bility of an individual officer or employee, it is necessary to observe the status of both parties to the transaction and determine which statutes are then applicable. In most cases, the discussion under two or more topics within this Note will be relevant to any single conflicts situation.

Finally, as was noted in the introduction to this commentary, statutory law deals only with the more or less overt types of conflict of interest. In most cases, the more subtle forms elude prosecutors, and sometimes even the party injured by the conflict. Unless courts can begin to deal with these illusive situations under a general common law theory of public trust, or some other relevant doctrine yet to be espoused, many acts of official misconduct will go unchecked and perhaps even unnoticed.

MARY ANN OTTINGER HEGE

EQUITABLE CONVERSION AND ITS EFFECT ON RISK OF LOSS IN EXECUTORY CONTRACTS FOR THE SALE OF REAL PROPERTY

I. Introduction

The doctrine of equitable conversion is a fiction which effects a constructive transmutation in the nature of property. An early English case, *Fletcher v. Ashburner*,[1] defined equitable conversion as a change in the nature of property whereby, in specified instances, real estate is considered to be personal property, and personal property to be realty, and transmissible and descendible in that converted form. A contemporary commentator on the doctrine has explained it as the application of a fiction whereby "a magic conversion . . . [occurs]; and that which to the eye of 'outward seeming' appears to be *terra firma* is not *terra firma* at all; it is personalty."[2] The origin of the doctrine is unclear,[3] but cases utilizing it have been found in English law as early as 1678.[4] The doctrine of equitable conversion is designed to give effect to the maxim that equity regards as done that which ought to be done,[5] in the absence of an intervening act which ought to prevent performance.[6] Equitable conversion is not a fixed rule of law, but proceeds on a case-by-case basis seeking to accomplish that which was intended.[7]

The impact of the doctrine of equitable conversion on the contract and property law of Iowa has been great, and often the results of its implementation have been surprising. Because the doctrine is employed in a myriad of factual sets arising in the areas of wills, trusts, inheritance taxes and contracts for the conveyance of real property, this Note will examine one limited aspect of the application of equitable conversion: the risk of loss in a contract for the sale of real property.

II. General Aspects of Equitable Conversion

An analysis of the effect of equitable conversion on the risk of loss in an executory contract for the sale of realty must begin with a review of the general ramifications of the doctrine in the area of executory land contracts. This doctrine is a principle in equity and is guided by the rules of equity, not by the

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1 28 Eng. Rep. 1259 (1779).

2 Herman, *The Doctrine of Equitable Conversion: I, Conversion by Contract*, 12 De Paul L. Rev. 1, 7 (1962).

3 Davis, *The Origin of the Doctrine of Equitable Conversion by Contract*, 25 Ky. L.J. 58 (1936).

4 Bubb's Case, 22 Eng. Rep. 32 (1678).

5 Brickson v. Schwebach, 219 Iowa 1368, 261 N.W. 518 (1935); *In re* Estate of Jackson, 217 Iowa 1046, 252 N.W. 775 (1934); *In re* Estate of Dodge, 207 Iowa 374, 223 N.W. 106 (1929).

6 *In re* Estate of Dodge, 207 Iowa 374, 223 N.W. 106 (1929); Inghram v. Chandler, 179 Iowa 304, 161 N.W. 434 (1917).

7 *Id.*

rules of law.[8] In *Beaver v. Ross*[9] the Iowa supreme court succinctly defined equitable conversion as "a constructive alteration in the nature of property by which in equity real estate is regarded as personalty or personal estate as realty." The doctrine works an imaginary transmutation of property in only one of two ways: 1) real property is considered to be personalty; or 2) personal property is considered to be realty.[10] Equitable conversion cannot be employed to effect a change from one form of personalty into another.[11]

It is well settled in Iowa case law that an executory contract for the sale of real property works an equitable conversion,[12] provided the contract is enforceable.[13] The resulting property interest of the vendor is personalty and that of the vendee realty.[14] The purchaser has equitable title or the beneficial ownership of the real property.[15] The vendee is said to be "actually seized of the estate."[16] The vendee is deemed to be the owner of the realty subject to the payment of the purchase price, which he holds in trust for the vendor,[17] and the vendor is considered to be holding the legal title in trust for the vendee.[18] The vendor is regarded as retaining the legal title to the real property as a security interest for the payment of the purchase money.[19] His property interest in equity has been changed from realty into personalty, which is in the form of a right to receive payments due under a contract—a chose in action or intangible personal property.

