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Contracts--Vendor-Purchaser--Risk of Loss--Common Law (Ross v. Bumstead, 173 P.2d 765 (Ariz. 1946))

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RECENT DECISIONS

CONTRACTS—VENDOR-PURCHASER—RISK OF LOSS—COMMON LAW.—Appeal by vendee, in action for damages brought by vendor, for breach of contract to purchase an Arizona date orchard, consisting of realty, packing plant, warehouse, equipment, and other personal property. The purchase price was $75,000, payable $5,000 on contract, $20,000 on delivery of title and possession, and the balance to be paid in quarterly instalments within six years. The contract stipulated that for purposes of adjusting taxes, insurance, and other charges against the property, possession was to date from the signing of the agreement. Vendor was to be allowed a reasonable time to remedy any title objections which might arise. Eight days after the contract was signed the packing plant and warehouse were destroyed by fire, without fault of either party. Vendee thereupon requested the vendor to make an adjustment for the loss, but the vendor refused. Vendee then stopped payment on the $5,000 check he had given as deposit. At the time of the loss the vendor was ready, willing and able to perform in accordance with the terms of the contract. The vendor subsequently sold the property to another purchaser for an amount less than $75,000. He seeks to recover the difference between the two purchase prices as damages. The vendee pleads in defense a partial failure of consideration. At the trial the vendor was awarded his damages as claimed. *Held,* affirmed. In executory contracts for the sale of real property, the risk of loss is upon the vendee where the vendor was ready and able to perform at the time of the loss and the loss was not occasioned by the vendor. *Ross v. Bumstead,* — Ariz. —, 173 P. (2d) 765 (1946).

It is best to consider the vendee's two assignments of error separately as they involve two distinct aspects of the law.

The first problem concerns the law of contracts. The vendee contends that the contract under consideration is conditional and that the conditions thereof were unperformed at the time of the loss. Consequently, the vendee asserts that he has assumed no binding obligation and cannot be held liable for the vendor's damages. The court, in denying the validity of this contention, distinguishes between executory contracts which are conditional and executory contracts which are unconditional. A conditional contract is held to be one whose very existence and performance depend on a contingency and condition.[1] Without the fulfillment of the conditions, the conditional contract does not bind the party who is not to perform until such

[1] Reedy v. Kelley, 208 Ala. 305, 94 So. 86 (1922); French v. Osmer, 67 Vt. 450, 32 Atl. 254 (1895).

conditions or contingencies are satisfied. On the other hand, an unconditional contract is an absolute agreement through which a party binds himself to do or not to do a particular thing in the future.[2] After making this distinction, the court concludes that the contract in the instant case is unconditional. The fact that the parties stipulated that many of the unperformed acts, when performed, were to be considered performed as of the date of the signing of the contract, was significant in leading the court to said conclusion. Another factor of weight, though not expressly noted in the decision, was that the acts which remained unperformed at the time of the loss were not extraordinary, and were usual acts required of parties in contracts of this nature during the interim period from the signing of the contract to the closing of title.

The vendee's second assignment of error asserts that even if the contract is unconditional the risk of loss still must fall upon the vendor. This contention is an elaboration upon the vendee's trial court defense of partial failure of consideration. The Arizona court having no precedent in point within the state, and no statute applicable to the situation, turns to the decisional law on the point in other jurisdictions to provide the answer to this second assignment of error. The problem of the risk of loss in an executory contract for the sale of realty was first considered in the chancery courts of England [3] and the rule there settled is still the majority rule in this country under common law.[4] The majority rule applies the theory of equitable conversion, whereby the vendor is trustee of the legal title after signing a contract for the sale of his realty and the vendee is the equitable owner of, and the person beneficially interested in the property. Under the majority rule, the risk of loss is cast upon the vendee where there is a partial destruction or deterioration of the realty provided that the loss was not caused by the vendor and he is able to convey good title at the time of the loss.[5]

Some jurisdictions have felt that the majority rule imposes too harsh an obligation upon the vendee of realty and have placed the risk of such a loss upon the vendor.[6] The states holding to this effect are in the minority today.[7]

At one time in New York the rule seemed settled, and not without reason, that the risk of loss should fall upon the party in pos-

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[2] Hercules Powder Co. v. Harry T. Campbell Sons Co., 156 Md. 346, 144 Atl. 510 (1929); *see* Rockhill Tennis Club of Kansas City v. Volker, 331 Mo. 947, 56 S. W. (2d) 9, 17 (1932).

[3] Paine v. Meller, 6 Ves. 349, 31 Eng. Rep. 1088 (1801).

[4] Paine v. Meller, 6 Ves. 349, 31 Eng. Rep. 1088 (1801); Parcell v. Grosser, 100 Pa. 617, 1 Atl. 909 (1885); Fouts v. Foudray, 31 Okla. 221, 120 Pac. 960 (1912); Sewell v. Underhill, 197 N. Y. 168, 90 N. E. 430 (1910); *see* Note, 22 A. L. R. 575 (1923).

[5] *Ibid.*

[6] La Chance v. Brown, 41 Cal. App. 500, 183 Pac. 216 (1919); Hawkes v. Kehoe, 193 Mass. 419, 79 N. E. 766 (1907).

