1935

Equity--Executory Contract for the Sale of Real Estate--Risk of Loss

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Available at: https://uknowledge.uky.edu/klj/vol24/iss1/9

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2—WHERE THERE IS A WILL—

(a) Gifts by a parent to a child prior to the execution of a will are not advancements unless charged therein.

(b) Gifts after the execution of a will are presumed to be in satisfaction of the legacies named in the will.

J. E. MARKS.

EQUITY—EXECUTORY CONTRACT FOR THE SALE OF REAL ESTATE—RISK OF LOSS.

In an executory contract for the sale of real estate upon whom is the risk of loss between the date of execution of the contract and the date of performance?

The first recorded decision upon this point was the English case of Paine v. Meller, decided in 1801 and consistently followed in England since that time. It is apparently followed by an overwhelming weight of authority in this country. Although many cases have been cited as contrary to this view yet a close analysis of them reveals that in practically every instance there is some factual element which deprives the decision of the binding force of precedent. In fact, only two cases have been found in which the court clearly placed the loss upon the vendor in an action in equity. This view is supported to some extent by Dean Pound, Keener, and Pomeroy.

1 6 Vesey Jr. 349.
3 See notes in 22 A. L. R. 575; 41 A. L. R. 1272; 46 A. L. R. 1126, setting out the authorities. Also 27 R. C. L. 293 and 66 C. J. 811.
4 Thompson v. Gould, 20 Pick. (Mass.) 134 (1838), and Gould v. Murch, 70 Me. 288 (1879), both oral contracts and unenforceable because of the Statute of Frauds, and both actions were at law. Phinisey v. Guernsey, 111 Ga. 346, 36 S. E. 796 (1900) (containing dictum in favor of equitable conversion), and Good v. Jarrard, 33 S. C. 223, 76 S. E. 698 (1912), the vendor-vendee relationship had not arisen due to the non-performance of conditions precedent. Wells v. Calnan, 197 Mass. 514 (1871), and Powell v. Dayton Co., 16 Ore. 33, 16 Pac. 863 (1888), the actions were at law. In Cutliff v. McAnally, 88 Ala. 507, 512, 7 So. 331 (1889), there was only a weak dictum. Davidson v. Ins. Co., 71 la. 532, 534, 22 N. W. 514 (1887), involved only the construction of an insurance policy. Kares v. Covell, 180 Mass. 206, 22 N. E. 244 (1902), and Bautz v. Kuhworth, 1 Mont. 133, 136 (1869), were actions at law.
5 See Cockerill, Equitable Conversion, 1 So. Calif. L. Rev. 309 (1928), where, after reviewing all the cases in California on this point, concludes at page 325: "No criticism is intended to be made of the decisions in the cases discussed. They are, it is believed, correctly decided on their respective facts. The suggestion made is only that, disregarding the loss, the vendor was not entitled in any of them to a decree of specific performance. If this deduction be admitted the doctrine of equitable conversion was in no wise involved."
6 Wilson v. Clark, 60 N. H. 352 (1890); Appleton Electric Co. v. Rogers, infra, note 13.
7 "Progress of the Law—Equity, 33 Harv. L. Rev. 813, 826-28 (1920).
At least four other views have been advanced by learned scholars and students of the law placing the risk of loss on the vendor. (1) That the risk of loss should be on the vendor until legal title is conveyed. (2) That the risk of loss should be on the vendor until the time agreed upon for the conveyance of the legal title, and thereafter on the vendee unless the vendor is then in such default as to be unable specifically to enforce the contract. (3) That the risk of loss should be on the party in possession, whether vendor or vendee. (4) That the risk of loss should be upon the vendor unless something in the contract or in the relations of the parties from which the court can infer a different intention.

But despite the eminence of these authorities no courts, with the possible exception of Wisconsin, have seen fit to adopt their views. Many times such arguments have been curtly dismissed by some evasive answer such as this: "These reasons may savor of laymen's ideas of equity but they are not the law."

Kentucky is apparently wedded to the proposition that the loss is upon the vendee although there is dictum (in no way necessary to


10 Williston, "The Risk of Loss After an Executory Contract of Sale In the Common Law," 9 Harv. L. Rev. 106, 111-130 (1895); 2 Williston, Contracts, Secs. 927-953 (1920); see notes: 6 Minn. L. Rev. 513 (1922); 2 Wis. L. Rev. 174 (1923).

11 Vanneman, "Risk of Loss in Equity between the Date of Contract to Sell Real Estate and Transfer of Title," 8 Minn. L. Rev. 127 (1924). On this theory "Possession may or may not be a sufficient controlling element," id. 143. See also notes: 6 Corn. L. Q. 111 (1920); 5 Wis. L. Rev. 239 (1930).

12 Appleton Electric Co. v. Rogers, 200 Wis. 331, 228 N. W. 505 (1930), which appears to adopt Williston's theory of possession as the test. See notes: 14 Marq. L. Rev. 183 (1930); 5 Wis. L. Rev. 503 (1930).


