RECENT ENGLISH DECISIONS.

Court of Appeal.

RAYNER *v.* PRESTON.

After the date of a contract for the sale of a house, and before completion of the purchase, the house was damaged by fire, and the vendors received the insurance money from the insurance company under a policy existing at the date of the contract. The contract contained no reference to the insurance. In an action by the purchasers against the vendors: *Held*, per COTTON and BRETT, L.JJ. (*dissentiente* JAMES, L. J.), that the purchasers were not entitled to recover the moneys from the vendors, or to be allowed to have the amount deducted from their purchase-money, or to have the moneys applied to reinstatement of the premises.

Per JAMES, L. J. The purchasers were entitled to succeed in their action, on the ground that the relation between the vendors and purchasers became and was, in law, as from the date of the contract, and up to the completion of it, the relation of trustees and *cestui que trusts*, and that the trustees received the insurance money by reason of and as the actual amount of the damage done to the trust property.

Judgment of JESSEL, M. R., 43 L. T. Rep., N. S. 18, affirmed.

ON the 31st of July 1878, the plaintiffs entered into a contract with the defendants for the purchase of a house in Liverpool for the sum of 3100*l.* The house at the time was insured against fire by the defendants with the Liverpool and Globe Insurance Company, but the contract contained no reference to this insurance.

Soon after the date of the contract, and before the completion of the purchase, the house was damaged by fire to the extent of 300*l.*, which sum was paid to the defendants by the insurance company, who were not then aware of the contract for sale.

The vendors (who were trustees under a will), refused either to hand over the money to the purchasers or to expend it in reinstating the premises, and the purchasers then brought this action.

JESSEL, M. R., considering himself bound by authority, held, that in the absence of express provision in the contract, the purchasers were not entitled, as against the vendors, to the benefit of the insurance money, either by way of abatement of the purchase-money or in reinstatement of the premises. (43 L. T. Rep. N. S. 18), and plaintiff appealed.

COTTON, L. J.—It was contended by the appellants that they were entitled to the moneys, 1, on general principles, irrespective of any special circumstances alleged to exist in this case; 2, under the provisions of the Act of 14 George III., ch. 78, either alone or with the aid of the special circumstances of this case. On the

first point, it was urged that, although the contract did not mention the policy, it gave the plaintiffs, as purchasers, a right to all contracts, to the benefit of which the vendors were entitled, and of which the execution would be beneficial to or improve the thing purchased. This was inconsistent with one of the conditions on the back of the policy, which stipulated that assigns of the property, with certain exceptions (not including a purchaser), should not be entitled to the benefit of the insurance. But, independently of that objection, I am of opinion that the contention of the appellants cannot prevail. The contract passes all things belonging to the vendor appurtenant to, or necessarily connected with, the use and enjoyment of the property mentioned in the contract, but not, in my opinion, a collateral contract, and such, in my opinion at least, independently of the Act of George III., the policy of insurance is. It is not a contract limiting or affecting the interest of the vendors in the property sold, or affecting their right to enforce the contract for sale. For it is conceded that, if there were no insurance and the buildings sold were burnt, the contract for sale would be enforced. It is not even a contract in the event of a fire to repair the building, but a contract, in that event, to pay the vendor a sum of money which, if received by him, he may apply in any way he thinks fit. It is a contract not to repair the damage to the building, but to pay a sum, not exceeding the sum insured, as the money value of the injury. In my opinion, the contract of insurance is not of such a nature as to pass, without apt words, under a contract for sale of the thing insured. But the appellants' case was put in another way. It was said that a vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being invested in him, he could not have recovered on the policy, he must be considered as a trustee of the money recovered. I think that this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser, and, so far as he is a trustee, he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no sense a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire

occurred, and the right to recover the money accrued before the day fixed for the completion. The argument that the money is received in respect of property which is trust property, is, in my opinion, fallacious. The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property.

It remains to be considered whether the statute of 14 Geo. III., ch. 78, can give the plaintiffs any right to the money. In my opinion the statute does not, of itself, so connect the money with the land sold as to entitle the plaintiffs successfully to contend that, under the contract, they are entitled to the money.[1] * * *

BRETT, L. J., delivered a concurring opinion.

