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Equity: Risk of Loss

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NOTES

EQUITY: RISK OF LOSS

Upon whom, in equity, should the burden of loss fall in executory contracts for the sale of land where before the time set for performance the premises are damaged through unavoidable accidents?[1] Since the answer to this question should depend on which of the parties is regarded by the courts as the owner, in equity, of the premises, it seems illogical to say that the risk should be borne by the owner from the inception of the contract.[2]

The law governing risk of loss of real property has developed entirely apart from that concerning sales of chattels and has taken place chiefly in the equity courts.[3] As early as 1724 it was said by way of dictum[4] that "If I should buy an house, and, before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not, in equity, be bound to pay for the house." Such a result is, of course, in accordance with that reached at law[5] where the loss is made to fall on the vendor. He is held to have the legal title together with all incidents of ownership and he can, therefore, neither recover the unpaid purchase price from the purchaser nor retain any payments which he may have received. Notwithstanding these considerations it became settled law in England that in equity the purchaser would be regarded as the owner from the time the agreemnt was entered into and that he should bear the risk of loss.[6]

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[1] The attention of the courts has been directed to various forms of loss: (fire), Paine v. Meller, 6 Ves. Jr. 349 (1801); (flood), Amundson v. Severson, 41 S. D. 377, 170 N. W. 633 (1919); (windstorm), Pellegrino v. Giuliani, 118 Misc. 329, 193 N. Y. Supp. 258 (1922); (collapse of building due to natural causes), Libman v. Leverson, 236 Mass. 221, 128 N. E. 13 (1920).

[2] Clark, J., in Wilson v. Clark, 60 N. H. 352, 353 (1880): "when property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time." This would seem to beg the question.

[3] 2 Williston, Contracts, Sec. 931.

[4] Sir Joseph Jekyll, M. R. in Stent v. Bailis, 2 P. Wms. 217, 220 (1724).

[5] Wells v. Calnan, 107 Mass. 514 (1871).

[6] Hartford v. Purrier, 1 Madd. Ch. 532, 56 Eng. Reprint 195, 16 Rev. Rep. 260 (1816); Michin v. Nance, 4 Beav. 332, 49 Eng. Rep. 367 (1841); Poole v. Adams, 33 L. J. Ch. N. S. 639, 10 L. T. N. S. 287, 12 Week. Rep. 683 (1864).

The case that settled the law in England was *Paine* v. *Meller.*[7] In that case there was a suit for specific performance of an agreement made in September for the conveyance of property at Michaelmas. When that time arrived, however, there was no conveyance made because the seller could not transfer a good title. There was evidence to show that subsequently the defect in title was remedied to the buyer's satisfaction. December 18th the house burned. The case has generally been cited as a decision that the purchaser is liable from the date of the contract for any loss through accidental destruction, although an eminent authority has stated that it did not decide the precise question involved here.[8]

In the United States there has been no such unanimity of decision as is found in England. The majority of jurisdictions[9] adhere to the decision laid down in *Paine* v. *Meller* or the "English rule" as it has been called with, however, a vigorous minority reaching a contra result.[10] Nearly all courts agree

[7] 6 Ves. Jr. 349 (1801). Lord Eldon stated: ". . . if the party by the contract has become in equity the owner of the premises they are his to all intents and purposes. They are vendible as his; chargeable as his; they may be devised as his; they may be assets; and they would descend to his heirs."

[8] In 1 Harv. L. Rev. 375, Dean Langdell shows that the practice in England requires the purchaser to prepare the title papers which are then presented to the vendor for execution, and that in Paine v. Meller the purchaser was in default and, therefore, the loss should not have been placed on the vendor. However, Williston in 9 Harv. L. Rev. 112, n. 1, suggests that the purchaser was not in default, since he had two days in which to prepare the papers.

