ago.

Mr. Schell: I have no objection to showing him 10
the paper; he had the paper in his possession and he was very clear in his recollection.

A. There was no question asked about rent—that question and that answer, yes.

Q. You said that at that time?

A. Yes, sir.

By Mr. Carr:

20

Q. Mr. Evans, you said in this statement of yours in answer to Mr. Schell's question, "A. That is, as far as possession was concerned, of course, not a deed." You said that was not correct. Now, will you state why you now make that statement—tell the Court and jury.

A. I didn't really stop to think what the word "possession" meant.

Mr. Schell: I object to this examination, because 30
under the terms and conditions of the policy contract we have a right to examine witnesses under oath and the examination was so conducted. This paper will be offered in evidence in due course, and the witness admits that the paper was sent to him, that he read it and signed it and swore to it as being

a correct statement, and therefore, I object to this examination at this time, because if this was not a correct statement of the facts, this insurance company certainly should have been advised and this witness is now estopped from attacking what under the very terms and conditions of the policy contract he swore to be a correct statement of the facts at the time the examination was conducted.

10 Mr. Carr: Now, if the Court please, three different times I asked three witnesses whether or not they had taken possession and Mr. Schell objected to the use of the word "possession" because it called for a conclusion of law and was something that these people could not specify. Now, he gets this unlettered man and asks him whether he did not on a certain day make a certain statement about possession, and of course, being a truthful man, he says yes, he made the statement, but it was not correct. Now, he is certainly entitled to show wherein
20 that statement was not correct, and if they think they can hide behind the clause of the policy that he must define at his peril what "possession" means, let them try it, but he is certainly entitled to say what he understands "possession" to mean.

Mr. Schell: If the Court please, there is a great difference between asking a question with the word "possession" in, and having the witness use the
30 word in his answer. The two questions to which I called the witness' attention did not contain the word "possession" at all; there is every distinction between the questions my friend has asked and the way those questions are framed, but I say to your Honor that there is an absolute estoppel, when a man is examined under oath, under the terms and

conditions of a policy, signs and swears to that examination, which is a right which is given to the insurance carrier by the terms of the contract itself, and which, if the insured did not comply with the demand to be examined would be a bar to any recovery under that contract, and he is estopped now to say that he did not mean what he said.

Mr. Carr: I think this man has a right to say whether he understood the word that he used in the sense that the law may regard it, because I am going to admit that I do not know what the word "possession" means in all of its implications and ramifications myself, and to attempt to hold this man to make it out that he has sworn falsely because he used the word "possession" without understanding

10

Mr. Schell: I did not say he swore falsely.

20

Mr. Carr: I beg pardon—to charge he made a false statement because he does not use the word "possession" in the sense that perhaps your Honor or counsel for the insurance company would prefer —

The Court: I am inclined to let him explain what he meant by his use of the word "possession."

(Exception noted for the defendant.)

30

Q. Now, Mr. Evans, will you state what you meant by the word "possession" when you used it in answer to Mr. Schell's question?

Mr. Schell: I object to that.

The Court: The objection is overruled.

(Exception noted for the defendant.)

Q. What did you mean?

A. I meant that Mr. Black could take renters and buyers there and look at it only.

Q. Let me ask you this, Mr. Evans, calling attention to the fact that the policy of fire insurance upon
 10 which you are bringing suit refers to—I will read this clause; now, attend to what I am going to ask you; this is at line twenty on the insurance policy—“or if any change other than by death of the insured takes place in the interest, title or possession of the subject of insurance, except change of occupancy without increase of hazard”—now, let me ask you, Mr. Evans, whether in using the word “possession” you made any distinction between a change
 20 of possession and a change of occupancy?

A. No, sir, I did not.

Mr. Schell: I object to that.

The Court: The objection is sustained.

(Exception noted for the plaintiff.)

Q. Now, Mr. Evans, Mr. Schell asked you, on this occasion, I mean, if he obtained a tenant for the
 30 property after May 28th there was no objection to his putting a tenant in possession. Did you know what Mr. Schell meant or had in his mind when he used the word “possession”?

A. No, sir.

Q. Was anything said, were you asked, rather —

Mr. Schell: Just a moment, please; I ask that the

answer to that question be stricken out. He asked the witness if he knew what I had in my mind. I certainly did not say —

The Court: Well, it is immaterial, is it not, whether he did or did not?

Mr. Schell: I think it is rather immaterial; that is the basis of my motion.

Q. Were you asked any questions, Mr. Evans on this particular occasion as to who was to receive the rent, if there had been a renting to a tenant—were you asked that?

A. I believe I was.

Q. Will you see whether you were asked any questions as to who would be entitled to rent if a tenant went into the property?

The Court: Mr. Carr, do you claim that such a 20 question was asked?

Mr. Carr: No, I claim it was not asked.

The Court: Well, if it is not there, the paper will speak for itself.

Mr. Carr: That is not my paper; I am not offering it.

Q. Then you were not asked that question?

A. No, sir.

By the Court:

Q. What happened to the keys, Mr. Evans?

A. Mr. Black had them.

10

30

By Mr. Carr:

Q. Was anything ever said between you and Mr. Black as to who would get any rent if the property was rented?

A. No, sir.

Mr. Schell: I object to that as incompetent, irrelevant and immaterial.

10

Mr. Carr: We have a part of the conversation; we have a right to know what the rest of it was.

The Court: The answer may stand.

Mr. Schell: I withdraw the objection.

By Mr. Schell:

20 Q. Just a moment, Mr. Evans, please; at the time of this examination in Mr. Bradley's office, you were represented by counsel, weren't you?

A. Yes.

Q. Who was it?

A. Mr. Evans.

Q. He was there?

A. Yes, sir.

Q. And stayed there during the entire examination?

30

A. Yes, sir.

Q. And he is the attorney of record in this proceeding against the insurance company in this suit that you brought?

A. I believe so, yes.

Q. And a copy of this examination, after it had been transcribed by the official court stenographer, was sent to Mr. Evans, wasn't it?

A. I suppose it was.

Q. How is that?

A. I suppose it was.

Mr. Schell: I call on the other side for the production of the copy.

Mr. Carr: Mr. Evans, don't answer unless you know.

10

The Witness: I don't know.

Mr. Carr: Because I don't think you know anything about it. It was here; it is here, yes.

Mr. Schell: Well, I would like to have something on the record to show you had this in your possession ever since the 3rd day of November, 1927.

Mr. Carr: I think it is entirely immaterial. Mr. Evans got it; I don't know what date. 20

Mr. Schell: I don't think it is immaterial, if the Court please. Here is a man who now, in November of 1928, a year later, after having these papers in his possession all this time or in the possession of his counsel, says that there is something wrong with the answers.

The Court: No, he doesn't say anything was wrong with the answers; he says the answers correctly appear there as he gave them; he only attempts now to explain what he meant. 30

Mr. Schell: Is it admitted that that was the copy delivered?

Mr. Carr: I haven't the date; Mr. Evans is going to testify and you can ask him that.

Mr. Schell: I would like to have this marked for identification.

(Said paper is marked Exhibit D2 for identification.)

10

HENRY M. EVANS, ESQ., SWORN.

By Mr. Carr:

Q. You are attorney of record in this matter?

A. Yes.

20 Q. Do you recall when you received from Mr. Bradley or Mr. Schell this testimony or the copy?

A. The oath was administered by Mr. Bradley on the 14th of December, 1927; it was sometime after that, but I don't know just when.

Q. Were you handling the matter of the settlement for the premises 322 Landis Avenue for Mr. Frank Evans and his wife?

A. I did.

Q. Had settlement been made for that property at the time of the fire on September 15, 1927?

A. No, it had not.

30 Q. Will you state what had caused the delay in settlement?

A. Well, I had some delay in getting the necessary information from Mr. Black regarding the title policy that was then on the property, the Landis Avenue property; then it took some time for the insurance company to make the necessary searches.

Q. You mean the title insurance company?

A. Yes.

Q. Were they completed by the date of the fire?

A. No, strange to say the search was mailed on September 15th by the Title Abstract Company of 527 Cooper Street, Camden —

Q. And not received then until after the fire?

A. It was received the day after the fire.

(No cross-examination.)

10

EUGENE D. BLACK, recalled for further cross-examination.

By Mr. Schell:

20

Q. Mr. Black, there is one question I wanted to ask you; after Mr. and Mrs. Evans moved into the property on Landis Avenue, did you ever advertise the property on Hillside Avenue for sale or rent in any newspapers or any other source?

A. I advertised for sale.

Q. And about when did that advertising begin?

A. Why, I don't know, right when the first agreement of sale was practically made.

Q. In what papers was the ad?

30

A. In the Camden Courier.

Q. And for what length of time did you have the ad in there?

A. Three days.

PLAINTIFFS REST.

Mr. Schell: We make a motion for non-suit, if the Court please. The policy of insurance provides specifically by its terms that it shall be void unless the assured is the sole and unconditional owner of the property at the time any loss may happen. In Cooley's Briefs of Insurance —

10 Mr. Carr: Now, just a moment; that question is not raised in the pleadings, is it?

Mr. Schell: I think so.

Mr. Carr: I don't think it is; I think it is only a question whether there was a transfer of title, interest or possession.

Mr. Schell: Well, that is the same thing.

20 Mr. Carr: Oh, no, he did not raise that point at all.

30 Mr. Schell: This is raised by the third defense (Reading answer.) I cannot answer for the pleadings, if the Court please. It is my thought that here is a policy of insurance upon which this suit is brought which provides specifically that it shall be void unless the assured is the sole and unconditional owner of the property at the time of the loss. The third defense raised by these pleadings avers that Eugene D. Black became the equitable owner of the property and actually went into possession thereof prior to this loss. Now, there is a host of authorities which appear in Cooley on Insurance which shows that the vendee in possession of property under a valid contract of purchase and entitled to specific perform-

ance is the sole and unconditional owner of the insured premises, and that recites so many cases it would take a long time for me to read them off to you; they are on page 2187 of volume three of Cooley, published in 1927—that is the latest edition. Now, the proposition that you have here, as I view it, Judge Jess, is purely and simply a legal proposition; I do not see that there is any question of fact involved in it at all. They admit that on the 28th of May, 1927, they vacated the premises on Hillside Avenue—there could be no question about that. I do not see that the fact that they allowed certain screens and window shades to stay there affects the situation, because there was an absolute abandonment of that personal property under the testimony of Mrs. Evans, who said they were of no value and would not have done her any good on the property on Landis Avenue anyhow; so you have an absolute giving up of this particular property by this insured on that date. They state that within a short time thereafter they delivered to Mr. Black the keys to this particular property, and Mr. Evans admits that the statements contained in the examination under oath are correct, that Black had the privilege of renting the property, and Black himself now admits that he advertised the property for sale in the Camden Courier two or three days after this agreement was executed. You have therefore, it seems to me, an absolute abandonment of that particular property by this insured on the 28th day of May by the giving of the keys to Black, and in answer to your Honor's question, the statement by Mr. Evans that these keys were retained by Black from that time on until the time of the fire. Now, there is no clause in this agreement which relieves Black in any way from liability for completing this agreement on account of the destruction of property on Hillside Avenue by fire;

Black is still liable under that agreement; the mere fact that the dwelling part of the property was lost by fire in no way relieves Black from giving the Evans a deed for 322 Landis Avenue if Evans pays the \$1,400.00 in cash required and tenders to Black a deed for the property on Hillside Avenue. It seems to me under those circumstances that you have got not only such a change in possession of this property by the absolute abandonment of it by the
10 assured and giving legal possession, certainly to Black, plus the fact that you have an absolute violation of the sole and unconditional ownership clause which I submit to your Honor is properly arguable to you under the third defense which is raised in this case, which shows that these plaintiffs have not established a case entitling them to go to the jury. I suppose if your Honor does not feel that this third defense as it is drafted covers that last situation that
20 an amendment to the pleadings ought to be allowed because certainly I imagine Mr. Bradley drew the answer—that that was the particular point he had in mind in drafting that third defense. It seems to me you are under no obligation in a pleading of that character to recite the third clause of a policy contract; if you set forth that somebody else has an interest or ownership in that property, it certainly, on its very face, shows necessarily as a matter of pleading to my mind that that man is not the sole and unconditional owner of the property which the
30 policy contract provides. I do not know how your Honor views that particular section of the pleadings, but to my mind it would seem to me that the defense of sole and unconditional ownership could very well be covered by that particular averment of the equitable ownership and possession of the property in Black. That briefly, without taking up your Honor's time, is the legal situation as we view it, together

with the case to which I called your Honor's attention which just came down from the Court of Appeals of the Fourth Circuit.

Mr. Carr: I was going to move for a direction upon the theory that there was no defense here under which the jury could be permitted to find that there had been any change of possession, because all we get here is the fact that this man received the keys and was given only the privilege of showing prospective renters and buyers the property. That is not possession and it is nothing that the jury could in a case of this sort find to be possession. But before we go into that, Mr. Schell has argued his motion on the theory that there was a violation of that condition of the policy with regard to the unconditional ownership. As I said at the outset, there is no breach of that condition pleaded. There is a breach specifically pleaded of the provision that the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, should be void if any change other than by death of the insured takes place in the interest, title or possession of the subject of the insurance. Now, do you claim, Mr. Schell, that there has been a breach of that condition that you are relying upon?

Mr. Schell: I claim that there has been a breach of that as well as a breach of the other.

Mr. Bradley: If the Court please, if there is a breach of that condition that they say is not set up as a defense, I suppose your Honor would permit the adding of that defense at this time. It is no surprise to the other side.

Mr. Carr: I think the Court has no right to do that. That is specially covered by the statute, that the party being sued on such an agreement must set out the exact condition of which they claim there has been a breach, otherwise it is a waiver; every breach not set up is waived.

(After further argument.)

