

# Michigan Law Review

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Volume 36 | Issue 4

---

1938

## VENDOR AND PURCHASER - EQUITABLE CONVERSION - APPLICATION TO OBLIGATION TO EXTINGUISH FOREST FIRES

Michigan Law Review

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### Recommended Citation

Michigan Law Review, *VENDOR AND PURCHASER - EQUITABLE CONVERSION - APPLICATION TO OBLIGATION TO EXTINGUISH FOREST FIRES*, 36 MICH. L. REV. 680 (1938).

Available at: <https://repository.law.umich.edu/mlr/vol36/iss4/20>

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VENDOR AND PURCHASER — EQUITABLE CONVERSION — APPLICATION TO OBLIGATION TO EXTINGUISH FOREST FIRES — A Montana statute <sup>1</sup> placed the burden of extinguishing forest fires on the person on whose "property" the

<sup>1</sup> 2 Mont. Rev. Code (1935), § 2778.2.

fire occurred, and, on failure of such person to extinguish it, made him liable to reimburse any authorized unit that should do so. Fire broke out on property owned by *D*, and a Government unit extinguished it. Previous to such fire, *D* had contracted to sell the land to *X* under a contract giving *X* the right of possession. *Held*, by the doctrine of equitable conversion, *X* was the beneficial owner, and the land was not *D*'s "property" so as to render him liable under the statute. *First State Bank of Thompson Falls v. United States*, (C. C. A. 9th, 1937) 92 F. (2d) 132.

Results in the field of vendor and purchaser are often explained by the doctrine invoked by the court in the principal case, to the effect that an executory contract for the sale of land vests the beneficial interest in such land in the purchaser and, during the life of the contract, the vendor retains legal title only as security for the purchase price.<sup>2</sup> But the decision here, although based on an interpretation of the statute, goes farther than the mass of reported cases in its application of the doctrine. The doctrine seems to have had its origin in cases involving the devolution of rights and liabilities under land contracts, on the death of one of the parties.<sup>3</sup> It has developed to aid in allocating the benefits and burdens incident to the property as between the contracting parties,<sup>4</sup> and as between the parties and third persons, not only to determine devolution of the respective interests as noted above, but to determine the rights of creditors of each party to reach the land,<sup>5</sup> and the rights of the spouses of the parties in the respective interests.<sup>6</sup> But we note that in the preceding situations, al-

<sup>2</sup> *Fletcher v. Ashburner*, 1 Bro. C. C. 497, 28 Eng. Rep. 1259 (1779); *Lechmere v. Carlisle*, 3 P. Wms. 211, 24 Eng. Rep. 1033 (1733); *Stewart v. Griffith*, 217 U. S. 323, 30 S. Ct. 528 (1910); 1 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 105 (1918); 13 C. J. 852 (1917). But see Stone, "Equitable Conversion by Contract," 13 COL. L. REV. 369 (1913), in which the author attacked the whole doctrine as an "unnecessary fiction," saying that ordinary equitable principles will accomplish the same result without recourse to a fiction.

<sup>3</sup> The rule is that on death of purchaser, his interest passes to his heirs as realty. *Bubb's Case*, Freem. Ch. 38, 22 Eng. Rep. 1044 (1678); *Johnson v. Corbett*, 11 Paige (N. Y.) 265 (1806). On death of the vendor, his interest passes to his personal representative as personalty. *Masterson v. Pullen*, 62 Ala. 145 (1878). See Simpson, "Legislative Changes in the Law of Equitable Conversion by Contract," 44 YALE L. J. 559 (1935).

<sup>4</sup> The majority rule is that risk of loss to the property during the life of the contract is to the vendee, in the absence of express stipulation to the contrary. *Martin v. Carver's Admr.*, 8 Ky. L. Rep. 56, 1 S. W. 199 (1886); *Fouts v. Foudray*, 31 Okla. 221, 120 P. 960 (1912). But *contra*: *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325 (1879). See also, 27 L. R. A. (N. S.) 233 (1910).

<sup>5</sup> The court in *Hook v. Northwest Thresher Co.*, 91 Minn. 482, 98 N. W. 463 (1904), held that a vendee in an executory contract for the sale of land, has such an interest in the property as may be subject to sale on execution. *Accord*, *Lumley v. Robinson*, 26 Mo. 364 (1858). But cf. *Goodwin v. Anderson*, 13 Miss. (5 Smedes & M.) 730 (1846); *May v. Getty*, 140 N. C. 310, 53 S. E. 75 (1905).