[9] Hough v. City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581 (1860); Thompson v. Norton, 14 Ind. 187 (1860); Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 60 Am. Rep. 818, 32 N. W. 514 (1887); Marks v. Tichenor, 85 Ky. 536, 4 S. W. 225 (1887); Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 583 (1869); McGinley v. Forrest, 107 Neb. 309, 186 N. W. 74 (1921); Manning v. North British & M. Ins. Co., 123 Mo. App. 456, 99 S. W. 1095 (1907); Marion v. Woolcott, 68 N. J. Eq. 20, 59 Atl. 242 (1904); Sutton v. Davis, 143 N. C. 474, 55 S. E. 844 (1906); Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623 (1907); Dunn v. Karish, 10 Okla. 388, 61 Pac. 926 (1900); Elliott v. Ashland Mut. F. Ins. Co., 117 Pa. 548, 12 Atl. 676, 2 Am. St. Rep. 703 (1888); Russell v. Elliott, 45 S. D. 184, 186 N. W. 824 (1922); Barker v. Smith, 3 Sneed 289 (1855); Northern Texas Realty & Constr. Co. v. Lary, 136 S. W. (Tex.) 843 (1911); Virginian R. Co. v. Jefferies, 110 Va. 471, 66 S. E. 731 (1909); Maudru v. Humphreys, 83 W. Va. 307, 98 S. E. 259 (1919); Wetzler v. Duffy, 78 Wis. 170, 42 N. W. 184, 12 L. R. A. 178 (1890).

[10] Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755 (1911); La Chance v. Brown, 41 Cal. App. 500; 183 Pac. 216 (1919); Smith v. Phoenix Ins. Co., 91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191 (1891); Gould v. Murch, 70 Me. 288, 35 Am. Rep. 325 (1879); Thompson v. Gould, 20 Pick. (Mass.) 134 (1838); Wells v. Calnan, 107 Mass.

that pending the time when the vendor will be able to make good title, the contract is not so complete as to give the purchaser the equitable title, and any loss from injury to or deterioration of the premises will fall on the vendor.[11] So, too, the loss must be borne by the vendor when the destruction occurs during the period when performance is delayed due to his fault[12] or when he has negligently been the cause of the loss.[13] However, the conflict over the question at hand is apart from these points and we find a strong minority placing the risk of loss, in executory contracts for the sale of land, on the vendor on the theory that "in every contract for the conveyance of property, there is an implied condition that the subject matter of the contract shall be in existence when the time for the performance of the contract arrives. . . . If it has ceased to exist when that time arrives, each party is discharged from his contract, the vendor from his contract to convey, the vendee from paying the purchase price."[14]

Aside from the question of which of the two rules is the more desirable, the authorities have bickered over the correctness of citing the so-called "minority cases" as applying the rule that from the inception of the contract until the time for performance the loss should be borne by the vendor. Of the cases cited *supra* as sustaining the minority rule it has been said that *Thompson* v. *Gould* and *Gould* v. *Murch* are not in point for the reason that they involved oral contracts unenforceable because of the Statute of Frauds and the actions were at law.[15] These facts are, of course, true. However, it would be well to call attention to the dictum in the former case which was followed by the court in the latter case and re-expressed:[16]

514, 9 Am. Rep. 65 (1871); Kares v. Covell, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271 (1902); Hawkes v. Kehoe, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (ns) 125, 9 Ann. Cas. 1053 (1907); Libman v. Levenson, 236 Mass. 221, 128 N. E. 13 (1920); Allyn v. Allyn, 154 Mass. 570, 28 N. E. 779 (1891); Adams v. North American Ins. Co., 210 Mass. 550, 96 N. E. 1094 (1912).

[11] Calhoon v. Belden, 3 Bush 674 (1868); Smith v. McCluskey, 45 Barb. 610 (1866).

[12] Smith v. Cansler, 83 Ky. 367 (1885); Bostwick v. Beach, 105 N. Y. 661, 12 N. E. 32 (1887).

[13] Kincheloe v. Smith, 28 Ky. L. Rep. 1329, 91 S. W. 1145 (1906); Good v. Jarrard, 93 S. C. 229, 76 S. E. 698, 43 L. R. A. (ns) 383 (1912).

[14] Powell v. Dayton, S. & G. R. R. Co., 12 Ore. 488, 8 Pac. 544 (1885).

[15] Pound, *The Progress of the Law*, 33 Harv. L. Rev. 813, 827, n. 72.

[16] Thompson v. Gould, 20 Pick. 134, 140 (1838).

"... we therefore cannot recognize the fiction in equity, by which a purchase and an agreemnt to purchase are held to be similar, and indeed identical in respect to the present question.... Where the contract is entire, the vendor cannot recover or retain part of the purchase money, where he cannot convey or make a good title to the whole estate sold."

