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# Right of Purchaser to Benefit of Vendor's Policy of Insurance

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proponents of the will, therefore, failed to sustain their burden of proof of compliance with the statute in the absence of affirmative evidence that the testator did in fact sign first. The judgment of the probate court was affirmed, not because of non-compliance with the statute governing due execution, but on the ground of insufficient evidence.[34]

The chief criticism with the reasoning of the *Borgman* opinion is the strong, although *obiter,* statement of the court that on proof of the testator's prior subscription the will should be probated despite the fact that the testator's signature was not visible to the attesting witnesses. The Ohio statute, which is patterned after the English Wills Act of 1837, unequivocally requires that the testator acknowledge his signature before two witnesses. It has already been noted that England and other American jurisdictions with similar statutes have held that an invisible signature cannot be acknowledged. A proper construction of the Ohio state, therefore, should lead to a similar conclusion, despite proof of the testator's prior subscription.

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# *Right of Purchaser to Benefit of Vendor's Policy of Insurance*

THE GREAT weight of authority supports the doctrine that from the date of the making of an unconditional contract for the sale of real property the purchaser is equitably and beneficially the owner of the property subject only to the vendor's right to possession, rents and profits prior to the actual conveyance. On this basis, the purchaser is held to bear the risk of loss to the property from the date of the making of the contract. Therefore, if the realty is damaged during the escrow period, the purchaser must accept the damaged property without any deduction from the purchase price.[1]

A minority of courts take the position that the risk of loss remains on the vendor until the time of conveyance of the realty.[2] These courts, rejecting the theory of equitable conversion,[3] state that the intent of the parties is, in accordance with business practice and common sense, that the risk of

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[34] *Cf.* Roosa v. Wickward, 90 Ohio App. 213, 105 N.E.2d 454 (1950). At the probate proceeding, the testimony of the surviving witness was essentially the same as that of the surviving witnesses in *Borgman v. Dillow.* Based on this testimony the probate court refused to probate the proffered will. The court of appeals failed to decide the important issue of substantive law in the case, namely, whether the testator's invisible signature was impliedly acknowledged to the surviving witness, but on procedural grounds reversed the judgment of the probate court.

[35] See note 31 *supra.*

loss shall pass to the purchaser at the time of performance. A few courts have taken the view that the risk of loss is on the party in possession.[4] Even in those states adhering to the majority rule, the vendor retains the risk of loss in the following situations: where the contract of sale is any way conditional and not all the conditions have been satisfied;[5] where the performance of the contract is delayed through the fault of the vendor;[6] where the loss is caused by the negligence of the vendor;[7] and where the contract expressly provides that the risk of loss remains on the vendor until the date of performance or that the premises are to be delivered in as good a condition as existed at the time of the making of the contract.[8]

When property which is the subject of an unexecuted contract of sale is destroyed or damaged by fire or some other hazard, there is often an insurance policy in effect which protects against loss from the particular injury to the property. If the contract of sale contains a provision concerning the distribution of insurance proceeds in the event of a loss during the escrow period, the courts will give this provision full effect.[9] However, the

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[1] Thompson v. Norton, 14 Ind. 187 (1860); Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 32 N.W 514 (1887); Johnston v. Jones, 12 B. Mon. 326 (Ky. 1851); Brewer v. Herbert, 30 Md. 301 (1869); Ins. Co. v. Dye, 233 Mo. App. 926, 20 S.W.2d 946 (1929); McGinley v. Forrest, 107 Neb. 309, 186 N.W 74 (1921); Marion v. Wolcott, 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. Yakish, 10 Okla. 388, 61 Pac. 926 (1900); Elliott v. Ashland Mut. Fire Ins. Co., 117 Pa. 548, 12 Atl. 676 (1888); Russell v. Elliott, 45 S.D. 184, 186 N.W 824 (1922); Oldham v. Kennedy, 3 Humph. 260 (Tenn. 1842); Virginian R.R. v. Jeffries, 110 Va. 471, 66 S.E. 731 (1909); Mandru v. Humphreys, 83 W Va. 307, 98 S.E. 259 (1919).

[2] Anderson v. Yaworski, 120 Conn. 390, 181 Atl. 205 (1935); Durham v. McCready, 129 Me. 279, 151 Atl. 544 (1930); Libman v. Levenson, 236 Mass. 221, 128 N.E. 13 (1920); Bautz v. Kuhworth, 1 Mont. 133 (1869); Wilson v. Clark, 60 N.H. 352 (1880); Elmore v. Stephens-Russell Co. 88 Ore. 509, 171 Pac. 763 (1918); Johnson v. Stalcup, 176 Wash. 153, 28 P.2d 279 (1934).

[3] For a discussion of the relation between equitable conversion and risk of loss, see WALSH, EQUITY § 96 (1930).

[4] Kelly v. Smith, 218 Cal. 543, 24 P.2d 471 (1933); Persico v. Guernsey, 129 Misc. 190, 220 N.Y. Supp. 689 (1927), *aff'd without opinion,* 222 App. Div. 719, 225 N.Y. Supp. 890 (1927); Appleton Elec. Co. v. Rogers, 200 Wis. 331, 228 N.W. 505 (1930).

