1923

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Recommended Citation

Vanneman, Harry W., "Risk of Loss in Equity Between the Date of Contract to Sell Real Estate and Transfer of Title" (1923). Minnesota Law Review. 1435.
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RISK OF LOSS, IN EQUITY, BETWEEN THE DATE OF
CONTRACT TO SELL REAL ESTATE AND
TRANSFER OF TITLE

By Harry W. Vanneman*

"If I should buy a house, and before the time as by the articles I
am to pay for the same, the house be burnt down by casualty
of fire, I shall not be bound to pay for the house." This dictum
of Sir Joseph Jekyll, M.R., in the case of Stent v. Baylis1 cor-
rectly stated the early English rule in so far as the rule was
settled, but from the days of Lord Eldon to the present the rule
in England has been contra and the decisions in the American
courts have been in conflict.

The above quotation presents the simplest possible group of
operative facts: a binding contract by which the vendor agrees
to sell a property on which there is standing a building; the title
papers to be executed at a fixed future date, at which time the
purchaser is to pay a certain price; before the date for passing
the title papers the building is destroyed by accidental fire.
Neither party is at fault. All courts agree that the loss should
fall upon the owner. The difference of opinion arises in de-
dtermining which party is the owner in equity.

At law the loss would fall upon the vendor.2 He can neither
recover the unpaid purchase price from the purchaser nor retain
any payments which he may have received. The legal title, to-
gether with all the incidents of ownership, is in him. He cannot
perform his contract, because of partial failure of the considera-
tion. The purchaser's only redress is an action for breach of
contract. The result is that the obligation is non-enforceable at
law and the loss remains with the vendor.

In equity, however, by the weight of authority, if the dicta of
courts be considered as well as actual decisions, the risk of loss
is shifted to the purchaser from the moment a binding contract
is made which equity will specifically enforce. This view has

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1(1724) 2 P. Wms. 217, 220.
had the support of many text writers. Sometimes a decision is based on the maxim, "equity regards as done what is agreed to be done;" sometimes on the trust doctrine that from the moment of the contract the vendor is trustee for the purchaser; sometimes resort is made to the mortgage theory that from the date of contract the vendor retains title as security for the purchase money; sometimes the equitable conversion doctrine is advanced; and not infrequently a court uses more than one theory in the same case. Practically all courts accepting this view treat the purchaser as "equitable owner," using the theory which best suits the fancy of the particular court.

In the leading case of *Paine v. Meller*⁴ Lord Eldon, in describing the purchaser's position in a court of equity, said, the premises "are his to all intents and purposes. They are vendible as his, chargeable as his; capable of being encumbered as his; they may be devised as his; they may be assets; and they would descend to his heir." While it may be true that that case did not decide precisely the question here being considered,⁶ there can be no doubt that the later English courts,⁷ and many American courts⁸ rely upon this case as settling the rule. *Paine v. Meller*

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³ Pomeroy, Equity Jurisdiction, sec. 2282; Fry, Specific Performance, sec. 911; Sugden, Vendors and Purchasers, 8th ed. 446; Eaton, Equity, sec. 21.
⁴ (1801) 6 Ves. Jr. 349.
⁵ It has been pointed out 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 be placed on the vendor. Dean Langdell in 1 Harv. L. Rev. 375, note 1. This view is urged in 6 *Minnesota Law Review* 513; Good v. Jarrard, (1912) 93 S.C. 229, 76 S.E. 698, 43 L.R.A. (N.S.) 383, and with strong dissenting opinion in McGinley v. Forrest, (1921) 107 Neb. 309, 186 N.W. 74, 22 A.L.R. 567. Prof. Williston does not think, however, that the purchaser was in default as he had two days left in which to prepare the papers. 9 Harv. L. Rev. 112, note 1.
⁷ In the following cases the purchaser was in possession and the loss was thrown upon him: Loventhal v. Home Ins. Co., (1895) 112 Ala. 108, 20 So. 419, 57 A.S.R. 17, 33 L.R.A. 258; Roach v. Richardson, (1907) 84 Ark. 37, 104 S.W. 538 (court does not stress the point of possession); Strachem v. Drake, (1916) 61 Colo. 444, 158 Pac. 310 (same comment); Mackey v. Bowles, (1896) 98 Ga. 730, 25 S.E. 834, (dictum, possession in vendee strongly emphasized); Davidson v. Hawkeye Ins. Co., (1887) 71 Ia. 532, 60 A.S.R. 818, 32 N.W. 514 (case has been cited in this and next group); Hueston v. Miss. & Rum River Boom Co., (1899) 76 Minn. 251, 79 N.W. 92, (dictum, vendee called equitable owner and allowed to maintain trespass); see also Chemedlin v. Prince, (1870) 15 Minn. 331; Linn Co. Bank v. Grisham, (1919) 105 Kan. 460, 185 Pac. 54; Walker v. Owen, (1883) 79 Mo. 563; Marion v. Walcott, (1904) 68 N.J. Eq. 20, 59 Atl. 242; Sutton v. Davis, (1906) 143 N.C. 474, 55 S.E. 844; Robb v. Mann, (1849)
and Sugden on Vendors and Purchasers, who derives his rule therefrom, are most often cited as authority for the English or majority view.

