



1940

# Vendor and Purchaser--Ejectment by the Vendor

B. H. Henard  
*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Property Law and Real Estate Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

### Recommended Citation

Henard, B. H. (1940) "Vendor and Purchaser--Ejectment by the Vendor," *Kentucky Law Journal*: Vol. 28 : Iss. 2 , Article 15.  
Available at: <https://uknowledge.uky.edu/klj/vol28/iss2/15>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

general welfare." But as has been pointed out, although the violation of a statute necessarily affects the public welfare, equity will not ordinarily enjoin such violation unless it is a purpresture, irreparable injury, or nuisance.<sup>25</sup>

The court goes far in the instant case in extending the jurisdiction of equity by allowing the injunction of an unlicensed small loan business. And following the approach that wherever the general welfare is endangered by criminal acts, or criminal procedure is inadequate to prevent crime, equity may relieve by injunction, can lead only to the result that equity could enforce the criminal law as such,<sup>26</sup> in disregard of the constitutional rights guaranteed a defendant in a criminal prosecution.<sup>27</sup>

ALAN ROTH VOGELER.

#### VENDOR AND PURCHASER—EJECTMENT BY THE VENDOR.

Plaintiff contracted to sell a house and lot to defendant for the sum of \$2,000, of which \$100 was then paid, the remainder to be paid in monthly installments of \$25. Defendant was placed in possession, agreeing that if he defaulted in his installments, or if he failed to keep up the insurance, the vendor should have the right to enter and take possession, and that any payments made under the contract should remain in the vendor as liquidated damages and rent for the use of the property. Defendant paid only two of the monthly installments and defaulted in the payment of the insurance premiums, whereupon the vendor brought an action of ejectment. The court held for the plaintiff because the vendee's payments did not amount to such a sum that he could be deemed to have acquired a "substantial equitable title" in the land. *Maschinot v. Moore*, 278 Ky. 36, 120 S.W. (2d) 750 (1938).

The courts in most jurisdictions will entertain an action of ejectment when the vendee has defaulted in the payment of his contract installments.<sup>2</sup> The action is essentially a possessory one,<sup>2</sup> and its

<sup>25</sup> *Supra*, note 3.

<sup>26</sup> Courts saying that the basis of equity jurisdiction in this class of cases is the inadequate remedy at law include Illinois, in *People v. Clark*, 268 Ill. 156, 108 N.E. 994 (1915), and Kansas, in *State v. McMahon*, *supra*, note 2. See, also, 2 Story, *Equity Juris.* (11th ed. 1873), sec. 924. The Kentucky court also follows that trend of reasoning in the Payne case. But see Note, (1931) 20 Ky. L.J. 340; Note, (1927) 75 Pa. L.R. 73; *Dean v. State*, 151 Ga. 371, 106 S.E. 792 (1921).

<sup>27</sup> *People v. Seccombe*, 103 Cal. App. 306, 284 Pac. 725 (1930); *State v. Saunders*, 66 N.H. 39, 25 Atl. 588 (1889); *State v. Diamint*, 73 N.J.L. 131, 62 Atl. 286 (1905); *State v. Martin*, 77 N.J.L. 652, 73 Atl. 548 (1909); *Heddon v. Hand*, 90 N.J. Eq. 583, 107 Atl. 285 (1919); Note, (1926) 6 Boston U.L.R. 123; and Note, (1920) 20 Col. L.R. 605.