[7] *See* Note, 22 A. L. R. 578 (1923).

session.[8] However, the Court of Appeals has apparently settled the New York rule today in accordance with the majority view.[9] The Uniform Vendor-Purchaser Risk Act of New York[10] has been held applicable only where there is a material destruction of the premises, so that as to a partial loss the common law view as now settled by the Court of Appeals is still controlling.[11]

In the instant case the court, after reviewing the authorities, adopts as the common law of the State of Arizona the majority rule. The vendee, therefore, is held liable for the damages suffered by the vendor. The court does not have to decide the vendor's right to obtain specific performance, but it is fair to infer that had such an action been brought the vendor would have been successful.

In deciding this case according to the majority rule, the Arizona court reaffirms the well defined rule in this country to the effect that the established common law will be applied where there is no statute controlling the issue under consideration, provided that said common law is not contrary to the public policy and laws of the state as manifested in its constitution and legislative enactments, and also provided that it is not contrary to similar federal documents and enactments.[12]

It may well be said that the conclusion reached by the court in the instant case is in contravention of the layman's interpretation of such a situation according to the ordinary rules of conduct of business affairs. The dissenters may argue that the vendee showed good faith by offering to perform provided that he receive an abatement in the purchase price, and that manifestly, the vendee desired to purchase, but that he sought to have *all* that he purchased, and would restore the premises to their former condition with the funds constituting the abatement. To the business man this might be a fair interpretation of the situation.

The vendor in the instant case received damages as substitutional redress for the conveyance he contracted to make, and upon him was thrust the burden of securing a new purchaser. It is thus

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[8] Smith v. McCluskey, 45 Barb. 610 (N. Y. 1866); Wicks v. Bowman, 5 Daly 225 (N. Y. 1874).

[9] Sewell v. Underhill, 197 N. Y. 168, 90 N. E. 430 (1910); Neponsit Realty Co. v. Judge, 106 Misc. 445, 176 N. Y. Supp. 133 (Sup. Ct. 1919).

[10] N. Y. REAL PROPERTY LAW § 240-a. It is interesting to note that the New York statute provides that where there is an immaterial destruction, the vendor and vendee are not deprived of their right to enforce the contract, but it allows an abatement of purchase price to the extent of the destruction. In the light of the decision in World Exhibit Corp. v. City Bank Farmers Trust Co., 296 N. Y. 586, 68 N. E. (2d) 876 (1946), it would seem that this statutory provision is limited to an action for specific performance.

[11] World Exhibit Corp. v. City Bank Farmers Trust Co., 270 App. Div. 654, 61 N. Y. S. (2d) 889 (2d Dep't 1946), *aff'd mem.*, 296 N. Y. 586, 68 N. E. (2d) 876 (1946); 21 ST. JOHN'S L. REV. 104 (1946).

[12] Fulton L., H. & P. Co. v. State of N. Y., 200 N. Y. 400, 94 N. E. 199 (1911).

obvious that were this case to be decided in accordance with the motives of the parties as the layman would determine them, and not by the intent as expressed in the written agreement, the court would be thrust upon the horns of an insurmountable dilemma. The law, as it is administered today, through decisions and statutes, is not primarily concerned with the motivating considerations which bring parties into written contract. It is concerned only with the intent of the parties as expressed in the instrument.[13] To require the courts to inquire into extrinsic motives would throw the law of contract and evidence into confusion.

If the harshness and somewhat arbitrary effect of the common law rule as to the risk of loss problem in the sale of realty is to be minimized, statutory direction should be the instrumentality adopted to achieve such an end. It should be borne in mind, however, that the statutory law is often more extremely opposed to the layman's sense of justice than is the common law.

C. J. B., JR.

EQUITY — INJUNCTIVE RELIEF WHERE NO PROPERTY RIGHT IS VIOLATED.—Plaintiffs, members of a religious sect known as Jehovah's Witnesses, seek injunctive relief against repeated arrests and jailings under an unconstitutional city ordinance forbidding the distribution of circulars, handbills and notices of meetings as violative of the sanitary code. Plaintiffs allege deprivation of their rights of freedom of religion, speech, press and assembly, and inadequacy of the remedy at law. The arrests and jailings are continuing notwithstanding the fact that the defendant city officials, police chief and trial judge know of the unconstitutionality of the ordinance. A demurrer by the defendants is predicated upon the absence of any allegation of breach of a property right, and upon the claim that equity will not interpose to prevent prosecution in the criminal courts. *Held,* under special circumstances equity will grant an injunction even in absence of injury to property rights. *Kenyon v. City of Chicopee,* — Mass. —, 70 N. E. (2d) 241 (1946).

It was the rule at common law that equity would protect only property rights,[1] which doctrine has been widely adhered to both in England and in the United States. The modern trend, however, has been to expand equity's jurisdiction to protect all rights recognized in law. Generally speaking, those rights to which equity extends its

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[13] Gans v. Aetna Life Ins. Co., 214 N. Y. 326, 108 N. E. 443 (1915); Goldstein v. Frances Emblems, 269 App. Div. 345, 55 N. Y. S. (2d) 740 (1st Dep't 1945).

[1] Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (1818).