10 The Court: Gentlemen, I will make this suggestion: I do not feel quite clear in my own mind at the present moment what action I ought to take upon the motion. My thought was that as this seems to be resolving itself entirely into a legal question, why cannot counsel agree to have a juror withdrawn and have the matter disposed of by the Court and submit your authorities to me.

20 Mr. Carr: I would be entirely willing to do that, the understanding being that we will submit briefs.

The Court: Yes, that is what I would like to have, and on this question —

Mr. Bradley: On the question of amendment, will your Honor allow that amendment if necessary?

30 The Court: Mr. Carr seems to be quite satisfied that I haven't the power to do it. I thought that I did have. If I have the power, I would permit the amendment.

Mr. Bradley: That will be covered by the brief.

Mr. Schell: May I offer in evidence those papers?

The Court: Yes.

Mr. Schell: I offer Exhibit D1 and D2 for identification in evidence and ask that they be so marked.

(Said papers are so marked.)

The Court: Suppose I should reach a point where it would seem to me that the question might turn upon the problem of whether or not there was any change in interest, title or possession, reverting to the question you raised, and that might be a question of fact for the jury rather than be a question of law, do counsel prefer, if that question is raised, that that should be submitted to the jury? 10

Mr. Bradley: We would be willing to let Judge Jess decide it.

The Court: The only difficulty with that is that it occurred to me that the Judge's decision might subconsciously be influenced by his thought as to the legal situation; I don't know. 20

Mr. Carr: I think it would save the Court a good deal of embarrassment, if after you conclude as to the legal aspect of this matter, you still think there is something as to which there might be conflicting inferences drawn, I think it might be well perhaps to relieve the Court of that and submit that to the jury, but I do not think it is likely to happen; I don't think that will be the situation. 30

The Court: Well, leave the matter with me, and if I feel later that that is a question of fact that the jury ought to pass upon, we will draw a jury and get the jury to pass upon it.

Mr. Carr: If I look into that and I find it is just a question of surprise or something—to tell you the truth I am not surprised—if it is not a waiver, then I will consent to the amendment.

The Court: You let me know what you think about that; unless you feel there is a waiver and show me something in support of that, I will permit the amendment now to be made. (To the jury.)

10 Ladies and gentlemen of the jury, by agreement of counsel a juror will be withdrawn in this case, as counsel have, in view of the legal questions which arise, agreed to submit the matter as far as the legal questions are concerned to the Court, and therefore you will be relieved from any further consideration of this case.

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MEMORANDUM OPINION.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

FRANK C. EVANS and EMMA
B. EVANS,

Plaintiffs,

v.

THE LONDON ASSURANCE
CORPORATION,

Defendant.

Action at Law.
Memorandum.
Findings.

10

For the plaintiffs, HENRY M. EVANS and JOSEPH H.
CARR.

For the defendant, FRENCH, RICHARDS AND BRAD-
LEY and HORACE M. SCHELL.

20

JESS, J.:

This is a suit upon a fire insurance policy, issued
to the plaintiffs by the defendant. The policy was
dated August 20th, 1923, was for \$3000 and was to
run for five years from August 18th, 1923. The prop-
erty covered by the insurance was a frame dwelling-
house, situate at No. 350 Hillside Avenue, in the City
of Camden, and owned by the plaintiffs as tenants by
the entirety. The house was destroyed by fire on

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September 15th, 1927. The defendant admits that if the plaintiffs are entitled to recover, the amount of the recovery should be \$3000, with interest from December 27th, 1927.

The defenses, as pleaded, were that at the time of the fire the policy was void because of the violation of the condition against a change in the interest, title or possession of the subject of insurance, and that, prior to the fire, one Eugene D. Black became the equitable owner of the premises and went into possession thereof.

At the close of the plaintiffs' case defendant's counsel moved for a non-suit on the ground that the contract of insurance provided that the policy should be void unless the assured were the unconditional and sole owners of the property at the time any loss occurred. The plaintiffs insisted that that issue was not within the pleadings. After some discussion the defendant asked that, if the Court was of the opinion that the defense as to unconditional ownership was not within the scope of the answer, it might be permitted to defend by specifically setting up that defense. Plaintiffs' counsel opposed this motion and questioned the power of the Court to grant it, but at the same time admitted that he was not taken by surprise.

It was finally agreed that a juror should be withdrawn and the case submitted to the Court for decision without a jury on the evidence already taken and on briefs to be filed. In order that, in the present action, the real questions in controversy between the parties may be determined, I will allow the amendment. *Hanrahan v. Metropolitan Life Ins. Co.*, 72 N. J. L. 504; *Mick v. Royal Exchange Assur.*, 87 Id. 607.

The defense is based upon the following clauses of the policy in suit:

“(a) 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.

(b) This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if any change, other than by the death of an assured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard.” 10

The defendant contends that the policy was voided by a violation of one or both of these provisions of the contract.

The questions to be decided are:

(a) Was the interest of the insured other than unconditional and sole ownership?

(b) Was there any change in the interest, title, or possession of the subject of insurance? 20

The facts as I find them are that on April 26th, 1927, Eugene D. Black and the plaintiffs entered into a written agreement whereby Black agreed to convey to the plaintiffs and they agreed to buy, a lot and bungalow erected thereon, known as No. 322 Landis Avenue, in the borough of Oaklyn, Camden County. The purchase price was \$5300, of which \$200 was paid down and the payment of the remainder provided for as follows: “\$1400 cash at the time of final settlement; \$300 cash on May 10th, 1927; \$3400 to be allowed by seller for property 350 Hillside Avenue, Camden, which said property is to be clear of all incumbrances, at the time of final settlement which shall be made at the office of Eugene D. Black, No. 22 Ormand Avenue, Oaklyn, N. J., on or before July 2, 1927.” 30

The plaintiffs moved into the Oaklyn property on May 28th, 1927. They left nothing in their Camden house but window shades and screens. Black obtained the keys of this house from the plaintiffs' attorney, for the purpose of showing the property to a possible purchaser and to see about making repairs and alterations, which he contemplated making after he got a deed. He never made any repairs or alterations. He had the privilege of placing a tenant on
10 the premises. He advertised the property for sale, the advertisement running for three days. Owing to delay in obtaining title searches the settlement for the Oaklyn property under the agreement of April 26th, 1927, had not taken place at the time of the fire on September 15th. The proof of loss made by Frank C. Evans, one of the plaintiffs stated: "There has been no change in the title to the property since the issuance of said policy, nor in its use as a dwelling, nor in its location, but deponent and his wife
20 and family moved out on May 28th, 1927, and it was the understanding with the said Black hereinbefore referred to, from whom deponent was purchasing 322 Landis Avenue, Oaklyn, that the said Black had the privilege of placing a tenant in 350 Hillside Avenue, Camden, pending settlement on 322 Landis Avenue, Oaklyn."

The written agreement and the acts of the parties in pursuance thereof did not, in my opinion, avoid the policy under either of the provisions of
30 the contract relied on by the defendant.

The effect to be given those provisions is to be determined in the light of the law that conditions in insurance contracts which create forfeitures are to be construed most strongly against the insurer. *Precipio v. Ins. Co. of Penns.*, 103 N. J. L. 589; *Hampton v. Hartford Fire Ins. Co.*, 65 Id. 267.

One of the cases cited by the defense, and regarded

by counsel as conclusive in support of their contention, is *Levin v. State Assur. Co.*, 144 Atl. 797. There the Court of Errors and Appeals held that a written agreement to sell the insured property and putting the purchaser in possession as tenant until the taking of title was a violation of the clauses of the policy identical with those involved in this suit. But the facts with which the Court dealt in that case were so dissimilar to those *sub judice* that in my view, the decision is not in point. Here the plaintiffs had not agreed to sell the insured property. Their agreement was to buy the Oaklyn property from Black. He agreed to "allow" \$3400 of the purchase price for the plaintiffs' insured property. The contract did not oblige, in terms, the plaintiffs to convey the insured premises to Black, but gave them the right to convey in part payment of the purchase price of the property they had agreed to buy from Black. The latter bound himself to accept the insured house at a fixed valuation and thus gave the plaintiffs the option of turning over their property at that valuation or paying the amount thereof in cash. *Levine v. Lafayette Building Corp.*, 142 Atl. 441. A contract to sell and purchase real estate only arises where there is a mutual obligation on the one party to sell and on the other party to buy. *Sooy v. Henkelman*, 142 Atl. 17. Here the required mutuality of obligation was entirely lacking.

Levin v. State Assur. Co., *supra*, cites *Grunauer v. West Chester Fire Ins. Co.*, 62 Atl. 418. In that case the question of the insurable interest of one who has contracted to convey property covered by a policy of insurance containing the provisions here in question, was decided by our Court of Errors and Appeals for the first time after the adoption in New Jersey of the new form of standard clause policy.

The facts in that case were that the plaintiffs had, after the issuance of the policy, executed a written agreement to convey the property in fee to their tenant, who was in possession, upon the payment of the stipulated price. It was held that such acts caused a change in interest, title and possession of the subject of insurance, sufficient to avoid the policy. The basis of the decision was that such contract and transfer of possession effected a complete transition
10 of the equitable and beneficial ownership from the vendors to the vendees. Judge Vredenburg, speaking for the Court, said: "After such contract the vendor's interest is no longer real estate, and the unpaid purchase money is personalty and goes to the vendor's personal representatives in case of death. Thereafter the assured could have but a diminished incentive in the preservation of the property from injury and such result was the very object intended by the insurer to be guarded against by the inserted
20 condition." The opinion cites *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568, in which it was said that a person in possession under an agreement for a conveyance has a substantial and an insurable interest. If the property be destroyed, it will be his loss, in contemplation of law. If he has paid the purchase money, the property is his property in fact and its destruction by fire would be his loss, as much as if the formal title was in him.

In the instant case there was no agreement to convey the insured property. The only contract between the plaintiffs and Black was that Black would sell and the plaintiffs would purchase a property which Black owned, and that Black would take over the insured property in part satisfaction of the purchase price. The acts of one of the plaintiffs and of Black subsequent to the execution of the agree-
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ment, which the defendant contends evidence a transfer of possession of the insured property to Black, at the most can be construed into nothing more than a mere license by one of the tenants by the entirety which would not be binding upon the other tenant without explicit evidence of her assent thereto. She testified that she had never delivered possession of the property.

Statements made under oath by one of the plaintiffs at an examination pursuant to the provisions of the policy, are also relied upon by the defendant to establish its claim that there was a change of possession. At the examination the following questions were asked and the plaintiff, Frank C. Evans made the following answers:

“Q. At the time you moved out of the property on Hillside Avenue, what was done with that property?

A. Why it was turned over, given possession to Mr. Black. 20

Q. So that Mr. Black had the property after May 28th to rent it or do with it whatever he wanted to do?

A. That is as far as possession was concerned. Of course not a deed.

Q. I mean, if he obtained a tenant for the property after May 28th there was no objection to his putting a tenant in possession?

A. No, sir, that was his privilege.”

30

At the trial Evans testified that at the prior examination he “didn’t really stop to think what the word possession meant;” that what he meant by the word “possession” was that Black could take renters and buyers to look at the property. To justify a holding that there was a change of possession in

this case, especially when so to hold would avoid the policy, something more is required than a characterization or conclusion by a lay witness who could not be expected to use the word "possession" with clear comprehension of what it imported in its legal signification.

10 Cooley, in his *Briefs on Insurance*, Vol. 3, p. 2653, says that the change of possession contemplated by a provision of the kind under consideration is something more than a change of occupancy. It is a change effected by legal process, judicial decree, voluntary transfer or conveyance, one which refers to the insured's possessory right and not to his occupancy of the premises.

20 Whatever rights or interest, if any, Black had in the plaintiffs' property must be ascertained by reference to the written agreement between the parties. By that test it must be manifest that the plaintiffs had not parted with their possessory right in the property.

30 There is nothing in the contract between the plaintiffs and Black which changed their interest in the insured premises from an interest in realty, or which gave any right of possession to Black, or which gave any beneficial or equitable ownership to Black, or any insurable interest, or which by any reasonable construction of the contract, or the rights and obligations of the parties thereunder, would cause the loss from the destruction of the house by fire, to fall upon Black. That loss must fall solely upon the plaintiffs. Black agreed to take the insured property at a valuation of \$3400 on account of the purchase price of the house he agreed to sell to the plaintiffs. If the plaintiffs cannot deliver the insured property they are bound by their contract to pay the equivalent of its agreed-upon valuation in

some other way, and that valuation is \$400 in excess of the insurance. Under these circumstances their agreement with Black can hardly be said to have diminished the interest of the plaintiffs in the preservation of the property. It would seem, therefore, that in this case there are present none of the elements or conditions found in those instances in which it has been held there was a change in the interest, title, or possession of the insured, or that the interest of the insured was other than unconditional and sole ownership. 10

The Court finds in favor of the plaintiffs and against the defendant.

The damages of the plaintiffs are assessed at \$3000, together with interest thereon from December 27th, 1927.

Frank B. Jess
Judge.

—————

GROUPS OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 FRANK C. EVANS and EMMA
B. EVANS,
Plaintiffs-Respondents,
v.
THE LONDON ASSURANCE
CORPORATION,
Defendant-Appellant. } Action at Law.
Grounds of Appeal.

—————

20 The above-named defendant-appellant, The London Assurance Corporation, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above cause:

1. Because the verdict as found by the trial Court is contrary to law.

2. Because the verdict as found by the trial Court is not supported by the evidence.

30 3. Upon the evidence as submitted to the trial Court, a verdict should have been found in favor of the defendant, and against the plaintiffs.

FRENCH, RICHARDS & BRADLEY,
Attorneys of Defendant-Appellant.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

HELEN E. HEARN, of full age, being duly sworn upon her oath, deposes and says, that on December 31st, 1929, she served a copy of the within grounds of appeal upon Henry M. Evans, Esq., attorney for the plaintiffs-respondents herein, by leaving same at his law offices, Fifth and Market Streets, Camden, New Jersey, in his absence with the person in charge thereof above the age of fourteen years. 10

HELEN E. HEARN.