<sup>2</sup> *Burnett v. Caldwell*, 76 U.S. (9 Wall.) 290, 19 L. Ed. 712 (1869); *Goode v. Temple*, 221 Ala. 588, 130 So. 202 (1930); *Lewis v. Rouse*, 29 Ariz. 156, 240 Pac. 275 (1925); *Empire Inv. Co. v. Mort*, 169 Cal. 732, 147 Pac. 960 (1915); *Roller v. Smith*, 76 Colo. 371, 231 Pac. 656 (1925); *Drollinger v. Carson*, 97 Kan. 502, 155 Pac. 923 (1916); *Balesh v. Alcott*, 257 Mich. 352, 241 N.W. 216 (1932); *Rose v. Loyd*, 98 Mo. 253, 11 S.W. 622 (1889); *Plet v. Wilson*, 134 N.Y. 339, 31 N.E. 336 (1892); *Credle v.*

true purpose is to obtain the actual, physical possession of certain real property.<sup>3</sup> That this conception of ejectment is followed in the majority of states is evidenced by the fact that in allowing the action to the vendor, no attention is given to the amount already paid by the vendee.<sup>4</sup> In such a case the success of that action is determinative of nothing but the bare right of possession, and the other rights of the parties are not thereby adjudicated.<sup>5</sup>

Kentucky is distinctly in the minority in its prior holdings on the question and has hitherto not allowed the action in such a case.<sup>6</sup> In

Ayers, 126 N.C. 11, 35 S.E. 128 (1900); Eldridge v. Vance, 128 Okla. 46, 261 Pac. 168 (1927); Malmstrom v. Second East Apt. Co., 74 Utah 206, 278 Pac. 811 (1929); Reynolds v. Bean, 91 Vt. 247, 99 A+1. 1013 (1917); Britt v. Bauman, 199 Wis. 514, 226 N.W. 955 (1929).

<sup>2</sup>Dickerson v. Colgrove, 100 U.S. 578, 25 L. Ed. 618 (1879); Peters v. Allison, 40 Ky. (1 B. Mon.) 232, 36 Am. Dec. 574 (1841); De Bergere v. Chaves, 14 N.M. 352, 93 Pac. 762 (1908), *aff'd.*, 231 U.S. 482, 58 L. Ed. 325, 34 S.Ct. 144 (1913).

<sup>3</sup>Cincinnati v. White, 31 U.S. (6 Pet.) 431, 8 L. Ed. 452 (1832).

<sup>4</sup>Burnett v. Caldwell, 76 U.S. (9 Wall.) 290, 19 L. Ed. 712 (1869) (\$4,000 out of \$18,000 paid, and court stated that the fact that the vendee had paid a large amount was no defense); Lewis v. Rouse, 29 Ariz. 156, 240 Pac. 275 (1925) (\$1,500 out of \$7,000 paid); Gervaise v. Brookings, 156 Cal. 103, 103 Pac. 329 (1909) (half of the contract price was paid, and in addition the land had doubled in value. Court states that the amount paid by the vendee is immaterial); Hincksman v. Delacour, 47 Cal. App. 416, 190 Pac. 932 (1920) (\$7,000 out of \$18,000 paid); Curry v. Curry, 213 Mich. 309, 182 N.W. 98 (1921) (vendee had paid one-half of contract price); Wright v. Lewis, 323 Mo. 404, 19 S.W. (2d) 287 (1929) (about one-third paid); Hill v. Buford, 111 Okla. 148, 239 Pac. 163 (1925) (\$900 out of \$1,500 paid); Malmberg v. Baugh, 62 Utah 331, 218 Pac. 975 (1923) (\$4,450 out of \$10,000 paid); Malmstrom v. Second East Apt. Co., 74 Utah 206, 278 Pac. 811 (1929) (\$7,600 out of \$35,000 paid).

<sup>5</sup>The right of possession is determined by the contract and is independent of other rights accruing by reason of the vendor-purchaser relationship. In Burnett v. Caldwell, 76 U.S. 290 (1869), after ejectment of the vendee the court said, "Whatever relief the plaintiff in error may be entitled to must be sought in equity. He can have none at law." In Hansborough v. Peck, 72 U.S. (5 Wall.) 497, 506, 18 L. Ed. 520 (1866), in speaking of the vendor's remedies in case of breach by the purchaser, *assumpsit*, equitable foreclosure, and ejectment, the court said of the latter, "In that case, the purchaser by going into a court of equity within a reasonable time and offering payment of the purchase-money, together with costs, is entitled to a performance of the contract". Accord: Taylor v. Longworth, 39 U.S. (14 Pet.) 172, 10 L. Ed. 405 (1840). Where the purchaser has taken possession under the contract "his right of possession is lost if he is in default, refusing to perform the contract or has delayed performance so long that his right to compel specific performance no longer exists." Walsh, *A Treatise on Equity* (1930) 434 (and citations). For a discussion of the rights of a vendee after default, see Corbin, *Right of Defaulting Vendee to Restitution of Installments Paid* (1931) 40 Yale L.J. 1013.