JAMES, L. J.—I am unable to concur in affirming the judgment of the Master of the Rolls. According to my view of the case, the plaintiffs' contention is founded, not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on the artificial equity as it is understood and administered in our system of jurisprudence. I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust.* I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract, while the contract is *in fieri*, the relation of trustee and *cestui que trust.* But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri.* But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is a thing ascertained that the relation was throughout that of trustee and *cestui que trust.* That is to say, it is ascertained that, while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that is, in

[1] The rest of the opinion being upon the statute, is omitted as not of general interest.

my opinion, the correct definition of a trust estate. Whenever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust. The legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust.* This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee, any benefit which accrues to a trustee from whatever source or under whatever circumstances, by reason of his legal ownership of the property, that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But a policy of fire insurance is not, in my opinion, a collateral contract; it is not a wagering contract—a contract that if a fire happened, then a certain sum of money shall be paid to the insurer—but it is, in terms and in effect, a contract that, if the property is injured, the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right, and is the measure of the right, and it seems to me impossible to say that it is not, by reason of the legal ownership, and in respect solely of the injury done to that legal ownership, that the right to recover from the insurance company accrued to the insurer. If the fire in this case had happened through the wrongful or negligent act of a third person, while the contract was *in fieri*, the legal right to sue for the damage would be in the vendor; but on the completion of the contract the purchaser would be entitled to use the name of the vendor as his trustee, to sue for the damage so sustained; or, if the damages had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right of the purchaser to use the vendor's name in an action on the contract of indemity against loss by fire, which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if, after actual conveyance and during the currency of the policy, a fire had occurred. The vendor in that case would have no right, as between him and the insurance office, and the purchaser would have no right of action, because one of the conditions of the policy excludes it, and, independently

of that condition the policy would or might, probably, be held not to run with the land in the hands of the subsequent owner. And in that case there would not be that which is the foundation of the right, the legal ownership and right in one person and equitable ownership in another. No doubt it is a mere accident that there was such a policy, and there was such a right. The purchasers could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there are a creditor, a debtor and a surety, and the surety finds out that, by something to which he is not privy and of which he had never heard, somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security as the case may be, and the creditor releasing such surety or parting with such security, would probably find himself in considerable peril. In the same city in which this controversy has arisen, there occurred some time ago a great destruction of property by reason of an explosion of gunpowder caused by a fire. Houses were damaged, not by fire, but by the explosion caused by a fire in another neighboring place. The insurance office thought that it was for their interest to be very liberal, and treat the damage from the explosion as a damage from fire within the policies, and to pay accordingly. This was a mere act of liberality. They thought it was for their permanent benefit, commercially, to be liberal, and they were liberal accordingly: *Taunton* v. *Royal Ins. Co.*, 2 Hem. & Mil. 135. I cannot myself doubt that, if a trustee or a vendor who had become trustee by the completion of his contract had received the bounty, he would have received it by reason of his trusteeship, and would have had to give it up to his *cestui que trust* and purchaser. In my view of the case, it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance; but the act seems to me to show that a policy of insurance on a house was considered by the legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser, having an equitable interest under a contract of sale, is a person having an interest in the house within the meaning of the act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a

tenant for life, having insured his house, has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by showing that he was of extreme old age, or suffering from a mortal disease. In the case of *Collingridge* v. *Royal Exchange Assurance Corporation*, L. R., 3 Q. B. Div. 173, the vendor recovered the whole amount of the loss, although it was absolutely certain, having regard to the solvency of his purchaser, that he would really never suffer any loss at all, personally or otherwise than as trustee for such purchaser. Of authority on the subject there is, no doubt, the express decision of KINDERSLEY, V. C., against the plaintiff; but against that there are to be set off the very distinct opinions of Lord ST. LEONARDS and PARKER, V. C., men of great knowledge of equity, and of great accuracy and sense in their dicta. But I prefer to rest my judgment on the fact that the relation between the vendor and purchaser became, and was in law, as from the date of the contract, and up to the completion of it, the relation of trustee and *cestui que trust*, and that the trustee received the insurance money by reason of, and as the actual amount of the damage done to the trust property. The plaintiffs put their case also on the ground of the representations made to them by the defendants' solicitor and agent. What took place appears to me to be this: The solicitor said to the purchasers, "I do not know who is entitled, but the vendors are the only persons who have a legal claim, and I will make the claim accordingly, whichever is entitled," and the purchaser left the matter in his hands. Now the purchasers could, at that time, have applied to the office to compel the money to be laid out in restoring the building. And I am of opinion that, when the money was, under these circumstances, obtained from the office, it reached the vendors' hands, according to the then rights of the parties, as between them and the insurance office; that is to say, as money which ought to be laid out in reinstating the premises; or, in other words, as money which the purchasers alone had any real and substantial interest in.