Of the remaining minority cases it has been said, with various reasons given, that they too are not in point and are not inconsistent with the majority rule.[17] Be that as it may. The purpose of this paper is not to analyze each case on the subject with a view toward making a statistical survey, but merely to set out the condition of the law as it exists today. Therefore, it is left to the reader to accept whichever of these views he deems correct. Suffice it to say that generally these minority cases have almost without contradiction been cited as being contra to the English rule by writers of law review articles and notes.[18]

The authorities have given various explanations as to how the result in equity has been reached. It has been said that in equity the vendor is trustee for the purchaser and that since the vendee stands in the position of *cestui que trust* he must

[17] *Supra*, n. 15. "In two more cases, Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796 (1900) (containing, by the way, a dictum in favor of the equity doctrine), and Good v. Jarrard, 93 S. C. 229, 76 S. E. 698 (1912), the vendor-purchaser relation had not attached at the time of the loss because condition precedent remained unfulfilled; in two more, Wells v. Calnan, 107 Mass. 514 (1871), Powell v. Dayton Co., 12 Ore. 488, 8 Pac. 544 (1885), the action was brought at law by the vendor. In none of these cases was the equitable doctrine as to risk of loss in any way involved. In the first four, purchaser could not have been compelled to take regardless of the loss. In the last two, when vendor sued at law for a breach he could not claim that purchaser was equitable owner. For the rest, Cutcliff v. McAnally, 88 Ala. 507, 512, 7 So. 331 (1889), is not even a strong dictum; Davidson v. Insurance Co., 71 Ia. 532, 534, 32 N. W. 514 (1887), was a question of construction of an insurance policy; Kares v. Covell, 180 Mass. 206, 62 N. E. 244 (1902), and Bautz v. Kuhworth, 1 Mont. 133, 136 (1869), were actions at law and in Bautz v. Kuhworth, plaintiff did not even show a breach at law on the part of vendor. One case thoroughly in point on this side is Wilson v. Clark, 60 N. H. 352 (1880); a suit in equity by purchaser. But this case relies on Thompson v. Gould without any discussion and without noting that the contract there was unenforceable in equity and did not raise the question which it is assumed was decided."

[18] 22 A. L. R. 575, 578; 4 Notre Dame Lawyer 506; 6 Minn. L. Rev. 513; 2 Wis. L. Rev. 174; 79 U. of Pa. L. R. 239; 29 Mich. L. Rev. 487; 2 Williston, Contracts, Sec. 928.

bear the burdens of that relationship;[19] that equity regards as done, that which ought to be done;[20] and that at the moment of the sealing of the contract a conversion in equity takes place; the realty of the vendor is converted into personalty and the purchase money of the vendee is converted into realty.[21] Since the last of these theories is the basis for most of the decisions placing the burden of loss on the vendee an analysis of the doctrine seems appropriate here.

Although it has often been suggested that the doctrine of equitable conversion or equitable ownership, as it has also been called, was first promulgated by Lord Eldon in *Seaton* v. *Slade*[22] it is believed by the writer that it had a much earlier origin. As early as 1735 it was said that "the rule . . . . is, that what ought to have been done, shall be taken as done, and a rule so powerful it is, as to alter the very nature of things; to make money land, and on the contrary, to turn land into money."[23] However, the rule as commonly stated and followed by most of the decisions may be found in *Lysaght* v. *Edwards*[24] where it is said that a "valid contract actually changes the ownership of the estate in equity."

It would seem that when the theory of equitable conversion was applied to risk of loss cases the courts made a false analogy to the devolution of land cases where it had previously been used. In those cases there was no problem of risk of loss and the two questions are entirely divorced in nature. It cannot follow from the fact that for some purposes (devolution of estates), the vendee is in equity dealt with as the owner of the realty, that he should be so dealt with for all purposes, and that consequently in risk of loss cases the burden should fall on the purchaser just as the burden of loss of trust property falls upon the *cestui que trust*.

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[19] "Rightly or wrongly. . . the vendee. . . has been given in equity rights analogous to those of the *cestui que trust*, with substantially the benefits of equitable ownership. As a necessary consequence. . . he must bear, as one of the burdens of ownership, the loss involved in the destruction of property." Keener, *The Burden of Loss*, 1 Col. L. Rev. 1, 10.

[20] Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 583 (1869).

[21] 5 Pomeroy, Eq. Jur. Sec. 2282.

[22] 7 Ves. Jr. 265, 273 (1802).

[23] Lechmere v. Carlisle, 2 P. Wms. 211, 215, 24 Eng. Rep. 1633, 1635 (1733).

[24] 2 Ch. D. 499, 507, 34 L. T. 787 (1876), Jessel, M. R.