Sworn and subscribed before me this 31st day of December, A. D. 1929.

THOS. R. CLEVENGER,
Master in Chancery of N. J.

20

EXHIBIT P1.

(\$3.50 in Documentary Stamps.)

THIS INDENTURE, MADE THE Eighteenth day of _____ in the year of our Lord one thousand nine hundred and twenty-three (1923). BETWEEN ANDREW PAPSHON and JENNIE PAPSHON, his wife, of the City and County of Camden and State of New Jersey of the first part, and FRANK C. EVANS and EMMA C. EVANS, his wife, of the City and County of Camden and State of New Jersey of the second part: 30
WITNESSETH, That the said party of the first part, for and in consideration of the sum of Thirty one hundred dollars lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the

first part, at and before the ensembling and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, their heirs and assgins, ALL that certain lot, tract or parcel of land and premises situate in the City and County of Camden and State
10 of New Jersey, known and designated as Lot No. 66, in Section "N" on the map or plan of Addition to Highland, No. 2, on file in the office of the Register of Deeds of Camden County, and more particularly described as follows:

BEGINNING at a point in the Easterly line of Hillside Avenue, in the Northerly line of lot number 65, in Section "N" on said plan, said point being distant two hundred and sixty feet Northwardly
20 from the Northeasterly corner of said Hillside and Waldorf Avenues, and being in the middle of a partition wall between premises Nos. 352 and 350 Hillside Avenue, and extending thence Northwardly along the Easterly line of Hillside Avenue the distance of twenty feet to the Southerly line of Lot No. 67, in Section "N" on said plan; thence extending Eastwardly between parallel lines of that width or frontage and at right angles to said Hillside Avenue the distance of one hundred feet in length or depth.

30 BEING known as premises No. 350 Hillside Avenue and the same premises which Daniel Turner and wife, by deed dated July 22, 1920, recorded in the aforesaid Register's office in Book 473 of Deeds, page 271, &c., granted and conveyed unto the party of the first part, in fee.

TOGETHER with all and singular, the buildings, improvements, woods, ways, rights, liberties, priv-

ileges, hereditaments and appurtenances, to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and the profits thereof, and of every part and parcel thereof:

AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances:

10

TO HAVE AND TO HOLD the said premises, with all and singular the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever.

AND the said party of the first part, for themselves, their heirs, executors and administrators, DO by these presents covenant, grant and agree to and with the said party of the second part, their heirs and assigns, that they the said party of the first part, their heirs, all and singular the hereditaments and premises herein above described and granted, or mentioned and intended to be so, with the appurtenances, unto the said party of the second part, their heirs and assigns, against them the said party of the first part, their heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, SHALL and WILL WARRANT and forever DEFEND.

20

30

IN WITNESS WHEREOF, the said party of the first part to these presents have hereunto set their hands and seals dated the day and year first above written.

Andrew Papshon (SEAL)
Jennie Papshon (SEAL)

Signed, sealed and delivered
 in the presence of
 Wilbur J. MacAllister

STATE OF New Jersey }
 Camden COUNTY, } ss.

BE IT REMEMBERED, that on this eighteenth
 10 day of August in the year of our Lord one thousand
 nine hundred and twenty-three. before me, a Notary
 Public of the State of New Jersey personally ap-
 peared Andred Papshon and Jennie Papshon, his
 wife who, I am satisfied are the grantors mentioned
 in the above deed or conveyance, and I having first
 made known to them the contents thereof they ac-
 knowledged that they signed, sealed and delivered
 the same as their voluntary act and deed. All of
 which is hereby certified.

20

Wilbur J. MacAllister
 A Notary Public of the
 State of New Jersey
 Commission expires March 17, 1924

41

971

 2660

30

DEED.
 ANDREW PAPSHON and JENNIE
 PAPSHON, his wife
 To
 FRANK C. EVANS and EMMA B.
 EVANS, his wife
 Dated August 18 1923
 Received in the Register of Deeds
 office of the County of Camden N J on

the 20th day of Aug A. D. 1923 at 9:32
o'clock in the forenoon, and recorded in
Book 542 of DEEDS for said County,
on pages 150 &c

Joshua C. Haines

Register

Paid

175

40

—
215

10

Wilbur J. MacAllister

Conveyancor

106 Market Street

Camden, New Jersey

Aug 20-23 at 9:32 Am

Search

S. O. 42575.

Mr. Eugene D. Black

20

EXHIBIT P2.

No. L. U. 6036500

UNITED STATES BRANCH OF

THE LONDON ASSURANCE

CORPORATION

OF LONDON, ENGLAND

INCORPORATED BY ROYAL CHARTER 1720. 30

Amount \$3000. Rate .70 Premium \$21.00

IN CONSIDERATION of the Stipulations herein
named and of Twenty-one and 00/100 Dollars, Pre-
mium Does Insure Frank C. & Emma B. Evans for
the term of Five Years from the 18th day of August
1923 at noon to the 18th day of August 1928 at noon

against all direct loss or damage by fire, except as hereinafter provided, To an amount not exceeding Three Thousand and 00/100 Dollars, to the following described property while located and contained as described herein, and not elsewhere.

Frank C. & Emma B. Evans

10 \$3000. On frame building with adjoining and communicating additions and extensions thereto, including the foundations, gas and water pipes and fixtures and apparatus, chandeliers, plumbing, wall decorations and all permanent fixtures as part of the building, including those for heating and lighting, window and door screens, storm doors, fences and awnings while occupied as a Dwelling
Situatē 350 Hillside Ave., Camden, N. J.

20 Privilege for existing communications, for additions, alterations and repairs; to use electric current for light, heat and power, and to use kerosene oil of legal standard, and gas for lights and fuel; to effect other insurance without notice until required and for the buildings hereby insured to remain vacant not to exceed two consecutive months at any one time in any six
one year, or unoccupied.

30 It is understood and agreed this insurance shall not be invalidated by any act or neglect of any agent, tenant or servant of the assured; provided such act or neglect shall occur without the knowledge or control of the assured, and that this policy covers Firm, Company or Corporation as is now or may be hereafter constituted.

New Jersey Standard Lightning Clause

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 wind storm), not exceeding the sum insured nor the interest of the assured 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. 10

Attached to and forming part of Policy No. LU 6036500 of the London Und. Insurance Company of England.

SMITH-AUSTERMUHL CO. 20
By Andrew B. F. Smith
Agents.

From
Smith-Austermuhl Co.
General Insurance
Fifth & Market Streets
Camden, 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 30

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 representative 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
 10 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 Corporation has executed and attested these presents, this 20th day of August 1923

This Policy shall not be valid until countersigned by the duly authorized Agent of the Corporation at
 CAMDEN, N. J.

20 SMITH-AUSTERMUHL CO., Agents
 Countersigned by Andrew B. F. Smith
 Agent.

John H Packard
 Assistant Manager

- 1 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
 30 2 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
 3 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,

- 4 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, 10
- 5 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
- 6 no abandonment to this company of the property described.
- 7 This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material 20
- 8 fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not
- 9 truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or
- 10 the subject thereof, whether before or after a loss. 30
- 11 This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the in-
- 12 sured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered

- 13 in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole
14 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
15 increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or
10 16 repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other
17 than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in
18 fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with
20 19 the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this
20 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 in-
21 terest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal
22 process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating
30 23 gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or
24 manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole,

- 25 dynamite, ether, fireworks, gasoline, greek fire,
gunpowder exceeding twenty-five pounds in
quantity, naphtha, nitro-glycerine
- 26 or other explosives, phosphorus, or petroleum or
any of its products of greater inflammability
than kerosene oil of the United
- 27 States standard (which last may be used for
lights and kept for sale according to law but in
quantities not exceeding five barrels,
- 28 provided it be drawn and lamps filled by day- 10
light or at a distance not less than ten feet from
artificial light); or if a building
- 29 herein described, whether intended for occu-
pancy by owner or tenant, be or become vacant
or unoccupied and so remain for
- 30 ten days.
- 31 This company shall not be liable for loss
caused directly or indirectly by invasion, insur-
rection, riot, civil war or commo-
- 32 tion, or military or usurped power, or by order 20
of any civil authority; or by theft; or by neglect
of the insured to use all rea-
- 33 sonable means to save and preserve the prop-
erty at and after a fire or when the property is
endangered by fire in neighboring
- 34 premises; or (unless fire ensues, and, in that
event, for the damage by fire only) by explo-
sion of any kind, or lightning; but
- 35 liability for direct damage by lightning may be
assumed by specific agreement hereon. 30
- 36 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
- 37 shall immediately cease.
- 38 This company shall not be liable for loss to
accounts, bills, currency, deeds, evidences of
debt, money, notes, or securities;

- 39 nor, unless liability is specifically assumed here-
on, for loss to awnings, bullion, casts, curiosities,
drawings, dies, implements,
- 40 jewels, manuscripts, medals, models, patterns,
pictures, scientific apparatus, signs, store or of-
fice furniture or fixtures, sculpture,
- 41 tools, or property held on storage or for repairs;
nor, beyond the actual value destroyed by fire,
for loss occasioned by ordinance
- 10 42 or law regulating construction or repair of
buildings, or by interruption of business, manu-
facturing processes, or otherwise; nor
- 43 for any greater proportion of the value of plate
glass, frescoes, and decorations than that which
this policy shall bear to the whole
- 44 insurance on the building described.
- 45 If an application, survey, plan, or description
of property be referred to in this policy it shall
be a part of this contract and
- 20 46 a warranty by the insured.
- 47 In any matter relating to this insurance no
person, unless duly authorized in writing, shall
be deemed the agent of this
- 48 company.
- 49 This policy may by a renewal be continued un-
der the original stipulations, in consideration of
premium for the renewed
- 50 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.
- 30 51 This policy shall be canceled at any time at
the request of the insured; or by the company
by giving five days' notice of
- 52 such cancellation. If this policy shall be can-
celed as hereinbefore provided, or become void
or cease, the premium having been

53 actually paid, the unearned portion shall be re-
54 turned on surrender of this policy or last re-
55 newal, this company retaining the cus-
56 tomary short rate; except that when this policy
57 is canceled by this company by giving notice it
58 shall retain only the pro rata
59 premium.

56 If, with the consent of this company, an inter-
57 est under this policy shall exist in favor of a
58 mortgagee or of any person or 10
59 corporation having an interest in the subject of
60 insurance other than the interest of the insured
61 as described herein, the condi-
62 tions hereinbefore contained shall apply in the
63 manner expressed in such provisions and condi-
64 tions of insurance relating to such
65 interest as shall be written upon, attached, or ap-
66 pended hereto.

60 If property covered by this policy is so en-
61 dangered by fire as to require removal to a place 20
62 of safety, and is so removed,
63 that part of this policy in excess of its propor-
64 tion of any loss and of the value of property re-
65 maining in the original location, shall,
66 for the ensuing five days only, cover the prop-
67 erty so removed in the new location; if removed
68 to more than one location, such
69 excess of this policy shall cover therein for such
70 five days in the proportion that the value in any
71 one such new location bears 30
72 to the value in all such new locations; but this
73 company shall not, in any case of removal,
74 whether to one or more locations, be
75 liable beyond the proportion that the amount
76 hereby insured shall bear to the total insurance
77 on the whole property at the time

- 66 of fire, whether the same cover in new location or not.
- 67 If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property
- 68 from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order,
- 10 69 make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and,
- 70 within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this com-
- 71 pany, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire;
- 72 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;
- 20 73 all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descrip-
- 74 tions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property
- 75 since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were
- 30 76 occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or
- 77 machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not inter-
- 78 ested in the claim as a creditor or otherwise, nor

- related to the insured) living nearest the place of fire, stating that he has
- 79 examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary
- 80 public shall certify.
- 81 The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property
- 82 herein described, and submit to examinations 10 under oath by any person named by this company, and subscribe the same; and,
- 83 as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies
- 84 thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall
- 85 permit extract and copies thereof to be made.
- 86 In the event of disagreement as to the amount 20 of loss the same shall, as above provided, be ascertained by two competent
- 87 and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent
- 88 and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and
- 89 damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing 30 of any two shall determine
- 90 the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the
- 91 expenses of the appraisal and umpire.
- 92 This company shall not be held to have waived

- any provision or condition of this policy or any forfeiture thereof by any
- 93 requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss
- 94 shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein
- 10 95 required have been received by this company, including an award by appraisers when appraisal has been required.
- 96 This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for
- 97 loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole
- 20 98 insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application
- 99 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
- 100 agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed
- 101 hereon.
- 102 If this company shall claim that the fire was caused by the act or neglect of any person or
- 30 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
- 103 insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such

- 105 payment.
- 106 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
- 107 full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.
- 108 Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and 10
- 109 wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."
- 110 If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization,
- 111 membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may
- 112 be writetn or printed upon, attached, or appended hereto. 20

ASSIGNMENT OF INTEREST BY INSURED.

The interest ofas owner of property covered by this Policy is hereby assigned to..... subject to the consent of The London Assurance Corporation. 30

Dated,

NOTE.—To secure Mortgagees, if desired, the Policy should be made payable on its face to such Mortgagee, as follows: Loss, if any, payable to John Doe, Mortgagee.

CONSENT BY COMPANY TO ASSIGNMENT OF INTEREST.

The London Assurance Corporation hereby consents that the interest of..... as owner of the property covered by this Policy be assigned to.....

Dated,.....

10

FORM FOR REMOVAL.

Permission is hereby granted to remove the property insured by this Policy to the..... situate.....

and this Policy is hereby made to cover the same property in new locality, all liability in former locality to cease from this date.

20

Rate increased to.....% Additional Premium \$..... Rate reduced to.....% Return Premium \$.....

.....Agent. Dated,.....19

SHEET.....BLOCK.....No.....

August 23 20th

30

If this Policy is cancelled the following receipt is to be filled up and signed by the Insured.

