

# GOL § 5-1311(1)(a)(1): Remedy of Specific Performance with Abatement Available to Purchaser Notwithstanding Material Destruction of Property

Jeffrey S. Lichtman

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

## Recommended Citation

Lichtman, Jeffrey S. (1980) "GOL § 5-1311(1)(a)(1): Remedy of Specific Performance with Abatement Available to Purchaser Notwithstanding Material Destruction of Property," *St. John's Law Review*: Vol. 55 : No. 1 , Article 14.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol55/iss1/14>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [lasalar@stjohns.edu](mailto:lasalar@stjohns.edu).

## GENERAL OBLIGATIONS LAW

*GOL § 5-1311(1)(a)(1): Remedy of specific performance with abatement available to purchaser notwithstanding material destruction of property*

General Obligations Law section 5-1311 allocates to a vendor the risk of loss in an executory contract for the sale of real property.<sup>66</sup> Although the statute appears to single out rescission of the

---

<sup>66</sup> GOL § 5-1311 (1978) provides in pertinent part:

1. Any contract for the purchase and sale or exchange of realty shall be interpreted, unless the contract expressly provides otherwise, as including an agreement that the parties shall have the following rights and duties:

a. When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser: (1) if 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 . . . (2) if an immaterial part thereof is destroyed without fault of the purchaser or is taken by eminent domain, neither the vendor nor the purchaser is thereby deprived of the right to enforce the contract; but there shall be, to the extent of the destruction or taking, an abatement of the purchase price.

*Id.* Prior to 1963, the statute was designated as Real Property Law section 240-a, Uniform Vendor and Purchaser Risk Act, ch. 731, § 1, [1936] N.Y. Laws 1597 (repealed 1963) (current version at GOL § 5-1311 (1978)). The statute was enacted to alter the long-standing common-law rule of equitable conversion, which placed the risk of loss on the purchaser of real estate prior to transfer of title or possession. Acts, Recommendation and Study relating to Risk of Loss in Executory Contracts for the Sale of Real Property, [1936] N.Y. Law Rev. COMM'N REP. 755, 759-60 [hereinafter cited as 1936 Study]. See generally Sewell v. Underhill, 197 N.Y. 168, 90 N.E. 430 (1910); Persico v. Guernsey, 129 Misc. 190, 220 N.Y.S. 689 (Sup. Ct. Erie County), *aff'd*, 222 App. Div. 719, 225 N.Y.S. 890 (4th Dep't 1927); Pellegrino v. Giuliani, 118 Misc. 329, 193 N.Y.S. 258 (Sup. Ct. Kings County 1922).

The theory of equitable conversion was criticized by many commentators, largely on the ground that since the purchaser only became the beneficial owner of the realty after transfer of possession, not after contract, it would be unjust to earlier impose upon him the obligations or risks of ownership. See, e.g., S. Williston, Professor Williston's Notes on Risk of Loss After a Contract to Sell Land, reprinted in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-FOURTH ANNUAL CONFERENCE 204-05 (1934); Holland, *Risk of Loss and Insurance in Contracts for the Sale of Real Estate*, 5 TEX. L. REV. 249, 261-62 (1927); Vanneman, *Risk of Loss, In Equity, Between the Date of Contract to Sell Real Estate and Transfer of Title*, 8 MINN. L. REV. 127, 141-43 (1923); Note, *Legislation—Vendor and Purchaser—Uniform Risk of Loss Act*, 14 N.Y.U. L. REV. 240 (1937). In New York, the interplay of equitable conversion principles and prevailing insurance law, moreover, had created the anomaly wherein the purchaser, who generally did not insure the realty prior to taking title or possession, was denied recourse to the vendor's insurance in the event of damage to the property. See 1936 Study, *supra*, at 763. Recognizing the inequities of the common-law rule, the American Law Institute statutorily repudiated the equitable conversion doctrine in the Uniform Vendor and Purchaser Risk Act. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-FIFTH ANNUAL CONFERENCE, 138-39

contract as the purchaser's sole remedy when the property has been materially or totally destroyed,<sup>67</sup> a number of lower courts have indicated that the purchaser's remedies should include specific performance with an abatement of the purchase price.<sup>68</sup> Recently, in *Lucenti v. Cayuga Apartments, Inc.*,<sup>69</sup> the Court of Appeals gave its imprimatur to this view, holding that a purchaser of real property has a statutory right to specific performance with an abatement in cases of material destruction of the purchased property.<sup>70</sup>