It has been suggested[25] that the effect of placing the risk of loss on the purchaser from the time the contract is entered into is, in effect, holding that the performance of a contract enforced in equity relates back to the time of making the contract. This analysis seems to expose one of the fallacies in the doctrine of equitable conversion as applied to risk of loss cases for when an act done at one time relates to a different time, the relation is, of course, a legal fiction. Since the only possible justification for the adoption of a legal fiction is that thereby more perfect justice can be done the question arises: Can more perfect justice be done by applying this fiction to risk of loss cases? An attempt will be made to answer this query further on, but in passing it should be pointed out that no "greater injustice could be inflicted than by shifting the consequences of an act of God from A, upon whom it has fallen, to B, upon whom it did not fall,—who was confessedly in no way responsible for the act, and who has done no wrong whatever to A, whether by committing a tort or by breaking an obligation."[26]

There would seem to be at least one limitation on the doctrine of equitable conversion that should argue strenuously against its use in the risk of loss cases. The theory of equitable ownership of land is an incident of the right to specific performance; it cannot exist apart from it.[27] Therefore, in a given

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[25] Langdell, A Brief Survey of Eq. Jur., p. 60.

[26] *Ibid.*, p. 61. But see Keener, *The Burden of Loss*, 1 Col. L. Rev. 1, 8, where it is said that the doctrine of equitable conversion has no basis in the doctrine of relation back; "in view of the position taken in equity as to the vendee's rights, there is no greater reason for invoking such a doctrine. . ., than there would be to invoke the doctrine of relation in the case of a mortgagor or mortgagee, if the question came up as to whether the mortgagor or the mortgagee should bear the loss, consequent upon the destruction of property, while in the possession of the mortgagee. If the loss is to be thrown upon the vendee it is because he is in equity substantially the owner of the property, and, as a consequence, justice requires that having the benefits he should bear the burden of ownership. It is because of his equitable, not his legal, ownership that the vendee should bear the loss."

[27] Haynes v. Haynes, 1 Dr. and Sm. 426, 452 (1861), Kindersley, V. C.: "The only reason why a contract by the owner of land for the sale of it to another operates to effect conversion is, that a court of equity will compel him specifically to perform his contract. 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." Cited by Stone, *Equitable Conversion by Contract*, 13 Col. L. Rev. 371, 386.

case, before it can be determined whether or not the purchaser should be regarded as the equitable owner it must first be decided by the court if there is a valid contract which ought to be specifically performed at the time the court is called upon to enforce it. Thus, the question arises, should a contract be specifically enforced when at that time a part of the subject matter, which the vendor impliedly agreed would be in existence at the time of performance, has been destroyed? Strangely enough, however, in those jurisdictions which place the burden of loss on the vendee this order of reasoning is reversed and the courts lead themselves into the following *non sequitur*: "equitable ownership of the vendee in the subject matter of the contract can exist only where the contract is one which equity will specifically perform. The vendee of land is equitably entitled to land, therefore the vendee may be compelled to perform, although the vendor is unable to give in return the performance stipulated for by his contract."[28] How it is possible for performance to be had because of the equitable ownership of land by the vendee, which in turn depends upon the right to specific performance, has not been explained. Certainly the result does not find itself as has been so often said, in the presumed intention of the parties. Rather it is brought about by the use of an arbitrary fiction,—by operation of a rule of law regardless of the parties' intent. This tendency is aptly illustrated by the case of *Pellegrino* v. *Giuliani*[29] where the contract expressly provided that the risk of loss or damage by fire should be assumed by the seller until delivery of the deed. The premises were damaged by a windstorm and it was held that the vendee should bear the loss, although he was apparently neither in possession nor entitled to possession.

The reason for placing the risk of loss on the vendee has been said by many authorities to be upon the hypothesis that from the time the owner of an estate enters into a binding agreement for its sale he holds the same in trust for the purchaser,[30] who, as *cestui que trust*, is the equitable owner of the property

[28] See Stone, *Equitable Conversion by Contract*, 13 Col. L. Rev. 371, 386.

[29] 118 Misc. 329, 193 N. Y. Supp. 258 (1922).