<sup>6</sup>The Kentucky court first denied ejectment to the vendor in Morton v. Dickson, 90 Ky. 572, 12 Ky. L. Rep. 507, 14 S.W. 905 (1890). Since that case and prior to the present decision the question has arisen only twice, in the cases of Doty v. Jameson, 29 Ky. L. Rep. 507, 93 S.W. 638 (1906) and Day v. Miles, 204 Ky. 711, 265 S.W. 282 (1924), and in

*Morton v. Dickson*,<sup>7</sup> the court said (p. 579) that it would be inequitable to allow the vendor the right of entry without considering the "value of the land, the improvements made upon it, or any other equitable right of the vendee." Similarly, in the principal case<sup>8</sup> the court says (p. 39) with reference to those cases where ejectionment was not allowed:<sup>9</sup> "the sums paid were of such proportion as to constitute penalties if allowed to be ignored or retained by the vendor." Accordingly it would seem that the Kentucky court now looks upon an action of ejectionment brought by the vendor as involving something more than the mere right of possession. In the *Morton* case by denying ejectionment on the ground that there would be no consideration of equities which the vendee might have acquired, and in the instant case by referring to those cases in which the substantial amount paid by the purchaser would be forfeited if the action were allowed, the court apparently determines in an ejectionment action not only the right of possession, but in addition, all other rights of the parties and the equitable title to the lands as between them.<sup>10</sup>

The determination of the equities of the two parties in ejectionment is certainly a reasonable consequence of a rule which allows the action where the vendee has made no substantial payment on the purchase price, and refuses to allow it where by such payment a "substantial equitable title" has been acquired.

B. H. HENARD

#### CONSTITUTIONAL LAW—LICENSE TAXES—CLASSIFICATION.

The General Assembly imposed graduated license fees on retail merchants, the amount of tax to be paid by each owner being dependent upon the number of stores which he operated within the state.<sup>1</sup> Plain-

both of those cases the action was denied (in the *Doty* case with no mention being made of the equity already acquired by the vendee, and in the *Day* case, where the vendee had paid \$400 out of a contract price of \$600).

<sup>7</sup> 90 Ky. 572, 12 Ky. L. Rep. 507, 14 S.W. 905 (1890).

<sup>8</sup> The court in *Maschinot v. Moore* states that there is no disposition to depart from the rule against allowing ejectionment, but states (p. 38) that "it will be observed from an examination that in each case of its application [citing *Morton v. Dickson*, 90 Ky. 572, 12 Ky. L. Rep. 507, 14 S.W. 905 (1890), and *Day v. Miles*, 204 Ky. 711, 265 S.W. 282 (1924)], there had been definitely and surely, a transfer or conveyance to the vendee of a *substantial equitable title*—just short of the legal title."

<sup>9</sup> *Supra* note 6.

<sup>10</sup> More particularly, those rights adjudicated will include the right of the vendee to specific performance or to a rescission, or his right to be relieved from a forfeiture (i.e., his right to recover part of the payments if time is not of the essence, or where time is of the essence, but his delay is not so serious that equity will not relieve him of his default). Corbin, *supra* note 5.

<sup>1</sup> Kentucky Statutes 1936, Section 4302a-17:

"Every merchant establishing, operating or maintaining one or more stores, stands or places of business within this State, shall pay annually the license fee hereinafter prescribed for the privilege of open-