courts would recognize assertions concerning the purpose of a trip as a declaration of a mental state acceptable in evidence as an exception to the hearsay rule. No other or better evidence may be expected to show the invisible phases of another's mind. Further, it may well be argued that if the declarant announced an intention, he probably carried it out. It is the intent that is material and this is so whether it accompanies an act or not.[11] Statements of pain or of physical state are readily admitted,[12] and there is no reason why the admission of declarations of mental states, intent, design, or plan should not be put upon the same basis.

E. G.

INSURANCE

Risk of Loss Between Vendor and Purchaser—Insurance Should Run With the Land

The plaintiff was the owner of certain real estate in Ohio and defendants were the owners of a lot with a bungalow thereon situated in Florida. They entered into a valid written contract to exchange their properties. A deed was executed and delivered by plaintiff conveying its property to defendants and they transferred the Florida property to plaintiff. Thereafter it developed that prior to the execution and delivery of deeds but subsequent to the contract of exchange, the Florida bungalow was destroyed by fire. The court held that in the absence of stipulation as to who should bear the loss, the purchaser must be regarded as the equitable owner of the property, and loss by reason of fire destroying the building before execution of the deed fell on him.[1]

It is undoubtedly true that the majority of courts have adopted the view that, where a contract is made to convey real estate upon which a building stands, the burden of loss by the destruction of the building without fault of either party falls upon the vendee.[2] The

[11] State v. Long, 32 Del. 380, 123 Atl. 350 (1923).

[12] People v. Hauke, 335 Ill. 217, 167 N. E. 1 (1929); Commonwealth v. Gangi, 243 Mass. 341, 137 N. E. 643 (1923); People v. Perrin, 224 App. Div. 546, 231 N. Y. Supp. 557 (1928); affirmed in 251 N. Y. 509, 168 N. E. 407 (1929).

[1] Oak Building and Roofing Co. v. Susor et al., 32 Ohio App. 66, 166 N. E. 908 (1929).

[2] Hough v. City Fire Insurance Co., 29 Conn. 10 (1860); Davidson v. Hawkeye Insurance Co., 71 Iowa 532, 32 N. W. 514 (1887); Brewer v. Herbert, 30 Md. 301 (1868); Marion v. Wolcott, 68 N. J. Eq. 20, 59 Atl. 242 (1904); McGinley v. Forrest, 107 Neb. 309, 186 N. W. 74 (1921); Dunn v. Yakish, 10 Okla. 388, 61 Pac. 926 (1900); *see* notes 22 A. L. R. 575.

vendee is looked upon and treated as the owner of the land; an equitable estate has vested in him and although the vendor remains owner of the legal title,[3] he holds it as a trustee for the vendee, to whom all the beneficial interest has passed.[4] Under this rule equity from the moment the contract is binding, gives the vendee the entire benefit of all increment and therefore he should accept the burden of any loss not due to the vendor's fault.[5]

A substantial minority view has been established which places the loss on the vendor on the theory that the vendor is unable to perform.[6] This is identical with the rule at law and the rule in practically all jurisdictions in the sale of chattels; it seems to conform more nearly to common business experience as evidenced by the stipulations in contracts placing loss on the vendor in almost all instances where the matter is called to the attention of the parties.[7] It has been suggested that possession at the time of loss should be an essential criterion for determining on whom the loss should fall.[8] From the viewpoint of natural justice, as some law writers express it, and from a practical viewpoint, the party in possession should be held for the loss.[9] However, the majority view is that possession is an unessential incident.[10]

Accepting the view that risk of loss falls on the vendee, great confusion in the law results where the vendor has insured the property

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[3] At law this would make the loss fall on the vendor who cannot perform because of failure of consideration. Wells v. Calwan, 107 Mass. 514 (1871).

[4] 1 POMEROY, EQUITY JURISPRUDENCE (4th Ed.) sec. 368.

[5] Keener, 1 COL. LAW REV. 1, 8; Williston, 9 HARV. L. REV. 106. 113.

[6] Thompson v. Gould, 37 Mass. 134 (1838); Libman v. Levenson, 236 Mass. 221, 128 N. E. 13 (1920); see comments 19 MICH. L. REV. 576, 6 CORNELL L. Q. 111; RESTATEMENT, CONTRACTS Vol. 1, Sec. 281; Stent v. Bailis, 2 P. WMS: (Eng.) 217 (1724) Headnote reads "Against Natural Justice that Anyone Should Pay For a Bargain Which He Cannot Have."

[7] Vanneman, *Risk of Loss Between Vendor and Purchaser*, 8 MINN. L. REV. 127.

[8] Uniform Vendor and Purchaser Risk Act. "1..... (a) when neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser, if all or a material part thereof is destroyed . . . the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price paid; . . . (b) when either the legal title or possession has been transferred to the purchaser; if all or a material part thereof is destroyed . . . the purchaser is not thereby relieved from a duty to pay the price . . ." Adopted in New York; REAL PROPERTY LAW, Sec. 240-a; See Cook, 31 ILL. L. REV. 143.

[9] See Justice Dean dissenting in McGinley v. Forrest, 107 Neb. 309, 186 N. W. 74 (1921).