The respective property interests of the vendor and purchaser after the conversion has been effected are creatures of fiction in equity, not in law.[20] The doctrine of equitable conversion does not affect the legal title to the real property sold on contract. In the eyes of the law the vendor and purchaser have respective duties and rights which arise from the contract, and, while the contract is yet executory, any remedies sought by either party must flow from the contract and corresponding contract law. The purchaser at that time has no legal interest in the real property.

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[8] Moore v. Kernachan, 133 Va. 206, 112 S.E. 632 (1922).

[9] 140 Iowa 154, 157-58, 118 N.W. 287, 289 (1908).

[10] *In re* Estate of Dodge, 207 Iowa 374, 223 N.W. 106 (1929).

[11] *Id.* It is not necessary, however, that money be the medium of exchange for the real property. An equitable conversion will be effected, for example, if personalty is exchanged for realty or realty for personalty. Bernhard v. Henning, 134 Iowa 603, 112 N.W. 86 (1907).

[12] Wood v. Schwartz, 212 Iowa 462, 236 N.W. 491 (1931); Johnson v. Smith, 210 Iowa 591, 231 N.W. 470 (1930); Larson v. Metcalf, 201 Iowa 1208, 207 N.W. 382 (1926). *See generally* Annot., 45 A.L.R. 344 (1926).

[13] Bernhard v. Henning, 134 Iowa 603, 112 N.W. 86 (1907).

[14] Briley v. Madrid Improvement Co., 255 Iowa 388, 122 N.W.2d 824 (1963); *In re* Estate of Baker, 247 Iowa 1380, 78 N.W.2d 863 (1956); Inghram v. Chandler, 179 Iowa 304, 161 N.W. 434 (1917). *See generally* 27 Am. Jur. 2d *Equitable Conversion* § 11 (1966).

[15] Wolfe v. Iowa Ry. & Light Co., 173 Iowa 277, 155 N.W. 324 (1915).

[16] Briley v. Madrid Improvement Co., 255 Iowa 388, 394, 122 N.W.2d 824, 827 (1963).

[17] Inghram v. Chandler, 179 Iowa 304, 161 N.W. 434 (1917).

[18] Larson v. Metcalf, 201 Iowa 1208, 207 N.W. 382 (1926).

[19] Wood v. Schwartz, 212 Iowa 462, 236 N.W. 491 (1931).

[20] Moore v. Kernachan, 133 Va. 206, 112 S.E. 632 (1922).

The purpose of the doctrine of equitable conversion is to give effect to the intent of the vendor and purchaser as it is manifested in the contract for sale,[21] and to treat that contract as if it had in fact been precisely performed, although yet executory.[22] However, problems arise when one attempts to fix the point in time at which the conversion actually occurs and from when it is to be effective. As a general rule, the time of the conversion is that of the execution of the contract for sale.[23] However, this rule must be tempered by the equity maxim at the base of the doctrine. Therefore, if a time for the conversion is specified in the contract, that time will control.[24] In a similar manner, if the contract is predicated upon a condition precedent, the time of the effectuation of the conversion will be that of the happening of the contingency.[25]

Another exception to the general rule is the option contract. The granting of an option to buy is not a sale, nor is it in fact an agreement for the sale of realty.[26] "An 'option' is not an actual or existing contract, but merely a right reserved in a subsisting agreement."[27] In *Milwaukee Mechanics' Insurance Co. v. B.S. Shea & Son*[28] the court stated: "An option is nothing more than a continuing offer to sell. . . . It is only when there has been an acceptance of a proposal to sell that the vendee becomes in any sense the equitable owner of the subject matter of the option." Thus, equitable conversion will occur at the time the optionee exercises the option, inasmuch as until that time the rights of the vendor and purchaser are contingent and mere expectancies.[29]

Roscoe Pound stated that "[w]hen we speak of conversion we are not describing a condition of the property for all purposes with respect to everybody but are giving a name to a situation resulting from the application of equitable doctrines to a state of facts between certain parties."[30] The conversion's effects, however, are not limited to the contracting parties. Consider a situation in which *A* (vendor) enters into a contract with *B* (purchaser) for the sale of real property on June 1. By the terms of the contract *B* takes possession immediately and is to deliver the purchase money to *A* on June 15, at which time *A* is to deliver the deed. On June 1 the doctrine of equitable conversion effects a change in the respective property interests of the parties. However, what are those interests if either *A* or *B* dies on June 3? The death of the vendee does not terminate the executory contract.[31] The interest of the purchaser passes to his heirs as an equitable interest in realty.[32] A judgment