Upon the first blush this decision seems scarcely consistent with equity, but the particular facts of the case disclose grounds for the decision which, apart from general principles, give a special complexion to the case itself. For instance, one of the conditions endorsed on the policy stipulated that assigns of the policy, with certain exceptions (not including a purchaser), should not be entitled to the benefit of the insurance. The policy of insurance was, as was

said by COTTON, L. J., a collateral contract. It was a contract, not to repair the damage to the building, but to pay a sum not exceeding the sum insured, as the money value of the injury.

But is not the vendor, in the interim between the making of the contract and its completion by a conveyance, a trustee of the property for the purchaser? Lord Justice COTTON thinks not, an unpaid vendor being a trustee in a qualified sense only, *i. e.*, only in respect of the property contracted to be sold. Of this the policy is not a part.

The money, be it observed, is received by virtue of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this, as the Lord Justice says, is very different from the proposition that the money is received by reason of his legal interest in the property. In the case of *Garden* v. *Ingram*, 23 L. J. Ch. 478, relied on by the appellants, Lord ST. LEONARDS (Chancellor), affirming a decree of KNIGHT BRUCE, V. C., declared that the purchaser from a mortgagee of a lease was entitled to the benefit of a policy of insurance effected in pursuance of a covenant contained in the lease in the joint names of the lessor and lessee, and ordered the defendant, the lessee, to concur with the landlord in giving a receipt for the money. But there the lease contained a provision that any money recovered on the policy should be laid out in reinstating the buildings injured by fire. Upon this ground the decision was based; and this is the view of the case expressed by KINDERSLEY, V. C., in *Lees* v. *Whiteley*, 35 L. J. Ch. 412. See Law Rep., 2 Eq. 143; 35 L. J. Ch. 412; 14 W. R. 534; *Lagrane* v. *U. M. Ins. Co.*, 14 L. T. (N. S.) 472, V. C. K. This is manifestly very different from the state of facts disclosed in the case before us, there being in *Garden* v. *Ingram*, *supra*, an express covenant or provision in the subject-matter of sale relating to the disposition of the money recovered under a policy. *Durant* v. *Friend*, 5 De G. & Sm. 343, also relied upon by the appellants, was *dictum* only, not a decision, and need not, therefore, be further considered. In *Norris* v. *Harrison*, 2 Madd. 268, a remainderman received the balance of a fund received by a previous tenant for life, on account of a policy effected by such tenant for life, but he did so because the executor and residuary legatee of the tenant for life had by his will treated the fund as appropriated for the benefit of the remainderman.

Against these there is the direct decision of KINDERSLEY, V. C., in *Poole* v. *Adams*, 12 W. R. 683; 33 L. J. Ch. 639; 10 L. T. (N. S.) 287. Also, a portion of the judgment of Lord ELDON in *Paine* v. *Meller*, 6 Ves. 349, quoted by the Master of the Rolls, which to some extent supports the view of the vice-chancellor in the case referred to.

BRETT, L. J., expressed his opinion that the subject-matter of insurance is a different thing from the subject-matter of the contract. The subject-matter of insurance may be a house in a fire policy, or premises in a fire policy; or may be a ship, or goods, or several other things, in a marine policy. But the subject-matter of the contract is money. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured, but not with regard to the subject-matter of the contract, which is money, and money only.