The court of equity has departed from the law rule largely in the development of its extraordinary remedy of specific per-


In many of these cases the fact that possession was in the vendee is treated as immaterial. It is not contended that the decision would have been otherwise if possession had been in the vendor, but the cases as they stand are not authority for the broad rule of the next group although the courts by dictum often indicate that they would so decide regardless of possession.

The following cases place the loss upon the vendee even though the vendor is in possession: Phinizy v. Guernsey, (1900) 111 Ga. 346, 50 L.R.A. 680, 78 A.S.R. 217, 36 S.E. 796 (dictum, the vendor's title was defective); Thompson v. Norton, (1860) 14 Ind. 187; O'Brien v. Paulsen, (1922) 192 Ia. 1351, 186 N.W. 440 (the court very clearly states that possession in vendee is immaterial and clears up any doubt created by Davidson v. Hawkeye Ins. Co., (1887) 71 Ia. 532, 32 N.W. 514, 60 A.S.R. 818); Gammon v. Blaisdell, (1891) 45 Kan. 221, 25 Pac. 580 (the entire tract was taken by eminent domain while the vendor was still in possession and yet the vendee was required to pay for same; he was allowed condemnation value); Johnson v. Jones, (1851) 12 B. Mon. (Ky.) 326 (joint possession); Martin v. Carver, (1886) 8 Ky. L. Rep. 56, 1 S.W. 199; Calhoun v. Belden, 3 Bush (Ky.) 674; but see Marks v. Techenor, (1887) 85 Ky. 536, 4 S.W. 225; Brewer v. Herbert, (1859) 30 Mo. 301, 96 Am. Dec. 583; Skinner and Sons Co. v. Houston, (1900) 92 Md. 68, 48 Atl. 85; Hamilton v. Insurance Co., (1894) 98 Mich. 355, 57 N.W. 735 (dictum); Manning v. No. British Ins. Co., (1907) 123 Mo. App. 456, 99 S.W. 1095 (dictum that possession was not necessary to throw the loss upon the vendee, and explains away what was said about possession in Walker v. Owen, (1883) 79 Mo. 563); Snyder v. Murdock, (1872) 51 Mo. 175. See also Mahan v. Ins. Co., (1920) 205 Mo. App. 592, 226 S.W. 593; Rauck v. Wickwire, (1913) 255 Mo. 42, 104 S.W. 460; Blew v. McClelland, (1860) 29 Mo. 304; McGinley v. Forrest, (1921) 107 Neb. 309, 186 N.W. 74, 22 A.L.R. 567. See comment in 77 U. of Pa. L. Rev. 248; Cropper v. Brown, (1909) 76 N.J. Eq. 406, 139 A.S.R. 770, 74 Atl. 987 (dictum that possession is immaterial); Woodward v. McCullum, (1907) 16 N.D. 42, 111 N.W. 623; Dunn v. Yakish, (1990) 10 Okl. 388, 61 Pac. 926; No. Texas Realty and Construction Co. v. Lary, (Tex. 1911) 136 S.W. 843 (party in possession did not appear); Maudru v. Humphrey's, (1919) 83 W.Va. 307, 98 S.E. 259; Paine v. Meller, (1801) 6 Ves. Jr. 347; Poole v. Adams, (1864) 33 L.J. Ch. 639, 10 L.T. 287, 12 W.R. 683. See also the annuity cases, White v. Nuth, (1702) 1 P. Wms. 61; Kenny v. Wexham, (1822) 6 Madd. 355.

The rule in New York is by no means free from doubt, although the tendency is probably toward the majority view, which considers possession an unessential incident. In the recent case of Sewell v. Underhill, (1910) 197 N.Y. 168, 90 N.E. 430, 27 L.R.A. (N.S.) 233, 134 A.S.R. 863, 18 Ann.
formance. The contract stated above falls in the class of contracts which equity will specifically enforce. The query is at

Cas. 795, Mr. Justice Gray said: "I am unable to find that the authority of the English rule has been shaken in this state, that a loss by fire, or other accident, not due to the fault of the vendor, must fall on the vendee, when the title is satisfactory and the contract is, therefore, capable of being specifically performed by the vendor."

There are two earlier cases which seem to make the risk of loss depend upon possession, and ability on the part of the vendor to deliver what he had agreed to sell. In Smith v. McCluskey, (1866) 45 Barb. (N.Y.) 610, the court said: "In this case the vendor had not parted with title or possession at the time of the disaster, which disaster rendered it impossible for him to deliver the substance of what was agreed to be transferred."

