Hastings Law Journal

Volume 12 | Issue 4 Article 5

1-1961

# Insurance Contracts--Right to Proceeds of Vendor's Insurance Where Property Conditionally Sold

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# INSURANCE CONTRACTS —
## Right to Proceeds of Vendor's Insurance Where Property Conditionally Sold

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IT IS BY no means settled in California who is entitled to the proceeds of a fire insurance policy on property which has been sold under a conditional sales contract when the subject matter of the contract is destroyed. It is the purpose of this comment to point up the several aspects of the problem and analyze their relative merits.

### *The Problem*

A surface understanding of the problem can be had by resort to a contract for the sale of land.[1] Assume: a vendor and purchaser enter into a conditional contract for the sale of buildings and the land on which the buildings are situate. The purchaser makes a down payment and takes possession; the vendor retains legal title as security for the balance of the purchase price. Vendor insures his interest in buildings with an insurance company in his own name and pays all the premiums. The purchaser does not insure his interest. While the contract is still executory, the buildings are destroyed by fire through no fault of the purchaser or vendor. The purchase contract is silent as to who is entitled to the proceeds of the insurance. The liabilities of the parties at this point are that the purchasor is liable to the vendor for the balance of the purchase price because the risk of loss is on the purchaser since he was in possession and in California the risk of loss follows possession.[2] The insurer is liable to the vendor on the insurance policy. The purchaser claims that the insurance money should be applied to the balance of the purchase price. The vendor claims that he is entitled to the benefits of both of his contracts and that he should get the balance of the purchase price from the purchaser and the insurance money from the insurance company. The insurance company, on the other hand, claims that if it has to pay on the insurance policy, it has the right to be subrogated to the vendor's cause of

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1 A contract for the sale of realty is used here only for purposes of simplicity. The problem is not unique to land contracts, and the analysis applies to all conditional sale contracts, for personalty as well as realty.

2 CAL. CIV. CODE § 1662 (Uniform Vendor and Purchaser Risk Act): "... (b) If, when either legal title or possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of vendor ..., purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid."

action against the purchaser for the balance of the purchase price. Now the court must decide whose claim to sustain.

*Attempted Solutions in California*

California courts have been confronted with this problem twice, and there is one federal decision which purportedly resolves it on the basis of California law. In *White v. Gilman*,[3] the vendor contracted to sell a lot to the purchaser. The purchaser took possession, made a couple of payments and built a dwelling on the lot. The vendor insured the dwelling on his own behalf. The dwelling was destroyed by fire, and the insurance company paid the vendor on the policy. In the purchaser's suit to have the insurance money applied to the balance of the purchase price, the California Supreme Court dismissed the suit and held that the insurance money belonged solely to the vendor, that the purchaser had no interest in the insurance money, and that the purchaser could not have it applied to the purchase price. Thus, the first time the issue was raised in California the purchaser was held not entitled to the benefits of the vendor's insurance, and the vendor was allowed to retain the insurance money and recover the balance of the purchase price.

A few years later the situation arose in a similar context in the case of *Kaufman v. All Persons*.[4] In *Kaufman*, the vendor obtained a loan from the defendant and gave a deed of trust on a building as security for the loan. In compliance with the loan agreement the vendor secured insurance on the building payable to the defendant. Thereafter the vendor contracted to sell the building, subject to the deed of trust, to the plaintiff-purchaser. The plaintiff agreed to pay a specified sum to the vendor and to assume the vendor's indebtedness to the defendant. The building was destroyed by fire, and the insurance company paid the defendant. The plaintiff brought suit to have the insurance money applied against the plaintiff's assumed indebtedness to the defendant. Without reference to, or even acknowledgement of, *White v. Gilman*, the district court of appeal allowed the plaintiff's claim and held that the plaintiff acquired an equitable interest in the proceeds of the insurance policy as an incident to her equitable title under the agreement of sale; so the plaintiff was entitled to have the proceeds of the policy applied upon the mortgage indebtedness assumed by her.