Lord Justice BRETT deems it wrong to say that the one is a trustee for the other, for if the vendor were a trustee of the property for the vendee, it would seem to follow that all the product, all the value of the property received by the vendor, from the time of the making of the contract, ought to belong to the

vendee. The Lord Justice thought, with all deference, that that was not law. Therefore, he ventured to doubt whether the one was ever a trustee for the other. They are only parties to a contract of vendor and purchaser, of which the court of equity will, under certain circumstances, decree a specific performance.

But even if the vendor was a trustee for the vendee, the contract of insurance is not a contract which runs with the land. It is a mere personal contract, and unless the contract is assigned there can be no suit or action maintained upon it, except between the original parties to it. At common law, with regard to marine insurances, it has always been held that where there is a policy, and where the subject-matter of the insurance is sold by contract during the running of the policy, no interest under the policy passes unless it is made part of the contract of purchase and sale, so that it would be considered in a court of equity as assigned. In *Powles* v. *Innes*, 11 M. & W. 10, it was decided that "a person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy, except as trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit."

Such was the opinion of both Lord ABINGER and Lord WENSLEYDALE. And QUAIN, J., in the case of *North of England Pure Oil Cake Co.* v. *Archangel Maritime Insurance Co.*, Law Rep., 10 Q. B. 249 (1875), lays it down, in accordance with the treatises of Arnold and Phillips, that "on the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly." Such appears to have always been the rule in courts of law; and KINDERSLEY, V. C., seems, in *Lees* v. *Whiteley*, *supra*, to lay it down as the well-settled and recognised rule in courts of equity. The action for money had and received was always, as BRETT, L. J., said in the course of his opinion, treated at common law as founded upon equity, and therefore, the decision in this case, whatever it ought to be, would be, in his opinion, the same, whether it should be considered to be a decision at common law or in equity.

In *Hill* v. *Cumberland, &c., Protection Co.* (1868), 59 Penn. St. 474, the owner of buildings insured them against fire, and afterwards entered into a contract to sell them. *Held*, that he had an insurable interest in the property, notwithstanding the stipulation in the policy that if the property "be alienated by sale or otherwise," or "transferred by any contract or change of partnership or ownership," the policy should be void. At the time of the loss a portion of the purchase-money remained unpaid, and no conveyance had been made. See also *Washington, &c., Ins. Co.* v. *Kelly*, 32 Md. 421 (1870), to the same effect.

The vendor in a contract of sale of a factory and machinery, who retains the legal title until payment of the purchase-money, has an insurable interest in the machinery as well as the buildings, and may procure an insurance upon the property itself, and not merely his equitable interest in it: *Wood* v. *Northwestern Ins. Co.*, 46 N. Y. 421 (1871).

The vendee bears the losses as well as the benefits between the dates of purchase and consummation. *Greaves* v. *Gamble*, Leg. Gaz. Rep. 1 (Pa., 1869); *Kitts* v. *Massasoit Ins. Co.*, 56 Barb. 177 (N. Y., 1867); *Hitchcock* v. *N. W. Ins. Co.*, 26 N. Y. 68, and *Phelps* v. *The Gebhard Fire Ins. Co.*, 9 Bosw. 404, are authorities on the subject of transfer of title and assignment of policy, but have little bearing on the present case.

The value of the bargain is not the

measure of damages in an action for breach of contract, but the actual consideration: *Ewing* v. *Thompson*, 66 Penn. St. 382 (1878). And if moneys, to be returned with interest: *Hertzog* v. *H.'s Adm'r*, 10 Casey 418; *Dumars* v. *Miller*, Id. 319; *Graham* v. *G.'s Ex'rs*, Id. 475.

Thus, the policy of insurance, or the moneys paid upon a policy of insurance pending the completion of a contract for the purchase of the premises insured, form no subject-matter of the contract between vendor and vendee, unless specifically mentioned or clearly implied. The vendor may require the completion of the contract on the part of the vendee, or the vendee may perhaps demand the return of his deposit, with interest, if the premises have, in the interim between the making of the contract and the time fixed for its completion, been destroyed or damaged by fire, and no deed has as yet been executed; unless, indeed, according to Lord Justice BRETT, the vendor is *not* "a trustee of the property for the vendee" (*supra*); but he cannot demand either their restoration, for such would not be the identical premises bargained for, nor yet the amount of the insurance money, for that would relate to another contract between the vendor and a stranger which had formed no part of the contract between vendor and vendee. Where no deposit has been paid the measure of damages is the expenses and trouble incurred by vendee in endeavoring to procure a title: *Dumars* v. *Miller*, *supra*; but he cannot, in addition, recover damages for the loss of the bargain: Id.