.....19

IN CONSIDERATION of..... Dollars Return Premium, the Receipt of which is

hereby acknowledged, this Policy is cancelled and surrendered to The London Assurance Corporation.
.....Assured.

UNITED STATES TRUSTEES

JAMES N. JARVIE, Esq.,
JAMES H. POST, Esq.,
 B. H. Howell, Son & Co.
JUSTUS RUPERTI, Esq.,
 Charles Hardy & Ruperti, Inc.
MOREAU DELANO, Esq.,
 Brown Brothers & Co.
 JOHN H. PACKARD,
 Assistant Manager

10

20

Standard Fire Insurance Policy of the
State of New Jersey Connecticut
and Rhode Island.

Expires August 18th 1928

Property Dwelling

350 Hillsode Ave., Camden, N. J.

Amount\$3000.

Premium\$ 21.00

Frank C. & Emma B. Evans

No. L. U. 6036500

30

UNITED STATES BRANCH

THE LONDON

ASSURANCE

CORPORATION

84 William St., New York

Issued through its

LONDON UNDERWRITERS
 Agency Department
 MORTGAGES
 General Insurance

RAYMOND S. PORTER
 2612 Federal St., Camden, N. J.
 REAL ESTATE

10 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.

EXHIBIT P4.

20 THIS AGREEMENT, MADE THE Twenty-sixth day of April A. D. 1927.

BETWEEN Eugene D. Black, of #22 Ormand Ave., Oaklyn, N. J., of the first part, hereinafter called the "SELLER," and Frank C. Evans and Emma B. Evans, his wife, of #350 Hillside Avenue, Camden, N. J., of the second part, hereinafter called the "BUYERS."

30 WITNESSETH, That the "SELLER" agrees to sell and convey and the "BUYERS" agrees to buy all that certain lot, tract, or parcel of land and premises situate in the Borough of Oaklyn County of Camden and State of New Jersey, more particularly decribed as follows:

#322 Landis Avenue, consisting of 6-room and bath bungalow and lot 40' x 100', for the price or sum of Fifty-three hundred (\$5300) Dollars, under and subject to the following terms and conditions:

1. A first payment of Two hundred (\$200) Dollars, receipt of which is hereby acknowledged by the "SELLER."

2. The balance of the purchase price shall be paid in the following manner:

\$1400.00 cash at the time of final settlement

300.00 cash on May 10th, 1927,

\$3400.00 to be allowed by Seller for property #350 Hillside Avenue, Camden, which said property is to be clear of all encumbrances at the time of final settlement, which shall be made at the office of Eugene D. Black, #22 Ormand Ave., Oaklyn, N. J., on or before July 2nd, 1927 or the deposit and all money paid made herewith, at the option of the "SELLER," may be applied on account of the purchase price or be forfeited as liquidated damages to the "SELLER," and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the "BUYER" in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land, Buyer to assume Sewer and street improvements, and shall be a marketable title, and the "SELLER" shall tender a General warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "BUYERS."

4. All adjustments shall be made as of possession and possession shall be given the "BUYER" on payment of \$300.00.

5. The "BUYER" shall pay for searches and all other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the "SELLER."

10 6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

20 IN WITNESS WHEREOF, The parties hereto have set their hands and seals the day and year first above written.

Eugene D. Black (L. S.)
Frank C. Evans (L. S.)
Emma B. Evans (L. S.)
..... (L. S.)

Signed, sealed and delivered
in the presence of

30 T. B. Lehman

State of

County, } ss.

BE IT REMEMBERED, that on this day of _____ in the year of our Lord one thousand nine hundred and _____ before me

personally appeared who, I am satisfied, _____ the grantor mentioned in and who executed the within deed and I having first made known to _____ the contents thereof 10* acknowledged that _____ signed, sealed and delivered the same as voluntary act and deed. All of which is hereby certified.

AGREEMENT FOR SALE OF LAND

20

Rec'd \$300. as per agreement. 5/10/27 Eugene D. Black.

Sept. 16, 1927

A fire having destroyed 322 Landis Ave on 9/15/27 the time for settlement herein is hereby extended until such time as adjustment is made by the Insurance Company on the fire insurance, both parties now being ready for settlement.

30

Frank Evans Eugene D. Black

Witness:

Henry M. Evans

EXHIBIT D1.

STATE OF NEW JERSEY }
 CAMDEN COUNTY } ss.

FRANK C. EVANS, of full age, being duly sworn, upon his oath deposes and says that he resides at No. 322 Landis Avenue, in the Borough of Oaklyn, Camden County, New Jersey, and has resided there since May 28th, 1927; that he is the same person, who, together with his wife, Emma B. Evans, who resides with him at the above address, is named along with his said wife as the insured under Policy No. L. U. 6036500 of the London Assurance Corporation, dated August 20th, 1923, and expiring August 18th, 1928; said policy referred to above was issued to cover property No. 350 Hillside Avenue, Camden, N. J., wherein this deponent, his wife and family resided until May 28th, 1927; that on September 15th, 1927, and between the hour of eleven o'clock P. M. and twelve o'clock midnight, he is informed, a fire, the origin of which is unknown to deponent, totally destroyed said premises No. 350 Hillside Avenue, Camden, N. J.; this deponent, together with his wife, Emma B. Evans, were the sole owners of said property at the time of the fire, although they had contracted to purchase another house where they now reside, settlement for which has not yet been made, and at said settlement the seller of No. 322 Landis Avenue, to wit, Eugene D. Black, was to allow the insured the sum of thirty-four hundred dollars as part of the consideration in the purchase of No. 322 Landis Avenue, Oaklyn, for 350 Hillside Avenue, Camden, as more fully set forth in the copy of agreement of sale already furnished C. A. S. McClellan, your adjuster, at 136 S. Fourth St., Philadelphia, Pa.; that

at the time of said fire deponent and his wife were the record owners in fee of the property so destroyed as heretofore stated; deponent says that while he is not familiar with the value of property, he believes the property at the time of the fire was worth between \$3500 and \$4000, the property adjoining, which was also destroyed by fire, having been purchased, he understands, for \$4,600, for a quick sale, there being, however, more ground with that property; that deponent has obtained a bid from William W. Aharon, contractor, of Gloucester City, which is attached hereto, in which he agrees to replace the property at \$4,280.00; deponent says that there was no incumbrance on the said property; that there was no other insurance; that there has been no change in the title to the property since the issuance of said policy, nor in its use as a dwelling, nor in its location, but deponent and his wife and family moved out on May 28th, 1927, and it was the understanding with the said Black hereinbefore referred to from whom deponent was purchasing 322 Landis Avenue, Oaklyn, that he, the said Black, had the privilege of placing a tenant in 350 Hillside Avenue, Camden, pending settlement on 322 Landis Avenue, Oaklyn; deponent understands that the building was still unoccupied at the time of the fire; deponent holds himself out to the said insurance company to give it any further information they may desire in making the adjustment of this loss, insofar as he is able so to do.

FRANK C. EVANS.

Sworn and subscribed to before me this 27th day of October, 1927.

HENRY M. EVANS,

(Seal)

Notary Public of New Jersey.

My commission expires February 28th, 1929.

Statement For Rebuilding To Property At 350
Hillside Ave., Camden, N. J.

Building to be 2½ storys high, frame on present foundation 16/0 x 38/0, Porch 16/0 x 5/6 three rooms on first floor, Living room, Dining room, Kitchen, three rooms and bath on second floor. One room in third floor, floor laid one 24 x 20 window frame in each end of attic, attic unfinished.

- 10 Demolishing all burnt and charred parts of burnt building. Remove all burnt and charred wood, dirt, rubbish, plumbing, fixturers or anything in present premises ready for new building, in cellar, three new 8 x 14 cellar window frames sash, screens and hardware complete. One new 2/6 x 6/8 grade door frame, 2/6 x 6/6 doors and hardware complete. Block party wall between 350 and 352 from present foundation wall to third floor roof rafters in center of building.

20

Plates Studding and Joice

Bottom plates, 2 Pcs. 2 x 6 spicked together all out side and carring partition to be 2 x 4 16" on centers closets and hallway partition to be 2 x 3 16" on centers top plates to be 2 Pcs. 2 x 4 spiked together

- 1 St. Floor joice 2 x 10 16" on centers.
2 " " " 2 x 8 16" " "
30 3 " " " 2 x 8 16" " "

Roof rafters 2 x 6 2/0 on centers collar ties into block center wall. Porch 2 Pcs. 2 x 6 bottom porch plate 2 x 8 joice 16" on centers #1 Flooring 1 x 8 facer and molding around bottom of porch. Three 8 x 8 8/0 square porch collumns porch rail top and bottom rail and balisters, 1 3/4 x 1 3/4 4 x 6 porch

plates, 2 x 3 ceiling rafters, N. C. lining and moldings, 2 x 4 roof rafters two foot on centers.

Cornice.

1 x 8 W. P. 1 x 4 and 4" cyp crown molding around porch also on side of main building front and back of building and 1½ cyp O G Molding. Main building to be sheaded with building paper and ½ x 6 R. C. Siding first floor, second floor and third floor front and back of building to be papered and 16" Ramdon-width shingles. Roofs 1 x 2 shingle lath covered with 24" Ramdon-width wood shingles. First and second floor #1 N. C. Flooring, third floor #2 common, cellar stairs two pes of 2 x 10 1 x 8 rise 1 x 10 tread. Main stairs two pes 2 x 10 horses 8" rise 10" tread wall string and shoe tillet, 13/4 x 13/4 balisters, 6 x 6 base neual, 4 x 8 landing neual, 4 x 4 neual in second floor hallway to third floor stairs, box stairs 8" rise 10" treads main stairs.

Main roof and porch roof to be covered with 1 x 2 shingle lath with 24" ramdon-width shingles 7½ to the weather.

Doors and windows.

Front door frame 1 3/4 3/0 x 7/0, 1 3/4 fur door C 100 ½ glass. Back door frame 1 3/4 2/8 x 6/8, four lights fur door. Two double hung windows and frames complete in each room on first and second floor. One 24 x 20 double hung window frames complete in bath room, flortane glass inside finishing.

Trim all doors and windows to stock, trim living and dining room with cabinet head finish 1 x 6 neck and B and C moldings. All other doors and win-

dows to be Plain 1 x 6 head finish, 1/2 x 8 Cyp base lip and quarter round moldings on first floor, 1/2 x 6 Cyp base lip and quarter round moldings on second floor rooms and closets. One medicine cabinet in bathroom, one clothes closet in each bedroom, 2/0 x 6/8 1 3/8 two-panel fir doors, stop beads, one pair 3 1/2 x 3 1/2 hinges, cuboard-turns pin rail shelves-boards C and H hooks in each closet.

Windows weights, cords, parting and stop beads, 10 trim sash locks and two hook lifts on each window.

Electric Work.

Electrician to wire house according to plan, two recptales on first floor, two recptales on second floor. Two lights in cellar and one snap switch. One porch light and one switch. All switches to be toggle type. One light outlet and one switch in each room on first floor. One light outlet and one 20 switch in each room on second floor. Dining room to be 23 way, second floor to be 23 way. Rough wiring and fixturers, inspection to be passed by under writer inspection and cerificate.

Lath and Plaster Work.

Lath intire first and second floors stairway, cellar stairway and closets, metalic corner beads on corners where necessary. Two coats of brown mortar, 30 one finishing white coat of pure lime plaster-parris and fine sand.

Plumbers Work.

All twisted and broken pipes to be removed out of cellar up to shut off in cellar. Furnish all new

pipes from shut off and filling to connect to the fix-
turers. Run new soil pipe to outside back cellar
wall, rain water conductor and new stack to roof.
One 30-gal. galvanized upwright boiler to connect
with range in kitchen, and gas heater for summer
use, gas pipe from front of cellar to connect with
range in kitchen. Gas range furnished one pc 42"
kitcheneet sink and drain board. Commation
spicket and soap dish in center. Bathroom fixturers
30 x 5/0, bathtub on legges, one 18 x 21 labatory. One 10
Ld toilet outfit, moghanogy seat. Plumber to take
out all necessary plumbing permits.

Tin Work.

Tin window caps on all windows and door heads
exposed to the weather. 14" gal. rain spout from
roof in back to soil pipe. 14" Gal. rain spout from
front roof, tin porch roof with shoe on bottom con- 20
tinued from porch roof to soil pipe in front of house.
On main roof one tin stop gutter to pitch back and
front.

Chimney.

Chimney to be built of Brick and flue lining.

Hot-Air Heating.

Four runs to second floor, three runs to first floor 30
with four-inch by 11" all double stack pipe. Six
registers to be in base board and bottom to be rest-
ing on floor, to be type that can be cleaned, one first
floor register in middle of bedroom on second floor.
Each register to have a separate run in cellar. Fur-
nish new hot-air 22" furnace in cellar with six runs.

Painters Work.

Two coats of paint on outside woodwork, colors to be selected by owner. Interior kitchen three coats of gray, living room, dining room, bed room and bath room, hallway and stair-way to have two coats of ivory, one coat of enamel.

10 Hardware.

All hardware on doors and windows to be dull brass finish, plates and knobs.

Paperhanging.

Paper intire house including six rooms, bath, second floor hall and closets in bedrooms.

20 Permits.

Contractor to take out all permits and necessary insurance, and pay for policy up to day of final settlement. Furnish owner with set of Release of Leins of all materials, men and sub-contractors. Then owner to take his own insurance policy from that day on.

All work to be done in true workmanship manner protecting all finished and un-finished work.

For the Sum of FOUR THOUSAND TWO HUNDRED AND EIGHTY DOLLARS (\$4,280.00).

WILLIAM W. AHARON.

EXHIBIT D2

EXAMINATION UNDER OATH PURSUANT
TO THE TERMS AND CONDITIONS OF
POLICY NO. L. U. 6036500 OF THE LONDON
ASSURANCE CORPORATION.