Thus, under two similar fact situations the California courts have reached two diverse results. The only other decision in point is a federal case, *In re Future Mfg. Co-op.*,[5] where the vendor made a conditional sales contract to sell personalty to the purchaser, and the vendor insured his own interest. When the property was destroyed

[3] 138 Cal. 375, 71 Pac. 436 (1903).
[4] 16 Cal. App. 388, 117 Pac. 586 (1911).
[5] 165 F. Supp. 111 (N. D. Cal. 1958).

by fire, the purchaser still owed the vendor the balance of the purchase price. The insurance company paid the vendor on the policy. The purchaser went into bankruptcy, and in the proceeding the insurance company sought to be subrogated to the vendor's rights against the purchaser for the balance of the purchase price. The vendor sought the balance of the purchase price, and the purchaser claimed that the proceeds of the vendor's insurance should be applied to the balance of the purchase price owed by the purchaser to the vendor. The court found for the purchaser and held that he was entitled to the benefits of the vendor's insurance. The court overruled the vendor's claim and held that he could not get the balance of the purchase price and also retain the insurance money because this would constitute double indemnification. As to the insurance company's claim, the court held that the company would only be entitled to subrogation to the insured's rights against one who had wrongfully caused the loss; therefore, the insurance company was not entitled to be subrogated.

The court in the *Future* case discussed both the *White* and the *Kaufman* cases but distinguished them and held that neither controlled. The *White* decision was discarded as authority on the grounds that it did not apply when the property which was the subject of the sales contract was destroyed.[6] Although the court in *Future* felt that the *Kaufman* decision was the California case ". . . most nearly in point,"[7] it was deemed not controlling because it did not deal with the relationship of vendor and vendee. Having distinguished[8] the only available authorities in California, and conceded that there were no cases in California directly on the point, the federal court disposed of the case on the basis of what the court thought the California Supreme Court would do. The federal court's decision is, of course, not binding on the California courts.

From a look at the available California law on the issue, it would appear that California is not definitely committed to any one of the three possible alternatives and that the California courts are free to pick and apply the solution which best disposes of the fact situation before them. An analysis of the three alternatives is now in order with an eye toward picking that one which most reasonably conforms to common sense and sound legal principles.

### *Three Alternative Solutions*

The three possible solutions of the controversy are: to subrogate the insurer to the vendor-insured's cause of action against the pur-

[6] *Id.* at 114.

[7] *Ibid.*

[8] The writer is not here concerned with the validity of the federal court's distinctions of White v. Gilman, *supra* note 3, and Kaufman v. All Persons, *supra* note 4, but it may be noted that neither distinction is so soundly based as to preclude scrutiny and criticism, and it is hoped that the California courts will not summarily limit the doctrines of the two cases without the consideration they deserve.

chaser for the balance of the purchase price; to give the purchaser the benefit of the vendor's insurance; or to allow the vendor to retain the insurance money and recover the balance of the purchase price from the purchaser. As will be pointed out below, all three are objectionable.

*Subrogation*

An analysis of the insurance company's claim that it is entitled to subrogation necessitates a look at the essence and requirements of the doctrine of subrogation. In the law of insurance, subrogation is the process of equitable substitution by which the insurer who has paid for the loss under the policy succeeds to any rights the insured may have against any person who is primarily responsible for the loss.[9] There are three prerequisites to an insurer's right to subrogation against a third party: that the third party be primarily liable to the insured for the property loss or damage; that the insurer be secondarily liable for some or all of this loss by a contract of indemnity; and finally, that the insurer have paid the insured under the insurance policy.[10]

The second and third requisites are not troublesome. However, that the first requisite is not fulfilled seems to be the greatest objection to subrogation; that is, where the third party has not wrongfully caused the loss and is not primarily responsible, should the insurer be subrogated to the insured's collateral causes of action against that third party? It is generally agreed that the insurer should be subrogated to the vendor's rights against one who has wrongfully caused the loss,[11] but here the vendor's cause of action sounds in tort. Where the vendor's cause of action sounds in contract rather than tort, the courts have more often than not refused to allow subrogation to a contract cause of action against one who has not wrongfully caused the loss.[12]

In California the rule seems to be that the insurer may be subrogated to the insured's cause of action against anyone who has wrongfully caused or is primarily responsible for the loss, regardless of

[9] VANCE, INSURANCE § 422 (1st ed. 1904).

[10] King, *Subrogation Under Contracts Insuring Property*, 30 TEXAS L. REV. 62, 63 (1951).

[11] Hardware Mut. Ins. Co. v. Dunwoody, 194 F.2d 666 (9th Cir. 1952). See authorities collected in 8 COUCH, CYCLOPEDIA OF INSURANCE LAW § 1997, nn.6 & 7, at 6590-91 (1931). Home Ins. Co. v. Bishop, 140 Me. 72, 34 A.2d 22 (1943).

[12] American Cas. Ins. Co. v. Weller, 106 Ore. 494, 212 Pac. 803 (1923); Nelson v. Bound Brook Mut. Fire Ins. Co., 43 N.J.Eq. 256, 11 Atl. 681 (1887); Washington Fire Ind. Co. v. Kelly, 32 Md. 421 (1870); Benjamin v. Saratoga County Mut. Fire Ins. Co., 17 N.Y. 415 (1858). *Contra*, Nobbe v. Equity Fire Ins. Co., 210 Minn. 93, 297 N.W. 349 (1941); Interstate Ice & Power Corp. v. U.S. Fire Ins. Co., 243 N.Y. 95, 152 N.E. 476 (1926); see dicta in Hardware Mut. Ins. Co. v. Dunwoody, 194 F.2d 666, 667-68 (9th Cir. 1952), and Continental Ins. Co. v. I. Bahcall, Inc., 39 F. Supp. 315, 319 (E.D. Wis. 1941). See also Castellain v. Preston, [1883] 11 Q.B.D. 380; Rayner v. Preston, [1881] 18 ch. D. 1.

whether the cause of action sounds in contract or tort.[13] Thus, it would follow that in California the insurer would not be subrogated to the vendor's cause of action against the purchaser for the balance of the purchase price unless the purchaser wrongfully caused the loss or is primarily responsible for it, and so, if the loss resulted through no fault of the purchaser, the insurer would not be entitled to subrogation.

Subrogation is objectionable from another standpoint. Since the insurance company fixes the premiums to be paid by the insured, one may reasonably presume that when the insurance company is paid its premium it is adequately compensated for the risk which it assumes, and therefore, subrogation would be a windfall to the insurer and free the insurer from a loss it had been paid to assume. However, it has been argued that if the policy either specifically provides for subrogation to the collateral rights of the insured or if the rate of the premiums is reduced to the extent that it is in fact commensurate with the right of subrogation and the limited risk, the insurance company should be so subrogated.[14] In the absence of such circumstances, it is evident that subrogation is not an adequate solution to the problem.

*Application of Proceeds to Purchase Price*

The second alternative would be to give the purchaser the benefit of the vendor's insurance and apply the proceeds of the policy to the balance of the purchase price owed by the purchaser. There have been a number of arguments offered in favor of this view, and it is undoubtedly the position adopted by the majority of American jurisdictions.[15] It can be argued that refusal to give the purchaser the benefit of the vendor's insurance works a hardship on the purchaser and is a harsh result because the purchaser did not cause the loss and in fact already suffered one loss by the destruction of his own uninsured interest in the property. Therefore, the equities of the situation demand relief for the purchaser. In answer to this extra-legal argument, it should be noted that the purchaser could have protected himself by insuring his own interest or by stipulating in the sales contract

[13] See *In re* Future Mfg. Co-op., 165 F. Supp. 111 (N.D. Cal. 1958); White v. Gilman, 138 Cal. 375, 71 Pac. 436 (1903); CAL. INS. CODE § 2071.

[14] Note, 72 HARV. L. REV. 1380, 1382-83 (1959).

[15] *In re* Future Mfg. Co-op., 165 F. Supp. 111 (N.D. Cal. 1958); Bruce v. Jennings, 190 Ga. 618, 10 S.E.2d 56 (1940); Brady v. Welsh, 200 Iowa 44, 204 N.W. 235 (1935); Godfrey v. Alcorn, 215 Ky. 465, 284 S.W. 1094 (1926); Sheridan v. Peninsula Sav. Bank, 116 Mich. 545, 74 N.W. 874 (1898); 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); Marion v. Wolcott, 68 N.J.Eq. 20, 59 Atl. 242 (1904); Russell v. Elliott, 42 S.D. 184, 186 N.W. 824 (1922); Dysart v. Colonial Fire Underwriters, 124 Wash. 601, 254 Pac. 240 (1927); see also Kaufman v. All Persons, 16 Cal. App. 388, 117 Pac. 586 (1911); Brakhage v. Tracy, 13 S.D. 343, 83 N.W. 363 (1900); Baettie v. Gay's Express, 112 Vt. 131, 22 A.2d 169 (1941); *cf.* Dolan v. Spencer, 92 Colo. 389, 21 P.2d 411 (1933); (where optionee awarded benefit of optionor's insurance); Raplee v. Piper, 3 N.Y.2d 179, 143 N.E.2d 919, 164 N.Y.S.2d 732 (1957).