In *Lucenti*, the plaintiff contracted to buy improved real estate from the defendant.<sup>71</sup> The contract was silent as to risk of loss.<sup>72</sup> Before closing, one of the two buildings on the property was "substantially destroyed" by fire.<sup>73</sup> Subsequently, the purchaser

(1935). In 1936, New York became the first of ten jurisdictions to adopt some form of the Uniform Vendor and Purchaser Risk Act. See UNIFORM VENDOR AND PURCHASER RISK ACT, table at 553 (master ed. 1980). Notably, however, the New York statute differs from the Uniform Act in that it explicitly provides for rescission in cases of material destruction and for specific performance with an abatement where there has been an immaterial destruction. Compare GOL § 5-1311(1)(a) (1978) with UNIFORM VENDOR AND PURCHASER RISK ACT § 1(a). The Uniform Act, on the other hand, applies only to cases involving material or total destruction, and with respect to such cases merely denies the vendor his common-law right to specific performance. UNIFORM VENDOR AND PURCHASER RISK ACT § 1.

<sup>67</sup> GOL § 5-1311(1)(a)(1) (1978). No criteria are provided in the statute to aid in determining what constitutes a "material" destruction of the property. Rather, the Law Revision Commission asserted that the terms "material" and "immaterial" in the statute should be construed according to their "recognized meaning in the law." 1936 Study, *supra* note 66, at 761. Predictably, the inquiry is *sui generis*. Compare *National Factors, Inc. v. Winslow*, 52 Misc. 2d 194, 196, 274 N.Y.S.2d 400, 401-02 (Sup. Ct. N.Y. County 1966) (\$10,000 loss on \$180,000 contract is immaterial as a matter of law) with *Rifkin v. Ed Zit Holding Corp.*, 254 N.Y. 352, 354, 173 N.E. 219, 219-20 (1930) (*per curiam*) (materiality of destruction caused by condemnation of five of seventy-five lots is a question of fact).

<sup>68</sup> See, e.g., *Rizzo v. Landmark Realty Corp.*, 277 App. Div. 1094, 1095, 101 N.Y.S.2d 151, 152 (4th Dep't 1950); *World Exhibit Corp. v. City Bank Farmers Trust Co.*, 186 Misc. 420, 422, 59 N.Y.S.2d 648, 651 (Sup. Ct. Kings County 1945) (*dictum*), *aff'd*, 270 App. Div. 654, 61 N.Y.S.2d 889 (2d Dep't), *aff'd mem.*, 296 N.Y. 586, 68 N.E.2d 876 (1946); note 82 *infra*.

<sup>69</sup> 48 N.Y.2d 530, 399 N.E.2d 918, 423 N.Y.S.2d 886 (1979), *aff'g*, 59 App. Div. 2d 438, 400 N.Y.S.2d 194 (3d Dep't), *rev'g*, 90 Misc. 2d 154, 393 N.Y.S.2d 227 (Sup. Ct. Tompkins County 1977).

<sup>70</sup> 48 N.Y.2d at 534, 399 N.E.2d at 919, 423 N.Y.S.2d at 887-88.

<sup>71</sup> 90 Misc. 2d at 155, 393 N.Y.S.2d at 228.

<sup>72</sup> *Id.* at 156, 393 N.Y.S.2d at 229.

<sup>73</sup> *Id.* at 155, 156, 393 N.Y.S.2d at 228, 229. The monetary damage sustained was estimated by the purchaser to be \$154,720 in replacement costs and \$34,200 in "cost to cure." In contrast, the defendant claimed that the damage sustained was only \$8,750 in reduction of fair market value of the property and that cost to cure was \$6,507. 66 App. Div. 2d 928, 928, 410 N.Y.S.2d 928, 930 (3d Dep't 1978).

sued for specific performance with an abatement.<sup>74</sup> The Supreme Court, Tompkins County, declined to order performance, interpreting the explicit grant of rescission in General Obligations Law section 5-1311 as evincing the legislative intent to preclude alternate remedies.<sup>75</sup> The Appellate Division, Third Department, unanimously reversed,<sup>76</sup> holding that despite legislative history to the contrary, the weight of judicial authority had interpreted the statute to allow specific performance with an abatement.<sup>77</sup>

On appeal, the Court of Appeals affirmed the decision of the appellate division.<sup>78</sup> Judge Meyer, writing for a unanimous Court, noted that the purpose of the statute was to reallocate risk, not to delineate remedies.<sup>79</sup> Therefore, the Court stated that the remedy of specific performance with an abatement may be afforded the

---

<sup>74</sup> 90 Misc. 2d at 154, 393 N.Y.S.2d at 228.

