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Real Property--Damage by Fire--Specific Performance with Abatement--Vendor and Purchaser Risk Act (World Exhibit Corp. v. City Bank Farmers Trust Co., 270 App. Div. 654 (2d Dep't 1946))

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by the parent for the defense of his child would determine whether or not the parent had furnished adequate legal counsel.

In reviewing the proceedings of this action in the lower court it seemed apparent to the learned justices of the Appellate Term that there might have been a justification for the child's action in dismissing the attorney selected by her father, and that the circumstances surrounding that dismissal should have been permitted to be fully inquired into at the trial. The court pointed out that it was error to determine as a matter of law that the defendant had provided competent legal services for his seventeen year old daughter. Generally, where the question arises as to whether the parent neglected to furnish suitable necessaries for his infant children it is for the jury to arrive at the answer from the facts.[7]

C. J. B. JR.

REAL PROPERTY—DAMAGE BY FIRE—SPECIFIC PERFORMANCE WITH ABATEMENT—VENDOR AND PURCHASER RISK ACT.—The plaintiff, the assignee of the purchaser, brought suit in equity for specific performance of a contract for the sale of realty with an abatement for the partial destruction of the improvements caused by fire which occurred between the date of signing of the contract and the law day. The vendor had refused to convey on these terms on the closing date, but instead, tendered the deed and demanded the full purchase price. Upon rejection by the vendee, the vendor made a second offer, namely, to return the down payment and pay the cost of the title search. The vendee rejected this proposal and reiterated his demand for the deed with an abatement for loss. The vendor had collected the insurance which amply covered the loss. At the trial, the defendant asserted the rights of the parties were determined by the Uniform Vendor and Purchaser Risk Act[1] and insisted that his second offer was made in compliance with the statute. The plaintiff contended that the statute was precluded from having effect by the following provisions of the contract of sale: "In the event for any reason the Seller *is unable to cause to be conveyed*

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[7] Stevens v. Hush, 107 Misc. 353, 176 N. Y. Supp. 602 (Sup. Ct. 1919).

[1] N. Y. REAL PROPERTY LAW § 240-a. "Uniform vendor and purchaser risk act. 1. Any contract hereafter made 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 . . . , the vendor cannot enforce the contract,* and the purchaser is entitled to recover any portion of the price that he has paid; . . ." (Italics supplied.)

marketable title to the premises *or otherwise to comply with this agreement,* the only obligation of the Seller hereunder shall be to refund the amounts paid by the Purchaser to the Seller under this agreement and the expenses paid by the Purchaser for a title search * * * *The risk of loss or damage to said premises by fire, until the delivery of said deed, is assumed by the Seller."* (The court's italics.) *Held,* specific performance with an abatement decreed. Where the burden of loss is expressly assumed by the vendor before closing in contract of sale, specific performance with an abatement will be enforced in favor of the vendee. *World Exhibit Corp. v. City Bank Farmers Trust Co.,* 270 App. Div. 654, 61 N. Y. S. (2d) 889 (2d Dep't 1946).

It is well established under the doctrine of equitable conversion that in the absence of a statute and where the contract of sale is silent, the loss by fire, or other accident not due to the fault of the vendor, must fall upon the vendee.[2] It has been held in the *Sewell* case that the risk of loss could be shifted to the vendor where the seller in his contract expressly assumed the burden and the purchaser could still have specific performance with an abatement.[3] In a later case, the doctrine laid down in the *Sewell* case[4] was reaffirmed,[5] the court pointing out that the parties could take themselves out of the common law rule by the terms of their contract.[6] In enforcing the rule the New York cases had drawn no distinction between material and immaterial destruction. It is from the resulting hardship to the purchaser, where there is a material loss, that Section 240-a of the New York Real Property Law seeks to relieve.[7] Where the damage is not substantial the statute is merely declaratory of the pre-existing case law rule. The act by its terms becomes an integral part of the contract for the sale of land "unless the contract provides otherwise." Here the parties by precise language withdrew the contract from the scope of the statute. The rights of the parties were determined by the contract of sale.

The majority in construing the contract held that the provision by which the seller be excused if he could not convey marketable title "or otherwise comply with this agreement" was not intended by the parties to include loss by fire in view of the express assumption of risk of loss by fire, by the vendor. Thus, the seller being able to convey marketable title, could specifically perform the contract.

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[2] Sewell v. Underhill, 197 N. Y. 168, 90 N. E. 430 (1910).

[3] Polisiuk v. Mayers, 205 App. Div. 573, 200 N. Y. Supp. 97 (2d Dep't 1923).

[4] Sewell v. Underhill, 197 N. Y. 168, 90 N. E. 430 (1910).

[5] Reife v. Osmers, 252 N. Y. 320, 169 N. E. 399 (1929).

[6] *See* Brownell v. Board of Education, 239 N. Y. 369, 169 N. E. 399 (1929); 5 POMEROY, EQUITY JURISPRUDENCE (2d ed. 1919) § 2282.

[7] N. Y. LAW REVISION COMMISSION, REPORT, LEGIS. DOC. 65(M) 759, 761 (1936).

The dissenting opinion argued that the parties had not provided in their contract that Section 240-a should not be operative and the contract thereby came within the purview of the statute. Further, since the statute does not provide for specific performance with an abatement where the loss is material, the defendant was correct in tendering the down payment plus the cost of title search.

The dissent, it would seem, is too narrow an interpretation since it would prevent the purchaser from obtaining the specific *res* for which he bargained. Historically, in an action by the vendee for specific performance, equity is more liberal in exercising jurisdiction.[8] There is greater reason for affording aid of the court to the purchaser who seeks specific execution of the agreement and who is desirous of taking the part which the vendor can convey.[9] The purchaser can require specific performance with abatement even though the damage or defect is material.[10] Clearly, the statute does not intend to deny the vendee a right so well rooted in the law and so equitable in result.

J. V.

RESTRAINT OF TRADE—MONOPOLY—ACTUAL EXCLUSION OF COMPETITION.—The petitioners, American Tobacco Company, Liggett & Myers Tobacco Company and R. J. Reynolds Tobacco Company,[1] dominate the national domestic cigarette production with a substantial monopoly amounting to over two-thirds of the entire domestic field of all cigarettes, the opposition being confined to six small competitors. The evidence tends to show that the petitioners conspired to fix and control prices and other material conditions relating to the purchase of raw material in the form of leaf tobacco for use in the manufacture of cigarettes and to exclude undesired competition against them in the purchase of leaf tobacco. It also appears to have been a conspiracy to fix and control prices and other material conditions relating to the distribution and sale of cigarettes and to exclude undesired competition. All these practices tended to keep them in their dominant position and demonstrate a power and intent on their part to exclude competition. The trial court charged the jury that ". . . the term *'monopolize'* as used in Section 2 of the Sherman Act,[2] as well as in the last three counts of the Information,

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[8] Waters v. Travis, 9 Johns. 450, 464 (N. Y. 1812).

[9] *See* Erwin v. Myers, 46 Pa. 96, 106 (1863).

[10] 5 POMEROY, EQUITY JURISPRUDENCE (2d ed. 1919) § 2256.

[1] Hereinafter referred to as American, Liggett and Reynolds, and "Big Three."

[2] "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall