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RIGHTS OF A VENDEE UNDER AN EXECUTORY CONTRACT FOR THE SALE OF REALTY AS DETERMINED BY THE SUPREME COURT OF WASHINGTON IN RECENT CASES.—Since the case of *Ashford v. Reese*¹, it has been a much mooted question as to the extent of a vendee's rights under an executory contract for the sale of realty. The purpose of this article is not to discuss the correctness of the rule of law as laid down in the *Ashford* case, but to examine the rights of a vendee, irrespective of the question as to whether or not he should have what is known in the law as an equitable title².

Logically, even though the doctrine of equitable conversion be rejected, the vendee's remedy of specific performance should not be affected. In the case of *Pratt v. Rhodes*³, the Court, commenting upon the *Ashford* case, said.

“It was not there meant that an executory contract for the sale of land vests no right in the vendee. It is not held that the contract is a nullity. The contract, on the contrary, has all of the validity that any other executory contract has which is duly and regularly executed by parties competent to contract. Nor will the Courts in every instance relegate the vendee to an action in damages where the contract is breached by the vendor. If equity, justice, and good conscience require that the contract be specifically enforced, the Courts will enforce it specifically.”

In subsequent actions for specific performance, the vendee's right to the remedy, once the validity of the contract was established, has been unquestioned⁴. Doubt, however, was raised in the minds of many, as to the enforceability of this remedy against a subsequent purchaser. This was due largely to the contention of Judge Tolman, in his dissenting opinion in the *Ashford* case, wherein he maintained that as the contract conveyed no interest in the land, it evidenced no interest, and consequently, even if recorded it would not be notice to a subsequent purchaser of any interest in the land by the vendee. Since this decision, the legislature has passed an act⁵ whereby executory contracts may be re-

¹ 132 Wash. 649, 233 Pac. 29 (1925), wherein it was held that an executory contract of sale conveys no title or interest, either legal or equitable, to the vendee.

² For a discussion of this question see: P. John Lichty, *Rights and Estates of Vendor and Vendee under an Executory Contract for the Sale of Realty*. (1925) 1 WASH. LAW REV. 9; Alfred J. Schweppe, *Rights of a Vendee under an Executory Forfeitable Contract for the Purchase of Real Estate. A Further Word on the Washington Law*. (1926) 2 WASH. LAW REV. 1, (1927) 2 WASH. REV. 205; and George D. Lantz, *Rights of Vendees under Executory Contracts of Sale*. (1928) 3 WASH. REV. 1.

³ 142 Wash. 411, 253 Pac. 640 (1927). Upon a rehearing *en banc*, the same opinion was adhered to. 256 Pac. 503.

⁴ *Fallers v. Pring*, 144 Wash. 326, 257 Pac. 627 (1927) *Hamilton v. Norris*, 144 Wash. 326, 258 Pac. 4 (1927).

⁵ Rem. Comp. Stat. (1927 Supp.) Sec. 10596-3; P. C. Sec. 1914-3.

corded, and when so recorded shall be notice to all persons of the rights of the vendee under the contract.

It is evident from this statute, that a subsequent purchaser with notice cannot obtain a greater right than the vendor had. Consequently, as the vendee has a right of specific performance against the vendor, he will also have the same right against a subsequent purchaser with notice.

The right to maintain an action of trespass is also vested in the vendee. In the case of *Katewa v. Snyder*⁶ the Court, in answering the contention of respondents that, as the appellants had only a conditional sale contract for the purchase of the land occupied by them, they therefore had no right to complain of any action of the respondent, said

“Unquestionably as between the parties to this action, it is sufficient upon which appellants can base their right to possession of the land which they are purchasing, and sufficient to authorize them to forbid any person to interfere with that possession.”

In the recent case of *Oliver v. McEachern*⁷, an interesting question was raised bearing upon the extent of the vendee's rights under an executory contract of sale. The vendee, plaintiff, brought an action to have an easement declared in the abutting property, which had been purchased by the defendant, subsequently, from the same vendor. By mistake, the vendor had failed to reserve this easement in the deed to the defendant although it had been included by the vendor in the previous contract of sale with the plaintiff. But physical factors, of which the defendant had notice, showed the existence of the easement. The defense was raised that the vendee's possession and claim of right, being based upon no title, either legal or equitable, gave no notice of any right or title in the vendee. The Court, in decreeing judgment in favor of the vendee, said

“It is true that under the doctrine of the *Ashford* case the respondent had no title and therefore appellants could have received no notice of what did not, in fact, exist, but neither in the *Ashford* case or elsewhere has this Court said that a purchaser in possession under an executory contract has no rights. Undoubtedly, such purchaser does have a right of possession and a right to acquire title in accordance with the terms of the contract. Such rights, though not amounting to title, are substantial rights such as one having notice and knowledge is bound to respect.”

It will be noticed that the Court has confined its remarks in the *Katewa* and *Oliver* cases, *supra*, to vendees in possession. Does the Court thereby intimate that the vendee's rights will be determined by factual evidence? Such an interpretation is con-

⁶ 143 Wash. 172, 254 Pac. 857 (1927).