that the risk of loss be on the vendor. A stipulation in the sales contract that the purchaser is entitled to the proceeds of the vendor's insurance requires the assent of the insurer either by a waiver of the non-assignability clause in the insurance contract or by an endorsement of the insurance by the insurer in favor of the purchaser, but such assent can be obtained, and the purchaser can protect himself in this manner. Having failed to protect himself, the purchaser could be viewed as having assumed the risks and, therefore, made to bear them.

In at least two cases,[16] the purchaser was held entitled to the proceeds of the insurance money collected by the vendor on the grounds that the vendor was a constructive trustee for the purchaser and held the insurance money in trust for him. Results such as these stem from a confused interpretation of the relationship between vendor and purchaser. Although the right of the purchaser to get specific performance of the sale contract somewhat resembles the interest of a cestui que trust, that is as far as the trust relationship goes. The vendor is not a trustee of the insurance money for the purchaser, the purchaser has no equitable title to the insurance money, and the trust notion is nothing more than an unnecessary fiction.[17]

Another argument proffered on the purchaser's behalf is that the insurance money collected by the vendor is a substituted res to which the purchaser is entitled.[18] Under this argument it is maintained that the insurance money takes the place of the property or original subject matter of the contract which was destroyed and that the purchaser is entitled to this substituted res as he was entitled to the property, had it not been destroyed. The argument ignores the facts that the destroyed property was already in the purchaser's possession and that the purchaser was to bear the risk of the loss of that property. Arguing that the insurance money is a substituted res or even a supplementary res merely begs the question, because such an argument assumes that the insurance money is part of the consideration to which the purchaser is entitled. But whether or not the purchaser is so entitled is the basic question.

The business world presents another argument in favor of giving the purchaser the benefit of the vendor's insurance. Some businessmen labor under the impression that insurance "runs" with the property, *i.e.*, that when one purchases property he automatically acquires the insurance benefits that have attached thereto. That such a situation is desirable or that the law should conform to this impression is not

[16] Wm. Skinner & Sons v. Houghton, 92 Md. 68, 48 Atl. 85 (1900); Gillingham v. Phelps, 5 Wash. 2d 410, 105 P.2d 825 (1940).

[17] Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 372 (1913).

[18] Doty v. Rensselaer County Mut. Fire Ins. Co., 188 App. Div. 29, 32, 176 N.Y. Supp. 55, 57 (1919).

here discussed. The point is that such is not now the law in California.[19] Absent a specific provision in the insurance contract to the contrary, the insurance policy and its benefits do not pass to the purchaser of the insured property without a valid assignment of the insurance contract.

As pointed out above, a substantial majority of the jurisdictions that have passed on the question have given the purchaser the benefit of the vendor's insurance.[20] However, there is some authority to the contrary.[21] In California and those states that have a similar Standard Form Fire Insurance Policy,[22] there may be a statutory prohibition against giving the purchaser the benefit of the vendor's insurance. The California Standard Form Fire Insurance Policy provides that the ". . . [insurer] does insure . . . [the insured's property] to the actual cash value of the property at the time of the loss . . . but not exceeding . . . *nor in any event for more than the interest of the insured. . . .*"[23] (Emphasis added.) Construing the provision literally, it would seem that it precludes giving the purchaser the benefit of the vendor's insurance because to do so would extend the insurer's liability beyond the interest of the insured and allow recovery to a beneficiary (the purchaser) not named or covered in the policy. In other words, the interest of the insured does not include the interest of the purchaser or anyone else, and allowing the purchaser to receive the benefits of the policy forces the insurance company to assume a risk in excess of the insured's interest and one that is expressly prohibited by the insurance contract. The writer has been unable to find any California decisions which construe this particular provision, but it is submitted that a construction which sustains the purchaser's claim would severely limit the purpose of the provision and deny the insurer and his insured the benefits of their contract by substantially altering their rights, duties and liabilities.

