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# COMMENTS

## THE VENDOR-PURCHASER RELATIONSHIP IN WASHINGTON

STUART G. OLES

The persistence with which our court clings to the unfortunate language of the leading case of *Ashford v. Reese*[1] has given rise to considerable confusion in the local practice. This comment is written with the hope that it may aid in dispelling that confusion.

The overwhelming weight of authority in this country has been to the effect that the vendee under an executory contract to purchase land is the equitable owner.[2] The early cases in this jurisdiction adhered closely to the prevailing view,[3] which in essence simply states the

[1] 132 Wash. 649, 233 Pac. 29 (1925)

[2] 55 AM. JUR., *Vendor and Purchaser*, 782, § 356.

[3] Hyde v Heller, 10 Wash. 586, 39 Pac. 249 (1895) Griggs Land Co. v. Smith, 46 Wash. 185, 89 Pac. 477 (1907) Davie v Davie, 47 Wash. 231, 91 Pac. 950 (1907)

eminently practical attitude that such a vendee has certain equities in the land which should be protected. It should be noted that this elementary doctrine is not properly synonymous with that of "equitable conversion." The latter is an attempt to systematize the doctrine of equitable ownership by considering the contract of purchase as a magical rite which converts the vendor's interest into personalty and the purchaser's interest into realty Like many legal fictions this one is open to over-literal interpretation. Thus Lord Eldon employed the fiction to place the risk of loss of the property on the purchaser where the loss occurs subsequent to the execution of the contract.[4] This heavy-handed application of the "equitable conversion" doctrine is generally the law today, and frequently a purchaser finds himself compelled to specifically perform his obligations under a contract for subject matter which has been partially or wholly destroyed.

A minority of jurisdiction has stood out against the rigor of Lord Eldon's rule and has placed the risk of loss on the vendor, basing this result on a variety of plausible grounds.[5] A number of legal writers welcome the increasing strength of this minority as an intelligent swing of the pendulum away from the often unjust working of the strict "equitable conversion" doctrine. But it remained for the Washington court to unhinge the pendulum altogether. In *Ashford v. Reese*[6] the purchaser sought to rescind a contract to buy a building and lot, the building having been destroyed by fire through no fault of the parties. The contract contained the usual clauses for notice and forfeiture in case of default by the purchaser and was largely executory at the time of litigation. The court found for the purchaser, asserting that the risk of loss must fall on the party holding title at the time of loss. To this extent the decision is in accord with the minority jurisdictions, but the court went on to say that the purchaser under any executory contract has "no title or interest, either legal or equitable." In effect, the entire doctrine of equitable ownership was discarded; whereas other jurisdictions had arrived at the same result with regard to fixing the risk of loss, without major dislocations of the substantive law, our court found it necessary to sacrifice a deeply embedded and valuable concept upon which is based a considerable part of our property law.

[4] Paine v. Meller, 6 Ves. 349, 31 Eng. Rep. 1088 (1801)

[5] Libman v. Levenson, 236 Mass. 221, 128 N. E. 13 (1920) *See* 101 A. L. R. 1243.

[6] See note 1 *supra.*

The Washington court was of course unable to cite cases from other jurisdictions to support this revolutionary holding and was forced to rely on certain previous Washington cases. As pointed out at the time, these cases grew out of unsupported dicta in early decisions.[7] This jurisdiction has remained *rara avis* with regard to the *Ashford* language and it is still impossible to find elsewhere any holdings squarely in accord with the principal case.

The *Ashford* case has been quite thoroughly dissected in previous Washington Law Review articles and notes.[8] We shall here confine ourselves to a summary of the decisions subsequent to the principal case. This summary, it is hoped, will delineate the present state of the law with regard to the vendor-purchaser relationship. It is also anticipated that it will clearly indicate that *Ashford v. Reese,* insofar as it rejected the doctrine of equitable ownership, is no longer the law in Washington.

The granting of specific performance to a purchaser upon the default of the vendor is in itself a recognition of the purchaser's special equities in the land. There is a certain logical inconsistency in recognizing the purchaser's right to specifically enforce the transfer of legal title and at the same time claiming that the purchaser has no "interest, either legal or equitable" in the land. By any practical definition the right to specific performance endows the purchaser with an "interest", yet our court has never applied the *Ashford* reasoning to deny specific performance to the purchaser.[9] Moreover our court has been liberal in granting to the purchaser a period of grace before foreclosure by the vendor will be allowed.[10] The decisions to this effect have been supported by citations from foreign jurisdictions and there can be little

[7] Dissent in Ashford v. Reese, *supra* note 1.

[8] Lichty, *Rights and Estates of Vendor and Vendee Under an Executory Contract for the Sale of Real Property* (1925) 1 WASH. L. REV. 9; 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. L. REV. 1; Lantz, *Rights of Vendees Under Executory Contracts of Sale* (1928) 3 WASH. L. REV. 1; Schweppe, *The New Forfeitable Clause Test in Executory Contracts for the Sale of Real Estate* (1928) 3 WASH. L. REV. 80; etc.

[9] Pratt v. Rhodes 142 Wash. 411, 253 Pac. 640 (1927) Dysart v. Colonial Fire Underwriters, 142 Wash. 601, 254 Pac. 240 (1927), Vandin v. McCleary Timber Co., 157 Wash. 635, 289 Pac. 1016 (1930)

[10] Zane v. Hinds, 136 Wash. 352, 240 Pac. 6 (1925), Wallis v. Elliott, 154 Wash. 625, 282 Pac. 928 (1929); Roy Investment Co. v. Holmes, 159 Wash. 244, 292 Pac. 403 (1930), Grosgebauer v. Schneider, 177 Wash. 282, 31 P (2d) 901 (1934), Central Life Assurance Soc. v Impelmans, 13 Wn. (2d) 632, 126 P (2d) 757 (1942) Dill v. Zielke, 126 Wash. Dec. 233 (1946)

doubt that the abhorrence of strict foreclosure is common with most courts. Our court, it would seem, fails to recognize that the basis of this abhorrence is, fundamentally, the doctrine of equitable ownership.[11]

As a result, then, of the court's attitude towards granting specific performance and periods of grace to the purchaser, it seems clear that there has been no eagerness to apply the *Ashford* language rigorously This lack of eagerness has been further exemplified by subsequent cases which have purposefully and arbitrarily limited the application of the *Ashford* case. It has been held that after the purchaser has fully performed his part of the bargain he acquires complete equitable title.[12] It would be difficult to explain why one who has paid all the purchase price should be held to be the equitable owner whereas one who has paid all but one or two instalments, for example, should be held to have no "interest, either legal or equitable." The distinction can be rationalized only by assuming that our court has begun to regret the *Ashford* language and has seen the necessity of sharply limiting it.

An even more arbitrary distinction has been made between those contracts which include a forfeiture clause and those which do not. It has been held that the *Ashford* doctrine is only applicable in the former situation; that is, the purchaser is equitable owner in the absence of a forfeiture clause.[13] The leading case for this position is based on various early Washington cases, which are of course no real authority because they arose at a time when *all* contracts to sell land transferred equitable ownership. Since most real estate contracts include forfeiture clauses as a matter of course, the distinction is of little practical importance, but it clearly indicates the almost frantic attempt of our court to confine the *Ashford* doctrine.

Not even in the risk of loss situation has our court stood firmly on the *Ashford* case. If the vendor has the whole legal and equitable title in the land, as the *Ashford* doctrine clearly implies, it should logically follow that the entire proceeds of a fire insurance policy taken out in his name should accrue to him alone in event of loss occurring prior to the date of performance set for the contract. But the Washington court has said that the vendor is only entitled to the proceeds to the

[11] Pound, *Progress of the Law* (1920) 33 HARV. L. REV. 813.

[12] Pratt v. Rhodes, 142 Wash. 411, 253 Pac. 640 (1927), cited *supra* note 9.

[13] Aylward v. Lally, 147 Wash. 29, 264 Pac. 983 (1928); First National Bank v. Mapson, 181 Wash. 196, 42 P (2d) 782 (1935), Dean v. Woodruff, 200 Wash. 166, 93 P (2d) 357 (1939)

extent of the payments due him under the contract.[14] The implication is that the vendor has only a security interest in the land, a sharp contradiction of the *Ashford* rule. Yet the court has continued to pay allegiance to the latter, apparently failing to see the inconsistency of its position.[15]