<sup>75</sup> *Id.* at 156-59, 393 N.Y.S.2d at 229-31. The supreme court's decision to preclude the remedy of specific performance with an abatement was largely predicated on the language in the 1936 Study promulgated by the statute's draftsmen, the Law Revision Commission. *See id.* The draftsmen indicated that the result obtained under the statute would be contrary to the result in *Polisiuk v. Mayers*, 205 App. Div. 573, 200 N.Y.S. 97 (2d Dep't 1923), wherein the court permitted the remedy of specific performance with an abatement in the event of material destruction of the property. *See* 1936 Study, *supra* note 1, at 778; note 89 *infra*. Special term in *Lucenti* agreed with the Law Revision Commission's assessment that rescission is "in accord with the actual, although unexpressed intention of the parties," 1936 Study, *supra* note 66, at 778-79, in the case of material destruction of the property. 90 Misc. 2d at 158, 393 N.Y.S.2d at 231.

<sup>76</sup> 59 App. Div. 2d at 443, 400 N.Y.S.2d at 196.

<sup>77</sup> *Id.* at 441, 400 N.Y.S.2d at 195. The Appellate Division, Third Department, remanded the case for a determination of the amount to be applied in abatement. The unreported decision of the Supreme Court of Tompkins County of March 30, 1978 on remand was appealed by the defendant to the Appellate Division, Third Department, whereupon the court determined the appropriate abatement to be \$20,000 in lost property value and \$7,500 in cost to cure. 66 App. Div. 2d 928, 929, 410 N.Y.S.2d 928, 930 (3d Dep't 1978).

Generally, in determining the amount of compensation to be given in abatement, neither the market value of the property, *see* *McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176, 181, 159 N.E. 902, 904 (1928), nor the insurance proceeds received for the loss, *see* *National Factors, Inc. v. Winslow*, 52 Misc. 2d 194, 197, 274 N.Y.S.2d 400, 403 (Sup. Ct. N.Y. County 1966), is the sole criterion. Rather, the abatement award appears to be determined by an amalgam of factors "tending to throw light upon the subject" . . . as well as the equities between the parties," *Burack v. Chase Manhattan Bank*, 9 App. Div. 2d 914, 194 N.Y.S.2d 987 (2d Dep't 1959) (quoting *McAnarney v. Newark Fire Ins.*, 247 N.Y. at 184, 159 N.E.2d at 905), *aff'd sub nom.* *Burack v. Tollig*, 10 N.Y.2d 879, 179 N.E.2d 509, 223 N.Y.S.2d 505 (1961).

<sup>78</sup> 48 N.Y.2d at 542, 399 N.E.2d at 924, 423 N.Y.S.2d at 893.

<sup>79</sup> *Id.* at 534, 399 N.E.2d at 919, 423 N.Y.S.2d at 887-88. The Court relied on its observation in *Hecht v. Meller*, 23 N.Y.2d 301, 304, 244 N.E.2d 77, 78, 296 N.Y.S.2d 561, 562 (1968), that the purpose of the enactment of the Uniform Vendor and Purchaser Risk Act by the New York Legislature was "simply [to bestow] a privilege on vendee to rescind the contract." *Id.*

purchaser without contravening the statute's legislative intent.<sup>80</sup> The *Lucenti* Court went on to reject the Law Revision Commission's conclusion that rescission of the contract is the remedy most likely intended by the parties when the property has been materially destroyed.<sup>81</sup> Rather, the Court noted, the actual although unexpressed intention of the parties is more accurately reflected in the stance uniformly adopted by the lower courts which have accorded the purchaser the right to enforce the contract with an abatement in the purchase price.<sup>82</sup> Moreover, Judge Meyer concluded, in consolidating the risk of loss statute, formerly found in the Real Property Law, into the General Obligations Law, the legislature had presumptive knowledge of this judicial interpretation of the statute's remedies.<sup>83</sup> Thus, he reasoned, the legislature had impliedly incorporated the right of specific performance with an abatement into the statute by failing to expressly preclude it.<sup>84</sup>

Notwithstanding that the result reached in *Lucenti* equitably effectuates the apparent intention of the contracting parties, it appears that the Court misconstrued the effect of the recodification of the statute and gave undue weight to prior decisions. In holding that the legislature acquiesced in, and hence impliedly sanctioned, the previous common-law construction of the statute, the Court apparently failed to consider that "no change in existing law" was intended by the draftsmen of the General Obligations Law.<sup>85</sup>

---

<sup>80</sup> 48 N.Y.2d at 538-39, 399 N.E.2d at 921-22, 423 N.Y.S.2d at 890-91.

<sup>81</sup> *Id.* at 538-39, 399 N.E.2d at 922, 423 N.Y.S.2d at 890-91.

<sup>82</sup> *Id.* at 539-41, 399 N.E.2d at 922-23, 423 N.Y.S.2d at 891-92 (citing *County of Westchester v. P. & M. Materials Corp.*, 20 App. Div. 2d 431, 433-34, 248 N.Y.S.2d 539, 542 (2d Dep't 1964) (per curiam); *Rizzo v. Landmark Realty Corp.*, 277 App. Div. 1094, 1095, 101 N.Y.S.2d 151, 152 (4th Dep't 1950); *Heerdt v. Brand*, 272 App. Div. 143, 144, 70 N.Y.S.2d 1, 2 (4th Dep't 1947) (per curiam); *Burack v. Tollig*, 6 Misc. 2d 450, 451, 160 N.Y.S.2d 1008, 1009 (Sup. Ct. Westchester County 1957), *modified sub nom.* *Burack v. Chase Manhattan Bank*, 9 App. Div. 2d 914, 194 N.Y.S.2d 987 (2d Dep't 1959), *aff'd sub nom.* *Burack v. Tollig*, 10 N.Y.2d 879, 179 N.E.2d 509, 223 N.Y.S.2d 505 (1961); *World Exhibit Corp. v. City Bank Farmers Trust Co.*, 186 Misc. 420, 422, 59 N.Y.S.2d 648, 651 (Sup. Ct. Kings County 1945), *aff'd*, 270 App. Div. 654, 61 N.Y.S.2d 889 (2d Dep't), *aff'd*, 296 N.Y. 586, 68 N.E.2d 876 (1946)).

<sup>83</sup> 48 N.Y.2d at 541-42, 399 N.E.2d at 923, 423 N.Y.S.2d at 892-93.

<sup>84</sup> *Id.* The Court relied, *inter alia*, on N.Y. STATUTES § 75 (McKinney 1971), which provides in pertinent part:

In the case of a revision or consolidation of statutes, if there is no change in the phraseology of the statute, its former judicial construction becomes a part of the subsequent statute.

*Id.*

<sup>85</sup> See Act and Recommendation Relating to the Reconsolidation in a "General Obligations Law" of Statutes Governing the Creation, Definition, Enforcement, Transfer, Modifi-

Rather than supporting the inference that a substantive reexamination of the statute was undertaken, the Law Revision Commission Study clearly indicates that the consolidation of the Uniform Vendor and Purchaser Risk Act into its present repository was intended by the legislature to be merely clerical in nature.<sup>86</sup> Nor does an examination of the prior cases cited by the majority compel the conclusion that a cognizant legislature would have been convinced that the statute had been dispositively interpreted to allow a purchaser the remedy of specific performance with an abatement. Generally the cases relied upon by the *Lucenti* Court as providing the legislature with that knowledge either indicated the availability of such remedy in dicta, or allowed the relief in response to a concession of the parties.<sup>87</sup> In addition, none of the precedent cited by the Court squarely addressed the Law Revision Commission's statement in its study accompanying the Uniform Vendor and

---

cation, Discharge and Revival of Various Civil Obligations, [1963] N.Y. LAW REV. COMM'N REP. 201, 272.

<sup>86</sup> Although it may be argued that the legislature approved the judicial interpretation of the Uniform Vendor and Purchaser Risk Act when it indicated that no change in the law was intended by the General Obligations Law's formation, the context of the Law Revision Commission's Study strongly suggests that the legislature undertook no substantive evaluations of the statutes consolidated into the General Obligations Law. *See id.* at 271-72. In creating the General Obligations Law, the legislative intent was simply "to make it easier to find the statutes," and "to provide a logical and coherent organization of existing statutes [dealing with 'civil' obligations]." *Id.* at 272; cf. 1A J. SUTHERLAND, STATUTORY CONSTRUCTION § 23.14 (4th ed. 1972) (unless statutory language is changed, codification is mere reiteration of previously existing law with no altering effects). Viewed in this context, it appears that the Law Revision Commission's Study serves to rebut the presumption that the legislature both knew of and accepted the previous judicial interpretation of the reconsolidated statutes.