[30] Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 583 (1869); Pomeroy, Eq. Jur. Sec. 1406.

and who must bear, as one of the consequences of ownership, the loss involved in the destruction of the property.[31]

Considering the problem in the light of recognized trust principles this reasoning seems faulty. No trustee is entitled to profit by his position and he cannot take beneficially the rents and profits from the trust *res*, yet that is what a vendor may do and the purchaser cannot require of him an accounting for the rents and profits. If because the purchaser is the equitable owner he must pay the purchase price, even though the premises have been destroyed, it may reasonably be argued that he is not the equitable owner in the sense that that phrase is usually understood but in some extraordinary or qualified sense. Even if we do say that in a certain sense the vendor and vendee occupy positions analogous to that of trustee and *cestui que trust* it must be admitted that the relationship owes its being to the fact that there is a contract which can be specifically enforced. Therefore, there is a trust because there is an enforceable contract; the former exists because the latter exists. And yet, those courts which say that the risk of loss should be borne by the vendee because he is in the position of a *cestui*, in effect say that the contract must be specifically performed because a trust exists, thereby inverting the true state of affairs and substituting cause for effect. Since the trust is a mere result of the contract it would seem proper to make it, the trust, conform to the intention of the parties as evidenced by the contract.

Regarding the question from another angle, does it follow from the fact that the vendee is a *cestui*, and must consequently bear the loss of the trust *res*, that he must pay the purchase price to the vendor who cannot perform?[32] If it is true that a *cestui* must bear the losses occurring without fault of the trustee it means that he has lost his equitable estate and cannot hold the trustee responsible. Likewise, in the case of vendor and purchaser, if the subject matter of the contract is destroyed, the latter loses his equitable estate and the later is not, on that account, responsible to the vendor. Evidently, then, the law of trusts does not call upon the vendee to pay. If he must pay at all, then, it must be because he is obligated by contract and if

[31] See to this effect: Keener, *The Burden of Loss*, 1 Col. L. Rev. 1, 10.

[32] See note, 12 Col. L. Rev. 257.

he is, then it must be on the theory that the vendor has performed or is able to. However, equity not only deems the vendor a trustee, but regards the trust obligation as his only one, arguing that since the trustee is not to blame for the loss he is not in default, and since he is not in default, it follows that the vendee must fulfill his obligation. But this view assumes that because the vendor is a trustee he is released from his promise to convey. This is, of course, fallacious, for the reason that there is nothing in the nature of the trust obligation which excuses that imposed by contract.

Concerning the maxim that equity regards as done that which ought to be done and that therefore the vendee will, from the inception of the contract, be considered, in equity, as the owner, it seems sufficient to point out that present ownership is a very different thing from future ownership. "However, certain it may be that in the future one will become the owner of property, it is a very different thing from owning it now. When, therefore, it is said that equity regards one who has a contract right to property in the future as the immediate owner of it, it is in effect said that equity regards two things which are inherently different as the same."[33]

As a further argument that the risk of loss should always be on the vendee, an eminent authority[34] has grouped certain rules of equity to show its consistent treatment of the vendee as owner or mortgagor. These have been commented on by Professor Williston[35] and the rules with his comments are substantially as follows:

I. The vendee can call for a conveyance of the property from a donee, or purchaser with notice.

It is true that a contract for the sale of real estate can be enforced not only against the vendor but also against anyone who takes from him with notice. Moreover, by registration the vendee can charge everyone with notice. But it is also true that one who has only an option to buy and who is not called

[33] 2 Williston, Contracts, Sec. 929. "Only the hoary age and frequent repetition of the maxim prevent a general recognition of its absurdity."

[34] *Supra*, note 31.

[35] *Supra*, note 33, at Sec. 936.

an owner in equity and whom no one saddles with the risk, has the same right.[36]

II. The interest of the vendee can be assigned or devised. The same can also be said of the holder of an option.[37]

III. In the event of the vendee's death, his heir, not his personal representative, is entitled to a conveyance.

"In regard to inheritance of property and dower rights therein after a contract to sell, it should be observed that the question here is not between vendor and purchaser, but between classes of inheritors, all of whom are in the position of volunteers. It may be entirely proper for equity to arrange the rule of inheritance in accordance with the intention of the owner to change the nature of the property at a future time. The vendor has indicated an intent to convert his real estate into personalty, and the purchaser an intent to convert personal estate into realty, and there is no reason why the intent should not be regarded. The question is not ordinarily at what time the conversion is to be dated, but whether there is any conversion. Where the former question arises, it is noticeable that the profits of land under contract of sale belong to the vendor's heir until the day fixed for conveyance. Whatever the basis of the rule in question, it does not violate any principle of contracts. Moreover, it seems probable on the authorities that even where the purchaser's contractual right to a conveyance is subject to a condition, other than the payment of the price, that this rule of inheritance will nevertheless be applied if the condition was one which the purchaser could have performed. Yet, it seems clear that the risk of loss would not be thrown on the purchaser in such a case under the English equitable doctrine. Thus, where the purchaser has a mere option when the vendor dies, on the exercise of the option the vendor's executor, not his heir, has been given the purchase money."[38]

IV. Under a devise by the vendee of his real estate, the interest of the vendee passes.

See comment to rule Number III, *supra*.

