North Dakota Law Review

Volume 39 | Number 3 Article 6

1963

Vendor and Purchaser - Risk of Loss - Right to Proceeds of Insurance Policy

Bernard J. Haugen

RECENT CASES

VENDOR AND PURCHASER—RISK OF LOSS—RIGHT TO PROCEEDS OF INSURANCE POLICY—The defendant-vendor had entered into a contract for the sale of property for $20,000. Pending its completion, a building insured by the vendor for $10,000 was destroyed. The trial court granted the purchaser specific performance and an abatement in the purchase price in the amount of the insurance proceeds. On appeal the Supreme Court of Missouri *held*, in affirming the decision of the lower court, that the doctrine of equitable conversion was misplaced and should not be applied. In dissenting, three justices argued that the substitution of the insurance proceeds for the res without evidence as to the actual damage suffered by the purchaser was in fact the application of this rejected doctrine. *Skelly Oil Co. v. Ashmore*, 365 S.W.2d 582 (Mo. 1963).

The majority of jurisdictions, including North Dakota, hold that when property is destroyed pending the completion of a contract for sale, the vendor holds the proceeds of his insurance policy in trust for the purchaser absent any agreement to the contrary.[1] Two legal fictions produce this result: 1) the equitable conversion doctrine,[2] and 2) the substitution of the insurance proceeds for the destroyed res.[3]

The equitable conversion doctrine has been severely criticized as misplaced, if not unsound, by legal scholars;[4] and was rejected by the court in the instant case. The majority decision professed to apply the Massachusetts rule[5]

---

1. McGinley v. Forrest, 107 Neb. 309, 186 N.W. 74 (1921); Raplee v. Piper, 2 App. Div. 732, 152 N.Y.S.2d 799 (1956), **aff'd**, 143 N.E.2d 919; Gunsch v. Gunsch, 71 N.W.2d 623, 630 (N.D. 1955) "When a loss occured for which the vendor collected insurance, the amount so collected must be applied in reduction of the amount due on the contract."; Russell v. Elliot, 45 S.D. 184, 186 N.W. 824 (1922); Rayner v. Preston, 18 Ch. D. 1 (1881) (dissent); see 34 N.D.L. Rev. 182, 183 n. 8.

2. Woodward v. McCollum, 16 N.D. 42, 111 N.W. 623 (1907); see Parr-Richmond Industrial Corp. v. Boyd, 272 P.2d 16, 22 (Cal. 1954) where the court states: "The doctrine 'is a mere fiction. Equity regards things which are directed to be done as having actually been performed where nothing has intervened to prevent such a performance.'"

3. Raplee v. Piper, **supra** note 1.

4. 4 WILLISTON, CONTRACTS § 942 (Rev. ed. 1936); Pound, **The Progress of the Law, 1819-1919—Equity**, 33 Harv. L. Rev. 813, 829-30 (1920).

5. Libman v. Levenson, 236 Mass. 221, 128 N.E. 13 (1920).

which, instead of arbitrarily placing the loss on the purchaser by declaring that the vendor becomes trustee of the legal title for the purchaser,[6] attempts to do what is equitable. The only reason why a contract for sale should operate to effect conversion is that a court of equity will compel specific performance of it.[7] Where buildings constituting a large part of the total price have been destroyed the contract should no longer be enforced.[8] Where they are not material, equity should grant specific performance *subject to compensation for damages*.[9] Basically this is the law applied in equity actions where the subject matter of the contract is personal property.[10]

However the substitution of the proceeds of an insurance policy for destroyed property seems to be the antithesis of the Massachusetts rule. Instead of holding the property for the purchaser, the vendor is arbitrarily required to hold the proceeds in trust. It is as much a fiction to consider an insurance policy as part of the res bargained for,[11] as it is to consider the proceeds as being held in trust under the doctrine of equitable conversion. Insurance is a contract of indemnity personal to the insured.[12] To permit this substitution is to permit the purchaser, merely because he is the beneficiary of this fictitional trust, to be unjustly enriched in those instances where the proceeds exceed his injury. 3

A minority of American courts, basing their decision on *Rayner v. Preston*,[13] deny to the purchaser the right to the proceeds.[14] These courts are further aided in reaching this

---

6. See Coolidge & Sickler v. Regn, 7 N.J. 93, 80 A.2d 554 (1951) for succinct statement of rule concerning risk of loss.

7. Stone, **Equitable Conversion by Contract,** 13 Colum. L. Rev. 369, 386 (1913).

8. Libman v. Levenson, **supra** note 5.

9. Milkes v. Smith, 91 Cal. App. 2d 79, 204 P.2d 419 (1949); Gilles v. Bonelle-Adams Co., 284 Mass. 176, 187 N.E. 535 (1933); **cf.** Henschke v. Young, 224 Minn. 339, 28 N.W.2d 766 (1947) (Deficiency in quantity of land).

10. Texas Co. v. Hogarth Shipping Corp., 256 U.S. 619, 629-30 (1920) "[I]f before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it."

11. Pound, **supra** note 4.

12. Rayner v. Preston, 18 Ch. D. 1 (1881); **cf.** Russell v. Williams, 24 Cal. Rptr. 859, 374 P.2d 827 (1962).

13. 18 Ch. D. 1 (1881).

14. White v. Gilman, 138 Cal. 375, 71 Pac. 436 (1903); Brownell v. Board of Education, 239 N.Y. 369, 146 N.E. 630 (1925). **But see** Raplee v. Piper, **supra** note 1.

decision by the refusal of their jurisdictions to accept the risk of loss doctrine.

It is submitted that since insurance proceeds are not always the true yardstick of damage to the property, legal title to the insurance fund should be left in the vendor; and that where the damage is not so great as to void the contract, the purchase price should be paid less the amount of damages, if any, which the vendee may establish.

BERNARD J. HAUGEN

NEGLIGENCE — EVIDENCE — ADMISSIBILITY OF PRIOR ACCIDENTS TO SHOW NOTICE OR KNOWLEDGE OF DANGER— Plaintiff fell and was injured as a result of slipping on a lettuce leaf lying on the ramp leading from defendant's store. From a judgment in favor of the plaintiff, the defendant appealed. The lower court allowed into evidence testimony that a few weeks earlier on two separate occasions someone else had slipped and fallen on the ramp; the first time because of "some smear or wet spot" and the second time because of "some green leafy vegetable." This evidence was allowed to show the defendant's notice and knowledge of the dangerous condition of the ramp. The Supreme Court of Nevada held, in reversing the judgment, that the evidence was prejudicial. They held such evidence of prior accidents inadmissible when they were related to a temporary condition.

Eldorado Club Inc. v. Graff, 377 P.2d 174 (Nev. 1962)

Evidence of other similar accidents is admissible only when meeting established judicial criteria. Generally, to be admissible, the prior accident must have occurred at the same place[1] and under substantially the same circumstances.[2] Remoteness of time is also a determining factor as to admissibility.[3] The evidence cannot be admitted to

1. Lindquist v. Des Moines Union Ry. Co., 239 Iowa 356, 30 N.W.2d 120 (1947). Herein the Iowa Supreme Court overruled former decisions, now allowing such evidence.

2. Lyon v. Dr. Scholl's Foot Comfort Shops, 251 Minn. 285, 87 N.W.2d 651. (1958); Henderson v. Bjork Monument Co., 222 Minn. 241, 24 N.W.2d 42 (1946).

3. Slow Development Company v. Coulter, 88 Ariz. 122, 353 P.2d 890 (1960). The Arizona court also treated the requirement of the same place in a liberal way.