The classic argument against giving the purchaser the proceeds of the vendor's insurance is that an insurance policy is a personal contract between the insurer and insured, and, therefore, the benefits or

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[19] CAL. INS. CODE § 305; Alexander v. Security First Nat'l Bank, 7 Cal. 2d 718, 62 P.2d 735 (1936). See generally CAL. INS. CODE § 2071. To the effect that the insurance should run with the land, see Vance, Comment, 34 YALE L. J. 87 (1924), and the dissenting opinion of James, L. J., in Rayner v. Preston, [1881] 18 Ch. D 1, 12, both criticized in Brownell v. Board of Educ., 239 N.Y. 369, 146 N.E. 630 (1925).

[20] See cases collected note 15 *supra.*

[21] Castellain v. Preston, [1883] 11 Q.B.D. 380; Rayner v. Preston, [1881] 18 Ch. D. 1. These cases have been abrogated by an English statute which gives the purchaser the benefit of the vendor's insurance. Law of Property Act, 1922, 12 & 13 Geo. 5, c. 16, § 105. See U. S. v. American Tobacco Co., 166 U.S. 468 (1897); White v. Gilman, 138 Cal. 375, 71 Pac. 436 (1903); King v. Preston, 11 La. Ann. 95; Brownell v. Board of Educ., 239 N.Y. 369, 146 N.E. 630 (1925); *cf* King v. State Mut. Fire Ins. Co., 61 Mass. 1 (1851) and *compare with* Tabbut v. American Ins. Co., 185 Mass. 371, 70 N.E. 430 (1904); Alexandra Restaurant v. New Hampshire Ins. Co., 297 N.Y. 858, 79 N.E.2d 268 (1948).

[22] See CAL. INS. CODE § 2071.

[23] *Ibid.*

detriments of the contract should accrue to no one but the insurer and the insured, in the absence of a valid assignment. Thus, the benefits of the insurance policy should not be awarded to the purchaser because the purchaser is not a party to the insurance contract and not a contemplated beneficiary thereof.[24] This argument seems valid, and is further fortified when one notes that allowing the purchaser to recover the proceeds of the insurance policy violates the insurance company's privilege to select its insured and determine its own risk, and ignores the fact that the purchaser and the insurer are not in privity with each other.[25]

Granting relief to the purchaser is objectionable on still another score. It is a windfall to the purchaser; he is getting the benefits of insurance coverage without contracting or giving consideration for them. The purchaser had an insurable interest in the property and could have indemnified himself against loss by taking out his own insurance or by stipulating in the sales contract that the risk of loss be borne by the vendor.

Obviously giving the purchaser the proceeds of the vendor's insurance is not as good a solution to the problem as may be desired. Whether the merits of the purchaser's contention outweigh the objections is basically an equitable consideration, rather than a legal one, but a decision one way or the other should be withheld until an analysis of the third alternative is made.

*Retention by Vendor-Insured*

The third possible solution is to allow the vendor to retain the insurance money collected from the insurer and also recover the balance of the purchase price from the purchaser.[26]

In support of this position it can be argued that the vendor has made two separate and distinct contracts (a sales contract with the purchaser and an insurance contract with the insurance company) and that he gave valuable consideration for each of these contracts and, therefore, that he is entitled to recover on both of them. If the court refuses to allow the vendor to recover on each of the contracts, it would be denying the vendor the benefits for which he has bargained and paid. The fact that the vendor's interest in the insurance contract is limited to the amount which is owed him by the purchaser does not seem to justify a judicial denial of one or the other of the two contracts. Even though the vendor's interest may now be limited, the two contracts are independent. One must avoid the confusion resulting

[24] Castellain v. Preston, [1883] 11 Q.B.D. 380; Rayner v. Preston, [1881] Ch. D. 1.

[25] See generally King, *Subrogation Under Contracts Insuring Property*, 30 TEXAS L. REV. 62, 71 (1951).