See also, Wicks v. Bowman, (1874) 5 Daly (N.Y.) 225. It should be noted, however, that in this case the contract was for the sale of a "lot of land, with all the buildings and improvements thereon." Dean Pound says these are overruled cases. 33 Harv. L. Rev. 826.

Another early case went to the opposite extreme and ruled that the vendee must suffer the loss even though the vendor retained possession. Gates v. Smith, (1846) 4 Edw. Ch. (N.Y.) 702. This view seems to be followed in the recent case of Neponsit Realty Co. v. Judge, (1919) 106 Misc. 445, 176 N.Y.S. 135. The property in this case was probably vacant land. In Goldman v. Rosenberg, (1889) 116 N.Y. 78, 22 N.E. 259, the vendor, a partnership, was in possession and was held bound to suffer the loss. The case was distinguished in Sewell v. Underhill, (1910) 197 N.Y. 168, 90 N.E. 430, 27 L.R.A. (N.S.) 233, 134 A.S.R. 863, 18 Ann. Cas. 795, on its peculiar facts. It seems the partnership was privileged to sell back to the vendor, one of the partners, the property which he had contributed to the partnership venture, but the contract did not bind it to do so. It was optional, hence it seems very proper in such a case to let the loss lie where it falls, on the partnership. It is doubtful if the purchaser in the agreement to sell back could enforce specific performance. The court by dictum seemed to approve of the English rule in Paine v. Meller, (1801) 6 Ves. Jr. 349.

A vendee in possession was considered the owner to the extent that he could insure the buildings in Aetna Fire Ins. Co. v. Tyler, (1835) 16 Wend. (N.Y.) 396, 30 Am. Dec. 90, and to maintain an action of trespass in Rood v. New York, etc., Ry. Co., (1854) 18 Barb. (N.Y.) 80.

The Sewell Case, above, is the last utterance by the court of appeals and is generally considered as adopting the English view; see 8 Mich. L. Rev. 515, 23 Harv. L. Rev. 476. The court relies upon Gates v. Smith, (1846) 4 Edw. Ch. (N.Y.) 702; Goldman v. Rosenberg, (1889) 116 N.Y. 78, 22 N.E. 259; McKenzie v. Sterling, (1867) 48 Barb. (N.Y.) 330 and other cases. See also Mott v. Coddington, (1863) 1 Abb. Pr. N.S. (N.Y.) 290. The rule is followed with some reluctance in Cammarata v. Merkewitz, (1923) 120 Misc. 503, 198 N.Y.S. 825, where Mr. Justice Rodenbeck said: "The fact that the plaintiffs were not in possession when the fire occurred creates no distinction, as the rule, in the absence of special agreement turns upon the title and rights of the parties at the time that the agreement of sale is made, and not, as in the case of personal property, upon the question of delivery. There are cases in which the loss is made to depend upon possession," citing Wicks v. Bowman, (1874) 5 Daly (N.Y.) 225, "or the right to immediate possession under the contract," citing McKenzie v. Sterling, (1867) 48 Barb. (N.Y.) 330, "or upon the destruction of personal property in conjunction with the real property," Listman v. Hickey, (1892) 65 Hun (N.Y.) 8, 19 N.Y.S. 880, affirmed 143 N.Y. 630, 37 N.E. 827, to which may be added Clinton v. Hope Ins. Co., (1871) 45 N.Y. 454, "but the great weight of authority is that in the absence of special agreement, the equitable interest that is created by an agreement to sell casts the loss upon the vendee," citing Sewell v. Underhill, (1910) 197 N.Y. 168, 90 N.E.
once suggested, should this difference in remedy make a difference in result? The answer requires an analysis of the vendor-purchaser relationship, which must be considered from two points of view: that of property or "ownership" and that of contract.

The viewpoint of "ownership" has been championed by Professor Keener who strongly supports the majority view held by Lord Eldon. He urges that equity should proceed with this problem just as it has with other problems where specific per-

Mr. Justice Kapper, in the case of Boehm v. Platt, (1921) 115 Misc. 55, 189 N.Y.S. 16, refused to be bound by the view which did not appeal to his sense of justice and very clearly made possession the controlling factor. His view was rejected, however, in Pellegrino v. Giuliani, (1922) 118 Misc. 329, 193 N.Y.S. 258.

With this disagreement in the supreme courts of New York it is likely the question will not be set at rest until court of appeals again has the matter before it.

Judicial sales.—The same conflicting views obtain where the sale is by order of court, and time is allowed between the date of bidding and the judicial confirmation of the sale, during which time better bids may be received. If the property is partially destroyed during this interim, on whom should the loss fall?