<sup>6</sup> In *Spalding v. Haley*, 101 Ark. 296, 142 S. W. 172 (1911), a widow was awarded dower in land as to which her husband was equitable owner under a contract, having been in possession and having paid a part of the price. But cf. *Nortnass v. Pioneer Townsite Co.*, 82 Neb. 382, 117 N. W. 951 (1908).

though the vendee is held to be "owner" for many purposes, the actions are more truly equitable in their nature than is the principal case, and also there is at least some definite legal relationship between the contracting party and any third party involved in the suit. The class of cases which seems most closely to approach the situation of the principal case is that of suits by the contract vendee against a third party, for a tort committed on the land by such third party during the life of the contract. Particularly analogous were two cases brought under statutes which required actions to be prosecuted in the name of the "real party in interest,"<sup>7</sup> and both courts held that the vendee could maintain an action for damages even though the damages were sustained before conveyance of legal title. Other courts simply state the proposition that a vendee in possession of land under an executory contract of sale is entitled to recover for damages to the land resulting from a trespass thereon.<sup>8</sup> Some courts have allowed the vendee to recover against a third party for such torts on the land even though the vendee is not in possession.<sup>9</sup> Thus the principal case is in line with decisions of cases involving analogous situations, the general tendency being to consider the contract vendee as the one who has the actual interest in the land. The principal case is particularly strong on its facts when one considers that the vendee, having the right to possession to the land, has thus the best opportunity of guarding against such forest fires as the statute aims to prevent. The court departed from the view still found in some cases that the doctrine of equitable conversion by contract applies only in equity proceedings and has no application at law,<sup>10</sup> for this is an action legal in its nature. But since the problem is primarily one of construing the Montana statute in the light of its broader purposes, it would have been unfortunate if the court had

<sup>7</sup> *Limberg v. Higenbotham*, 11 Colo. 156, 17 P. 481 (1888), was an action against a trespasser for mesne profits accruing after vendee's purchase of the land and before delivery of seisin by his grantor; and *Matthews v. James Lumber Co.*, 187 N. C. 651, 122 S. E. 480 (1924), was an action for trespass on land by negligently burning over it, continuing and not having ceased when the vendee acquired it.

<sup>8</sup> *Hueston v. Mississippi & Rum River Boom Co.*, 76 Minn. 251, 79 N. W. 92 (1899); *Gartner v. Chicago R. I. & P. R. R.*, 71 Neb. 444, 98 N. W. 1052 (1904); *Gotshall v. J. Langdon & Co.*, 16 Pa. Super. Ct. 158 (1901). But cf. *Litchfield v. Norwood Mfg. Co.*, 22 App. Div. 569, 48 N. Y. S. 496 (1897); *Williams v. Shade*, 13 Ill. App. (13 Brad.) 337 (1883).

<sup>9</sup> In *Texas & P. Ry. v. Bullard*, (Tex. Civ. App. 1909) 127 S. W. 1152, plaintiff had an enforceable contract to purchase the land which he afterwards fully perfected, but the vendor had both legal title and possession at the time of the fire negligently started by defendant railroad company on the land.

In *Hastings & G. I. R. R. v. Ingalls*, 15 Neb. 123, 16 N. W. 762 (1883), it was held that the contract vendee is "owner" of the land so as to be entitled to recover damages to the land as the result of the appropriation of the land to the use of the railroad company (although the legal owner properly should be joined in the suit).

<sup>10</sup> *Painter v. Painter*, 220 Pa. 82, 69 A. 323 (1908); *Emery v. Cooley*, 83 Conn. 235, 76 A. 529 (1910); *Moore v. Kernachan*, 133 Va. 206, 112 S. E. 32 (1922); 13 C. J. 854, § 4 (1917). In *Foster's Appeal*, 74 Pa. 391 at 397 (1873), the court said, "Conversion is altogether a doctrine of equity. In law it has no being. It is admitted only for the accomplishment of equitable results. . . ."

made the result depend on a historical distinction between law and equity which modern procedural reforms have tried to minimize.