<sup>87</sup> *See County of Westchester v. P. & M. Materials Corp.*, 20 App. Div. 2d 431, 248 N.Y.S.2d 539 (2d Dep't 1964) (per curiam) (dictum); *Heerd v. Brand*, 272 App. Div. 143, 70 N.Y.S.2d 1 (4th Dep't 1947) (per curiam) (court does not clearly indicate whether the damage is deemed immaterial or substantial); *Burack v. Tollig*, 6 Misc. 2d 450, 160 N.Y.S.2d 1008 (Sup. Ct. Westchester County 1957), *modified sub nom. Burack v. Chase Manhattan Bank*, 9 App. Div. 2d 914, 194 N.Y.S.2d 987 (2d Dep't 1959), *aff'd sub nom. Burack v. Tollig*, 10 N.Y.2d 879, 179 N.E.2d 509, 223 N.Y.S.2d 505 (1961) (parties conceded that abatement should be granted); *World Exhibit Corp. v. City Bank Farmers Trust Co.*, 186 Misc. 420, 59 N.Y.S.2d 648 (Sup. Ct. Kings County 1945) (dictum), *aff'd*, 270 App. Div. 654, 61 N.Y.S.2d 889 (2d Dep't), *aff'd*, 296 N.Y. 586, 68 N.E.2d 876 (1946). *But see Rizzo v. Landmark Realty Corp.*, 277 App. Div. 1094, 101 N.Y.S.2d 151 (4th Dep't 1950). *See also Property, Roberts*, 1977 *Survey of New York Law*, 29 SYRACUSE L. REV. 421, 422-23 & n.14 (1978). Since only one of the five cases relied upon by the *Lucenti* Court—an appellate division decision—actually held that a purchaser possesses the remedy of specific performance with an abatement, the suggestion that the legislature had acquiesced in such construction by inaction appears questionable at best.

Purchaser Risk Act<sup>88</sup> which indicated that the import of the act would be to change the result in a prior case<sup>89</sup> granting specific performance with an abatement where the subject property had been materially destroyed. This statement of the Commission is weighty evidence that the legislature intended to preclude the remedy sanctioned in *Lucenti*. Thus, even assuming that prior case law did alter the result dictated by a literal reading of the statute, it does not appear that this interpretation was incorporated into the General Obligations Law by legislative inaction.

Despite the questionable interpretation of legislative intent upon which it is founded, it appears that application of the *Lucenti* holding will bring about equitable results in most situations. Nevertheless, in instances in which the purchaser intends to demolish and remove existing structures on the property, application of the *Lucenti* rule may create an injustice to the vendor and a windfall for the purchaser. In this situation, if the existing structure is razed prior to closing, *Lucenti* would allow the purchaser to command an abatement in the purchase price even though he may have been relieved of a large portion of his cost of demolition.<sup>90</sup> Given this potential, it is submitted that cautious sellers' attorneys

---

<sup>88</sup> Reference to the 1936 Study is made in only two of the opinions relied upon by the *Lucenti* Court. See *County of Westchester v. P. & M. Materials Corp.*, 20 App. Div. 2d 431, 248 N.Y.S.2d 539 (2d Dep't 1964) (per curiam); *Heerd v. Brand*, 272 App. Div. 143, 70 N.Y.S. 1 (4th Dep't 1947) (per curiam). Neither *Westchester* nor *Heerd*, however, are illuminating as to the rationale applied in concluding that the common-law interpretation statute superceded its legislative history.

<sup>89</sup> *Polisiuk v. Mayers*, 205 App. Div. 573, 200 N.Y.S. 97 (2d Dep't 1923). In *Polisiuk*, wherein the seller had contractually assumed the risk of loss by fire, *id.* at 574, 200 N.Y.S. at 98, the appellate division determined that it was within the realm of the court's equity powers to accord the remedy of specific performance with an abatement to the purchaser. *Id.* at 579, 200 N.Y.S. at 102. The Law Revision Commission subsequently rejected the *Polisiuk* result while discussing section 1(a) of the Uniform Vendor and Purchaser Risk Act, see note 1 *supra*. See 1936 Study, *supra* note 66, at 778. The *Lucenti* Court, however, believed that section 1(a) of the act concerned shifting the risk of loss and not the allocation of remedy. See 48 N.Y.2d at 534, 399 N.E.2d at 919, 423 N.Y.S.2d at 887-88 (citing *Hecht v. Meller*, 23 N.Y.2d 301, 304, 244 N.E.2d 77, 78, 296 N.Y.S.2d 561, 562 (1968)).