Some of the courts which place the loss on the purchaser where the contract is complete treat the inchoate purchaser in such a case as a mere "preferred bidder," and the transaction as not a contract. Hence, the vendor-purchaser relation never having been perfected, the loss remains with the vendor. In re Sermon's Land, (1921) 182 N.C. 122, 108 S.E. 495, approved in 20 Mich. L. Rev. 554; Upchurch v. Upchurch, (1917) 173 N.C. 88, 91 S.E. 702; Harral v. Blythe, (1906) 140 N.C. 415, 53 S.E. 232; Ex parte Minor, (1805) 11 Ves. Jr. 559; Twigg v. Fife, (1807) 13 Ves. Jr. 517; Robb v. Mann, (1849) 11 Pa. St. 300; Demmey's Appeal, (1862) 43 Pa. St. 155. The bid is merely a proposal to buy. On the other hand, it has been held that the confirmation of the sale is a mere ministerial act which relates back to the date of the sale, and that the loss falls upon the purchaser from that date. Crooper v. Brown, (1909) 76 N.J.Eq. 406, 74 Atl. 987. In New Jersey the rule seems to be largely the result of statute which the court thinks had taken away the contingent nature of bids at judicial sales. It seems the bid stands there as final unless equitable grounds require an opening of the bid. The policy of the state is, apparently, to make judicial sales identical, in this respect, to private sales.

formance of this sort of contract is involved and dispose of the risk of loss by analogy in the same way. The following rules which equity has evolved are presented as affording a guide to the proper disposition of the risk of loss. They also suggest his method of approach, viz., that of property and not contract.

"(1) The vendee can call for a conveyance of the property from a donee, or purchaser with notice. (2) The interest of the vendee can be assigned or devised. (3) In the event of the vendee's death, his heir, not his personal representative, is entitled to a conveyance. (4) Under a devise by the vendee of his real estate, the interest of the vendee passes. (5) In jurisdictions where a wife is given dower in equitable estate, the widow of the vendee is entitled to dower. (6) The vendee has the right to require husband-like conduct of the vendor in the management of the estate. (7) The vendee is chargeable with the cost of improvements made by the vendor under compulsion of law. (8) The vendee is chargeable with taxes paid by the vendor beyond the value of the usufruct. (9) An estate which a vendor has contracted to sell will pass under a will to a devisee to whom the vendor has devised the estates held in trust by him. (10) A court of equity will not allow a widow to claim, as against the vendee, dower in land which the husband had, before his marriage, contracted to sell. (11) The property is no longer liable for the debts of the vendor."

To this list Professor Williston adds, the insurance cases which hold the vendee is the "owner" under policies with clauses making the contract void unless the insured reveals the true state of the title and the multitude of cases in which the vendor is called trustee.

An examination of several of these rules which evidence "equitable ownership" will disclose that they would have been decided the same way had the rights of the purchaser been simply contractual. For instance, suppose that by the agreement an option to buy land had been secured instead of a contract of sale. Equity does not treat an optionee as "owner" and certainly the risk of loss is not upon him. Nevertheless, as has been pointed out by Professor Williston, a purchaser for value with notice does not take free from the optionee's rights; nor would a donee. An optionor could not deal with the property in an unhusband-like manner. And it is difficult to see why the same reasoning used in the case of King v. Ruckman, by which a vendee was charged with improvements made under

92 Williston, Contracts, sec. 930.
10Ibid, sec. 936 and cases cited in note 70.
11Note 8.
compulsion of law, and subjected to taxes beyond the value of the usufruct, could not be used equally well to place these burdens upon the optionee if he exercised his option. Thus it would seem that “equitable ownership” was unnecessary in reaching the first, second, sixth, seventh and eighth rules.

Respecting the rules of inheritance of property subject to a contract of sale, the rule that the vendee’s interest passes by a general devise of his real estate, the dower interest of the vendee’s widow, and the rule that the vendor’s will of trust estates carries real estate contracted to be sold, it should be observed that the issue was in no case between the parties to the contract but at most between one party to the contract and third party volunteers.

“It may be entirely proper for equity to arrange the rules of inheritance in accordance with an intention of the owner to change the nature of the property at a future time.”

But to do this resort is had to a pure fiction. No principle of contracts is violated. It does not follow that the same fiction should be employed to carry the risk of loss to the vendee merely for the sake of uniformity where the issue is between the parties themselves, when as often as not, it is contrary to their discoverable intention. The theory of “equitable ownership,” which was proper enough in the third, fourth, fifth, ninth and tenth rules, where third party volunteers were concerned, becomes of doubtful value and propriety in fixing the risk of loss inasmuch as it does violence to a contract principle.