In the principal case reference is made to 14 Geo. 3, c. 78. Apart from the fact that that act embraces only the metropolitan limits of London, it directs the application of the insurance money by the insurance companies, "upon the request of any person or persons interested in or entitled unto any house or houses, or other buildings which may hereafter be burnt down, demolished or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons, who shall have insured the same, have been guilty of fraud, or of wilfully setting their house, &c., on fire, to cause the insurance money, as far as the same will go, to be laid out and expended towards rebuilding," &c., "unless sufficient security be given that the insurance money shall be expended as aforesaid;" "or unless the said insurance money shall be within sixty days settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such insurance office."

A consideration of this act was eliminated from the discussion of the case before us because no such notice as that required by the act was given, and no suspicion of fraud or of arson attached to the owners or occupiers thereof. And therefore the act did not apply. Indeed, it is clear that this statute has no reference to a mere executory contract between vendor and vendee, but has for its object the protection of all those having existing interests in or ownerships of the premises, under certain circumstances. So far, therefore, it supports the views taken in the cases before cited.

In conclusion, a court cannot decree a specific performance of an impossibility which accident or the hand of God has effected. It can at most restore to the vendee his deposit-money, with interest. It cannot set up a contract where no contract existed. How far the insurance company would be justified in withholding the money payable on the policy must depend entirely upon the terms of their policy relative to its assignment, the projected change of ownership, and any notices required by them, but can have no bearing upon a contract between vendor and vendee in which the existence of the policy of insurance is neither

expressed or implied, much less itself assigned or conveyed.

The cases before cited on the subject of the measure of damages were instances of parol agreements or contracts for the sale of lands, &c.; and, as the court observed more than once, to acknowledge any other standard of damages would be to place the whole of the land in the state at the mercy of parol contracts. This would be virtually to offer a premium to fraud and perjury, the very mischief which the Statute of Frauds was designed to prevent.

"In England," as was remarked by WOODWARD, J., in *Dumars* v. *Miller*, *supra*, "a parol contract would not be suable at all;" but, as the same learned judge observed in *Hertzog* v. *Hertzog*, *supra*, "the 4th section of the British Statute of Frauds, relating to parol contracts for the sale of land, has been omitted in the Pennsylvania statute." The original statute of Charles II. had no force, *proprio vigore*, in the colonies, but each colony adopted or adapted it as in its wisdom it thought fit. If, however, in parol contracts relating to the sale of lands, where such are allowed, the actual consideration alone is the measure of damages, *à fortiori* in the more solemn form of a written contract, as was judicially remarked in the latter case, the value of the bargain is not the measure of such damages but the actual consideration.

The other side of the question yet remains, viz.: What is the measure of damages to which the vendor is entitled, the vendee declining to accept a damaged property, and refusing to complete his purchase? We apprehend the same answer must be given to both parties. As the vendee bears the losses as well as the benefits between the dates of the purchase and consummation (*supra*), the vendor can insist upon completion and the payment of the purchase-money, or may recover damages for the default. The measure of damages, however, is the actual consideration. See *Ewing* v. *Tees*, 1 Binn. 450; *Wilson* v. *Clarke*, 1 W. & S. 554; *Ellet* v. *Paxson*, 2 Id. 418; *Sedam* v. *Shaffer*, 5 Id. 529; *Hastings* v. *Eckley*, 8 Barr 197. Also, 1 Smith's Laws 397; Sugden on Vendors and Purchasers, 280, and Chitty on Contracts, vol. i., p. 426 (Am. ed.).

At all events the application of money received by the vendor, under a policy of insurance for damage resulting from fire pending the completion of the contract of sale of such premises, such vendor being the policy holder unconditionally, can form no ingredient in the vendee's claim for damages for breach of even a written contract in which the assignment of such policy is neither expressed nor implied.