[10] O'Brien v. Paulsen, 192 Iowa 1351, 186 N. W. 440 (1922); In *Cammarata* v. *Merkewitz*, 120 Misc. 503, 198 N. Y. S. 825 (1923), Mr. Justice Rodenbeck states with reluctance, "The court is bound to follow this ruling (possession unessential), even if it does not appeal to one's sense of justice, that a person out of possession or without the right of possession, with no control over the care of the property, should be obliged to pay for something the vendor is unable to deliver."

and fails to make a proper assignment to the vendee. The English view, followed by a minority of American courts, holds that as between the purchaser and vendor the latter is entitled to the insurance money[11] because the vendee is a stranger to the contract, which does not run with the land.[12] The sequel to such a holding is that as between the vendor and the insurance company the latter is entitled to retain the money because the vendor suffers no loss and where paid the insurer may recover through the doctrine of subrogation.[13] The result reached by the English view seems undesirable because many a purchaser believing the vendor's insurance to cover his loss, discovers that a strict compliance with legal theory deprives him of his expected indemnity from the insurer.[14]

The weight of authority in this country is that the vendor is entitled to collect the insurance and hold in trust for the vendee as a substitute for the insured property.[15] While such a holding accomplishes a desirable result it must be admitted that the logic used is somewhat questionable. As long as the fire insurance policy is considered personal the insurer should only be held to the terms of his contract. Since the agreement is to indemnify the insured against his loss, no amount of legal gymnastics can impose on the insurer the additional burden of indemnifying a stranger to the contract for that person's loss. However, courts of equity are ever willing to disregard legalistic reasoning if by so doing the ends of justice are attained.

It is submitted that uniformity on this important matter can be obtained only by appropriate specific modification of the statutory standard fire policies.[16] Legislation should be enacted to the effect

[11] Rayner v. Preston, L. R. 18 Ch. Div. (Eng.) 1 (1881), approved by Pound, 33 HARV. L. REV. 813, 829; White v. Gilman, 138 Cal. 375, 71 Pac. 436 (1903); Zenor v. Hayes, 228 Ill. 626, 81 N. E. 1144 (1907); 13 L. R. A. (N.S.) 909.

[12] "Insurance of a building against fire is a personal contract. It is a contract of indemnity with the person whose interest in the building is insured, to indemnify him against loss which he may sustain. It does not pass to the purchaser of the building." McDonald v. Adm'r. of Black, 20 Ohio 185, 192 (1851).

[13] Castellain v. Preston, L. R. 11 Q. B. Div. 380 (1883).

[14] The English Parliament has deemed it wise to enact legislation which allows the purchaser to have the benefit of the vendor's insurance. Statute 12 & 13 Geo. V., sec. 105. "Any money becoming payable after the date of any contract for the sale of property under any policy of assurance in respect to any damage to or destruction of property included in such contract shall, on completion of such contract, be held and receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or as soon thereafter as the same shall be received by the vendor."

[15] Skinner & Sons Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900); Williams v. Lilley, 67 Conn. 50, 34 Atl. 765 (1895); Russell v. Elliott, 45 S. D. 184, 186 N. W. 824 (1922), 22 A. L. R. 557, Approved in 6 MINN. L. REV. 607.

[16] Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract*: II, 44 YALE L. J. 754, 769-71 (1935).

that policies of fire insurance shall *run with the land*[17] and be paid *as interest may appear;* where the vendor insures prior to the contract of sale, such insurance shall continue on the property until expressly cancelled by the insurer. It is realized that such a provision modifying the statutory forms of insurance policies will be fought strenuously by the insurer in the several state legislatures.[18] Such opposition has been encountered and defeated on previous occasions.[19]

Whether it be called convenience, [20] universal consensus of mankind,[21] business man's viewpoint,[22] or natural justice,[23] the layman assumes that an executory contract for the sale of insured realty carries the protection of existing insurance to the purchaser. If that is the meaning in the market place, that should also be the meaning in the court room.[24] This can be accomplished most effectively by legislative enactment.

R. W. C.

JOINT TENANCY

JOINT BANK ACCOUNTS—JOINT TENANCY—SURVIVORSHIP

F, by letter, directed her Building and Loan Association to withdraw $1800.00 from her savings account and deposit it in a separate account, issuing therefor a certificate of deposit in the names of "F or S or suvivor," the certificate to be placed in her deposit passbook, then in the hands of the association; S to be notified of the arrangement only if she survived F. The Ohio Court of Appeals, upon reversing the trial court's judgment for the executor, because of conflict certified the record to the Supreme Court. *Held,* affirmed, the court reasoning that at the moment the company carried out the instructions of F, an executed contract arose between the company and F, enforceable by S with the attendant incident of survivor-

[17] Vance, 34 YALE L. J. 87.

[18] A somewhat similar amendment to the Uniform Vendor and Purchaser Risk Act was withdrawn for that reason. 44th Annual Meeting National Conference on Uniform State Laws. Milwaukee, Wisconsin, 1934.

[19] Notably incontestible clause in life insurance policies.

[20] RICHARDS, INSURANCE (4th Ed.) 1932, sec. 245.

[21] James dissenting in Rayner v. Preston, L. R. 18 Ch. Div. (Eng.) 1 (1881).

[22] Vanneman, 8 MINN. L. REV. 139.

[23] Headnote in Stent v. Bailis, 2 P. WMS. (Eng.) 217 (1724).

[24] Vance, 34 YALE L. J. 90.