⁷ 49 Wash. Dec. 269, 271 Pac. 93 (1928)

sistent with its statements. It is submitted, that if such is the position to be taken by the court in the determination of the vendee's rights, it is erroneous, being inconsistent with the principle the Court has adopted. If the vendee has not equitable title or interest in the land, which the Court has repeatedly held⁸ and yet he has what the Court chooses to call "substantial rights," from where must they spring? They must emanate from the contract itself, and therefore, as these rights are purely contractual, the interpretation of the contract, and not factual evidence, should determine those rights. But it has been said that although possession is not the equivalent of ownership of, or title to real property, still one in possession under such a contract, like any other bailee, may maintain an action for conversion of or injury to the property.⁹ The Court, in the case of *Stotts v. Puget Sound Tr & P Co.*¹⁰, in considering the rights of a vendee of a truck under a conditional sales contract, drew such an analogy. But can it be said that the Court has extended this analogy to vendees under executory contracts for the sale of realty¹¹? It is clear that it has not, for in none of its decisions has it even intimated that such was the basis of its decision, but always has based them on the fact that the vendee has certain rights which must be protected. In the *Oliver* case, *supra*, the contract was not recorded, but the defendant was held to have had actual notice of the vendee's rights. If the contract had been recorded but the vendee had not been in possession, should his rights have not been the same? If the vendee's rights flow from the contract, it is clear that notice of those rights, as given by the contract through the records, should be the determining factor, and the question of whether or not the vendee is in possession should be immaterial.

The questions as to whether or not the vendee may restrain the vendor from using the property in a husband like manner, and whether or not he may maintain an action for damages, have not been raised. Another interesting question to be determined is whether or not the vendee may maintain an action of ejectment. The statute¹² provides

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover

⁸ *Holt Manufacturing Co. v. Jaussaud*, 132 Wash. 667, 233 Pac. 35 (1925) *In Re Kuhn's Estate*, 132 Wash. 678, 233 Pac. 293 (1925), *Peck v. Farmers National Bank*, 137 Wash. 627, 243 Pac. 861 (1926), *In Re Field's Estate*, 141 Wash. 526, 252 Pac. 534 (1927), *Norman v. Levenhagen*, 142 Wash. 372, 253 Pac. 113 (1927), *Bank of California v. Clear Lake Lumber Co.*, 146 Wash. 543, 264 Pac. 705 (1928). See also notes 1, 6, 7, *supra*.

⁹ 1 WASH. LAW REV. 8.

¹⁰ 94 Wash. 339, 162 Pac. 519 (1917) Accord: *Messenger v. Murphy*, 33 Wash. 559, 74 Pac. 473 (1903), *Oras v. Allen*, 133 Wash. 268, 233 Pac. 314 (1925).

¹¹ It should be noticed that all the cases which support this analogy related to personality. Technically, the analogy cannot be applied to cases of realty because a bailee is a holder of personal property.

¹² Rem. Comp. Stat. Sec. 785, P. C. Sec. 7517.

the same by action in the Superior Court of the proper county ”

In the *Oliver* case, *supra*, the Court expressly stated that the vendee had a right to possession, but in that case, as well as in numerous others¹³, it also stated that he had no interest in the land. The statute, however, makes pre-requisite as a right to maintain the action, not only a right to possession, but also an interest in the land. Consequently, as a vendee is held to have no interest, he is helpless to gain its possession, or if he has lost it, to recover it. Could the court say, when such an issue is raised, that the term “right” as used in the *Katewa* and *Oliver* cases could be used as a substitute for “interest” as it appears in the statute¹⁴?

At the present time it is impossible to clearly define the extent of a vendee’s rights, but it is evident from the decisions on the question, that the vendee has not as yet been affected by the rule of the *Ashford* case¹⁵. Furthermore, the Court, in an effort to protect him from the injustice of such a rule, has adopted, in one line of cases, an exception to the rule itself, namely, that where there is no forfeiture clause in the contract, an equitable title will vest in the vendee¹⁶, and in cases where the exception has not applied, it has resorted to the theory of a vendee’s “rights”

May it not be contended that the Court, by the use of the term “rights”, is attempting, without repudiating its former holdings, to reach the position maintained by Courts which accept the doctrine of equitable conversion.

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¹³ See note 8, *supra*.

¹⁴ Under this statute prior entry is not a requisite to the right to maintain the action. *Blanc’s Cafe v. Corey*, 110 Wash. 242, 188 Pac. 759 (1920). In this case the Court, in holding that a lessee had the right under the statute to maintain the action, cited the rule as stated in 1 TIFFANY ON LANDLORD AND TENANT, Sec. 37, p. 293: “As regards the right of the lessee, before entry, to maintain ejectment to the premises, it would seem that the cases asserting that right are in accord with the modern rule that this action may be maintained by any person having a right to possession.” As a vendee has the right to possession, which by modern authority is sufficient to sustain the action, the Court might interpret the statute to be merely cumulative and not an abrogation of the common law right.

¹⁵ The actual decision of the *Ashford* case, *supra*, on its facts, was favorable to the vendee, holding that in case of destruction of the subject matter, the loss would fall on the vendor. The vendor, however, may still protect himself in such cases, by inserting in the contract where the loss shall fall. *Cameron v. Hurn*, 147 Wash. 434, 266 Pac. 179 (1928).

¹⁶ This exception was enunciated in the case of *Aylward v. Lally*, 147 Wash. 29, 264 Pac. 983. For a discussion of this case and the test therein laid down as to whether or not the vendee has an equitable title, see: Alfred J. Schweppe, *The New Forfeiture Clause Test in Executory Contracts for the Sale of Real Estate*, (1928) 3 WASH. LAW REV. 80.