[5] Skeen v. Ellis, 105 Ark. 513, 152 S.W 153 (1912); Lombard v. Chicago Sinai Congregation, 64 Ill. 477 (1872); Ford v. Russell, 13 La. App. 390, 128 So. 310 (1930); Frankiewicz v. Konwinski, 246 Mich. 473, 224 N.W 368 (1929); Gilbert & Ives v. Port, 28 Ohio St. 276 (1876).

[6] Smith v. Cansler, 83 Ky. 367 (1885).

[7] Good v. Jarrard, 93 S.C. 229, 76 S.E. 229 (1912).

[8] Goddard v. Bebout, 40 Ind. 114 (1872); Marks v. Tichenor, 85 Ky. 536, 4 S.W. 225 (1887); Green v. Kelly, 20 N.J.L. 544 (1845); Brownell v. Board of Education, 239 N.Y. 369, 146 N.E. 630 (1925).

[9] Bruce v. Jennings, 190 Ga. 618, 10 S.E.2d 56 (1940); Craig v. Crossman, 209 Mich. 462, 177 N.W 400 (1920).

cases are in conflict as to the distribution of the insurance fund in the absence of such a provision.

A contract of insurance is essentially a personal one and does not run with the property to a transferee.[10] Thus, a contract of fire insurance insures the policyholder against loss which *he* may suffer through the destruction of a particular interest in the property as a result of fire. On this basis an English court in *Rayner v. Preston*[11] held that the purchaser had no right to the insurance fund. In this case the vendor had received proceeds of a fire insurance policy covering the realty which had been damaged by fire after the contract of sale but before the transfer of title. After paying the purchase money to the vendor, the purchaser then filed a bill asking that the vendor either pay him the insurance money or use it to repair the damage to the property. The court reasoned that since the contract of insurance was a personal one between the insurance company and the vendor, it did not run with the land, and, therefore, the purchaser had no claim to the insurance money. In a later proceeding,[12] the vendor was compelled to return the insurance money to the insurer because he had suffered no loss.

The rule laid down in *Rayner v. Preston* has been followed by the English courts[13] and by one American jurisdiction.[14] The great majority of American courts, however, hold that if the loss falls on the purchaser the insurance fund in the hands of the vendor must be used to reduce any unpaid balance of the purchase price owed to him.[15] If the insurance money received by the vendor exceeds the unpaid purchase price, the remainder of the insurance fund is held by the vendor in trust for the purchaser.[16]

A problem exists under the majority rule as to how the insurance fund is

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[10] VANCE, INSURANCE § 13 (3d ed. 1951).

[11] 18 Ch. D. 1 (1881).

[12] Castellain v. Preston, 11 Q.B.D. 380 (1883)

[13] West of England Fire Ins. Co. v. Isaacs, [1897] 1 Q.B. 226; Phoenix Ins. Co. v. Spooner, [1905] 2 K.B. 753.

[14] King v. Preston, 11 La. Annual Rep. 95 (1856); *cf.* Brownell v. Board of Education, 239 N.Y. 369, 146 N.E. 630 (1925). Note, 23 KY. L.J. 505 (1935).

[15] Bruce v. Jennings, 190 Ga. 618, 10 S.E.2d 56 (1940); Brady v. Welsh, 200 Iowa 44, 204 N.W 235 (1925); Godfrey v. Alcorn, 215 Ky. 465, 284 S.W 1094 (1926); Skinner & Sons' Dry Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900); Standard Oil Co. v. Dye, 223 Mo. App. 926, 20 S.W.2d 946 (1929); McGinley v. Forrest, 107 Neb. 309, 186 N.W 74 (1921); Persico v. Guernsey, 129 Misc. 190, 220 N.Y. Supp. 689 (1927); Peck v. Hale, 11 Ohio App. 418 (1919); Russell v. Elliott, 45 S.D. 184, 186 N.W 824 (1922).

[16] Brady v. Welsh, 200 Iowa 44, 204 N.W 235 (1925); Skinner & Sons' Dry Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900).

If the risk of loss is upon the vendor, he alone is entitled to the insurance proceeds. Phinizy v. Guernsey, 111 Ga. 346, 36 S.E. 796 (1900).

The purchaser is entitled to the insurance money if the vendor assigns his rights under the policy to the purchaser either before or after the loss. Zenor v. Hayes, 228 Ill. 626, 81 N.E. 1144 (1907); Reed v. Lukens, 44 Pa. 200 (1863).

to be distributed if the selling price of the property is less than the amount of loss and, consequently, less than the amount of insurance money received by the vendor. According to the 1943 New York Standard Fire Insurance Policy,[17] the limit of the insurer's liability is the actual cash value[18] at the time of the loss but such liability is not to exceed the cost of repair or replacement of the property. Would the portion of the insurance fund received by the vendor in excess of the sales price be retained by him free from any charges, or would the court hold this also to be held in trust for the purchaser? No cases have been found in point. Since the courts are in effect treating the insurance as "running with the land" in these cases,[19] the excess of the insurance money over the selling price should also be considered as held in trust by the vendor for the purchaser. The vendor should not be allowed to receive more than the price for which he contracted to sell the property. Since the purchaser made a good bargain, he should be the one to receive the excess insurance money.