Both the “equitable ownership” theory and the equitable conversion theory, the latter being but another method of describing the same result, are entirely a consequence of specific performance of contracts in equity. “It is apparent, says Dean Stone:"

“That the theory of equitable ownership of land, subject to a contract of sale, is literally an incident of specific performance, and cannot exist apart from it. A preliminary to the determination of the question whether there is equitable ownership of land must therefore necessarily be the determination of the question whether there is a contract which can be and ought to be specifically performed at the very time when the court is called upon to perform it.”

Courts that place the risk of loss on the purchaser lose sight of this sequence. Instead of asking whether the contract can be specifically performed they reverse the order and say that

12Note 10.
13Col. L. Rev. 369-386. See also 6 Cornell L. Rev. 111.
since the purchaser is the equitable owner he must consequently
perform his contract and the loss will, therefore, be his. The
first issue is, should there be a decree for specific performance
at all?

A further difficulty is involved in the equitable conversion
view. As pointed out by Dean Langdell\textsuperscript{14} equitable conversion is
a fiction designed to carry out a supposed intention of the parties.
It depends upon "the intention of the owner of the property as
shown by the making of the contract. But this, surely, has noth-
ing to do with the question whether the ownership of the land
has passed from the vendor to the vendee." Especially is this
ture when the fiction would go contrary to the intention of the
parties, a point to be discussed later.

Since the basic question is whether the contract can be speci-
fically performed, it may be well to inquire whether, after the
destruction of a part of the res, the vendor has a standing in a
court of equity sufficient to entitle him to specific performance.
It is clear that if a vendor cannot make out a good title he can-
ot enforce specific performance\textsuperscript{15} and it is urged:

"But if a condition is implied in this connection, why is there
not also an implied condition that the subject matter shall be in
existence when the time for performance arrives? A promise
to convey a house and lot is no more fulfilled by conveying a lot
without a house than by conveying nothing at all. In either case
there is a failure of consideration, and if total failure is a total
defense, partial failure should be at least a partial defense.\textsuperscript{16}

\textsuperscript{14}1 Harv. L. Rev. 378, 380.
\textsuperscript{15}Phinizy v. Guernsey, (1900) 111 Ga. 346, 36 S.E. 796, 50 L.R.A.
680, 78 A.S.R. 217; Epstein v. Kuhn, (1906) 225 Ill. 115, 10 L.R.A. (N.S.)
117, 80 N.E. 80; Lombard v. Chicago Sinai Cong., (1872) 64 Ill. 477; see 2
Ill. L. Rev. 274; Calhoun v. Belden, (1868) 3 Bush (Ky.) 674; Dickinson
24 Neb. 167; Violet v. Rose, (1894) 39 Neb. 660, 58 N.W. 216; Smith v.
(1915) 35 S.D. 191, 151 N.W. 887; Amundson v. Severson, (1919) 41
S.D. 377, 170 N.W. 633. Here the purchaser was in possession and a
large part of the farm was washed away by the Missouri river, yet the loss
was thrown on the vendor. This case has been cited, 33 Harv. L. Rev. 826,
as an illustration of the rule that possession is immaterial in determining
the risk of loss. The facts show that the vendor did not have title and in
no case could have specific performance, and it is submitted that this is
the crux of the decision and not the matter of possession. No one would
suppose that a defective title in a vendor could be overcome by possession
in the purchaser. Christian v. Cabell, (1872) 22 Gratt. (Va.) 82; Corrodus
v. Sharpe, (1855) 20 Beav. 56; 23 Yale L. Jour. 266.

\textsuperscript{16}6 MINNESOTA LAW REVIEW 513.

If the vendor has conditions to perform, a failure therein will defeat
specific performance and the loss will be his; Natl. Ins. Co. v. Lumber Co.,
(1905) 217 Ill. 115, 75 N.E. 450; Chappel v. McKnight, (1884) 108 Ill.
570; Phoenix Ins. Co. v. Caldwell, (1900) 187 Ill. 73, 58 N.E. 314; Nunn-
The cases seem to agree that if the contract called for a delivery of the property in good condition, or to deliver the land with improvements and the vendor could not do so, the loss would be his. Professor Williston insists with good reason that "a promise to convey must always mean a promise to convey in substantially the same condition as at the time of the contract." 17

Practically all of the cases in which the loss is thrown upon the purchaser urge as a matter of justice that since the purchaser is entitled to any benefits which may accrue he should suffer any loss. This seems unsound as a premise on which to base specific performance. It does not show a vendor able to perform his side of the agreement.