10

OFFICES OF FRENCH, RICHARDS AND
BRADLEY, 106 Market Street, Camden, New Jer-
sey, Monday, November 2, 1927, at 3:30 o'clock
P. M.

PRESENT:

FRANK C. EVANS, the assured. 20
HENRY M. EVANS, Esq., attorney for the assured.
HORACE M. SCHELL, Esq., the examiner.

FRANK C. EVANS, having been duly sworn, was
examined and testified as follows:

By Mr. Schell:

30

Q. Where do you reside?
A. 322 Landis Avenue, Oaklyn.
Q. How long have you lived at 322 Landis Ave-
nue?
A. Since May the 28th.
Q. Of this year?

- A. Of this year, yes, sir.
- Q. And prior to that time you resided where?
- A. 350 Hillside Avenue, East Camden.
- Q. And is the property 350 Hillside, Camden, the property in which this fire loss occurred?
- A. Yes, sir.
- Q. And when did the fire happen?
- A. September the 15th of this year.
- Q. Now, prior to September 15th of this year you
- 10 had entered into an agreement of sale with a Mr. Eugene D. Black for the purchase of the property, 322 Landis Avenue, had you not?
- A. Yes, sir.
- Q. And I show you a copy of an agreement dated April 26, 1927, between Eugene D. Black, and Frank C. Evans and Emma B. Evans, and ask you whether or not that is a correct copy of that agreement?
- A. Yes.
- Q. Pursuant to that agreement the \$300 men-
- 20 tioned in that paper was paid when?
- A. On May the 10th.
- Q. And you say on May the 28th you took possession of the property on Landis Avenue?
- A. Yes, sir.
- Q. And did you move into that property directly from the property on Hillside Avenue?
- A. Yes, sir.
- Q. And at the time you moved out of the property on Hillside Avenue what was done with that
- 30 property?
- A. Why, it was turned over, given possession to Mr. Black.
- Q. Did you leave any of your effects in the property on Hillside Avenue?
- A. No, sir.
- Q. So that Mr. Black had the property after May

28th to rent it or do with it whatever he wanted to do?

A. That is as far as possession was concerned. Of course, not a deed.

Q. I mean if he obtained a tenant for the property after May 28th there was no objection to his putting a tenant in possession?

A. No, sir. That was his privilege.

Q. And you didn't give him the deed for the property at that time? 10

A. He had it for a short while, that is all. For a search he got it.

Q. I didn't mean that. Was a deed made by you and your wife to Mr. Black for the property?

A. No.

Q. So the title still stands in the name of you and Mrs. Evans?

A. Yes, sir.

Q. Have you the deed for the property at the time you purchased it? 20

(The witness produces deed dated August 18, 1923, from Andrew Papshon and Jennie Papshon, his wife, to Frank C. Evans and Emma B. Evans, for premises 350 Hillside Avenue; consideration \$3100; recorded in the office of the Register of Deeds for the County of Camden on August 20, 1923, in book 542 of Deeds, pages 150, and so forth.)

Q. Now, in addition to the \$300 which you paid on May 10, 1927, you also paid \$200 at the time the agreement was executed? 30

A. That is right.

Q. Has the \$1400 balance of cash ever been paid Mr. Black?

A. No, sir.

Q. Why was settlement not made on July 2nd, 1927?

A. That is something I cannot say. I don't know.

Q. Were you prepared to complete the settlement on July 2nd?

A. I believe I was. I don't know whether I was or not. I was waiting for money from the building and loan.

Q. You have been living in 322 Landis Avenue since May 28th; that is right?

A. Yes, sir.

Q. And have been paying rent for that property to Mr. Black?

A. Oh, no. I am supposed to keep the taxes and water rent up, I believe. At least, I haven't that in black and white.

Q. Prior to the time of this fire in this property on Hillside Avenue, had Mr. Black succeeded in renting that property to any one, so far as you know?

A. No.

Q. Was it vacant at that time?

A. Vacant.

Q. It had been vacant constantly from May 28th?

A. Yes.

Q. Mr. Black's business is what, do you know?

A. Contractor and builder.

Q. And I suppose he was the builder of this 322 Landis Avenue?

A. Yes, sir.

Q. Have you ever been able to ascertain anything in reference to what may or may not have caused the fire?

A. I cannot say.

Q. At the time you signed your proof of loss on the 27th of October, you stated the cause of the fire was unknown to you, and I was wondering whether

between now and then you had heard anything at all with reference to what caused this fire?

A. No, sir, I have not.

Q. This building or property at 350 Hillside Avenue, did it catch fire from the building adjoining; is that the way the fire happened?

A. They told me the fire started in my place. That is all I know. That is what this Detective Shaw said. The man across the street told me about it the next morning at work. They all said it started 10
in my place.

Q. Do you know whether or not Mr. Black ever insured this property after he got possession of it?

A. I don't believe so.

Q. Did you ever inquire of him whether he did?

A. He told me no, he hadn't.

AGREEMENT
FOR SALE OF LAND.

20

Rec'd \$300 as per agreement 5-10-27 (Sgd) Eugene D. Black.
Sept 16, 1927.

A fire having destroyed 350 Hillside Ave on 9-
322 Landis Ave
15-27 the time for settlement herein is hereby extended until such times as adjustment is made by the Insurance Company on the fire insurance both 30
parties now being ready for settlement.

(Sgd) Frank Evans.

(Sgd) Eugene D. Black.

Witness: (Sgd) Henry M. Evans.

THIS AGREEMENT, Made the Twenty-sixth day of April A. D. 1927.

BETWEEN Eugene D. Black, of #22 Ormand Ave., Oaklyn, N. J. of the first part, hereinafter called the "SELLER," and Frank C. Evans and Emma B. Evans, his wife, of #350 Hillside Avenue, Camden, N. J., of the second part, hereinafter called the "BUYERS."

10 WITNESSETH, That the "SELLER" agrees to sell and convey and the "BUYERS" agrees to buy all that certain lot, tract, or parcel of land and premises situate in the Borough of Oaklyn County of Camden and State of New Jersey, more particularly described as follows:

#322 Landis Avenue, consisting of 6-room and bath bungalow and lot 40' x 100', for the price or sum of Fifty-three hundred (\$5300) Dollars, under and subject to the following terms and conditions:

20 1. A first payment of Two hundred (\$200) Dollars, receipt of which is hereby acknowledged by the "SELLER."

2. The balance of the purchase price shall be paid in the following manner:

\$1400.00 cash at the time of final settlement

300.00 cash on May 10th, 1927,

\$3400.00 to be allowed by Seller for property #350 Hillside Avenue, Camden, which said property is to be clear of all encumbrances

30 at the time of final settlement, which shall be made at the office of Eugene D. Black, #22 Ormand Ave., Oaklyn, N. J., on or before July 2nd, 1927, or the deposit and all money paid made herewith, at the option of the "SELLER," may be applied on account of the purchase price or be forfeited as liqui-

dated damages to the "SELLER," and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the "BUYER" in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land, Buyer to assume Sewer and street improvements, and shall be a marketable title, and the "SELLER" shall tender a General warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "BUYERS." 10 20

4. All adjustments shall be made as of possession and possession shall be given the "BUYER" on payment of \$300.00.

5. The "BUYER" shall pay for searches and all other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the "SELLER."

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto. 30

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appur-

tenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

IN WITNESS WHEREOF, The parties hereto have set their hands and seals the day and year first above written

(signed) Eugene D. Black (L. S.)

“ Frank C. Evans (L. S.)

10 “ Emma B. Evans (L. S.)

SIGNED, SEALED AND DELIVERED

IN THE PRESENCE OF

(signed) T. B. Lehman

20 STATE OF _____ }
COUNTY, } ss.

BE IT REMEMBERED, That on this day of _____
in the year of our Lord one thou-
sand nine hundred and _____ before me,
personally appeared _____ who I am
satisfied _____ the grantor
mentioned in the above deed or conveyance, and I
having first made known to _____ the contents
thereof _____ acknowledged that
30 signed, sealed and delivered the same as
voluntary act and deed.

All of which is hereby certified.

Frank C. Evans.

STATE OF NEW JERSEY }
COUNTY OF CAMDEN } ss.

10

BE IT REMEMBERED that on this 14th day of December, 1927, before me appeared Frank C. Evans, who being duly sworn according to law, doth depose and say that the facts set forth in the foregoing examination under oath are true and correct.

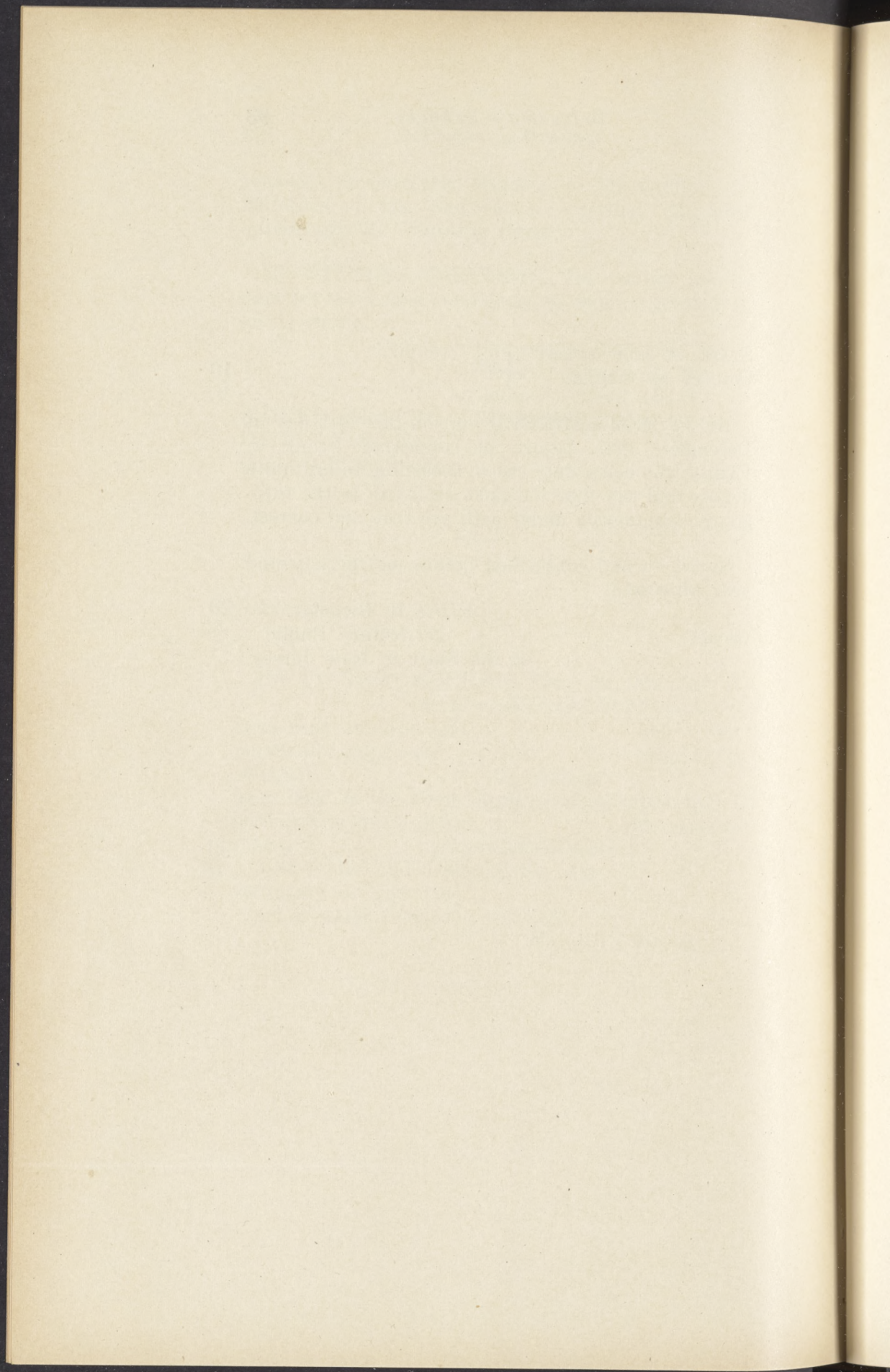
Sworn to and subscribed before me the day and year aforesaid.

(Seal)

FLOYD H. BRADLEY,
Notary Public
of the State of New Jersey.

20

30



NEW JERSEY COURT OF ERRORS AND
APPEALS.

FRANK C. EVANS and EMMA B. EVANS,
Plaintiffs-Respondents,

v.

THE LONDON ASSURANCE CORPORATION,
Defendant-Appellant.

ACTION AT LAW.

APPEAL FROM SUPREME COURT.

BRIEF FOR DEFENDANT-APPELLANT.

STATEMENT.

This appeal brings up for review a judgment of \$3,313, entered in our Supreme Court in favor of the respondents and against the appellant company. Action was instituted herein by respondents upon a "Standard New Jersey Form" policy of insurance to indemnify them against loss by fire. On November 28, 1928, this cause came on for trial before

Judge Frank B. Jess at the Camden Circuit. After a motion for non-suit had been partially argued and objection had been made to the form of "Third Defense" of the answer, it was agreed by the parties hereto, that a juror be withdrawn and the controversy be submitted to the Court for determination, including an amendment to the answer. The defendants introduced Exhibits D1 and D2 respectively. By order of Court, an amendment was allowed to the Third Defense of answer. Upon the findings of the trial Court, resulting in a general verdict in favor of the respondents and against the appellant company, judgment was entered on October 7, 1929.

The appellant does not deny the fire, nor the amount of the resulting loss, but its defenses consist of the violations by the assured of certain provisions of said policy more particularly set forth in Second Defense and Third Defense (amended), respectively, of the answer, as follows:

"SECOND DEFENSE.

The policy No. L. U. 6036500 issued by the defendant to plaintiffs contained a provision that said entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, should be void 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. After the issuance of said policy, to wit, in May, 1927, the plaintiffs agreed in writing to convey to Eugene D. Black the insured premises and plaintiffs received a large part of the purchase price therefor and said Eugene D. Black was by said plaintiffs put into possession of said premises. No agree-

ment to such change either in interest, title or possession was endorsed on said policy or added thereto and the policy became and is void" (page 6).