[26] White v. Gilman, 138 Cal. 375, 71 Pac. 436 (1903); King v. State Mut. Fire Ins. Co., 61 Mass. 1 (1851); Alexandra Restaurant v. New Hampshire Ins. Co., 297 N.Y. 858, 79 N.E.2d 268 (1948).

from treating the contracts as if they were one; they are separate and distinct and should be treated as such.

An indirect argument which might be made in favor of allowing the vendor the benefits of both of his contracts is that it is the only one of the three available solutions which does not give the prevailing party a windfall. When the vendor is allowed to recover the consideration for which he bargained, he is getting just what he contracted and paid for and not a windfall. Whereas, a decision in favor of the insurer or the purchaser would definitely be a windfall to one or the other.

The obvious argument against the vendor's recovery is that it constitutes a double recovery which is obnoxious to public policy.[27] The argument is that no one should be placed in a position to profit by a loss because he might be tempted to cause the loss or be negligent in preventing it.[28] In other words, it is contended that allowing the vendor to recover under both his contracts places the vendor in a position whereby he might profit from causing or failing to prevent destruction of the property. While such a principle may be sound public policy in the broad view, it is still to be decided whether or not such a policy outweighs a desire for sanctity of contract relations. One must measure the merits of the public policy in terms of the possible harm that such a policy may wreak upon contract stability. Specifically the question may be posed: which is more desirable, to place the insured-vendor in a position to profit by a loss and violate an established public policy or to deny the insured-vendor the benefit of a valid contract in deference to such a policy? Neither solution is without objection, nor without merit.

It is submitted, however, that the proper solution should be made to depend upon the facts and circumstances of each individual case and not upon an arbitrary ruling, applicable to all situations. At any rate there would seem to be even less reason for such a public policy when one considers that the vendor here is not even in possession or control of the insured property and therefore would have less opportunity to cause or fail to prevent loss of the property than the typical insured who has possession of the insured property. Furthermore, the social presumption should be that one is not going to wrongfully destroy property, and society has laws and punitive processes for those who by their conduct rebut this presumption. The point is that the deterrent influence of penal laws should be used to control an insured's conduct, and not necessarily a policy which is itself not without objection.

In any event the fact remains that if he is allowed to recover from both the insurance company and the purchaser, the vendor is getting

[27] Note, 28 COLUM. L. REV. 202, 203, 204 (1928); Note, 72 HARV. L. REV. 1380, 1381 (1959).

[28] See Kernochan v. New York Bowery Fire Ins. Co., 17 N.Y. 428 (1858).

double indemnification. The argument is that all the vendor is entitled to is recovery of the balance of the purchase price from the purchaser or indemnification from the insurance company to the extent of the unpaid balance of the purchase price, but not both.

The whole enigma may be readily summarized. The vendor's insurable interest is limited to the amount of the unpaid purchase price owed by the purchaser; that is, to the amount of the loss that the vendor actually suffers. If the vendor is allowed to recover the balance of the purchase price from the purchaser, the vendor has in fact suffered no loss, and therefore, the insurance company does not have to pay. But this is a windfall to the insurer. On the other hand, if the vendor is not allowed to recover the balance of the purchase price from the purchaser, because the vendor has already been indemnified by the insurer, and the purchaser is given the benefit of the insurance money, this is a windfall to the purchaser. Subrogating the insurer to the vendor's rights against the purchaser for the unpaid balance is also a windfall to the insurer. Finally, the only way to prevent a windfall to either the purchaser or the insurer is to breach public policy by allowing the vendor double indemnification. The court must decide which is the least repugnant result in terms of the fact situation before it. It is submitted that the equities in favor of the purchaser outweigh the contract rationale proposed for the vendor and that allowing the purchaser to prevail is the least objectionable result, but obviously none of these solutions is adequate.

### *Remedies — Contract Provisions, Legislation*

In view of the inherent inadequacies of the available solutions, two further remedies are suggested: One is that remedial legislation is required, and the second is that until such time as appropriate legislation is adopted, the parties should make specific provisions in their contracts that will assure the result which they feel can best meet their needs.