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[36] Citing Ross v. Parks, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47 (1890); Thompson v. Henry, 85 Mo. 451 (1885).

[37] See 2 Williston, Contracts, Sec. 415.

[38] *Ibid.*, at Sec. 936, citing Townley v. Bedwell, 14 Ves. 591 (1808).

V. In jurisdictions where a wife is given dower in equitable estates, the widow of the vendee is entitled to dower.

See comment to rule Number III, *supra.*

VI. The vendee has a right to require husbandlike conduct of the vendor in the management of the estate.

Although this is true, the same may be said not only of the vendor's right against a purchaser in possession but also of the right of the holder of an option. Surely one who has given an option, for valuable consideration, cannot thereafter be allowed to misuse the property.[39]

VII. The vendee is chargeable with the costs of improvements made by the vendor under compulsion of law.

If this be true then it operates to destroy one of the arguments most commonly advanced for throwing the risk of loss on the purchaser; namely, that the chance of gain is his also. In the case supposed he is made to pay an additional price for improvements.[40]

VIII. The vendee is chargeable with taxes paid by the vendor beyond the value of the usufruct.

It is well settled that the vendor must bear the burden of taxes until the purchaser is entitled to possession.[41]

IX. An estate which a vendor has contracted to sell will pass under a will to a devisee to whom the vendor has devised the estate held in trust by him.

See comment to rule Number III, *supra.*

X. The property is no longer liable for the debts of the vendor.

It is, of course, true that the creditors of the vendor cannot by seizing the property destroy the purchaser's interest but this only goes to show that equity regards the purchaser as having an interest and does not explain the extent of that interest. On the other hand, it should be observed that only through

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[39] *Ibid.*

[40] *Ibid.*

[41] *Ibid.* Citing Sherman v. Savery, 2 Fed. 505 (1880); Natl. Bank v. Danforth, 80 Ga. 55, 7 S. E. 546 (1887); Brown v. Brown, 124 Mo. 79, 27 S. W. 552 (1894).

a bill in equity can creditors of the purchaser seize the property and it is not subject to execution until the price has been paid.[42]

In addition to setting out what seems to the writer a thorough refutation of any application of the above rules to the question here, Professor Williston points out that certain well settled rules negative any argument that the purchaser stands in the position of a mortgagor. (1) It is a well settled rule of mortgage law that no agreemnet of forfeiture between mortgagor and mortgagee for non-payment on time will be enforced.[43] Also, it is well settled in the law of vendors and purchasers that an agreement that time shall be of the essence, will be enforced.[44] And even though the contract does not make time of the essence, either party by giving a reasonable notice to the other, requiring him to perform within a stated reasonable time, may make such performance a condition of his own further liability.[45] (2) The purchaser is not entitled to possession of the premises unless the contract expressly gives him that right[46] nor can he lay claim to the rents and profits until the time when he is entitled to possession.[47] (3) If the vendor is in possession he is liable for taxes.[48]

Various solutions to this perplexing problem have been offered. The one that is probably foremost among these, and which seeks to change the present "equitable ownership" rule, is that suggested by Professor Williston.[49] His position is that the intention of the parties should always control; that although

[42] *Ibid.* "These rules must therefore be dropped from consideration in any argument concerning the purchaser's risk of loss. They evidently do not depend upon the existence of a situation where the purchaser must be said to have ownership in equity as distinct from an interest less than such full beneficial ownership as should carry with it risk of loss."

[43] Citing Seymour v. Mackay, 126 Ill. 341, 18 N. E. 552 (1888).

[44] Citing Woodruff v. Semi-Tropic Co., 87 Cal. 275, 25 Pac. 354 (1890).

[45] Citing Harding v. Olson, 177 Ill. 298, 52 N. E. 482 (1898).

[46] Citing Gates v. McLean, 70 Cal. 42, 11 Pac. 489 (1886).

[47] Citing Tucker v. McLaughlin-Farrar Co., 36 Okla. 321, 129 Pac. 5 (1912).

[48] Citing Hall v. Ely (N. J. Eq.), 108 Atl. 390. Therefore, concludes Williston, "one who admits that the relation of vendor and purchaser is not in legal effect that of mortgagee and mortgagor, though he is not precluded from asserting that one who has contracted to purchase has some incidents of ownership, cannot fairly argue that those incidents justify the transfer of risk from the vendor, who retains not only the legal title, but some at least of the incidents of beneficial ownership."

