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Partition Sale--Specific Performance of Contract for Sale of Land (Bowen v. Horgan, 259 N.Y. 267 (1932))

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the fire spreads over intervening lands, *B* not being an adjoining landowner, *A* is not liable.[3] The reason for absence of liability when fire spreads over intervening lands being that defendant has no control over the material on that land. Liability attaches when the fire on defendant's land spreads to the plaintiff's without the intervention of any intermediate agencies. Defendant disclaims liability contending that inasmuch as neither party owned any part of the intervening street they were not adjoining landowners.[4] Although a street intervened between the lands of the parties the fire did not spread to the street and thence to the plaintiff's land but spread directly to the land of the plaintiff so that the fire upon the land of the defendant was the proximate cause of the destruction of plaintiff's buildings. This decision modifies the general rule in that it extends liability to an owner of land not adjoining plaintiff when the intervening land does not contribute to the spreading of the negligent fire.

A. E. A.

PARTITION SALE—SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND.—A vendee at a partition sale paid 10% of the bid but on closing day refused to perform. Six months thereafter an order directing the vendee to take title and make payment was obtained. On appeal the order was affirmed. The purchaser defaulted on the day set and on subsequent adjournments. Thereafter an order of resale, providing that the purchaser at the sale will be liable for a deficiency, was decreed. It was never vacated or modified. Subsequently purchaser assigned his rights. When the property fortuitously enhanced in value, the assignees moved for specific performance. Order was denied. On appeal, *held,* the assignees were not entitled to the relief sought. They acquired no greater rights than the assignor possessed. *Bowen* v. *Horgan,* 259 N. Y. 267, 181 N. E. 567 (1932).

The purchaser may assign his rights under the contract, thereby transferring the same right to specific performance that he had.[1] But at the time of the assignment the vendee did not possess the right to specific performance, he defaulted absolutely and thereby forfeited it.[2] Hence, the assignee did not acquire this right. An assignee

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[3] *Ibid.*

[4] Matter of City of New York, *supra* note 1; Ansorge v. Belfer, 248 N. Y. 145, 161 N. E. 450 (1928); Monogram Development Co. v. Natben Construction Co., 253 N. Y. 320, 171 N. E. 390 (1930).

[1] Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922); Langel v. Betz, 250 N. Y. 159, 164 N. E. 890 (1928).

[2] Stagman v. Lasson, 345 Ill. 482, 178 N. E. 166 (1931); McDonald v. Sautter, 346 Ill. 67, 178 N. E. 340 (1931); Haddaway v. Smith, 277 S. W. 728 (1925) (refusal to perform is a breach discharging the other party); Westown Realty Co. v. Keller, 143 App. Div. 458, 128 N. Y. Supp. 518 (1st Dept. 1911).

acquires no greater rights than the assignor had at the time of the transfer.[3] The default of the vendee was not waived. An insistent ineffectual demand upon performance does not constitute a waiver unless the other party can show an ability and willingness to substantially comply,[4] or that he was prevented by the acts of the party demanding performance.[5] As the assignor could not come within these principles the assignee cannot claim to be. This would be a greater right.

When specific performance cannot be actually enforced the court may provide that the property shall be resold and direct that the defaulting party shall be liable for a deficiency, if any, as in a foreclosure action.[6] Since the order of resale was for seller's benefit, he should not be compelled to perform if he chooses to abandon it. A party invoking the power of a court of equity is bound by its discretion. If a travesty of justice will result, the relief sought will be denied as in the instant case.[7]

P. A. L.

RESCISSION—MINOR'S CONTRACT VOIDABLE, NOT VOID—MEASURE OF DAMAGES UPON DISAFFIRMANCE.—Plaintiff, an infant, opened a stock account with a firm of brokers, which he subsequently transferred to the defendants, who accepted the same by paying a debit amount thereon to the former firm. These shares of stocks were kept by the defendants as a security for the unpaid balance due them from the plaintiff, which was continued with purchases and sales until it was closed by a payment of a small sum. Plaintiff, while still an infant, rescinded his agreement and disaffirmed his entire transaction. In an action to recover the amount which he alleges to represent the value of his interest at the time of his transfer of the stocks

[3] Fairbanks v. Sargent, 117 N. Y. 320, 22 N. E. 1039 (1889); Central Trust Co. of N. Y. v. The West India Improvement Co., 169 N. Y. 314, 62 N. E. 387 (1901).

[4] Fox v. Hutton, 142 Ark. 530, 219 S. W. 28 (1920); Quinn v. Daly, 300 Ill. 273, 133 N. E. 290 (1921); O'Donnell v. Henley, 327 Ill. 406, 158 N. E. 692 (1927); Haddaway v. Smith, *supra* note 2.

[5] Fox v. Hutton, *supra* note 4; Quinn v. Daly, *supra* note 4; Gladstone v. Warshowsky, 332 Ill. 376, 163 N. E. 777 (1928); Stagman v. Lasson, *supra* note 2; McDonald v. Sautter, *supra* note 2.

[6] Williams v. Haddock, 145 N. Y. 144, 39 N. E. 825 (1895) (it would seem that the rule of equitable conversion is inapplicable after default); Strauss v. Bendheim, 32 Misc. 179, 66 N. Y. Supp. 247 (1900).

[7] Fisher v. Hersey, 78 N. Y. 387, 388 (1879) (the courts of equity exercise control over sales made under their decrees which are not always controlled by legal principles, but by its discretion). In Matter of Attorney-General v. Continental Life Ins. Co., 94 N. Y. 199 (1883) (contract while executory is within the power of the court); Westown Realty Co. v. Keller, *supra* note 2 (purchaser not allowed to speculate on property); Leahy v. Leahy, 116 Misc. 330, 189 N. Y. Supp. 897 (1921).