There are other situations in which the court has arrived at results that are inconsistent with the doctrine that the vendor has more than a security interest in the land. It has been held that a creditor of the vendor cannot attach more than the vendor's interest in the land—that is, the amount of the payments due from the purchaser.[16] The court has also held that the vendor's interest is personalty for purposes of administration.[17] This is the precise situation for which the "equitable conversion" theory was originally developed by Lord Eldon, and our court seems to apply the theory in its usual form.[18] That this is in opposition to the *Ashford* case almost goes without saying, but what renders the holding more remarkable is that the citations used as authority by the court are those early Washington cases which were overruled by the *Ashford* case! A like situation is presented by the view in our state that a vendor's interest, where the vendor is out of the state, is not taxable under the inheritance tax.[19] The court's reasoning is that the vendor's interest is intangible personal property having its situs at the vendor's place of residence and hence is outside of the state's jurisdiction. If this argument be compared with the language of *Ashford v Reese* we are confronted by the anomalous proposition that the purchaser has no interest whatsoever, and the vendor has only a personal interest; the real property interest which remains floats about in some kind of legal vacuum! The court's holding with regard to the inheritance tax is supported by a citation to an Oregon case, which in turn squarely bases its decision on the doctrine of equitable ownership.[20] This type of juggling is perhaps justified by a practical consideration—that of keeping our classification of property for purposes of probate

[14] Dysart v. Colonial Fire Underwriters, 142 Wash. 601, 254 Pac. 240 (1927) cited *supra* note 9.

[15] Capital Savings & Loan Ass'n v. Convey, 175 Wash. 224, 27 P (2d) 136 (1933); Johnson v. Stalcup, 176 Wash. 153, 28 P (2d) 279 (1934)

[16] Vandin v. McCleary Timber Co., 157 Wash. 635, 289 Pac. 1016 (1930) cited *supra* note 9.

[17] *In re* School Districts 12 and 133. 141 Wash. 538, 251 Pac. 882 (1927)

[18] Paine v. Meller, 6 Ves. 349, 31 Eng. Rep. 1088 (1801), cited *supra* note 4.

[19] *In re* Eilermann's Estate, 179 Wash. 15, 35 P (2d) 763 (1934)

[20] *In re* Denning's Estate, 112 Ore. 621, 229 Pac. 912 (1924)

in accord with the classification adopted by other jurisdictions. But at best it illustrates the unfortunate confusion to which the *Ashford* case gave birth.

A few years subsequent to the *Ashford* decision an interesting holding of our court established that a vendor under an executory contract to sell land who has assigned his interest in the contract has no property in the land which can be taken by a trustee in bankruptcy to satisfy the vendor's debt.[21] The court said that the "vendor has only the naked legal title to the property" This language smacks strongly of that used by courts invoking the doctrine of equitable ownership. It is true that here there was not only a contract but also an assignment of the vendor's contractual interest, but there was no parting with the legal title and it would seem that the *Ashford* language would dictate a different result from that reached by our court. The case can only be explained by finding the vendor to have only a security interest in the land, an interest which could be assigned like any contractual right. This explanation is of course repugnant to the *Ashford* case.

One of the few situations where the vendor has been accorded an interest in realty which seems to be consistent with *Ashford* is that of a statutory action to establish boundaries. It has been held that the vendor is a necessary party to the suit.[22] But this result may be reached without resort to the *Ashford* case and is not a refutation of our contention that the latter is no longer the law. For obvious practical reasons it is important that the vendor be a party, for if he were not the decision might not be binding upon him—a significant matter in the event that the purchaser should default and the vendor recover unincumbered title.

In summary, then, it appears that the vendor has considerably fewer rights than the *Ashford* language would lead us to believe. If we except the risk of loss cases, he has, under decisions subsequent to *Ashford,* no clearly identifiable rights or liabilities other than those ascribed to a vendor in other jurisdictions. Although the court continues to pay lip service to the *Ashford* language, that language is not reflected, as we have seen, in the substantive law.

Now let us turn our attention to the rights and liabilities of the purchaser and ascertain whether the court has adhered to the *Ashford* case in that field. Our court has found no difficulty in finding that the

[21] Culmback v. Stevens, 158 Wash. 675, 291 Pac. 705 (1930)

[22] Cady v. Kerr, 11 Wn.(2d) 1, 118 P.(2d) 182 (1941)

purchaser has at least some rights: the right to acquire title, and where the contract so provides the right to acquire and defend possession.[23] These rights are of sufficient substance that they may be attached for debt under the Washington statute authorizing attachments on "real" property.[24] This result is rather apparently a contradiction of the *Ashford* case, as was pointed out at the time.[25]

It is now settled, moreover, that a purchaser can maintain an action for trespass.[26] It might technically be argued that trespass, being a purely possessory action, may be maintained by one who has no title "either legal or equitable" in the land. But it is surely inconsistent to permit an action in trespass to one who has, as the *Ashford* case asserted, no "interest" in the land. The court realized this and said that the purchaser *does* have an interest in land.[27] Only a failure to refer to the case itself prevents this language from being a specific overturn of at least a portion of the *Ashford* doctrine.