"THIRD DEFENSE (amended).

In and by the policy of insurance upon which suit is brought, it is provided, *inter alia*, as follows:

'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.'

Defendant is informed, believes and expects to be able to prove at the time of trial, and therefore avers that on September 15, 1927, the plaintiffs herein were not the sole and unconditional owners of the property intended to be insured by the policy upon which suit is brought, but that the sole and unconditional owner thereof was one Eugene D. Black, and that the said plaintiffs had not, on September 15, 1927, any insurable interest in the insured premises" (pages 7-8).

The appellant contends that, as a matter of law, the violation of either or both of the above provisions of the policy precludes the respondents from any recovery in this action.

STATEMENT OF FACTS.

The London Assurance Corporation, appellant herein, issued a policy of fire insurance to Frank

C. Evans and Emma B. Evans, respondents, insuring them against direct loss or damage by fire to an amount not exceeding \$3,000 covering premises 350 Hillside Avenue, Camden, New Jersey. The policy was written for the term of five years, from August 18, 1923 (Exhibit P2, pages 59-74). On September 15, 1927, a fire occurred in the premises (page 14, lines 1-2).

The policy by its express terms contained two provisions important to this cause of action, namely (pages 63-64):

“This entire policy, unless otherwise provided by agreement indorsed 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 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;”

On April 26, 1927, the respondents entered into a written agreement with one Eugene D. Black, the important provisions of that agreement being as follows (Exhibit P4, pages 74-75):

“THIS AGREEMENT, MADE THE Twenty-sixth day of April A. D. 1927.

BETWEEN Eugene D. Black, of #22 Ormand Ave., Oaklyn, N. J., of the first part, hereinafter called the ‘SELLER,’ and Frank C. Evans and Emma B. Evans, his wife, of #350 Hillside Avenue, Camden, N. J., of the second part, hereinafter called the ‘BUYERS.’ WITNESSETH, That the ‘SELLER’ agrees to sell and convey and the ‘BUYERS’ agrees

to buy all that certain lot, tract, or parcel of land and premises situate in the Borough of Oaklyn County of Camden and State of New Jersey, more particularly described as follows: #322 Landis Avenue, consisting of 6-room and bath bungalow and lot 40' x 100', for the price or sum of Fifty-three hundred (\$5300) Dollars, under and subject to the following terms and conditions:

1. A first payment of Two hundred (\$200) Dollars, receipt of which is hereby acknowledged by the 'SELLER.'

2. The balance of the purchase price shall be paid in the following manner:

\$1400.00 cash at the time of final settlement

\$300.00 cash on May 10th, 1927,

\$3400.00 to be allowed by Seller for property #350 Hillside Avenue, Camden, which said property is to be clear of all encumbrances at the time of final settlement, which shall be made at the office of Eugene D. Black, #22 Ormand Ave., Oaklyn, N. J., on or before July 2nd, 1927 or the deposit and all money paid made herewith, at the option of the 'SELLER,' may be applied on account of the purchase price or be forfeited as liquidated damages to the 'SELLER,' and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the 'BUYER' in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained."

The evidence discloses that on May 28, 1927, the respondents vacated the insured premises and

moved to 322 Landis Avenue, Oaklyn, which was the property to be conveyed by Black to the respondents (page 17, lines 14-18). On the date mentioned, the respondents moved all their property from 350 Hillside Avenue, except the window shades, which the witness, Emma B. Evans, testified she would not have bothered taking away, as they would have been of no use at the property 322 Landis Avenue. Mrs. Evans likewise testified that Mr. Evans delivered the keys to premises 350 Hillside Avenue to Mr. Black within three days after they had moved into the property on Landis Avenue (pages 17-18).

Frank C. Evans also testified that he gave the keys to the property, 350 Hillside Avenue, to Mr. Black (page 26, lines 30-32), and at that time told him he could take renters and buyers to look at the house (page 26, lines 36-37), and that was all the conversation he had ever had with Black concerning the delivery of the keys (page 25, lines 6-10). *It should be here noted that the trial Court was in error when he found that the keys to the house were obtained by Mr. Black from the attorney of the respondents* (Findings, page 48, lines 3-5), *for there was no evidence whatever in this case upon which such a finding could be justified.* Evans admitted that the facts contained in a written paper marked "D1" for identification, which paper was signed and sworn by the witness on October 27, 1927, was a correct statement of the facts in reference to the dealings between Black and himself as they affected the premises, 350 Hillside Avenue (page 25, line 32; page 26, line 13). Those facts appear in the State of Case as Exhibit D1 (pages 78, 79) as follows:

"* * * this deponent, together with his wife, Emma B. Evans, were the sole owners of said property at the time of the fire, although they

had contracted to purchase another house, where they now reside, settlement for which has not yet been made, and at said settlement the seller of No. 322 Landis Avenue, to wit, Eugene D. Black, was to allow the insured the sum of thirty-four hundred dollars as part of the consideration in the purchase of No. 322 Landis Avenue, Oaklyn, for 350 Hillside Avenue, Camden, as more fully set forth in the copy of agreement of sale already furnished C. A. S. McClellan, your adjuster, at 136 S. Fourth St., Philadelphia, Pa." (page 78, lines 24-38).

Also:

"* * * that there has been no change in the title to the property since the issuance of said policy, nor in its use as a dwelling, nor in its location, but deponent and his wife and family moved out on May 28th, 1927, and it was the understanding with the said Black hereinbefore referred to, from whom deponent was purchasing 322 Landis Avenue, Oaklyn, that he, the said Black, had the privilege of placing a tenant in 350 Hillside Avenue, Camden, pending settlement on 322 Landis Avenue, Oaklyn" (page 79, lines 15-25).

In answer to an inquiry as to whether or not, following the delivery of the keys to Black three days to a week after Evans had vacated the Hillside Avenue property, Black had the property on Hillside Avenue to do as he pleased, he replied, "Well, to take renters and buyers there to look at it" (page 26, lines 36-37), and the witness admitted that when he was examined under oath in the office of Floyd H. Bradley, Esq., on November 2, 1927, he was asked

the following question and made the following answer (page 27, lines 10-15):

“Q. I asked you the question, ‘So Mr. Black had the property after May 28th to rent it or do with it whatever he wanted to? A. That is, as far as possession is concerned, of course, not a deed.’ You so answered it?

A. Yes, I believe I did.”

Upon examination at the trial, however, while he admitted he made such answer, he denied that the answer was true, notwithstanding that he subsequently read the deposition and swore to it.

Eugene D. Black, upon being recalled for further cross-examination, stated that about the time the agreement dated April 26, 1927, was made, he advertised the property 350 Hillside Avenue for sale for three days, in the Camden Courier (page 37).

This is all the evidence pertinent to a consideration of the legal points involved and, we submit, that from this testimony we have the following undisputed facts:

(1) The absolute abandonment by the respondents of the property 350 Hillside Avenue, Camden.

(2) The delivery of the keys to that property to Black.

(3) The right in Black to place a tenant in possession and the exercise of such other rights of ownership as ordinarily exist after title has passed.

(4) That insofar as possession is concerned, the respondents had parted therewith and Black exercised all the rights of possession after May 28, 1927.

The fire for which claim is made occurred September 15, 1927.

ARGUMENT.

The defenses urged for reversal of this judgment deal principally with the so-called "unconditional and sole ownership" clause and "the change of interest, title or possession" clause. The appellants contend that the assured violated both these said clauses and therefore forfeited their right to recovery under the policy.

I.

THE VERDICT IS CONTRARY TO LAW.

A.

*"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 or sole ownership."*

Under this clause of the policy to which we have referred and set up as Third Defense (amended) (page 7), the law is well settled that a vendee in possession of a property under a valid contract of purchase and entitled to specific performance, is the sole and unconditional owner.

Martin v. State Insurance Co., 44 New Jersey Law, 485;

Levin v. State Assurance Co., Ltd., 144 Atl. 797;

Alliance Insurance Co. v. Enders, 293 Fed. 485;

Cooley's Briefs on Insurance (2d Ed.), Vol. 3, p. 2187;

First National Bank of Wagener, S. C., v. Glens Falls Insurance Co., 27 Fed. (2d Series) 64.

In the last mentioned case the Circuit Court of Appeals for the Fourth Circuit, in an opinion by Mr. Justice Parker, said (p. 67):

“It is well settled, of course, not only in South Carolina, but elsewhere, that in the case of a binding contract for the sale and purchase of real estate, where the purchaser has made payments and entered into possession, equity will treat him as the real owner of the property, subject to liability for the unpaid purchase price, and the vendor or seller as holding the legal title merely as security, applying the maxim that equity regards as done that which ought to be done. Pomeroy's Equity Jurisprudence, Vol. 1, Sec. 368; *Virginia Shipbuilding Corporation v. United States* (C. C. A. 4th), 22 F. (2d) 38, 50; *Rexford v. Southern Woodland Co.* (C. C. A. 4th), 225 F. 1022; *Id.* (D. C.) 208 F. 295; *Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 1133; *Epps v. McCallum Realty Co.*, 139 S. C. 481, 138 S. E. 297. And in such case the vendor is not the unconditional and sole owner of the property, within the meaning of the clause of the insurance policies here under consideration. *Vancouver Nat. Bk. v. Law Union & Crown Ins. Co.* (C. C.), 153 F. 440; *Phenix Ins. Co. v. Kerr* (C. C. A. 8th), 129 F. 723, 66 L. R. A. 569; *Sharman v. Continental Ins. Co.*,

167 Cal. 117, 138 P. 708, 52 L. R. A. (N. S.) 670; *Ins. Co. v. Erickson*, 50 Fla. 419, 39 So. 495, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495, and note at 498; 14 R. C. L. 1058."

It would seem that there could be no question but that Black could enforce, by a bill for specific performance, a conveyance by the respondents to him of the property 350 Hillside Avenue. As part of the consideration for the purchase of the property 322 Landis Avenue, Black was to receive the property 350 Hillside Avenue. Possession of 322 Landis Avenue had been given to the respondents and they had abandoned the property 350 Hillside Avenue and moved into the Landis Avenue property, and had been in possession thereof practically four months prior to the fire. Is it possible that respondents could enjoy the benefits of the property on Landis Avenue and not convey to Black the property on Hillside Avenue? To state the question is to answer it. It would seem that Black could at any time compel the conveyance by the respondents to him of the insured premises under the terms and conditions of the agreement.

The learned trial Court placed a construction upon the agreement between Black and the respondents which the agreement itself does not warrant, which is that the respondents had not agreed to sell the insured property; that the agreement was to buy the Landis Avenue property from Black and that Black had agreed to allow \$3400 on the purchase price for the insured premises; that the contract did not in terms oblige the respondents to convey the insured premises to Black, but gave them the right to convey; and that therefore, under the terms

of the agreement, the respondents could either convey the property or, at their option, pay \$3400 in cash. The conclusion reached is apparently based upon a theory of the trial Court that so far as the Hillside Avenue property was concerned, mutuality of obligation was entirely lacking.

The agreement is not susceptible to such construction, in our opinion. The figure of \$3400 appearing in the agreement as the price fixed for the property 350 Hillside Avenue is obviously inserted therein in order that the down money plus the cash due on May 10, 1927, and at the time of final settlement, when added together should total \$5,300, the amount which the respondents agreed to pay for the property on Landis Avenue. A very pertinent inquiry arises in view of the narrow construction placed upon the agreement by the trial Court, as to what conclusion would have been reached had there been no figure appearing for the property 350 Hillside Avenue, Camden. For example, if the agreement had provided for a down payment of \$200, \$400 cash at the time of final settlement, \$300 cash on May 10, 1927, the balance of the total consideration to be allowed by the seller for the property 350 Hillside Avenue, would the construction of the Court have been the same? If it was not the intention of the parties that there was to be a conveyance of the property on Hillside Avenue to the seller, why the provision of the contract requiring the Hillside Avenue property to be free of encumbrance at the time of final settlement?

The construction placed upon the agreement by the learned trial Court does violence to its terms, and the agreement does not give to the respondents in this cause the option of paying \$3400 in cash or conveying the property on Hillside Avenue. Under the terms of the agreement, as we view it, a Court

of Chancery would have had the right to compel specific performance of the agreement by forcing the respondents to convey the Hillside Avenue property to Black. Black would have been under no obligation to accept \$3400 in lieu thereof. It is at once obvious that the \$3400 figure in the agreement appears solely for the purpose of evidencing the distribution of the total consideration to be paid. Black may have believed that he could obtain more than \$3400 for the property and, as the evidence discloses that he was legally a vendee in possession of that property when the fire occurred, the authorities we have heretofore cited are applicable to the case at bar and support the contention of the appellant that judgment should have been entered in its favor.

B.

*“This entire policy, unless otherwise provided by agreement endorsed hereon or added thereto, shall be void * * * 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.”*

Under this second clause of the policy, we submit that in order to apply the facts of this case to the law, it first becomes necessary properly to construe the language of the contract dealing with any change in the interest, title or possession of the subject of insurance. If the word “interest” is confined in its meaning to “title,” as apparently attempted by the Court below, you then would possibly obtain the

same conclusion as that Court reached, but we submit that the authorities have held that the word "interest" is of broader significance than the word "title" and embraces both legal and equitable rights. If this were not so, then the authorities to which we shall hereinafter refer are without sound basis, because very frequently a vendee is placed in possession of a property prior to the passage of title, but the policy has nevertheless been held void in most of the States.