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21 *In re* Estate of Baker, 247 Iowa 1380, 78 N.W.2d 863 (1956).
22 Gunton v. Carroll, 101 U.S. 426 (1879).
23 Bernhard v. Henning, 134 Iowa 603, 112 N.W. 86 (1907).
24 Baker v. Commissioner, 253 Mass. 130, 148 N.E. 593 (1925).
25 Rockland-Rockport Lime Co. v. Leary, 203 N.Y. 496, 97 N.E. 43 (1911).
26 Hopwood v. McCausland, 120 Iowa 218, 94 N.W. 469 (1903).
27 Rampton v. Dobson, 156 Iowa 315, 321, 136 N.W. 682, 684 (1912).
28 123 F. 9, 11 (1903).
29 *See generally* Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369 (1913).
30 Pound, *The Progress of Law, 1918-1919*, 33 HARV. L. REV. 813, 831 (1920).
31 Colson v. Estate of Johnson, 111 Neb. 773, 197 N.W. 674 (1924).
32 Wood v. Schwartz, 212 Iowa 462, 236 N.W. 491 (1931). *See generally* Stone,

against the purchaser would attach as a lien on the equitable estate in land.[33] The effect of the death of the vendor is best illustrated by *Inghram v. Chandler*,[34] an Iowa case involving the death of a vendor who had executed a lease with an option to purchase. *H* (vendor) executed his will in 1904, by which he left all his personal property and a life estate in his real property to *W* (his wife). He directed that at the termination of the life estate the real property would pass to his children. Two years after executing his will *H* leased his realty to *B* (purchaser) for five years with an option to buy during that time. One month later *H* died, and his will subsequently was probated. One or two months prior to the termination of his lease, *B* exercised the option to purchase. He paid the purchase money to *W* and received the title to the property. The administrator of *H*'s estate then brought an action against the administrator of *W*'s estate for recovery of the purchase money. It was the contention of *W*'s administrator that there was an equitable conversion at the time *B* exercised his option to buy and that this conversion related back to the date of the execution of the lease. If this were the case, since the lease antedated the death of *H*, his interest in the real property at the time of his death was in the form of personalty and would be distributed to *W*. The court stated that if the equitable conversion related back to the execution date of the lease, the vendor's interest would be personal property and would pass to the vendor's administrator and thus to *W*. The court held, however, that the time of the equitable conversion was that of the exercise of the option and did not relate back to the execution of the lease. Therefore, the real property passed to the children of *H* as such, inasmuch as the conversion occurred after the death of *H*, and they were entitled to the proceeds of the sale of that property.

III. Risk of Loss

If *A* (vendor) executes a contract for the sale of real property on June 1 by which *B* (purchaser) is to receive the deed and deliver the purchase money to *A* on June 15, on whom does the risk of loss fall if the subject matter of the sale is destroyed by an earthquake, flood, or fire, or is taken by eminent domain prior to June 15? If it were up to the law courts, the risk would fall on the vendor.[35] In equity, however, the result is not always the same. Generally, there are three different approaches taken in the United States:[36] 1) the risk

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Equitable Conversion by Contract, 13 Colum. L. Rev. 369 (1913); 27 Am. Jur. 2d *Equitable Conversion* § 11 (1966).

[33] *In re* Estate of Miller, 142 Iowa 563, 566, 119 N.W. 977, 978 (1909).

[34] 179 Iowa 304, 161 N.W. 434 (1917).

[35] C. Langdell, A Brief Survey of Equity Jurisdiction 58 (2d ed. 1908).

[36] Generally the authorities list five different theories which are used to allocate the risk of loss in an executory contract for the sale of real property. The theories usually discussed are:

1) The risk of loss is on the purchaser from the moment of the execution of the enforceable contract.

2) The risk of loss is on the vendor until the legal title is conveyed by him.

