DEPARTMENT OF INSURANCE.

EDITOR-IN-CHIEF,
GEORGE RICHARDS, ESQ.,
Assisted by
GEORGE WHARTON PEPPER, LUTHER E. HEWITT.

PEOPLE'S STREET RAILWAY CO. *v.* SPENCER.[1]

Insurance Money. Lessee with option to purchase.

Plaintiff conveyed land to defendant by deed, and received $20,000, the consideration money mentioned therein. By a lease of the same date, defendant leased the premises to plaintiff for one year at a nominal rent, and in the lease gave an absolute and exclusive option to the plaintiff to purchase the land at the end of the year for $20,000 and interest. At the end of the term, the arrangement was extended for another year. Plaintiff insured the buildings on the property for defendant's protection, the policy to be "payable to him as his interest may appear." Before the expiration of the second year the buildings were burned. After the fire, the plaintiff exercised the option received from the defendant, and paid him $20,000. Defendant claimed insurance money. *Held*, that on the exercise of the option to redeem, plaintiff's equitable title reverted back to the date of the original agreement, and plaintiff became the owner of the land as it was at such date, or of the insurance money which stood *pro tanto* in its place.

Opinion by MITCHELL, J.

THE RIGHTS OF VENDOR AND VENDEE IN RESPECT OF A POLICY OF INSURANCE UPON PROPERTY SOLD.

Among recent decisions in the domain of insurance law none has raised more important questions or furnished a basis for more interesting speculations than the decision of the Supreme Court of Pennsylvania in Peoples' Street Railway Co. *v.* Spencer (27 Atl. Rep. 113; 156 Pa. 85; July 19, 1893). Both upon principle and authority, there seems to be no doubt that the decision of the Court is correct, and Mr. Justice MITCHELL, in a clear and terse opinion, bases this decision upon intelligible grounds. It seems to the writer, however, that the court might with advantage have taken the opportunity to reduce the problem before them to its simplest form and to solve it with reference to two fundamental principles of the law of fire insur-

[1] Reported in 156 Pa. 85.

ance; one, that insurance is a personal contract and does not run with the land; the other, that the controlling feature of fire insurance is that it is a contract of indemnity. If this course had been adopted, it is conceived that the case before the court would have been seen to bear an interesting relation to the leading English cases of Rayner *v.* Preston (L. R. 18 Ch. D. 1, 1881) and Castellain *v.* Preston (L. R. 11 Q. B. D. 380, 1883), as well as to certain earlier cases decided by the Supreme Court of Pennsylvania, especially Reed *v.* Lukens, 44 Pa. 202 (1863).

The case of the Peoples' Street Railway Co. *v.* Spencer was an action brought by the corporation against Spencer to determine the rights of the parties to certain money deposited by a fire insurance company in payment of a loss by fire. It appeared that the company had been the owners of the property in question, and that in consideration of a payment of $20,000 by Spencer a conveyance of the property was executed to him and a lease back to the company at a nominal rent with no change of possession, which remained all the while in the company. This arrangement included the giving by Spencer to the company of an absolute and exclusive option to re-purchase at the end of the year for the same sum with interest. At the end of the year the company paid up the interest, and the arrangement was renewed for another year. During the continuance of the agreement the company effected an insurance upon the premises and paid the premium. In the policy the company were described as the assured, and there was inserted therein the following clause: "The interest of the assured in the above described building is the right to purchase from A. D. Spencer, owner; and, in case of loss, the insurance is payable to him, as his interest may appear under said contract." The property was destroyed by fire, and pending this action (which was instituted as the result of an agreement between the company and Spencer) the company exercised the option to purchase and took a conveyance upon payment of the purchase money.

After stating the facts the opinion of Mr. Justice MITCHELL proceeds, as follows:

"It is unimportant what name we apply to the relation of the parties during the year. Whether technically vendor and vendee, mortgagor and mortgagee, or lessor and lessee, is immaterial. The nature of the relation is incontestable. Appellant was the holder of the legal title, subject to an equity in the company. It is strongly argued for appellant that his interest at the time of the fire was an absolute fee-simple title. But this is an error. It was not absolute. It was the legal title in fee, but subject to the equitable interest of the company, an interest in the land, capable of being specifically enforced, and good, not only against the appellant, but all others, creditors, purchasers or strangers, to whom the recorded deeds and the company's possession gave notice.

The only substantial question in the case is the date at which the company's equity became complete. The fire took place during the running of the term. The option to redeem was exercised after the fire had occurred. Did the company's interest begin to run only from the