"It is fallacious to argue," said Mr. Chief Justice Gary, "that the loss should be borne by the vendee on the ground that, if the value of the land enhanced he would receive the benefits thereof, he should sustain the loss when the land decreases in value. The argument is unsound for the reason that in one case he gets the specific property for which he bargained, whereas in the other case he does not, on account of the failure of the vendor to carry out his contract." 18

The majority rule courts frequently treat the vendor-purchaser relation as analogous to that of mortgagee-mortgagor. Since the vendor retains title he does so as security for the unpaid purchase money. The Illinois court says:

"Although the legal title does not pass from the vendor by the contract of sale, he holds it from the time merely as security for the payment of the purchase money. The purchaser becomes the equitable and substantial owner, subject only to the rights of the vendor to the payment of the purchase money." 19

To this may be added the conclusion of the Arkansas court:

"It follows, therefore, that the vendee in analogy to the mortgagor, is the owner of an equity of redemption, and that his is the real and beneficial interest subject, of course, to the rights of the vendor." 20

In at least two essential particulars, however, the analogy of the mortgage breaks down. It is clear that a vendor may

179 Harv. L. Rev. 106-114. 2 Williston, Contracts, sec. 932.
19Stevenson v. Loehr, (1871) 57 Ill. 509.
make time of the essence of the contract and he may do so at any subsequent time by giving reasonable notice, and equity will generally enforce the same, provided forfeitures are avoided or other inequitable results. But no court of equity will permit a mortgagee to cut off the mortgagor’s equity of redemption by such an agreement.\footnote{21} Again, and the absence of a provision to the contrary, the vendor retains, or is entitled to, the possession of the property,\footnote{22} and to the rents and profits therefrom. Professor Keener recognized this weakness in the analogy but did not consider it fatal. It would seem, however, that these differences greatly undermine the analogy to a mortgage and the conclusions drawn therefrom.

Another favorite theory of the cases in this group is that of trust. This is, of course, admittedly the basis of all the above rules which Professor Keener formulated. A Maryland court, after an exhaustive review of the cases thus states the trust view:

“From these and other authorities of equal weight, announcing the maxim that equity regards as done that which was agreed to be done, is deducted as the established doctrine of equity, 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, and the latter becomes a trustee of the purchase money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue to the estate in the interim between the agreement and the conveyance.”\footnote{23}

The English court in Rayner v. Preston\footnote{24} is more guarded. After stating the trust rule Cotton, L. J., said:

“In my opinion 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 the court of equity will give effect to by transferring the property sold to the purchaser.”

A trustee is not entitled to profit by his position. Certainly he cannot take beneficially the rents and profits from the trust res, and yet that is precisely what a vendor may do. The purchaser cannot require of him an accounting for the rents and

\footnote{21} Williston, Contracts, sec. 937 and numerous cases cited there.

\footnote{22} In Alabama, contrary to the general rule, the purchaser is entitled to possession, in the absence of a stipulation, rather than the vendor. Reid v. Davis, (1842) 4 Ala. 83; Loventhal v. Home Ins. Co., (1895) 112 Ala. 108, 20 So. 419, 57 A.S.R. 17, 33 L.R.A. 258.


\footnote{24} (1881) L.R. 18 Ch. Div. 1; Howard v. Miller, (1915) A.C. 318.
profits. It is submitted, therefore, that in very substantial particulars both the mortgage and the trust analogies fail to apply to this problem. Furthermore, when at all carefully considered, the courts apply the doctrines only in those cases where equity will specifically perform the contract. Hence the first question reappears, should equity specifically enforce the contract? The property or "ownership" viewpoint, it is submitted, does not satisfactorily answer the question.

An incidental question which has caused some difficulty under the majority rule, and which should be briefly considered before pursuing the main question further, is that of the proper disposition of the insurance money which is payable under a policy held by the vendor on the building which is burned. As before noted both the vendor\textsuperscript{25} and the purchaser\textsuperscript{26} under a contract of sale have insurable interests, the former to protect his security, the latter as "owner" under insurance law. Where, however, a vendor has been paid the purchase price in full, or may recover it from the purchaser, should he also collect\textsuperscript{27} the insurance money, and, if so, will he hold it beneficially or for the purchaser?

The leading case is Rayner v. Preston\textsuperscript{28} to which Castellain v. Preston\textsuperscript{29} is a sequel. In the former case it was held, with a strong dissenting opinion, that a vendor who had been paid might keep the insurance money so far as the purchaser was concerned, that the insurance contract was purely personal between the vendor and the insurer, that the purchaser was a stranger to the contract and could take no rights under it, and that it did not run with the land sold. The latter case held, as between the vendor and the insurer, that the vendor could not retain the insurance money, he having suffered no loss, having been paid in full the purchase price, which the company was bound to indemnify, and that through the doctrine of subrogation the money could be recovered by the insurer.

\textsuperscript{25}Hamilton v. Ins. Co., (1894) 98 Mich. 535 (vendor's interest must be "intelligently insured").
\textsuperscript{28}Note 24.
\textsuperscript{29}(1883) L.R. 11 Q.B. Div. 380.
The result reached by these English cases seems unwise, unjust and inequitable. The insurance company has assumed a risk for which a premium was paid, which has not been changed by the contract to sell the property and which, on application, they would have transferred to the purchaser. After the loss has occurred the insurer should not be relieved except for the strongest reasons. Someone will suffer loss by the destruction of the building which was insured. It is no hardship or injustice upon the company to require it to pay the policy.

