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RISK OF LOSS IN EXECUTORY LAND CONTRACTS

By Albion Meade Griffin

The question to be discussed in this article is: Where there is an executory contract for the conveyance of land with buildings situated thereon, and before conveyance the buildings are destroyed, upon whom shall the loss fall—the vendor or the purchaser?

An investigation of this question reveals two surprising facts. First, that in spite of the fact that the situation is one that we would expect to be very common, there is nevertheless an unexpected paucity of decisions on it. Second, the states which have ruled on the question are divided, not evenly, but irreconcilably. Such eminent courts as those of Massachusetts and New Jersey are at direct opposites on this point. The situation is peculiar in that one court places the burden of loss on the vendor; the other places it on the purchaser, and both give very logical reasoning for their conclusions. In this short article, I shall attempt to set forth the reason behind both rules, and shall presume to offer some comment of my own. It is understood that this question is to be discussed as arising in an action at law.

The majority rule on this question places the burden of loss on the purchaser of the property. The general theory on which these decisions are based is that the purchaser is the equitable owner of the property, entitled to all the benefits thereof, and should therefore be required to bear the loss. At least twelve states have definitely stated this to be the rule.

Since these courts have seen fit to apply a rule of equity to the solution of the problem, it might be well to see what Pomeroy has to say. In his Equity Jurisprudence, (Vol V, Par. 2282, P. 5067) he says: “Following out the rule of equity that as soon as the contract is finally concluded, although it is wholly executory in form, there results by its operation an equitable conversion of the land and the purchase money, and the purchaser then becomes the equitable owner of the land, the con-


clusion can hardly be escaped that the loss should fall on the vendee. Equity, from the moment the contract is binding, gives the vendee the entire benefit of the use in value of the land and of all subsequent improvements and of any other advantages that may accrue to the estate. If the vendee is the owner in equity so as to receive all the increment, he then should be considered owner so as to accept the burden of any loss not due to the vendor's fault. This was the view taken by Lord Eldon in Paine vs. Meller, 6 Ves. Jr. 349, which established the doctrine in England as the general rule of equity, that all loss by fire or other accident shall fall on the vendee rather than on the vendor, after the vendor is in a position to make a good title or the vendee has accepted the title; in other words, as soon as the contract is capable of specific performance, by the vendor."

The reasoning so set forth by Mr. Pomeroy is that which has led the majority of the states to the conclusion that the vendee must bear the loss. An early Kentucky case, Johnson v Jones, 12 B. Mon. 326, decided in 1851, uses the same logic. The court in that case, through Chief Justice Simpson, said. "The property after the sale, belonged in equity to the purchaser . . . . The safety of property, both real and personal, is at the risk of the owner, and the purchaser of real property by the executory contract, is the equitable owner of it, and has to sustain any accidental loss that may occur after the purchase and before the conveyance of the legal title; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim."

The Supreme Court of Pennsylvania has followed the same line of reasoning. In Reed v Lukens, 44 Pa. St. 200, decided in 1863, that court said: "On the execution of the contract of sale, the purchaser became, in equity, the owner of the property, the vendor holding it thereafter as his trustee, with a right to retain it until the purchase money should be paid. Whatever advantage might thereafter arise to it would be the purchaser's, and whatever loss might befall it, he must sustain; the vendor has no further interest in it, except as a security for the purchase money; he would neither lose nor gain by any change that might occur in it."
The two cases quoted above are typical illustrations of those which are in line with the majority rule. With all due respect to the eminent courts which have expressed themselves thusly, it is the humble opinion of the writer that the rule they support is not the one that should obtain.

It must be admitted that the doctrine of equitable ownership is undoubtedly necessary, as a general rule, for the protection of the vendee, but it does not seem to be fittingly applied here. To give it such an application as to force a person to pay for something which he will never receive, i.e., the specific property contracted for, seems to me to be stretching the rule further than it ever was intended to go. It succeeds in frustrating the obvious intention of the parties, as will be pointed out below.

Such a rule, though proceeding on equitable grounds, seems also to bring about inequitable results. Since the property is destroyed, the vendee of course could not have a strict specific performance of the contract. The contract is, to convey certain property. That the vendor cannot do, it not being in existence. And yet, to hold that the vendee must bear the loss, is, in effect, to en\_force specific performance against him. It gives to the vendor an advantage not enjoyed by the vendee.

Moreover, the courts who hold to this rule, invariably refer to the fact that the vendee is entitled to the benefits from the land. I fail to see why this fact should carry much weight. It is only reasonable and natural that the vendee receive the benefits, for he is paying for them. He is not getting something for nothing. The vendor is not benevolently conferring a great favor upon him. The vendee is paying in cash for all he is getting. Yet, because the vendee gets something to which he is justly entitled, the courts have seen fit to balance that by deciding he shall pay whether or not he ever obtains the property.