In a very recent opinion rendered October 17, 1929, by the Supreme Court of Alabama in *Tucker, et al., v. Royal Insurance Company, Ltd.*, 124 Southern Reporter, 215, the Court, in an opinion by Gardner, Jr., said:

"That the word 'interest' in the above-quoted clause of the policy is of broader significance than the word 'title,' embracing both legal and equitable rights, is well established by the authorities. Brighton Beach Racing Ass'n v. Home Ins. Co., 113 App. Div. 728, 99 N. Y. S. 219, 221; Widincamp v. Phenix Ins. Co., 4 Ga. App. 759, 62 S. E. 478; Farmers' Mut. Fire Ins. Co. v. Olson, 74 Ind. App. 449, 129, N. E. 234; Gorsch v. Niagara Fire Ins. Co., 68 Misc. Rep. 344, 123 N. Y. S. 877; Loventhal v. Home Ins. Co., 112 Ala. 108, 20 So. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17."

In *Sewell v. Home Insurance Company*, 115 New York. Sup. 345, it was held that where there was a change of possession from that of a tenant to a vendee, the policy was avoided. In *Northern Assurance Company v. City Savings Bank*, 45 S. W. Rep. 737, it was held that a change of possession within the meaning of a policy is effected by admitting

another into possession under a conveyance, though a purchase money lien be retained. In *Cottingham v. Fireman's Fund Insurance Company*, 10 Ky. Law Rep. 727, it was held that the contract was avoided by giving the vendee possession under an executory contract of sale, and in another case bearing the same title but reported in 90 Kentucky, 439, likewise in 9 L. R. A. 627, it was held that the policy became avoided where possession was given under a contract for exchange of properties. See *Cooley's Briefs on Insurance* (2d Ed.), Vol. 3, pages 2653, 2654, 2655.

The last case to which we have referred is closer in point on this feature of the argument than any other of which the writer has knowledge, because in the case at bar it is really an exchange of one property for another plus a cash consideration to equalize the bargain, whereas in the Cottingham case no cash consideration was involved, there simply being an exchange of properties.

Were it not for the narrow construction of the agreement between Black and the respondents which the Court below adopted, there can be little doubt that he would have followed the decision of the New Jersey Court of Errors and Appeals, decided February 14, 1929, in the case of *Levin, et al., v. State Assurance Company, Ltd.* (not officially reported but found in 144 Atl. 797 and VII N. J. Adv. Rep. 447). By reason of the close analogy of that case to the case at bar, we quote at some length from the opinion, as follows:

“* * * The policy of insurance contained this provision, viz.: ‘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 the death of an insured, take place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise.'

There were two policies, each for the sum of \$2,500.00, and dated April 4th, 1923. The policies were to run each for a period of three years. One covered property known as No. 1200 Summit Avenue, and the other property known as No. 1198 Summit Avenue, Jersey City, N. J. On July 26th, 1924, a fire damaged one house and completely destroyed No. 1198 Summit Avenue.

The testimony shows, that on May 23rd, 1924, the plaintiffs, Levin and Petrofsky, and their wives, entered into a written agreement, Ex. P1, with Samuel Rubin, whereby they agreed to convey to him on or before January 15th, 1925, the building known as No. 1198 Summit Avenue, and the lot whereon it stood, subject to a monthly tenancy, therein held by him at \$50.00 per month rent, commencing June 1st, 1924, with the right to occupy the same as monthly tenant from June 1st, 1924, until taking title. The purchaser, his heirs and assigns, to have possession on January 15th, 1925, and from thence take the rents thereof to their own use.

The prospective purchaser, Samuel Rubin, took possession as tenant under the agreement on June 1st, 1924, and on the 26th of the following month of July, 1924, a fire occurred, which entirely destroyed the premises at No. 1198 Summit Avenue, occupied by him, and damaged the other building at No. 1200 Summit Avenue; the damage to No. 1200 amounted to

\$135.00, the amount for which the verdict was directed for the plaintiffs by consent of the parties.

Under our cases, the agreement of sale was in direct violation of the terms of the policy, in that, the ownership is not unconditional and sole, there is a change by the written agreement in the interest, title and possession of the subject of the insurance, as provided by the policy, not endorsed thereon or added thereto. *Grunauer v. Westchester Insurance Co.*, 72 N. J. L. 289. That case was in this court, and the facts of the case are substantially the same as the facts of the case under discussion. *Hanson v. Nat. Liberty, &c., Insurance Co.*, 100 N. J. L. 215. As was said in the case of *Plockzek v. St. Paul, &c., Insurance Co.*, 91 Atl. 812, the provision, above quoted, is a part of the contract and must be enforced, unless there is evidence that its provisions have been waived by the defendant company."

We submit the authorities to which we have referred substantially show that the cases relied upon by the trial Court are not in point, but only one of these cases need be specially referred to, namely, *Levine, et al., v. Lafayette Building Corporation*, 142 Atl. 441. In that case the complainant was allowed to waive the credit intended by the second mortgage and pay cash. It seems at once apparent that there is a decided distinction between the privilege of giving a mortgage upon a property, and the privilege of giving a deed for the other property provided it is clear of encumbrances. A mortgage is not an instrument upon which a profit can be made. If one took a \$5,000 mortgage upon a piece

of real estate, except for such interest as may have accrued, the owner could only obtain \$5,000 for that mortgage; but if one agreed to take a piece of real estate for \$5,000, he has the privilege of selling it for such sum over and above that amount as he can obtain from a prospective purchaser. No one can obtain more than the face amount of a mortgage with accrued interest, but everyone can hope to obtain more for a piece of real estate than he paid for it.

We submit that both under the terms of the agreement and the evidence in this cause, the respondents had parted with their interest and possession in the insured property. It is true that the naked legal title they had retained, but even that was of no value at the time of the fire, for Black had fulfilled the terms of the agreement so far as he was concerned when, on May 28, 1927, the respondents took possession of the Landis Avenue property. From that date on Black was in the position of compelling the respondents to pay the \$1400 in cash and transfer to him the Hillside Avenue property of which he already had possession. The accepted method of passing possession to real estate is by delivery of the keys, and this had been done and the keys retained by Black from sometime during the latter part of the month of May, 1927, to the date of the fire. These factors, with the other admitted facts to which we have referred, establish that there was no further evidence of ownership possible for the respondents to confer upon Black except the legal title.

II.

THE VERDICT IS NOT SUPPORTED BY THE EVIDENCE.

The facts, we submit, establish beyond peradventure that Black was the vendee in possession of the Hillside Avenue property when the loss occurred, and the case is controlled by the authorities cited in this brief.

Just how much of the trial Court's verdict was based upon his erroneous finding, that the keys to the property 350 Hillside Avenue were delivered to Black by the respondent's attorney, we are unable to say. The question of "the change in possession" contemplated by the terms of the policy, must be viewed in the light of the actual dealings between Black and the respondents. To actually put a person in possession of a dwelling house, we deliver the keys to him. We submit, therefore, that when this delivery of the keys was actually accomplished by the respondent Evans, and in pursuance thereof Black went into actual physical possession, showed the property to prospective customers, examined it for the purpose of making needed repairs and advertised it for sale in a newspaper, there can be no other rational explanation of these actions than an express violation of the change of "interest, title or possession" clause.

For this reason and those heretofore urged, we contend that the verdict is not supported by the evidence.

III.

UPON THE EVIDENCE SUBMITTED TO THE TRIAL COURT HE SHOULD HAVE FOUND A VERDICT FOR THE APPELLANT INSTEAD OF THE RESPONDENTS.

With the uncontradicted evidence submitted in this case and the proper application of the law governing same, as heretofore set forth, the trial Court should have found a general verdict in favor of the appellant and against the respondents.

CONCLUSIONS.

For the reasons above set forth, we respectfully submit, the judgment herein appealed from should be reversed.

FRENCH, RICHARDS & BRADLEY,
Counsel for Appellant.

NEW JERSEY COURT OF ERRORS AND
APPEALS

FRANK C. EVANS and EMMA B. EVANS,
Plaintiffs-Respondents,

v.

THE LONDON ASSURANCE CORPORATION,
Defendant-Appellant.

ACTION AT LAW.

APPEAL FROM SUPREME COURT.

BRIEF FOR PLAINTIFFS-RESPONDENTS.

FACTS.

We wish to refer to certain facts not mentioned in the brief for the appellant. The witness Black testified that the insured property was not in his possession "to do any repairs" (p. 20); that he got the keys from Mr. Evans about a week after Evans moved out of the property (p. 19); that he (Black) did not have the privilege of renting the property (p. 22); that all his dealings were with

Mr. Evans (pp. 22 and 23). (It should be said here that the Evans referred to in this testimony is the plaintiff Evans and not his attorney, whose name also is Evans. This similarity of names, no doubt, is what led the Court below to say that the keys were delivered by the attorney.) There was no testimony connecting Mrs. Evans, the plaintiff, with the delivery of the keys, although she was one of the owners by the entirety of the property in question. Mr. Black also testified (p. 23) that it was only after getting a deed that he intended to make repairs.

Mrs. Evans, one of the plaintiffs, testified that she never delivered possession of the insured property to anyone (p. 15) nor delivered the keys to anyone, nor put anybody in the property (p. 17).

Frank C. Evans, one of the plaintiffs, testified that when he was examined before the institution of suit, by the attorney for the insurance company, that he "didn't really stop to think what the word possession meant" (p. 29); and (on pp. 31-32), that by the word "possession" he meant that Black "could take renters and buyers there and look at it only;" and also, that in answering Mr. Schell's question (p. 32), in which the word possession appeared, he did not know what he (Schell) meant by that word; and that he was never asked, who, if the property had been rented, would have been entitled to the rents (pp. 33-34).

By error, no doubt, there was printed in the State of the Case in two places (pp. 77 and 89) an endorsement on the agreement of extension of time, which was not admitted in evidence (pp. 14-15).

ARGUMENT.

The argument for the plaintiff-appellee will be presented under three heads:

1. There was no change of interest in or title to 350 Hillside Avenue, the insured premises, and no forfeiture because of such a change.

2. There was no change of possession, and no forfeiture because of such a change.

3. There was no violation of the clause requiring that the plaintiffs be the sole and unconditional owners of the property.

1. THERE WAS NO CHANGE OF INTEREST IN OR TITLE TO 350 HILLSIDE AVENUE, THE INSURED PREMISES, AND NO FORFEITURE BECAUSE OF SUCH A CHANGE.

The agreement between plaintiffs and Black is not an agreement to sell the insured premises. The agreement, as will be seen by an inspection of the original, is for the sale of #322 Landis Avenue. *This is not* the property which was destroyed by fire. The property which was destroyed by fire was #350 Hillside Avenue, Camden, and the only reference in this agreement to #350 Hillside Avenue is that at the time of final settlement the balance of the purchase price for #322 Landis Avenue should be paid partly in cash and partly by the sum of "Thirty-four Hundred Dollars to be allowed by the seller for property #350 Hillside Avenue, Camden, which said property is to be clear of all encumbrances."

The time fixed by this agreement for the settlement for #322 Landis Avenue was extended from time to time prior to the fire without either party to that agreement being in default. The references in the agreement to moneys paid, on account of which receipt is thereby acknowledged, to possession and other like matters, relate solely to the premises not involved in this fire, and have no relation to #350 Hillside Avenue. The plaintiffs' contention in this respect is that the references to #350 Hillside Avenue in the agreement relating to the sale of #322 Landis Avenue conferred upon the plaintiffs an option to obtain credit at the settlement for thirty-four hundred dollars by a conveyance of the insured premises, that at the time of the settlement, plaintiffs could have paid, if they had seen fit, this thirty-four hundred dollars in cash, and that Black would have had no right to complain and would have had no right to insist upon a deed for #350 Hillside Avenue. Under the circumstances, the cases relied upon by the defendant have no bearing and clearly exclude a case of this sort from the effect of the forfeiture clause relied on by the defendant.

Grunauer v. Westchester Insurance Company, 72 N. J. L. 289, is a leading case upon this question. The policy in that case contained a clause similar to the clause in the present policy. It appeared that the plaintiffs did, after the policy was issued, execute a written agreement to sell and convey the property in fee to their tenant, who was in possession, upon the payment of the stipulated price, a portion of which was then paid. It was held that such action caused a change in interest, title and possession of the subject of insurance sufficient to void the policy. The reasoning of the Court was that by force of such a contract and transfer of possession a complete transfer of the equitable and

beneficial ownership from the vendors to the vendee was effected, subject only to the claim of the vendors for purchase money, and that although the vendors thereafter still retained the legal title to the land, they held it as trustees for the vendee, who became the owner in equity. It is clear from a reading of this opinion that the whole basis of the ruling was the fact that the vendee had become the equitable owner. And this would not be the case unless there was a binding contract of sale of the particular property insured.

That the rule relied upon by the defendant is only given effect upon the theory that the vendee is the equitable owner, is shown by all of the reported cases. In the late case of *Levin v. State Assurance Company*, 144 A. R. 797, there was a binding contract of sale and there does not seem to have been any question raised as to that point. In the case of *Hanson v. National Liberty Insurance Company*, 100 Law, 215, there was a sale under foreclosure prior to the fire and the purchaser at the foreclosure sale was clearly the owner of the property, and his purchase at the sale was, of course, a change in ownership.

Plochzek v. St. Paul Insurance Company, 91 A. R. 812, was an attempt by the purchaser to reform the policy so that it would run in his favor, this attempt being made after the fire. That case involved an outright conveyance.

The reason of these cases being absent, it would, of course, follow that they will not be applied.

The cases in the various States dealing with the general subject-matter of the effect of the contract for sale upon a policy of insurance are collected in *Cooley's Briefs on Insurance*, Volume 3, pages 2669 to 2678, inclusive.

The equitable doctrine that a valid contract of sale operates as an equitable conveyance is only effective where the contract is one that equity will enforce. Thus, in *Wittingham v. Lighthipe*, 46 N. J. E. 429, Vice-Chancellor Van Fleet said:

“The principle is well settled, that every valid contract for the conveyance of land creates, in the view which equity takes of such transactions, the relation in a qualified sense of trustee and *cestui que* trust. The vendor becomes the trustee of the legal title of the land for the vendee, and the vendee becomes the trustee of the purchase money for the vendor, but no such relation is created unless the contract be one that equity will enforce.”