14 Johnson v. Jones, 51 Ky. (12 B. Mon.) 326 (1851). Here, although the vendee was in joint possession with the vendor, the court clearly based the decision upon the doctrine of Paine v. Meller. Calhoon v. Belden, 66 Ky. (3 Bush) 674 (1865), only dictum. Martin v. Carver's Admr., 8 Ky. L. Rep. 56, 1 S. W. 199 (1886), apparently a decisive holding that the risk of loss is upon the vendee. Marks v. Tichenor, 85 Ky. 636, 4 S. W. 225 (1887). Here a deed was given but was not to become operative until the performance of certain conditions, but the court clearly adopted the dictum of Calhoon v. Belden. Cottingham v. Fireman's Fund Ins. Co., 90 Ky. 439, 14 S. W. 417 (1890), upheld an instruction to the effect that a proviso in a policy of insurance against change of title was violated by an executory contract to convey, decided without reference to an instruction given upon change of possession. Godfrey v. Alcorn, 215 Ky. 465, 284 S. W. 1094 (1926), held that the vendor having collected insurance upon the property holds the money in trust for the vendee. Benjamin v. Dinwiddle, 226 Ky. 106, 10 S. W. (2d) 620 (1928), wherein the court said:
the decision) in a recent case pointing to the theory of Williston. The court said: "Requiring a vendor to pay damages to his vendee for a failure to convey property is no greater hardship than requiring a vendor to pay damages on account of his having ignorantly, though honestly, and after the exercise of all possible diligence bargained away something which he did not own, but which he believed was his own. The court in that case (referring to Phinizy v. Guernsey, supra note 4., Ed.) observed that he should be required to pay damages in the former ("latter", Ed.) case no one will doubt; that he should be in the former case, ought not, it would seem, to be questioned upon principle. We have no hesitance in holding that the vendee, in a case like the present, is entitled to have a conveyance made to him of the land and compensation for the loss of the building, provided the loss thus sustained is capable of computation."11

Whatever may have been the import of the ambiguous language it was, in effect, overruled in the case of Godfrey v. Alcorn, although the court in the latter case purported to distinguish the cases upon the ground that in the former, the vendee had only an option when the loss occurred. This distinction appears untenable when it is considered that the option was exercised. This view is shared by Professor Simpson who says:12 "In view of the decision in Godfrey v.

"While B's title bond could not take the place of a deed and was insufficient to vest in him the legal title, it did give him an equitable right superior to the claims of all others having notice. He was regarded in law as the owner of the property subject to his liability for the unpaid purchase price; his vendor holding the legal title in trust for him as security for the payment of the agreed consideration."

Of the cases commonly cited to be contra, none is persuasive. Morgan v. Hymer, 18 Ky. L. Rep. 339, 37 S. W. 576 (1876), where, in granting specific performance to the vendee the court allowed him a credit for insurance collected by the vendor, apparently upon the ground that the risk of loss being on the vendee, any compensation therefor belongs to him. German Fire Ins. Co. v. Duncan, 140 Ky. 27, 130 S. W. 804 (1910). Here the vendee, the U. S. government, was not to accept any conveyance until it had approved the abstract of title, consequently, no beneficial interest had passed from vendor to vendee. Martin Grocery Co. v. Meng Co., 212 Ky. 469, 279 S. W. 661 (1926), was decided upon the ground that the vendee, not having performed certain conditions precedent at the time of the loss, was not in a position to get specific performance, consequently no beneficial interest had passed to him.

"Wheeler v. Gahan, 206 Ky. 366, 370-371, 267 S. W. 227 (1924). The court here denied vendee specific performance with abatement of the purchase price, upon the ground that to do so, there having been a loss to the extent of five-sixths of the total value, would be to make a new contract for the parties.

11Editor's Note.—In the Southwestern Reporter this is given as only a quotation from the Phinizy case but in the Kentucky Report no quotation marks are used.

12Supra, note 15.

Alcorn it may be doubted whether *Wheeler v. Gahan* would now be followed in Kentucky."

Regardless of what may be the true meaning of the words in the *Wheeler* case, the Kentucky court definitely reaffirmed the doctrine that the vendee becomes the equitable owner from the date of the contract in the case of *Benjamin v. Dinwiddie*, though not referring specifically to the risk of loss.

In view of the extreme meagreness of case authority for the proposition that the risk of loss should be upon the vendor it is to be seriously doubted that many courts will feel inclined to change their present views. The change, if any, will probably come from the legislature.

But regardless of the source of the change, it is the firm conviction of this writer that the risk of loss should be borne by the party who is in possession. Cogent reasons seem to demand such a change:

1. The analogous situation of contracts for the sale of chattels where the vendee has the risk of loss.
2. The better position of the party in possession to take steps to protect his interest.
3. The common belief of laymen who contract with reference to real estate that the risk of loss is on the one in possession.
4. Such a holding will practically always effectuate the intention of the parties.
5. The arguments of such authorities as Williston, Stone, and Langdell.
6. The extremely narrow and isolated application of the present rule, i.e., to contracts for the conveyance of a fee simple in realty.
7. The "homespun justice" of the rule.

Robert Edwin Hatton, Jr.

**PARENT AND CHILD—CAN A PARENT EMANCIPATE A MINOR WITHOUT HIS CONSENT?**

The problem stated briefly is to determine the age, if at all, at which a father can emancipate his son, without that son's consent, without rendering himself liable criminally for non-support or abandonment, and, at the same time, avoiding liability for debts made by the son, by pledging his father's credit for necessaries.

The statement that the law must, in case of emancipation, give its primary consideration to the rights and welfare of the infant implies that there are other elements for legal consideration. That is so. The financial condition of the parent is important. If we were to set an arbitrary age at which emancipation could occur, we would make a mistake which, after a few decisions, would become so evident as to demand rectification. In a West Virginia case a father had become insolvent and his creditors sought to levy on crops raised by the labor of the minor child. It was there held that a parent in-

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*Supra*, note 15.