Vendor and Purchaser—Risk of Loss—[Washington].—The plaintiff agreed in writing to sell without warranties, and the defendant to buy, a warehouse, part of which was of lighter construction than the remainder and not in compliance with a city ordinance. The defendant made a part payment upon the execution of the contract and was to pay the balance in monthly installments, to have possession, and to pay taxes and insurance. The defendant had been in possession four years and in default about seven months when the floor of the lighter constructed portion gave way. Both parties refused to repair; when the plaintiff sued to forfeit the contract and payments made thereunder and to secure possession, the defendant cross-claimed for rescission. From a judgment of rescission the plaintiff appealed. *Held*, that the defendant was entitled to an abatement from the purchase price, but not to a rescission, the loss and consequential partial failure of consideration not being substantial enough to warrant the latter. *Capital Savings & Loan Association v. Convey*, 27 P. (2d) 136 (Wash. 1933).

The prevailing rule places the risk of loss upon the purchaser. *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477 (1872); *Skinner & Sons Shipbuilding & Drydock Co. v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900); *McGinley v. Forrest*, 107 Neb. 309, 186 N.W. 74 (1921); *Paine v. Meller*, 6 Ves. Jr. 349 (1801). The justification of this rule is often stated to be that the purchaser is equitably and beneficially the owner of the property; but, inasmuch as ownership of the property is divided, such a criterion does not furnish a sound basis for allocating the risk of loss. 5 Cook, Lectures on Legal Topics (1924), 337, 351–358.

The minority view places the risk of loss upon the holder of the legal title. *Gould v. Murch*, 70 Me. 288 (1879); *Libman v. Levenson*, 236 Mass. 221, 128 N.E. 13 (1920); *Powell v. D., S. & G.R.R.R.Co.*, 12 Ore. 488, 8 Pac. 544 (1885). It is argued that since the vendor has not yet conveyed the legal title the loss will result in a partial or complete failure of consideration when the time for performance arrives, and hence the purchaser should be excused from performance. However, since the vendor holds the legal title for security purposes only as he is privileged to do, and the purchaser has received substantially that which he has bargained for when he receives possession and control of the realty, in reality there is no failure of consideration. Moreover, where the loss is insubstantial the purchaser will not be granted rescission but only an abatement from the purchase price. *Phinizy v. Guernsey*, 111 Ga. 346, 36 S.E. 796 (1900).

A third view recently adopted imposes the risk of loss upon the one in possession of the realty. *Appleton Electric Co. v. Rogers*, 200 Wis. 331, 228 N.W. 505 (1930); 2 Williston, Contracts (1920), 1784, § 940. But possession as the sole factor in the determination of the allocation of the risk of loss will under certain circumstances lead to undesirable results and should be only one of the factors in determining upon whom the risk of loss is to fall; all the facts should be considered in the light of the surrounding circumstances. See Vanneman, Risk of Loss Between Vendor and Purchaser, 8 Minn. L. Rev. 127; 141–142 (1924).

After a period of uncertainty Washington adopted the minority rule with respect to contracts containing a forfeiture clause. *Ashford v. Reese*, 132 Wash. 649, 233 Pac. 29 (1925) (three judges dissenting). As was pointed out in the dissenting opinion in that case, prior decisions of the court did not require the rule adopted and, also, the same court for other purposes did hold that the vendee has an interest in the property. Subsequently, in an analogous situation in the law of property, the conditional sale of goods, the Washington court, relying on the reason advanced in the *Ashford* case, took

the peculiar position that the risk of loss is not on the buyer in possession, but on the seller, even though he holds the legal title only for security purposes. *Holt Manufacturing Co. v. Jaussaud,* 132 Wash. 667, 233 Pac. 35 (1925) (the *same* three judges dissenting as in the *Ashford* case). The majority view is *contra. O'Neil-Adams Co. v. Eklund,* 89 Conn. 232, 93 Atl. 524 (1915); *National Cash Register Co. v. South Bay Club House Assoc.,* 64 Misc. 125, 118 N.Y.S. 1044 (1909). See Bogert, Commentaries on Conditional Sales (1924), U.L.A. 2A 196, § 146.

Prior to the present case it appeared that the Washington court's denial of the position of the vendee of real property as the owner in equity had occurred only in the case of contracts containing forfeiture clauses. See Schweppe, Rights of a Vendee of Land: A Further Word on the Washington Law, 2 Wash. L. Rev. 1, 9–10 (1926). The report of the principal case does not indicate that the contract involved contained such a forfeiture clause; if there was in fact no such clause, it is to be regretted that the court did not seize upon the absence of such clause as affording an opportunity to break away from a rule that seems harsh and oppressive in its operation and unsound as a matter of principle.

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