I should like to refer here to a very able article on this question by Samuel Williston, in 9 Harv. Law Rev. 106. In criticising the prevailing rule, he says at page 118: "In determining the propriety of throwing the risk on the purchaser from the date of the contract, the primary question is not, it should be observed, whether the vendor or the vendee may be called owner with the greater propriety pending performance of the
contract, still less whether the vendee may be called owner in
equity and the vendor a trustee. The vendee, when sued, is
sued on a promise to pay money. This promise he gave in re-
turn for a counter promise. Unless a fundamental principle of
the law of contracts—a principle founded on natural justice—
is to be set aside, the vendee cannot be called upon to perform
his promise unless the vendor performs his counter promise, in
substance at least, and it matters not that non-performance of
the counter promised is excused by the impossibility of per-
formance. The vendor contracted to give a complete legal title,
with all which that implies,—the right to dispose of the prop-
erty, jus disponendi, and the right of present enjoyment there-
of, jus fruendi. Unless the vendee acquires by the contract it-
self substantially this, it is at variance with sound legal prin-
ciples to hold him liable on his own promise after destruction
of the premises. It does not advance the argument to discuss
equitable ownership unless it be also considered how far that is
the equivalent of the legal ownership for which the vendor con-
tracted. In the United States, at least, the vendee does by the
contract itself, as soon as it is recorded, acquire the full jus
disponendi, the substantial equivalent of a legal reversionary
interest from the time when performance is due. In England
he does not get nearly as much as this, for the vendor may, by
selling to a bona fide purchaser for value without notice deprive
the vendee of any claim to the land—but neither in England nor
in this country does the vendee acquire by the contract the sec-
ond great incident of ownership—the right of present enjoy-
ment. This may be a matter of great importance. If the con-
tract is to convey at a day far in the future, it seems impossible
to say in any sense that the vendee receives at the moment of
the contract the equivalent of what he bargained for. If the day
fixed for conveyance is near at hand, it is true, the possession is
of less importance, but it is still to be considered, and a rule
which is laid down as a general one must be able to stand the
strain of hard cases."

The minority rule is, of course, directly opposed to that
of the cases quoted above, in that it places the loss to such
cases on the vendor. The general reasoning on which they
base their conclusion is that in such a contract it is the inten-
tion of the parties that the property shall be in existence when the time comes for performance. If it is not then in existence, the contract is treated as at an end.

One of the oldest cases on the point in this country is that of Thompson v. Gould, 20 Pick. (Mass.) 134 decided in 1838. It was said in that case, "It has been argued that this contract may be enforced in equity. But if it might be, that would not affect the plaintiff's legal rights. This court, however, has no authority to decree a specific performance. Nor could this contract be enforced by a court of equity having jurisdiction of the subject matter, for by the destruction of the house the defendant is no longer able to perform his part of the contract. He may make compensation for the destruction of the house, but generally a purchaser, independently of special circumstances, is not to be compelled to take an indemnity, but he may elect to recover back the purchase money, if paid in advance, and if the vendor refuses or is unable on his part to perform the contract, and the purchaser has no legal remedy to recover damages."

A later case, that of Wells v Calnan, 107 Mass 514, is the one most cited in support of the minority rule. The court in that case, through Justice Gray, said: "... where, from the nature of the contract, it appears that the parties must from the beginning have contemplated the continuing existence of some particular specified thing as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the accidental perishing of the thing without fault of either party." It was further said in that case: "In the case at bar the defendant has only agreed to pay the purchase money upon tender of a deed of the whole estate contracted for, including the buildings as well as the land; and the buildings having been wholly destroyed by fire on the day before that appointed for the conveyance, the plaintiff did not, and could not, tender such a conveyance as he had agreed to make or as the defendant was bound to accept, and was not therefore entitled
to maintain any action against the defendant on the agree-
ment."

Maine, in the case of Gould v Murch, 70 Me. 288, adopted
the reasoning of Massachusetts in absolving the vendee from
the contract. In that case the court also said: "When the
owner of a lot of land with buildings on it agrees to convey
it at a future day on payment of the purchase money by the
purchaser, and before payment and conveyance the buildings
are destroyed, without fault of either party, the loss must fall
upon the vendor; and if the buildings formed a material part
of the value of the premises, the vendee cannot be compelled
to take a deed of the land alone, and pay the purchase money;
and if he has paid it, he may recover it back."

Oregon, in Powell v Dayton, S. & G. R. R. Co., 12 Ore-
gon 488, reached the same conclusion.

Chancellor Kent has expressed himself on this point as
follows: 2 Kent. Com. (2nd Ed.) 373: "The good sense and
equity of the law on this subject is, that if the defect of title,
whether of lands or chattels, be so great as to render the thing
sold unfit for the use intended, and not within the inducement
to the purchase, the purchaser ought not to be held to the
contract, but be left at liberty to rescind it altogether. But if
the defects were not so great as to rescind the contract en-
tirely, there might be a just abatement of price."

Indiana is one of the states which have adopted the pre-
vailing view, yet even that state has given its approval to the
reasoning of the minority view, in the case of Krause et al.
v. Board of Trustees of the School Town of Crothersville, 162
Ind. 278. That case was not one of vendor and purchaser, but
involved a contract to erect an annex to a school building.
Before completion of the work, fire destroyed both the old and
new buildings. It was proven that the annex, without the old
building would be useless. The school trustees sued for failure
to carry out the contract. Chief Justice Gillett, in delivering
the opinion of the court, said: "Where from the nature of the
contract, it appears that the parties must from the beginning
have known that it could not be fulfilled unless when the time
for the fulfillment of the contract arrived some particular spe-
cified thing continued to exist, so that, when entering into the
contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused, in case before breach, performance becomes impossible from the perishing of the thing without default of the contractor." That a court which is in accord with the prevailing rule has seen fit to reason thusly, is most significant.

It is the opinion of the writer that the minority rule is by far the more reasonable and the more equitable. It follows the fundamental principle that wherever possible, effect will be given to the intention of the parties. It gives full protection to the legal rights of both vendor and purchaser. And finally it seeks to do complete justice by releasing both parties from a contract which it is impossible to perform.