To the same effect, *Keep v. Miller*, 42 N. J. E. 100, and *Marion v. Wolcott*, 68 N. J. E. 20, and cases cited; *Peoples Water Co. v. Millville*, 95 N. J. E. 732; *Jersey City v. Flynn*, 74 N. J. E. 104 (115, 118, 121). See *Cropper v. Brown*, 76 N. J. E. 406, at page 421.

The basis of the doctrine is that equity considers as done that which *was agreed to be done*. See cases cited in *Cropper v. Brown*, *supra*.

An option, until exercised, will not pass the equitable title, and in that respect an option differs from a binding contract. Vice-Chancellor Garrison, in the case of *Cropper v. Brown*, *supra*, at page 420, refers with approval to the note in 57 L. R. A., at page 643, and this note, on page 648, gives a number of cases in which it is held that to work an equitable conversion the contract must be one which equity will specifically enforce. One of the most recent cases dealing with the nature of a contract, as one of sale or as of option, is the case of *Sooy*

v. Henkelman, 104 N. J. L. 540. In that case the Court of Errors said that whether an instrument in writing transferring an interest in real estate shall be construed as an absolute contract for sale and purchase, or only an option to purchase, depends not on any particular words or phrases, but on the intention of the parties to be derived from the instrument itself by consideration of its parts, and when that is doubtful, from the circumstances attending it. In that case plaintiffs put in evidence the written agreement upon which they relied and rested their case without any further proof. The defendant's motion for a non-suit was then granted on the ground that the agreement merely gave the defendant an option to purchase which he might exercise or not, as he saw fit. The agreement was much stronger and much more definite as to a sale than the agreement now before the Court. The plaintiffs expressly stated that they agreed to sell the premises to the defendant for a sum in excess of one million dollars, ten thousand dollars whereof was paid on the execution of the agreement, and the manner of payment of the balance particularly set forth. Nowhere, however, in the agreement, did the defendant state that he agreed to purchase the land nor to make the payment. In the present case, Evans and wife did not agree to sell, and when we say agree we mean that these parties did not promise or covenant with each other that Evans would sell the insured premises. The sole agreement was that when the time of final settlement came, which had not arrived up to the time of fire by reason of mutual extensions, Black would allow a certain sum for a deed for the property in question. This was only an option to sell and is even less stringent than the agreement in the Sooy case, which this Court held was a mere option. In this

case, no payment of any sort was ever made by Black to the plaintiffs in connection with the insured premises.

If there had been no fire, the contract might have become binding, it is true, by the option of the plaintiffs at the time the settlement time arrived and Black would have been bound by the election of the plaintiffs to exercise their option to sell. But when Evans had not exercised the option up to the time of the fire, it would then be too late to bring into existence a contract binding upon Black, as after that date the subject-matter would be regarded as destroyed and performance could not be obtained. But, however this may be, there would be no transfer of the equitable title to Black until the exercise of the option, so that until the occurrence of that act Black would not be responsible for the loss, and could after the fire very well say that the subject-matter had been destroyed.

But this is not the situation which the Court has to consider. The option to sell to Black, or, otherwise expressed, to require Black to take this property, was never exercised, and whether Black could be held or not, is not an issue in this case. The plaintiffs would have the right to say, after the fire, and before settlement time, that they would not exercise their option, nor attempt to hold Black, either because their legal right to do so was doubtful or absent, or because of the practical difficulty of recovering from him, and also to say, at that stage of the matter, that they preferred the more certain recovery from the insurance company which had received a premium for insuring against just such a loss as in fact occurred. And unless the equitable title was transferred to Black before the fire, there is no legal reason for refusing plaintiffs relief in this action. To give the insurance company the right to

treat the property as converted is to give it, in effect, the right to exercise Evans' option to sell, without Evans' consent and before the arrival of the time for its exercise.

The English case of *Haynes v. Haynes*, 1 Dr. and Sm. 426 (62 Eng. Reprint, p. 442), is an interesting case on the question of conversion. No fire loss was involved, but as that question here depends upon whether there was an equitable conversion, the case is in point. This case arose out of a condemnation proceeding. The railway company had given a "notice to treat," a notice somewhat similar to the notice of the institution of condemnation proceedings to which we are accustomed in our practice. The land-owner died without having done anything pursuant to the notice. The railway company, it would seem, after the giving of the notice to treat, could not withdraw. The situation, therefore, was equivalent to an option in the sense that one party was bound and the other not, although the land-owner's rights, for some purposes, were subjected, by the notice, to certain restrictions. In considering the question of whether the notice given by the railway company had the effect of an equitable conversion, the Court had to determine whether there was anything in the nature of a contract by the land-owner which would work a conversion. As the Court stated (Reprint, p. 452):

"A court of equity considers that as done which ought to be done, and which it will compel to be done. There is no conversion at law. Conversion as arising from a contract to sell is merely and exclusively the consequence of the application by a court of equity of the doctrine of specific performance. Where there can be no specific performance there can be no conversion."

So the Court was required to resort to first principles and (Reprint, p. 445) referred to Blackstone's definition of a contract as "an agreement upon sufficient consideration to do or not to do a particular act," and said, "In order to constitute an agreement or contract, two things are requisite, firstly, the will, and secondly, some act, whether in word or deed, whereby that will is communicated to the other party."

In applying these principles, the Court said (Reprint, p. 445):

"Now, so far as the company are concerned, they have the will and have notified that will to the land-owner. Let it then be conceded (I do not assert it), but let it be conceded that the notice constitutes an agreement or contract on the part of the company. But how does it operate with respect to the land-owner? Has he contracted or agreed? In the first place, what is his will on the subject? No one can say what it is, for no one can read his thoughts; he may be willing or he may be entirely unwilling, but, until he has by some means indicated his will, he must stand in the category of the unwilling. But, in the next place, suppose that you could ascertain that he was willing, how has he communicated his will to the company? He has not opened his lips, or written a word or stirred a finger in relation to the matter. As the case stands, there is a total absence of the requisites which are necessary to constitute an agreement or contract on his part."

It may be argued by the defendant in our present case that an intention to exercise the option can be

implied upon the ground that there was a change of possession. But there was never such a transfer as would be regarded as intended to transfer the right to possession, as distinguished from possession. The evidence does not go beyond proof that Evans, one of the owners by the entirety, authorized Black to rent, and for all that appears to rent solely for the benefit of both Evans and wife, it being their property until the exercise of the option in some definite manner.

Another of the English cases, which applies the principle stated in *Haynes v. Haynes* to the case of a fire, is *Edward v. West*, 7 Ch. Div. 858 (L. R. 1877-8). In this case a tenant having an option to purchase sought to exercise the option after a fire had destroyed certain property, part of the subject-matter of the option. It was contended that when the tenant exercised the option it related back to the date of the contract which gave the option. In disposing of this contention, Mr. Justice Fry said:

“Now, it appears to me that such a conclusion would be highly inconvenient, because it would place a person under the obligation which rest upon a trustee, or make him free from them, by reference to an act which was not performed until a future day; and the retrospective conversion of a person into a trustee of property is a result eminently inconvenient. In the next place, the argument appears to me to be opposed to the general course of authority and principle. According to the view which I conceive to be true, the conversion of property, which means the treating it as belonging to somebody else before it has been actually transferred to that other person, results from a contract which can be specifically enforced; so that

where there is no specific performance of contract possible, there is no conversion. It flows in effect from the principle of equity which considers that done which ought to be done, and which the Court can compel to be done, and it extends so far back as those circumstances exist, and no farther. In other words, where there is a contract capable of being specifically enforced as from the date of that contract, and neither earlier nor later, the property comprised in the contract is deemed to belong to the purchaser, and the money to be paid is deemed to belong to the vendor, because those two things ought to be done; but here there is no obligation to do them at any earlier date than that of the contract constituted by the exercise of the option. The conversion cannot, according to the principle, relate back to an earlier date than the contract which gives rise to it."

Aside from the fact that in our case the option was, in fact, never exercised, the last-mentioned case is quite similar to the present one.

2. THERE WAS NO CHANGE OF POSSESSION AND NO FORFEITURE BECAUSE OF SUCH A CHANGE.

The clause relating to change of possession must be read as a whole and it must be borne in mind that the language of the policy contains the condition that "change of occupants without increase of hazard" is excepted. In Cooley's Briefs on Insurance, Volume 3, page 2653, it is said, "The change of possession contemplated by a provision of this

kind is something more than a change of occupation. It is a change effected by legal process, judicial decree, voluntary transfer, or conveyance, one which refers to the insured's possessory right and not to his occupancy of the premises." Therefore, putting in a tenant, or any change of occupation falling short of intention to part with the right of possession, which in a sense is a change of title, is not within the prohibition of the policy. The language of the condition itself, coupling the word possession, as it does, with interest and title, shows that this is a true construction. The testimony as to what was done by Evans and his wife, who were owners of the property by the entirety, must be taken as true, being supported by the findings of the trial Court. There was no provision in the agreement respecting the delivery of possession of the insured property. The defendant sought to bind Evans as to the change of possession by reason of the fact that he had, under examination before suit, stated that he had given Black possession. The first comment with respect to this testimony would be that it would not be binding upon Mrs. Evans, who was an owner by the entirety, and who was not examined. The second statement which can be made with respect to this statement prior to suit is that Mr. Evans did not have sufficient technical knowledge to distinguish between possession in a legal sense as intended by this policy condition and possession in a popular sense, as change of tenants, or something of that sort. The examination before suit (Case, pp. 86-87) shows that Mr. Evans was first led to say that on May 28th he took possession of the Landis Avenue property, the word possession having been used by Mr. Schell in his question. A few questions further on Mr. Evans stated that he had given possession to Mr. Black. That Mr.

Evans did not mean to say that he had parted with his interest in the property or that the possession was of that nature, is apparent in his answer to Mr. Schell's question, "So that Mr. Black had the property after May 28th to rent it or do with it whatever he wanted to do?" Answer: "That is, as far as possession was concerned. Of course, *not a deed*" (p. 87). This was followed by Mr. Schell's question, "I mean if he obtained a tenant for the property after May 28th, there was no objection to his putting a tenant in possession?" Answer: "No, sir, that was his privilege" (p. 87). It is to be noted that Mr. Schell did not ask to whom the rent should go if a tenant had been put in possession, as he, Mr. Schell, termed it. There is an entire absence of testimony tending to show that there was any intention to transfer to Black any beneficial possession or that these rents would belong to Black for the period prior to the exercise of the option. And without evidence on this point, the defense fell, the burden being on them. We submit that it is not going too far to say that an attempt was made to take advantage of Mr. Evans' lack of technical knowledge to obtain from him some admission against his interest without directing his attention to the real meaning of the question and the purpose of the examination. Therefore, the Court very properly allowed Mr. Evans at the trial to state what he intended by his use of the word possession. We suggest that when Mr. Evans says that he did not mean possession in the sense of a change of right, but merely as a change of occupancy, that this Court must for the purpose of these motions accept that as true, as there was no dispute on that point. Certainly counsel for the plaintiffs would not agree to define under oath the meaning of the term "possession," and yet we claim some tech-

nical knowledge of the subject. Definitions of "possession" are given in 31 *Cyc.*, pages 923 to 952, inclusive, reference to which will show the amazingly large number of ways in which the meaning of possession can arise. Where, as in this case, the question arises of whether there was or was not a change of possession within the meaning of this forfeiture clause, the answer depends upon the intention. If that intention is testified to, there is no occasion for a jury to pass upon the question. In the case of *Hampton v. Hartmann Fire Insurance Company*, 65 Law, 265, it was held that where there was a conflict in a testimony as to whether or not there was occupancy, the question was one for the jury. This would equally be true in this case if there was a conflict in the testimony as to whether there was possession. But it is submitted that there was no room for a jury in this case, to have found that there was a change of possession in the sense contended for by the defendant. Certainly, there can be no justification for so holding as to plaintiff, Emma Evans. As she was a tenant by the entirety, she would be entitled to recover in full, even if her husband was barred by his examination before suit. See *Trade Insurance Company v. Barracliff*, 45 Law, 543. Attention is called to the fact that this examination before suit could not operate by way of estoppel, there having been no change of position by the defendant in reliance thereon, but is merely evidence of a statement made by Frank Evans, which, it seems to us, he has reasonably explained. An interesting case, showing the difficulty our own Courts have had in dealing with the question of possession and in defining it, is the case of *Schwinn v. Perkins*, 79 Law, 515.

3. THERE WAS NO VIOLATION OF THE CLAUSE REQUIRING THAT THE PLAINTIFFS BE THE SOLE AND UNCONDITIONAL OWNERS OF THE PROPERTY.

The defendant has misconceived the meaning of this clause. It has to do with the question of the interest of the insured when the policy is written. The condition itself is in the present tense. It reads that the policy shall be void "if the interest of the insured be other than unconditional and sole ownership." The deed to the plaintiffs was in evidence and shows that they were the owners in fee on the day of the date of the policy. The cases on this point are collected in Cooley's Briefs on Insurance, pages 2120 to 2122, Volume 3. As stated on page 2122, "The clause relates to the interest of the insured at the time of the consummation of the contract." To so construe this clause brings it into line with the other clauses relating to changes of title. The cases cited in the defendant's brief did not hold that the condition had prospective operation. These cases are authority for the position which we would take, if it were necessary, that even if Evans had given Black a deed, so long as he retained the real interest in the property he would be sole and unconditional owner and, therefore, there would have been no change in interest or title. Thus, in *Franklin Fire Insurance Company v. Martin*, 40 Law, 568, the assured did not have legal title, but it was held by the Court of Errors and Appeals that he was justified in referring to the property as "his." *Martin v. State Insurance Company*, 44 N. J. L. 485, is to the same effect, and in *Carson v. Jersey City*, 43 Law, 300, it was held that the execution of mortgage subsequent to the insurance was not an alienation, etc.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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