3) The risk of loss is on the purchaser from the time agreed upon by the vendor and purchaser for the conveyance of the legal title.

of loss is on the purchaser once the contract is executed; 2) the risk of loss is borne by the vendor until legal title is conveyed; and 3) the risk of loss is on the purchaser only if either legal title or possession has been conveyed to him. The remainder of this Note will analyze the rule followed in Iowa and a rule set forth by the Uniform Vendors and Purchasers Risk Act.

A. *The Rule in Iowa*

Iowa follows the widely held view that the risk of loss must be borne by the purchaser from the moment the contract for sale has been executed when the loss is the result of eminent domain, fire, flood or similar natural occurrence.[37] The origin of this doctrine was the English case *Paine v. Meller*.[38] In that case the vendor and purchaser executed a contract for the sale of realty on September 1. By the terms of the contract, the consummation of the agreement was to occur on September 29. In the interim, however, defects in the vendor's title were found whereby the parties renegotiated the amount of the purchase price. By December 17 the parties had concluded their negotiations and were ready to exchange the purchase money and deeds. However, before actually completing the exchange, the houses on the realty were destroyed by fire. The vendor then sought specific performance of the contract in the equity court. The court stated that if the purchaser had accepted title prior to the loss, then the vendor would be entitled to specific performance. Furthermore, once the conveyance was made, the purchaser would receive all rents and profits from September 29. The issue was then submitted to a master for a determination as to the acceptance of title by the purchaser. The court stated the rationale in this often cited statement: "For if the party by the contract has become in equity the owner of the premises, they are his for all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be devised as his; they may be assets; and they would descend to his heirs."[39]

The courts holding the purchaser liable for any natural loss occurring to the property after the contract for sale has been executed, base this result on the doctrine of equitable conversion. At the time of the execution of the contract for sale, the vendor's interest is personal property; he has no further interests in the property as realty. On the other hand, the purchaser is the beneficial owner of an interest in real property. This interest entitles the pur-

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4) The risk of loss is on the party in possession.
5) The risk of loss is on the vendor unless a contrary intent is expressed by the parties.

See generally Hermann, *The Doctrine of Equitable Conversion: I, Conversion by Contract*, 12 DE PAUL L. REV. 1, 10-14 (1962); Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963).

[37] *In re* Estate of Miller, 142 Iowa 563, 119 N.W. 977 (1909); Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 32 N.W. 514 (1887). *See generally* Annot., 27 A.L.R.2d 444 (1953).

[38] 31 Eng. Rep. 1088 (1801).

[39] *Id.* at 1089.

chaser to the rents, profits and any appreciation in the value of the realty. "If the vendee is the owner in equity so as to receive all the increment, he then should be considered owner so as to accept the burden of any loss not due to the vendor's fault."[40] This reasoning has been followed by the Iowa courts in *O'Brien v. Paulsen.*[41] The vendor and purchaser entered into a contract for the sale of real property. Subsequent to the execution of the contract, but prior to the date agreed upon for the delivery of the deed and possession and the purchase money, several of the structures appurtenant to the realty (barns, cattle sheds, and corncribs) were destroyed by lightning. At the time prescribed by the contract, the vendor delivered possession and the deed which were accepted by the purchaser. The purchaser, however, refused to complete his part of the agreement, claiming that the vendor was liable to him for the value of the destroyed buildings. The Iowa supreme court held that the vendee was the equitable owner of the real property from the date of the contract's execution and as the owner must bear any loss to the realty. The fact of possession was held to be immaterial to the issue of risk of loss. The court cited *Paine* as authority for the decision. The court stated that the doctrine would apply to contracts for the sale of real property once the conversion had been effected: "[T]he contract of sale shall have no conditions or contingencies therein that would render it unenforceable."[42]

In some instances the risk of loss will fall on the vendor even though the equitable title has passed to the purchaser. In *Rhomberg v. Zapf*[43] the parties executed a contract for the sale of real property with a covenant which stated that "[a]ll buildings to be delivered to said . . . [purchaser] in as good conditions as they are in at the date of this contract, usual wear excepted." Prior to the consummation of the agreement the premises were destroyed by fire. The court held that notwithstanding the equitable title in the purchaser, the covenant must be given effect and the loss borne by the vendor, since performance on his part was rendered impossible.