### *Contract Provisions*

The sales contract can provide that the purchaser is entitled to the vendor's insurance only if the purchaser pays the insurance in the meantime,[29] or the vendor and the insurer can agree to an assignment or endorsement of the insurance policy to the purchaser, and the purchaser can be made to assume payment of the premiums. Possibly the sales contract could require the purchaser to insure his own interest and include a reasonable liquidated damages provision, payable to the vendor, if the purchaser should fail to insure. The sales agreement could provide that the risk of loss is upon the vendor notwithstanding the fact that the purchaser is in possession, in which case the purchaser

[29] See Raplee v. Piper, 3 N.Y.2d 179, 143 N.E.2d 919, 164 N.Y.S.2d 732 (1957) (purchaser allowed benefit of vendor's insurance because purchaser had paid the premiums).

would not be entitled to the proceeds of the vendor's insurance. Any other such provision the parties may desire could be incorporated into the contract.

*Remedial Legislation*

One or two types of remedial legislation may help solve the problem. The English solution has been to adopt a statute which conclusively presumes that the vendor's insurance is held for the benefit of the purchaser.[30] Such legislation is advantageous in that it proscribes all solutions other than that one which would give the purchaser the benefit of the vendor's insurance and thereby establishes with certainty the applicable law. If such a statute were adopted in California the parties to a conditional sales contract would be able to determine and provide for their insurable interests without having to anticipate or "second-guess" a court's ruling.

Such a statute should provide that insurance attaches to and runs with the land; that is, that an insurance policy on a piece of property would pass to a purchaser of that property. The assent of the insurance company to the transfer and an assumption of payment of premiums by the purchaser would be assumed. This would give effect to the wishes and impressions of the market place, put the insurance benefits and burdens on the purchaser, and reach a completely equitable result.

Without attempting to overcome the mechanical problems involved, there would seem to be merit in an additional type of legislation. The maximum amount of indemnification which one may recover under a fire insurance policy decreases in a direct proportion to the decrease of one's insurable interest therein, but the converse is not true. Thus, when a vendor enters into a conditional contract for the sale of his insured property, and receives payment for part of the purchase price from the purchaser, the vendor's insurable interest and the maximum amount he can recover on the policy decrease to the balance of the unpaid purchase price. However, the premiums which the vendor is required to pay remain the same, thereby giving the insurer a windfall. If the courts or legislature of California adopt the view that the purchaser is entitled to the proceeds of the vendor's insurance, it is suggested that the risks and burdens of premiums be redistributed in a fashion more equitable to the vendor, by making the vendor's premiums commensurate with his new interest. Similarly, if it is made the law of California that insurance passes with the conditional sale of the insured property, the purchaser's assumed premiums should be readjusted to match his interest.

Obviously, if a statute entitled the purchaser to the vendor's insurance without causing the insurance to run with the land, no vendor would retain his previous policy after entering into a conditional sales contract. If the vendor were to retain his policy, there would be no

[30] Law of Property Act, 1922, 12 & 13 Geo. 5, c. 16, § 105.

need for the purchaser to take out insurance. However, if a statute provided that insurance does run with the property in such situations, the purchaser would be adequately covered and be made to pay for such coverage, the vendor could reinsure as his interest appears with commensurate premiums, and an equitable distribution of burdens and benefits would be achieved.

### *Conclusion*

This comment has attempted to point out the defects in the three non-statutory solutions to the problem of who is entitled to the proceeds of the vendor's fire insurance policy after a conditional contract for the sale of the insured property. Each solution is objectionable in that it constitutes a windfall or double indemnification to the prevailing party. The anomaly lies in the difficulty of weighing the equitable arguments propounded for the purchaser against the contract analysis in favor of the vendor. It would seem that a windfall is less odious than a double recovery. While the purchaser's recovery may not be totally "just," it appears to be least inequitable. On these grounds, it is submitted that giving the benefits of the vendor's insurance to the purchaser is the least objectionable result, and until statutory reform is forthcoming is the result which the California courts should adopt.

The real solution lies in remedial legislation. It is recommended that legislation be adopted which would most effectively cause the fire insurance on property to pass to the conditional purchaser of that property, relieve the vendor from insuring for the purchaser and cause the purchaser to acquire and pay for his own insurance.

In the interim, it is suggested that prospective vendors, purchasers and insurers appreciate this quandary and make adequate provisions in their contracts to avoid what, in the absence of provisions or legislation to the contrary, seem to be inevitably inequitable results.