[49] 2 Williston, Contracts, Sec. 940.

they frequently fail to make provision as to risk, they do indicate whether they intend a present transfer of the rights of ownership or a future transfer and evidently they expect all the incidents of ownership to pass at that time. It frequently happens that the purchaser is given immediate possession with the right to use it as his own to the same extent as is customary with a mortgagor, the title being retained merely as security for the purchase price. In such case, Mr. Williston argues, an equitable result is reached by placing the risk of loss on the purchaser on the transfer of possession.

Such a rule has much to commend it. Very often the real intention of the parties, which should govern every case, is readily ascertained by the fact that possession has been transferred to the purchaser and thereby he is endowed with every conceivable evidence of ownership except legal title, which, as pointed out above, is retained by the seller merely as security for the purchase price. It is a short way of accomplishing the same end as would be achieved by conveying to the purchaser and taking a mortgage back. However, the suggestion of this, the "possession theory", as a rule to be used in risk of loss cases, has been severely criticised,[50] and it is significant to note that the courts have not accepted it to any extent. This is evidenced by the attitude of the court in *Amundson* v. *Severson*.[51] In that case the contract was made in October, 1909, and the purchaser went into possession in March, 1910. Most of the

[50] Pound, *The Progress of the Law*, 33 Harv. L. Rev. 813, 826, n. 68. "There is practically no authority for this view. It is suggested by and argued as the analogy of the law as to sales of chattels. But three important distinctions have to be noted. (1) A contract for the sale of a chattel gives rise to no real right; such a right arises only upon transfer of the legal title. In equity, on the other hand, a contract for the sale of lands gives rise to a real right from the time when the contract is in the class of specifically enforceable undertakings. Indeed, today, when in most jurisdictions the purchaser can record his contract and thus charge everyone with constructive notice of his rights, he is often better protected in his equitable ownership than a *cestui que trust*. (2) In case of a chattel, it is expedient to cast the risk of loss on the one in possession because that puts pressure on him to care for it. In case of a building, the one in possession exercises his possession through having his property in the building, and the presence of his property therein is enough to induce him to care for the risk of fire, even if the building is at another's risk. (3) Possession is not material with respect to the possessing or existence of either legal or equitable title to land. Why, then, should it be material as to the incidents of equitable title?"

[51] 170 N. W. (S. D.) 633 (1919).

land was washed away by the Missouri River in 1913. Thereafter the vendor procured a good title. As a condition precedent to the vendor-purchaser relationship had not been fulfilled at the date of loss and the purchaser could not have been compelled to take as things then stood the risk was held to be on the vendor, although the purchaser was in possession. Evidently the court did not find possession to be a material factor in determining upon whom the risk of loss rests in equity.

Another authority who disputes the correctness of the majority rule suggests that a better result would be reached by making the rule in equity the same as that in law.[52] That is to say, let the risk of loss remain on the vendor until the time agreed upon for the conveyance of the legal title, and thereafter on the purchaser, unless the vendor is then in such default as to be unable to specifically enforce the contract. However, it has been pointed out[53] that this is objectionable in that if no time is set for performance, it would be quite inconvenient to have the risk determined by such an uncertain test as the lapse of a reasonable time. Because of that objection the prevailing rule, even though it is unnecessary for the adequate protection of the vendor, is preferable since the time of the completion of the contract is usually easy to ascertain.

Perhaps the better reasoned solution and the one that more nearly conforms to the intention of the parties is that put forth by Professor Vanneman.[54] Under it there would be no hard and fast rule for the courts to apply to every case; instead they would find and effectuate the intention of the parties in each case. In cases involving the simplest group of operative facts the same rule that is used at law would be applied. In more complex situations all of the incidents of ownership would be considered: The care of the property, including maintenance, repairs and management; the duty to exercise good husbandry on the part of the one responsible for the property

[52] Langdell, A Brief Survey of Eq. Jur., p. 59. A similar solution has been offered by Stone, *Equitable Conversion by Contract*, 13 Col. L. Rev. 368, 385–387.

[53] Clark, *Some Problems in Specific Performance*, 31 Harv. L. Rev. 271, 287. Clark suggests that the vendor would be "given reasonably adequate protection, if the courts had held the risk to possession at the time the vendor puts the purchaser in default, by a proper offer of performance."