As therefore the policy of insurance cannot enter into the question, neither vendor nor vendee can obtain any compensation for any depreciation in the value of the property on the one hand, or the loss of the bargain on the other, where there is no taint of fraud to vitiate the contract. The principle that governs is that of mutuality. The value of the land is not the measure of damages, but the amount of the consideration.

"If under the pressure of heavy damages the party could, in such cases, be deprived of what is called the *locus penitentiæ*, and on the one hand, be compelled to convey, or on the other to accept of the purchase by having damages against him *to the amount of the contract*, according as the jury may view the circumstances of the case, the distinction would then be without a difference, and the absence of the 4th section of the statute of Charles a serious inconvenience:" 1 Smith's Laws, p. 397.

Numerous English cases have been decided in the same way, where the consideration is executory as well as where it is executed: *Feureau* v. *Thornhill*, 2 W. Blk. 1078; *Walker* v.

Constable, 1 Bos. & Pul. 306; *Johnson* v. *Johnson*, 3 Id. 162; *Walker* v. *Moore*, 10 B. & C. 416; *Jarmain* v. *Egelstone*, 5 C. & P. 172. "The vendee must pay the consideration although the estate itself be destroyed between the agreement and conveyance; and on the other hand he will be entitled to any benefit which may arise to the estate in the interim: Sugden V. & P. 446 (Am. ed.); 2 Pow. Con. 61; *Stent* v. *Bailis*, 2 P. Wms. 220; *Bacon* v. *Simpson*, 3 M. & W. 78; *McKechnie* v. *Sterling*, 48 Barb. 330; *Robb* v. *Mann*, 11 Penn. St. 300; *Reed* v. *Lukens*, 44 Id. 200; *Hill* v. *Cumberland Valley Mutual Protection Co.*, 59 Id. 474. But see *Thompson* v. *Gould*, 20 Pick. 134, *contra*, and *Blew* v. *McClelland*, 29 Mo. 304, also *contra*, so far, at least, as the recovery of the consideration was concerned, the destruction having occurred previous to the execution of a deed. The opposite or former doctrine, however, bears the impress and prestige of antiquity. See *Hunter* v. *Wilson* and *Achison* v. *Dickson*, vol. 2, of Coll. of Decis., p. 56. At all events there is no authority for the vendee's unconditional claim to the insurance money.

In *Loft* v. *Dennis*, 1 E. & E. 474, an action for use and occupation, Lord CAMPBELL, C. J., said: "I cannot see why the fact of the landlord having received the insurance money, entitles the tenant to be relieved from his liability for rent, any more than if the landlord had won that amount in a lottery; there is no privity in either case between the defendant and the party from whom the money comes."

This decision had been anticipated in *Leeds* v. *Chatham*, 1 Sim. 146, where the tenant had covenanted to repair. It was held that a tenant has no equity to compel his landlord to apply insurance moneys received by him on the destruction of the demised buildings in rebuilding, or to restrain the collection of rent until the same are so applied. The court said: "The plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but not having done so, a court of equity cannot supply that provision which he has omitted to make for himself." The court added, although there was a surplus: "upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do?" These two cases are cited in the argument in *Sheets* v. *Selden*, 7 Wall. 416–24.

The same doctrine was enunciated in *Bussman* v. *Ganster*, 72 Penn. St. 285; also in *Magaw* v. *Lambert*, 3 Penn. St. 444, the court saying: "It was not the rent which was insured, but the premises out of which it issued: and the tenant could not say that the company had paid it for him."

So, by analogy, as between vendor and vendee, it is not the consideration or purchase-money which is insured, but the premises for which the consideration is paid or agreed to be paid, and the vendee could not say that the company had paid it for him.

In *Whitaker* v. *Hawley*, 25 Kans. 674, however, it has been recently held that, where real and personal property are leased by a single instrument for an amount in gross, and the personalty is a substantial part of the property leased, its destruction, without the fault of the lessee, by fire or otherwise, entitles the lessee to an apportionment of the rent; but the insurance, nevertheless, existed for the benefit of the landlord.

The court also doubts, after a careful consideration, whether what is admitted to be the common-law doctrine, that the lessee is bound for the rent in spite of the destruction of the buildings by fire, is in force in Kansas, but put its decision on other grounds.

In the measure of damages for breach of contract upon sale of goods, the an-