A problem closely associated with risk of loss is the disposition of insurance proceeds from policies covering destroyed property sold on contract. In *Brady v. Welsh*[44] the vendor and purchaser entered into a contract for the sale of realty in June of 1919. The deed and possession were to be delivered in March of 1920. The vendor held an insurance policy on the house appurtenant to the realty and collected the proceeds of the policy when the house was destroyed by fire in November of 1919. On the date fixed by the contract, the purchaser paid the purchase price set by the contract and requested the proceeds from the insurance policy. The vendor denied this request, claiming that the policy was a personal contract between himself and the insurance

[40] 5 J. POMEROY, EQUITY JURISPRUDENCE § 2282, at 5069 (2d ed. 1919).
[41] 192 Iowa 1351, 186 N.W. 440 (1922).
[42] *Id.* at 1354, 186 N.W. at 442.
[43] 201 Iowa 928, 208 N.W. 276 (1926).
[44] 200 Iowa 44, 204 N.W. 235 (1925).

company. The court held that since the purchase money had been paid the vendor merely held the insurance proceeds as trustee for the purchaser. The court reasoned that as a result of the fire the loss incurred by the vendor was a depreciation in his security interest by the amount of the loss. Since the purchaser paid the full contract price, the vendor profited from the transaction to the extent of the insurance money. This rationale of unjust enrichment has been applied to cases where the purchaser exercised an option to purchase real property after the loss by fire of appurtenant structures.[45] Many of the problems arising in the area of insurance are remedied by careful construction of the contract for the sale of the realty. An example of contract draftsmanship is found in the Iowa State Bar Association forms for conveying real property.[46] These forms contain clauses affixing the burden of risk of loss, the obligation of the parties to purchase insurance, and the distribution of the proceeds in the event of a loss.[47]

B. *Uniform Vendors and Purchasers Risk Act*

The Uniform Vendors and Purchasers Risk Act states in essence that the risk of loss in an executory contract for the sale of real property falls on the vendor until such time that either legal title or possession has been conveyed to the purchaser.[48] This Act is a combination of two theories on the allocation

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[45] Gard v. Razanskas, 248 Iowa 1333, 85 N.W.2d 612 (1957).

[46] Iowa State Bar Ass'n, *Offer to Buy Real Estate and Acceptance* Form 26.5; Iowa State Bar Ass'n, *Real Estate Contract—Installments* Form 21; Iowa State Bar Ass'n, *Real Estate Contract (Short Form)* Form 21.2.

[47] As an example, Iowa State Bar Ass'n, *Offer to Buy Real Estate and Acceptance* Form 26.5 provides:

> 4. Insurance. Sellers shall maintain $______ of fire, windstorm and extended coverage insurance until possession is given and shall forthwith secure endorsements on the policies in such amount making loss payable to the parties as their interests may appear. Risk of loss from such hazards is on Buyers only when and as soon as (1) this offer is signed by both Sellers and Buyers and (2) upon performance of this paragraph by Sellers and (3) after a copy hereof is delivered to Buyers. . . .
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> 10. Status Quo Maintained. Said real estate (and any personal property contracted for) as of date of this offer, and in its present condition will be preserved and delivered intact at the time possession is given. Except, however, in case of loss or destruction of part or all of said premises from causes covered by the insurance thereon, Buyers agree to accept such insurance recovery (proceeds to be applied as the interests of the parties appear) in lieu of that part of the damaged or destroyed improvements and Sellers shall not be required to repair or replace same. Buyers shall thereupon complete the contract and accept the property. . . .

For a discussion of the Status Quo Maintained clause in this contract, *see* note 57, *infra*.

[48] § 1 of the Act provides:

> Any contract hereafter made in this State for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise: (a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid; (b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not

of the burden of loss: 1) the Massachusetts rule which places the risk of loss on the vendor until such time that legal title is transferred to the purchaser, and 2) the rule advanced by Professor Williston[49] which places the loss on the party in possession, whether vendor or purchaser. The Act presents a reasonable solution to the problem of the allocation of the risk of loss, especially when compared to the Iowa rule. Each of the component theories which comprise the Act will be presented as separate theories, and individually compared to the Iowa rule.