The vendor should not be allowed, however, to receive the insurance money for himself. The vendee is bound by his contract to pay the full price for the property purchased if he has not done so. The vendor would thus receive double recovery—the price for his property and the insurance money. Such a result would be contrary to sound public policy. It would tend to encourage incendiarism on the part of unscrupulous vendors and promote carelessness in vendors who retain possession of the property until sale is completed.

Furthermore, the vendee suffers loss. He gets less than he pays for from the vendor. When a court of equity is required to determine to which of two parties a fund should be paid inequitable results should be avoided.

While a few American courts have followed the doctrine of *Rayner v. Preston* the weight of authority in this county follows the dissenting opinion of James, L. J. In order to avoid the injustice of the English rule these courts advance the theory that the vendor, while entitled to collect the insurance money from the insurance company, holds it as trustee for the purchaser. The money is considered a substitute for the insured property, and is held by the vendor under precisely the same duties and obligations as he had held the building. This view seems much more equitable and it is in harmony with the general principles controlling the majority view of the main question, where the vendor is so often treated as trustee for the purchaser.

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It must be quite readily admitted, of course, that, logically, the vendor's insurance contract is entirely a collateral matter in which the purchaser has no concern,\(^{32}\) that it is the vendor's interest which is insured and not the vendee's, but it should be constantly remembered that this is a practical business matter and that the business-man's viewpoint should not be entirely disregarded for the sake of pure logic, especially if the logical result is inequitable and can be avoided. One feels sorely discontented with the results of the English view. The majority of the courts in this country avoid such results by means of a theory which is quite consistent with the view which places the risk of loss on the purchaser. It is submitted that the error was made in the case of *Rayner v. Preston* in denying the purchaser a right in the insurance contract, and it is with some satisfaction that one recalls that the English Parliament has recently changed the rule of that case\(^{33}\) and a similar procedure would seem wise on the part of those American states which still adhere to its rule.

To return to the main problem, a second method of approach is that of the contract point of view. Running through the whole law of contracts is the endeavor on the part of the courts to ascertain\(^{34}\) and carry out the intention of the parties. "The intention of the parties is a factor in any proper decision."\(^{35}\) It is true that the parties have not expressly declared their intention as to who should bear the loss, hence the court must decide for itself what is reasonable in a given case. Certain elements in the problem will assist in reaching what may be termed a reasonable intention. At the time of the bargain what did the vendor intend to sell? What did the purchaser intend to buy? Certainly if the building was a material portion of the res its value was represented in a considerable fraction of the price. It would seem reasonable, therefore, to say that the vendor intended to sell and the purchaser to buy the land with a building upon it. What would have been their reaction had the risk of loss been called to their

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\(^{32}\) Harv. L. Rev. 826.
\(^{33}\) Statutes 12 and 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." This becomes effective in 1925.

\(^{34}\) Williston, Contracts 927, and authorities there cited.

\(^{35}\) Ibid.
attention? This can only be answered by stating that generally whenever the parties have stipulated respecting the risk of loss they have placed it upon the vendor.\textsuperscript{36} Thus by their contract, the parties place the risk of loss just contra to the equity rule which is followed by the weight of authority. Should equity, in the absence of a compelling reason, thus disregard common business experience?

It would seem obvious, moreover, that the parties when they stipulate that the title shall pass to the purchaser in the future do not intend a present shifting of ownership. Certainly it cannot be "denied that present ownership is a different thing from future ownership."\textsuperscript{37} The difference is ignored by the majority rule, and doubtless, in many cases, just the reverse of the intention of the parties is made to prevail. Perhaps the most striking instance of this is to be found in the case of \textit{Pellegrino v. Giuliani}.

In this case the parties stipulated in their contract, that the risk of loss by fire should be upon the vendor but made no provision for other possible loss. The loss was occasioned by a storm, and the court—disregarding what seems to be the clear intention of the parties as to loss—held that it fell upon the purchaser.

Since the parties intend a future transfer of ownership Dean Langdell concluded that that future date was the time to shift the risk of loss.\textsuperscript{38} Professor Williston does not think that the

\textsuperscript{36}It is surprising that many large realtor associations make no provision in their standard contracts against such loss. None seems to exist in Connecticut. New York probably has such a provision, at least in New York city. The California real estate association's standard form contains the following clause: "Fourth, That in the event the improvements on said premises should be destroyed or materially damaged between the date hereof and the consummation or settlement of this purchase this contract shall at the purchaser's election immediately become null and void and said deposit shall be returned to said purchaser on demand." The National Association has made no recommendation on the matter. Dean Stone says that "almost universal practice" is to throw the loss on the vendor, 13 Col. L. Rev. 387.