In some instances the purchaser pays for the policy of insurance. When the purchaser procures and maintains the policy in his own name, he has the exclusive right to the proceeds in the event of a loss.[20] The contract of sale may provide, however, that the insurance is to be maintained at the purchaser's expense but in the vendor's name. In this case the purchaser may require that the insurance money be applied as will best protect his interest.[21]

Ohio is in accord with the majority view that the purchaser is the equitable owner of the property, and, therefore, the risk of loss is upon him.[22] Ohio courts, however, have not fully settled the question as to the right of the purchaser to the insurance proceeds under a policy carried by the vendor. In an early case, the Ohio Supreme Court stated that the vendor is the trustee of the property, and that insurance proceeds from the fire were held in trust by him for the purchaser.[23] Although this statement supports the majority view in the United States, because there was only an unexercised option, the vendor-purchaser relation was held not to have come into existence, and, therefore, the remarks of the court are not part of the holding of the case. Subsequently, a court of appeals adopted the ma-

[17] N.Y. INS. LAW § 168. The New York Standard Fire Insurance Policy has been adopted in all states except Massachusetts, Minnesota, New Hampshire and Texas.

[18] For a discussion of the meaning of "actual cash value," see Note, 56 A.L.R. 1149.

[19] See cases cited in notes 15 and 16 *supra.*

[20] Hammer v. Johnson, 44 Ill. 92 (1867); Goodin & B. Coal Co. v. Southern Elkhorn Coal Co., 219 Ky. 827, 294 S.W 792 (1927).

[21] Naquin v. Texas Sav. & Real Estate Invest. Ass'n, 95 Tex. 313, 67 S.W 85 (1902); Baker v. Rushford, 91 Vt. 495, 101 Atl. 769 (1917).

[22] Oak Building & Roofing Co. v. Susor, 32 Ohio App. 66, 166 N.E. 908 (1929).

[23] Gilbert & Ives v. Port, 28 Ohio St. 276, 292 (1876).

jority rule.[24] So even though there has been no supreme court decision, what little Ohio law there is on the point follows the majority rule.

With no supreme court decision to guide them, Ohio attorneys should be constantly aware of the pitfall into which a prospective buyer of realty could stumble. Perhaps the safest solution to the problem would be to have an express provision in the purchase agreement for the location of the risk of loss and for the disbursement of insurance money in the event of a loss. With such a provision in the contract, the courts would recognize this as being the intent of the parties and would enforce it.[25]

It is a reasonable assumption that in the commercial world the average vendor and purchaser of real property believe that fire insurance policies procured by the vendor protect whatever interest the purchaser may have in the realty due to the contract of sale. Despite the general principle of law that a contract of insurance does not run with the land,[26] it seems only proper to say: "If that is the meaning in the market place, that should also be its meaning in the courtroom."[27] If the risk of loss is to fall on the purchaser, therefore, the majority American rule that the purchaser will receive the benefit of the vendor's contract of insurance, at least up to the extent of the purchaser's actual loss, seems more realistic than the English rule denying the purchaser any rights in the insurance fund.

Since insurance companies receive the entire premiums for their policies,[28] they should not be able to avoid all liability because of the technical reasoning a few courts have adopted. This is clearly a situation in which equity ought to imply a trust as a remedial fiction. The vendor should recover the full amount of the loss to the extent of his insurance. This fund, in the hands of the vendor, then takes the place of the damaged property and is held in trust for the purchaser.

## CONCLUSIONS

1. The majority rule in the United States, which is at present the law

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[24] Peck v. Hale, 11 Ohio App. 418 (1919).

[25] Goddard v. Bebout, 40 Ind. 114 (1872); Marks v. Tichenor, 85 Ky. 536, 4 S.W 225 (1887); Green v. Kelly, 20 N.J.L. 544 (1845); Brownell v. Board of Education, 239 N.Y. 369, 146 N.E. 630 (1925).

[26] Bruce v. Jennings, 190 Ga. 618, 10 S.E.2d 56 (1940); Craig v. Crossman, 209 Mich. 462, 177 N.W 400 (1920)

[27] Comment, 34 YALE L.J. 87, 90 (1924).

[28] Fire insurance rates on property are determined by various rating bureaus using many systems and schedules for the computation of the rates. For example, the rates in Ohio are determined by the Ohio Inspection Bureau. All of these systems and schedules are based on the physical hazard of the property; i.e., construction of the building, type of occupancy, etc. None of these schedules provide for a variance in the rates due to any moral hazard of a particular insured.

[29] The English rule was changed by statute in 1925. 15 GEO. V, c. 20, § 47 (1925).