One of the older Massachusetts cases expounding the rule that the vendor must bear the risk of loss in an executory real property contract until such time that legal title is transferred is *Thompson v. Gould*.[50] In that case the vendor and purchaser entered into a contract for the sale of "a lot and a house." The purchaser paid the purchase price and the vendor had cleared his title of an outstanding mortgage. Prior to the delivery of the deed, however, the house was destroyed by fire. The purchaser then brought an indebitatis assumpsit action to recover his purchase money. The court held, *inter alia,* that there was a failure of consideration on the part of the vendor which necessitated the recovery by the purchaser of the purchase money. The court reasoned that the consequences of casualty to the real property in an executory contract should be no different than those in an executory contract for the sale of a chattel. When loss occurs to a chattel pending the consummation of the contract for sale, that loss is borne by the owner of the legal title—the vendor. The court further rejected the application of *Paine* for courts of equity, pointing out that prior to *Paine* the equity courts were in harmony with the decisions handed down in the law courts. Thus the Massachusetts court repudiated the doctrine of equitable conversion as the standard to be used in determining the risk of loss. Following this rationale, the Massachusetts court in a later case stated:

> [When] the conveyance is to be made of the whole estate, including both lands and buildings, for an entire price, and the value of the buildings constitutes a large part of the total value of the estate, and the terms of the agreement show that they constituted an important part of the subject matter of the contract . . . the contract is to be construed as subject to the implied condition that it no longer shall be binding if, before the time for the conveyance to be made, the buildings are destroyed by fire.[51]

The court concluded that in such cases the contract would no longer be binding; the vendor would bear the risk of loss; and the purchaser could recover any purchase money paid.

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thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid.

49 Williston, *The Risk of Loss After an Executory Contract of Sale in the Common Law*, 9 HARV. L. REV. 106 (1895).

50 37 Mass. (20 Pick.) 134 (1838).

51 Hawkes v. Kehoe, 193 Mass. 419, 424, 79 N.E. 766, 767 (1907).

In *Vancouver National Bank v. Law Union & Crown Insurance Co.*[52] the essence of the Massachusetts rule was considered to be the intent of the contracting parties that the continued existence of that bargained for be a condition to performance. In comparing the rationale of this theory to that of the *Paine* rule, there appears to be one major difference in emphasis. Both theories seek to give effect to the intentions of the contracting parties, but application of each theory to a given set of facts yields opposing answers. In *Paine* and the cases following its theory, the intent of the parties is considered to be the transfer of ownership of the estate. The emphasis appears to be placed on land as such. The cases following the Massachusetts rule, however, seem to place the import on the improvements to the land when they make up a considerable amount of the value of the realty, especially when the improvement is a house.[53] In the contemporary contract for the sale of urban realty, the conveyance usually involves the sale of a house which is the major consideration in the bargaining. Upon the execution of a contract for sale there is a time interval during which all the necessary tasks preparatory to the final closing are accomplished. It is at the time of the closing that the title and possession of the property are usually exchanged, not at the time of the execution of the contract. Therefore, the concomitants of ownership—possession and use—which the doctrine of equitable conversion assumes to be present in the beneficial owner from the time of the contract's execution, are missing in the contemporary land sale until the time of the closing. Much of the argument supporting equitable conversion points to the ultimate fairness achieved through use of the doctrine in that he who reaps the benefits of use and possession must also suffer any loss. Today the purchaser is without the benefits of beneficial ownership but yet stands to lose that for which he bargained.

The Massachusetts rule places the loss upon the vendor until legal title is conveyed, but this is only a partial solution to the problem with the Iowa rule. It is possible under the Massachusetts rule that the vendor may be harmed. Consider a situation where the vendor enters into an executory contract and the purchaser takes immediate possession. During the time period between the execution of that contract and the transfer of the legal title, the purchaser enjoys the entire beneficial ownership of the land. If the house is destroyed prior to the conveyance of the deed, the vendor would suffer the loss not having had the benefits of possession, use and appreciation in value. This situation is remedied by placing the burden of loss on the party in possession.

The rule that the risk of loss in an executory contract for the sale of real property follows possession is well set forth in *Appleton Electric Co. v. Rogers*.[54] In that case the vendor and purchaser executed a contract for the sale of real property and the buildings thereon. By the terms of the contract the

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52 153 F. 440 (9th Cir. 1907).
53 Hawkes v. Kehoe, 193 Mass. 419, 424-25, 79 N.E. 766, 767 (1907).
54 200 Wis. 331, 228 N.W. 505 (1930).

vendor remained in possession until such time as the balance of the purchase price was paid. During that time the buildings were damaged by fire. The court held, *inter alia,* that the burden of loss fell on the vendor inasmuch as he was in possession. Simpson[55] explained the rationale for this view:

> The theory behind this solution of the problem is that the purchaser in possession is substantial owner of the property and should bear the burdens of ownership, while the purchaser out of possession is not substantial owner; this argument is supported by the decisions which make the right to rents and profits and the liability for taxes and other outgoings depend upon possession. Moreover, the practical argument is made that placing the burden of loss on the party in possession will put pressure on him to protect the property.