\textsuperscript{37}2 Williston, Contracts, sec. 940.

\textsuperscript{38}(1922) 118 Misc. 329, 193 N.Y.S. 258.

\textsuperscript{39}In regard to the performance of the contract, the perfection of justice consists in its being performed at the time fixed in the contract for its performance, and therefore the reason is obvious a performance enforced in equity should relate to that time; but what possible reason can exist for making such performance relate to the time of making the contract, i.e. to a time when neither party was bound either to perform or accept performance."

"What 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."
date of transfer of title papers necessarily manifests the intention of the parties as to the passing of the rights and incidents of ownership. He says:

"If, as frequently happens, a purchaser is given immediate possession under his contract, with the right to use the property as his own to the same extent as is customary with a mortgagor, the title is retained merely as security for payment of the 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."40

It is concluded then that as a rule of law the risk of loss should shift on such possession being given. Both of these views are attempts to ascertain and enforce the intention of the parties. Is it possible to reduce the intention, which the court thus infers the parties to the contract to have had, to a rule of law?

Possession is but one of the incidents from which the court may infer an intention that the ownership shall pass to the purchaser.41 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 and to avoid waste; the obligation to pay taxes; the privilege of keeping the property insured; the right to the returns from the property are all incidents of ownership which should have weight with the court 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. What is the intention of the parties here where incidents of ownership are divided? The court must decide this problem in each case rather than apply a rule of law that possession shows the intention of the parties. Let the matter rest frankly in the court's discretion. This may want in certainty42 but is not the problem in its nature incapable of settlement by an inflexible rule?

A supplement to this view has been suggested, (see Clark, Equity sec. 118) to meet the case where no time for performance has been fixed by the parties. This view would let the risk of loss shift to the vendee from the moment the vendor puts the purchaser in default by offering performance.

402 Williston, Contracts 940; 19 Mich. L. Rev. 831 disagrees. It is there said, "But it is submitted that if possession by the vendee is a short way of accomplishing a mortgage, so is a land contract a short way of getting rid of the risk of loss on the part of the vendor."

41The facts in Williams v. Lilley, (1895) 67 Conn. 50, 34 Atl. 765, 37 L.R.A. 150 suggests possibilities.

A very respectable line of authority applies the same rule to this problem as obtains at law and which practically all courts adopt in dealing with contracts for the sale of chattels, i.e., the vendor must bear the risk of loss until legal title is transferred. The leading case for this minority view is Thompson v. Gould. The court there said:

“When there is an agreement for the sale and purchase of goods and chattels, and after the agreement, and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of its destruction. . . . No reason has been given, nor can be given, why the same principle should not be applied to real estate.”

After commenting on the equity rule the court declined to “recognize the legal fiction” on which it was based.

This case was an action at law in which the purchaser was seeking to recover payments he had made claiming failure of consideration, the building having been burned, and it could well be urged that the case, in actual decision, was not contra to the majority view. This matter, however, has been set at rest in Massachusetts by the recent case of Libman v. Levenson, which was an equity case and which expressly followed the Thompson Case.

Certain clear advantages are secured by this view. It is identical with the rule at law and the rule in practically all juris-

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49In the case of Potts Drug Co. v. Benedict, (1909) 156 Cal. 322, 104 Pac. 432, 25 L.R.A. (N.S.) 609; which was a case respecting sale of a chattel interest, the loss was thrown on the vendee because of the intention of the parties. Osborn v. Nicholson, (1871) 13 Wall. (U.S.) 654, 20 L. Ed. 689.

45Note 43.

44Note 43.
dictions in sales of chattels. There is no need of resorting to legal fictions. Litigation is avoided by letting the loss lie where it falls. 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 when the matter is called to the attention of the parties. Even from the standpoint of property it would seem that more of the material incidents of ownership were with the vendor than with the purchaser. He has the legal title. He can cut off the purchaser by a sale to a bona fide purchaser without notice. He usually retains possession and the right to the returns from the property. He is in a better position to care for the property. The problem of adjusting the insurance money is entirely avoided.

It is submitted that the best disposition of the risk of loss is to accept the rule of the minority in the cases involving the simplest group of operative facts. Where there is nothing from which a court can infer a different intention let the risk of loss lie with the vendor. Further than this it seems unwise to attempt to formulate a rule. Possession may or may not be a sufficiently controlling element. Since it usually carries other incidents of ownership it would show, in most cases, a reasonably inferable intention to shift the risk of loss, but it may not in a given case as above indicated. It is suggested that in those cases involving additional operative facts each case should be left to the court to decide as its exigencies require, unhampered by rule, thus sacrificing certainty to discretion in order to secure equity and justice in the individual case.