exercise of its option, or did it, upon that event, relate back for all purposes to the transaction? We are of opinion that both principle and authority sustain the latter view. As already said, the transaction was in substance a loan of money, and appellant's right was to have his money back with interest at a specified time, or, in default of that, to have his title become absolute. The insurance was for his protection, not to increase his profit; to keep up the sufficiency of his security while the loan lasted, or make good the value of his purchase, if it became absolute. For that reason it was to be kept up by the appellee. If the latter had exercised its option before the fire, there could have been no question that the insurance money would have belonged to it. But the date of the fire makes no substantial difference when, as was the case, the appellee elected to repay the loan, and resumed its title. On the happening of that contingency, the appellant got his money, with interest, which was all he was entitled to; while the appellee got back its land, lessened in value by the fire, but the loss compensated by the insurance money. The insurance was, in contemplation of law, for the benefit of whomever should be entitled when the option was exercised or expired by default, and, in fact, it was contracted for "as interest may appear." It stood in place of so much of the property as was destroyed by the fire, and followed the title when the equitable and legal interests united. The authorities, so far as we have any analogous case, lead to the same conclusion. It was held in Kerr *v.* Day, 14 Pa. 112, that an option to purchase is a substantial interest in land, which may be conveyed to a vendee; and the English chancery cases were reviewed by BELL, J., with the result that, "when the lessee made his option to purchase, he was to to be considered as the owner *ab initio*. Indeed, the determination can only be supported by attributing to the lessee an equivalent estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election." And in Frick's Appeal, 101 Pa. 485, where the land was sold upon a prior judgment before payment or conveyance, it was held that the surplus was the property of the optional vendee. It is true that the option in that case had been exercised before the levy and sale, but that circumstance was not of controlling weight, as the decision was put on the ground that "in equity the vendee became the owner, subject to the payment of the price stipulated. His right of property therein flows from the contract, and exists before any purchase money may have been paid:" Citing Siter's Appeal, 26 Pa. 178. We are of opinion that, upon the exercise of its option to redeem, the appellee's equitable title reverted back to the date of the original agreement, and appellee became the owner of the owner of the land as it was at such date, or of the insurance money, which stood *pro tanto* in its place.

Before discussing the case further it will be well to summarize the other decisions to which reference has been made.

In Rayner *v.* Preston, it appeared that the plaintiffs had purchased

from the defendants a messuage and workshops. Between the date of the contract and the time fixed for settlement, the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact or of the policy. The vendors collected the policy money from the insurance office, and the vendees brought an action to establish their right to the money thus received or to have it applied in or towards reinstating the buildings injured. Against the dissent of JAMES, L. J., it was decided by the Court (affirming the judgment of Sir GEORGE JESSEL) that the action was not maintainable. The following extract from the opinion of Lord Justice BRETT exhibits the grounds of the decision more clearly than any statement that the writer could make :—

"It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the plaintiffs and the defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy if an accident which is within the insurance happens, is a payment of money. It is true that, under certain circumstances, in a fire policy there may be an option to spend the money in re-building the premises, but that does not alter the fact that the only liabiliity of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons and two persons only, as a contract.

In this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of any one interested other than themselves. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the plaintiffs. It was a personal contract between the defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in equity, be assigned so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor

impliedly, was assigned to the plaintiffs, and, so far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants.

But there did exist a relation between the plaintiffs and the defendants, but with regard to the subject-matter of the insurance, there was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to the premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a Court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me 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, under all circumstances, to belong to the vendee. What is the relation between them, and is the result of the contract? Whether there shall ever be a conveyance depends on two conditions: first of all, whether the title is made out; and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose, at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a Court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued, due, and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties, to say, that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a court of equity will, under certain circumstances, decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it."

Lord Justice BRETT, having expressed a doubt whether, as between the defendants and the insurance company, the defendants could keep the money, the company instituted the suit of Castellain *v.* Preston, in respect of the money which had been paid by the company to the defendants on account of the loss by fire. The vendors having (as before stated) insisted upon a completion of the purchase, and having, therefore, received the full contract price, which became due and payable, irrespective of the fact of the happening of the loss, the Court held that the underlying principle of indemnity required such an application in favor of the insurer of the right of subrogation, as to entitle the company to recover from the vendors so much of the money received from the vendees, as was equal to the amount paid by the company in consequence of the loss. "The very foundation, in my opinion," said Lord Justice BRETT, "of every rule which has been applied to insurance law is this, namely: that the contract of insurance contained in a marine or fire policy, is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it—that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity—that proposition must certainly be wrong."

The principle of Castellain *v.* Preston is not of as great importance in this country as in England, because, here, such a case as Raynor *v.* Preston, would be decided differently. Here the tendency of the Courts is to ignore the objections suggested by Lord Justice BRETT, and to treat the vendor under articles as trustee for the vendee. Accordingly, it is said that an insurance by the vendor is *prima facie*, an insurance of the whole estate—legal and equitable—and that the vendor will take the policy money as trustee for the vendee. See Insurance Company *v.* Updegraff, 21 Pa. 513; Nelson v. Insurance Company, 43 N. J. Eq. 256; International Trust Company *v.* Bordman, 149 Mass. 161. In Reed *v.* Lukens, (44 Pa. 200), under facts similar to those in Rayner *v.* Preston, the Court held that the vendor must account in equity to his *cestui que trust*, for the insurance money received by him.

If, now, we recur to the principal case, the following considerations will be seen to be applicable:

1. If the Railway Company with the option to purchase, had effected insurance in its own name, and had subsequently exercised the option, it could, without doubt, have recovered upon the policy. Under the contract, the company had a valid insurable interest, and after the loss it would, in collecting the insurance money from the company, be receiving no more than the indemnity which the parties had in view when the contract was made.

2. If Spencer, the lessor, had insured in his own name, and had collected the money from the company, and had then, upon the exercise of the option received the