<sup>90</sup> Another inequitable situation may arise in a condemnation setting. Under the *Lucenti* holding, a purchaser may elect specific performance with an abatement for property that had been taken to facilitate the building of a major highway. This abatement may constitute a windfall, however, since the purchaser may not actually sustain damage if the roadway will substantially increase the value of the remaining land. It is certainly arguable that if the vendor had contemplated such occurrence at the time of contracting, he would neither have intended nor expected that the contract be enforceable. Hence, by attributing to the vendor the intent to perform the contract notwithstanding a material change in circumstances, the *Lucenti* Court's holding in some cases may actually frustrate the expectations of one or both parties.

would do well to provide explicitly for the risk of loss in sales contracts so as to avoid gratuitously allowing the purchaser the now-broadened range of statutory remedies.<sup>91</sup>

Jeffrey S. Lichtman

### DEVELOPMENTS IN NEW YORK LAW

#### *Cohabitation without marriage does not give rise to recovery in implied-in-law contract for personal services rendered*

Actions between unmarried cohabiting individuals to recover compensation for personal services rendered pursuant to an express contract generally have been allowed provided that illicit relations do not form any part of the consideration.<sup>92</sup> New York courts, however, consistently have refused to recognize implied contracts for personal services within such a relationship.<sup>93</sup> This position has come under attack in other jurisdictions,<sup>94</sup> most nota-

---

<sup>91</sup> Notably, the New York Court of Appeals has held that a contractual clause reiterating the effect of GOL § 5-1311—that the risk of loss by fire is on the seller—serves to take the contract outside the statutory purview and within common-law rules, at least to the extent of the risks for which express provision was made. *See World Exhibit Corp. v. City Bank Farmers Trust Co.*, 270 App. Div. 654, 657-58, 61 N.Y.S.2d 889, 892 (2d Dep't), *aff'd*, 296 N.Y. 586, 68 N.E.2d 876 (1946); *Approved Properties, Inc. v. City of New York*, 52 Misc.2d 956, 958, 277 N.Y.S.2d 236, 238 (Sup. Ct. Richmond County 1966). A contract provision requiring the purchaser to accept the property "as is," however, will not shift the risk of loss to the purchaser since such provision only refers to a risk of natural deterioration and wear and tear, and does not apply to "intervening acts of destruction." *Id.* at 957-58, 277 N.Y.S.2d at 237-38.

<sup>92</sup> *See In re Gordon*, 8 N.Y.2d 71, 75, 168 N.E.2d 239, 240, 202 N.Y.S.2d 1, 3 (1960); *McCall v. Frampton*, 99 Misc. 2d 159, 415 N.Y.S.2d 752 (Sup. Ct. Westchester County 1979); *Rhodes v. Stone*, 63 Hun 624, 624, 17 N.Y.S. 561, 562 (Sup. Ct. Gen. T. 5th Dep't 1892). The courts' recognition of the validity of express contracts for personal services between cohabiting parties differs sharply from the rule governing married persons. Such contracts between married persons are clearly unenforceable. *In re Callister*, 153 N.Y. 294, 301, 47 N.E. 268, 270 (1897); *In re Paine*, 12 N.Y.S.2d 201, 203 (Sur. Ct. Queens County 1939).

<sup>93</sup> *See In re Gordon*, 8 N.Y.2d 71, 75, 168 N.E.2d 239, 240, 202 N.Y.S.2d 1, 3 (1960); *Vincent v. Morarity*, 31 App. Div. 484, 492, 52 N.Y.S. 519, 525 (2d Dep't 1898); *Rhodes v. Stone*, 63 Hun 624, 624, 17 N.Y.S. 561, 562 (Sup. Ct. Gen. T. 5th Dep't 1892). The rationale behind refusing to recognize an action in implied contract between a cohabiting couple for personal services is that cohabitation belies an intention that such services are being performed for compensation. *See Cooper v. Cooper*, 147 Mass. 370, 17 N.E. 892 (1888). Not all courts, however, subscribe to this reasoning. *See note 96 infra*.

<sup>94</sup> *See, e.g., Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977).