The Connecticut supreme court in *Anderson v. Yaworski*[56] held that in the case of a contract for the sale of realty with buildings thereon, where neither possession nor title had been conveyed, the risk of loss remained with the vendor. They rejected the doctrine of equitable vesting of beneficial ownership in the purchaser from the time of the contract's execution. The court, in essence, stated that there could be no beneficial ownership if there were in fact no benefits of ownership. It also denied the applicability of the basic assumption that equity does that which ought to be done when the doctrine of equitable conversion is employed to determine the risk of loss. When seeking to accomplish the parties' intent, that intent must be ascertained and analyzed from their agreement. In the case where the parties enter into an agreement for the sale of real property with the consummation of that contract to take place at a future date, the intent of the parties is to effect a conversion at that later date, not at the time of the contract's execution. At that future date the parties intend the vendor's property interest to become personalty and the purchaser's realty, unless a contrary intent is expressed. This desire to give effect to the intentions of the parties is the goal of both the *Paine* rule and the Uniform Vendors and Purchasers Risk Act. It appears that the latter best accomplishes that goal.

IV. Conclusion

In Iowa the purchaser bears the risk of loss to the property pending consummation of the contract. The doctrine of equitable conversion is invoked to reach this conclusion. The intentions of the parties, as manifested in their integrated contract for sale, are sought to be accomplished. But is this intent actually achieved through equitable conversion? One must only consider the real intent of the parties in a contemporary urban contract for the sale of real property to appreciate the inequities of the Iowa rule. The vendee's primary objective is the purchase of a house; the land on which it is located is an incidental consideration. It is true that in purchasing a house one evaluates the

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55 Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II,* 44 Yale L.J. 754, 756-57 (1935).

56 120 Conn. 390, 181 A. 205 (1935).

location of the property, the number of trees, shrubs and general landscaping, the subsoil base, drainage and other similar aspects which are primarily concerned with land as such. Yet these considerations are incidental to the real object of the purchase—the house. The vendor's intent is simply to sell that house at the best possible price, hopefully with an increment of profit. It can be implied that both parties contemplate the continued existence of that for which they bargained. What then happens to their intentions when the house is destroyed by fire pending the closing of the sale? Since the purchaser must bear the loss in Iowa, he has the deed to a piece of real property, the charred ruins of a house, and a handfull of insurance policy proceeds. He has not, however, received that which he intended. The vendor has accomplished his purpose; the loss of the house is of no consequence to him.

The basis for the Iowa rule is understandable and logical when analyzed from an historical perspective. At early common law the estate in the land was the commodity of the greatest importance in a real estate conveyance. The "closing" of the transaction was signified by the vendor picking up a clump of dirt or a twig from his land and handing it to the purchaser. He did not hand the purchaser the key to the front door of the house situated on the land. Any structures appurtenant to the land were incidental to the conveyance; their effect on the conveyance was *de minimus*. Any destruction to the buildings could be easily remedied. The burden placed upon the purchaser by the doctrine of equitable conversion would not be great because the purchaser's intent was achieved. He obtained that for which he bargained. The emphasis in contemporary contracts for the sale of real property has shifted, and so should the law affecting them.

Until such time as the doctrine of equitable conversion in the area of risk of loss is respectfully laid to rest in Iowa, the purchaser of real property would be well advised to include in the contract for sale a clause conditioning performance on the requirement that the property and appurtenances be in as good condition at the time of the closing as they were at the time of the execution of the contract.[57]

MICHAEL J. MOON

[57] The Iowa State Bar Ass'n Form 26.5 has a Status Quo Maintained provision which requires substantially the same conditions. However, the provision further provides that the buyer shall accept insurance money in lieu of property damaged or destroyed, and accept the property in that damaged condition. This form then should be used with caution, keeping in mind the actual intent of the contracting parties, especially that of the buyer in the case of the purchase of a house.