[54] Vanneman, *Risk of Loss*, 8 Minn. L. Rev. 127, 141–143.

and to avoid waste; the obligation to pay taxes; the privilege of keeping the property insured; the right to the returns from the property. The incidents of ownership should all have weight in determining the intention of the parties and they do not always, of necessity, follow possession. "It might well happen that by the contract the purchaser was given immediate possession but that the vendor retained the duty of making repairs, or the obligation to pay taxes, and of keeping up insurance."[55] Under such a rule possession may or may not be controlling. The entire matter is left to the discretion of the courts; they are to weigh the divided incidents of ownership and gather therefrom the true intention of the parties.

The minority rule which places the risk of loss on the vendor has sound argument to sustain it. Certainly it accords with natural justice. Even though that topic embodies many varying views it would seem that in construing contracts no rule could be more just than to aim to discover the intention of the parties and therefore to place the risk on the vendee if they intend an immediate transfer and on the vendor if they intend a future transfer. That is to say, intent to transfer ownership should always control. Unless a contract is in violation of public policy it is the duty of the courts to enforce that agreement and not to substitute one entirely foreign to the intention of the parties. And yet that is exactly what is done when the courts hold the purchaser to be the owner in equity from the inception of the contract, even though there is certainly no public policy requiring the purchaser to be the owner any sooner than the agreement specified. Of course, more than often the parties manifest no intention as to risk of loss except as it may be inferred from all of the provisions of the contract. And in that event the only ground for contending that the risk should be thrown on the vendee is because of his supposed equitable ownership. However, if, after the contract is made, certain incidents of ownership, both legal and equitable, pass to the vendee and others are retained by the vendor, the risk should still remain with the latter since he should not be allowed to hold the vendee to his promise to pay until he, the vendor, has delivered all—not merely part—of what he agreed to give.

There seems to be no good reason for the opposite results

[55] *Ibid.*, p. 141.

reached at law and equity. If a purchaser should make a promise to pay expressly conditioned on receiving the property in good order, certainly a court of equity could disregard such a stipulation no more than could a court of law. Then how is it possible, where the purchaser's promise is in terms absolute, for a court of law to hold such a stipulation subject to an implied condition of performance by the vendor when equity reaches a directly contrary result? If equity requires the purchaser to accept a tender of a deed in spite of the destruction of the property, and to pay the full price, a refusal of such a tender should ground an action at law. Certainly the result reached in equity is inconsistent with the settled law of implied conditions, which is that there is a failure of consideration for a promise if the performance promised in return is not given. Can it be argued that a promise to convey an estate is fulfilled by conveying only a part of it?

It should aid in this problem to ask what, at the time of the bargain, did the vendor intend to sell. What did the purchaser intend to buy? If a building was on the land and was a material portion of the estate than its value was a considerable fraction of the price. Therefore, it seems reasonable to say that the vendor intended to sell and the vendee intended to buy land with a building on it, not land without a building or with a damaged building. If the attention of the parties had been directed to risk of loss they would have undoubtedly stipulated that it was to be on the vendor until consummation of the contract.[56]

Certain clear advantages are secured by allowing the risk of loss to remain on the vendor and it seems to the writer that the minority rule has decidedly the better argument. In doubtful cases it seems far better to let the loss lie where it falls, since this saves litigation and concomitant useless expense. Also, it is probably wiser to have the party in possession, usually the vendor, care for it at his peril rather than have one not in possession care for it at *his* peril. This, of course, does not mean that possession should control every case. As pointed out by Mr. Vanneman, *supra,* possession is merely one of the things to consider, although it is an important item and more than

[56] Stone says that the "almost universal practice" is to throw risk on the vendor. 13 Col. L. R. 387.

often it may swing the decision. Of course, if the vendor in possession is negligent and owing to his negligence the property is damaged, the loss is his under any view, but there might be quite a difference in not being so negligent as to be liable and taking such care as would be induced by a personal interest in the consequences. Then, too, it is difficult to prove a vendor in possession negligent.

Considering this matter in the light of all that has been discussed here, it would seem that too long have our courts tolerated the doctrine of equitable conversion which operates to throw the risk of loss on the vendee. Common sense, business experience and usage, and theoretical analysis of the problems involved, all militate against the use of this fiction. And besides, as pointed out above, it fails to produce the justice which, after all, is the only excuse for its employment. So long as such a result prevails in our courts, the common law is restrained in what is probably its most important characteristic, namely, its capacity for expansion and growth.

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