Another blow was struck at *Ashford* by a decision that a purchaser is a "proper" party to a condemnation proceeding.[28] This is a half-hearted overruling of the early case of *Schaefer v. Gregory*[29] which found that a purchaser need not be present at a condemnation proceeding because he has no legal or equitable title to the land. The *Schaefer* case was the lone citation given by the majority in the *Ashford* case, and a weakening of its authority indirectly undermines the validity of the later case. The undermining appears considerable when we regard the illogic of holding that a person who has no "title or interest, either legal or equitable" is nonetheless a proper party at a condemnation proceeding.

Recent cases show an increasing reluctance to apply the *Ashford* language. Characteristic is the holding that a purchaser is a property

[23] *Cf.* Oliver v. McEachran, 149 Wash. 433, 271 Pac. 93 (1928), Daniels v. Fossas, 152 Wash. 516, 278 Pac. 412 (1929)

[24] State *ex rel.* Oatey Orchard Co. v. Sup'r Ct., 154 Wash. 10. 280 Pac. 350 (1929), Epley v. Hunter, 154 Wash. 163, 281 Pac. 327 (1929) The statute concerned is REM. REV. STAT. (1932) § 659, which authorizes attachments on "real property"

[25] The concurring opinion in State *ex rel.* Oatey Orchard Co. v Sup'r Ct., 154 Wash. 10, 280 Pac. 350 (1929), cited *supra* note 24.

[26] Lawson v. Helmich, 20 Wn.(2d) 167, 146 P (2d) 537 (1944)

[27] *Ibid.* With regard to the whole question of the purchaser's possessory interest see: Kateiva v. Snyder, 143 Wash. 172, 254 Pac. 857 (1927); Peters v. Bellingham Coal Mines, 173 Wash. 123, 21 P (2d) 1024 (1933)

[28] State v. Wenatchee Valley Holding Co., 169 Wash. 535, 14 P (2d) 51 (1932)

[29] 112 Wash. 408, 192 Pac. 968 (1920)

holder within the meaning of the irrigation district statutes.[30] We are again presented with the familiar post-*Ashford* pattern of inconsistency: a purchaser has no "interest" but is a property holder! Another recent case found that a purchaser has certain rights "annexed to and exercisable with reference to" land which are sufficient to permit him to defend, and possibly even to maintain, an action to quiet title.[31] The first question that comes to mind is how one can defend a title which the *Ashford* case specifically says he doesn't have! Yet the court goes on to reiterate that the *Ashford* case is still good law in this state.

So we have a picture of the manner in which our court has tacitly slipped out from under the *Ashford* case and in a large number of subsequent decisions has endowed the purchaser with all the attributes of title which are conferred by the doctrine of equitable ownership. As we have indicated before, the doctrine of equitable ownership is simply a convenient expression for explaining the protection of the purchaser's obvious equities in the land.[32] It is the writer's contention that the court has recognized these equities to an extent that is entirely incompatible with a denial of the doctrine.

It was suggested in a concurring decision to the *Ashford* case that the decision therein reached, while out of line and without sound analytic basis, was yet so woven into the fabric of our real property law even at that time that it must be affirmed for the sake of stability If this was true at that time, it is certainly so no longer, for the court has made so many exceptions that the principal rule exists now only in name. A forthright repudiation of the language of *Ashford v. Reese,* insofar as it rejected the doctrine of equitable ownership, would not only remove numerous inconsistencies in the court's present position but would also clear the atmosphere of our property law.

[30] *In re* Horse Heaven Irrigation District. 11 Wn.(2d) 218, 118 P (2d) 972 (1941) The particular statute considered was REM. REV. STAT. (1932) § 7528, which provides for irrigation district elections by such voters as "hold title or evidence of title to land" in the district.

[31] Turpen v. Johnson, 126 Wash. Dec. 674 (1946)

[32] Stone, *Equitable Conversion by Contract* (1913) 13 COL. L. REV. 369.

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## THE 1943 WASHINGTON ARBITRATION ACT

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### I.

### INTRODUCTION

Changes in the arbitration laws of the State of Washington effected by the 1943 Act, can be expected to increase the effectiveness of written