1891

The Specific Performance of Contracts for the Sale of Real Estate

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THE

SPECIFIC PERFORMANCE

OF

CONTRACTS

FOR

THE SALE

OF

REAL ESTATE.

-----by-----

Chas. S. Lattin,

Cornell University,

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It has ever been the fundamental and primary object of courts of equity to do more perfect and complete justice between the litigating parties than was afforded by the common law courts. It was for this purpose that equity originated the remedial right of specific performance of contracts. In every contract the primary right of the party who is to receive the benefit is always a right to have the very thing done, or omitted, which the other party has promised to do or omit,—a right to the specific acts or forbearances for which the agreement stipulates; and the corresponding primary duty of a party on whom the obligation rests is to do or omit exactly what he has undertaken to do or omit.

From the dual nature of the English law courts, from the highly technical and arbitrary forms of its action, and no doubt from a certain narrowness and rigidity which pervaded the entire system itself, the common law gave and still gives but one kind of remedy, one species of remedial right and duty for the breach of all contracts. This single remedy is a sum of money paid by
the wrongdoer.

As the law courts were either unable or unwilling to deviate from these methods which they had originally adopted, the court of chancery was compelled to supply the deficiency and to administer the only remedy which is just and adequate and even practicable in many classes of violated agreements. Hence there arose at an early day in the history of equity jurisprudence, the jurisdiction of chancery to enforce the equitable remedy of specific performance as applied to contracts. It consists in the contracting party's exact fulfilment of the obligation which he has assumed,—in his doing or omitting the very acts which he has undertaken to do or omit.

Not all contracts can be enforced in a court of equity, for equity will not interfere where there is a full, adequate and complete remedy at law for their breach. However, in the case of contracts for the purchase and sale of real property, the court will compel the vendor to convey the estate agreed to be sold, to the purchaser, and to enter into all the usual covenants for title, and will compel the purchaser to pay the pur-
chase-money, whether the price has been ascertained and fixed by the parties themselves or whether it has to be determined by valuation, it being considered that compensation in damages is not an adequate remedy, and the purchaser ought to have the estate which he has agreed to buy and the vendor to sell. For the purchaser is deemed to have the equitable interest in the land, while the vendor has the legal estate, and is considered to be a trustee for the benefit of the purchaser, holding the land in trust to convey it to the latter upon the terms and conditions of the contract of sale; while the purchaser is a trustee of the purchase-money for the benefit of the vendor.

It is upon this principle that the doctrine of the specific performance of contracts for the sale and purchase of land mainly depends. But the exercise of the jurisdiction of equity in this respect, is not a matter of right in either party, but of sound and reasonable discretion in the court. (1) And in order that a contract may be enforced in equity it must contain the following essential elements, to wit;

(1) Story's Equity Jurisprudence, 743.
1.---It must be based on an actual and valuable consideration. A merely good consideration or a consideration imported by a seal is not sufficient.

2.---The contract must be reasonably clear in its subject matter, its terms and its parties.

3.---It must be mutual; i.e., such that it could be enforced by either party against the other at the time it was entered into. But it will not constitute a defence that the defendant, by his laches or other acts or omissions, has lost his right to enforce the contract against the plaintiff;—a party not being allowed to take advantage of his own wrong.

4.---The contract must be free from fraud, misrepresentation or illegality.

5.---It must be fair and just in all its provisions.

6.---If the enforcement of the contract would result in oppression or hardship to either party, it will be denied.

7.---The vendee cannot be compelled to accept a doubtful title.

8.---If the defendant is so situated that he cannot perform, specific performance will not be decreed. (1)

(1) Professor H. B. Hutchin's Lectures on Eq. Juris'pdnc,
In a word, a valuable consideration, particularly, certainty, fairness, mutuality and a necessity for performance are requisites upon which the equity of a case arises. (1)

**WHO MAY BE PARTIES.**

Those who entered into the contract or who stand in their place, or are interested in the subject-matter are as a rule the only proper parties to the suit. Persons who have acquired interests in the property agreed to be conveyed, subsequent to the making of the contract, and strangers who claim adversely to both of the parties to it, should be made parties defendant. A purchaser from the vendee, is not as a rule, a proper party to a bill filed by the vendor, there being no contract between them; (2) nor the original purchaser where his vendee has been accepted in his place by the vendor. But such purchaser may maintain a suit against the vendor, making the original purchaser a party; it being a

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(1) Waterman on specific performance, sec. 6.
(2) Corbus v Tweed, 69 Ill. 293.
rule that where the original parties to a contract, would be entitled to a decree for specific performance, all parties claiming under them have the same rights, providing there are no intervening equities. (1)

An assignee of the vendor and persons claiming an interest in the property obtained from the vendor after the date of the contract with notice of the vendee's rights, are necessary parties defendant, at the suit of the purchaser. (2) It being a rule that a purchaser with notice is liable to the same equity, stands in his place and is bound to do that which the person he represents would be bound to do by the decree. (3) If a contract is made by a trustee in behalf of his cestui que trust, and a suit for specific performance is brought by the latter, the trustee is a necessary party; as otherwise

(1) Whitney v McKinney, 7 Johnson's Ch. 144. Miller v Bear, 3 Paige's Ch. 467.
another suit might have to be brought against him. (1)

Where the husband has entered into a contract con-
cerning the real estate of his wife, both should be made
parties. (2) In case of the death of a party to the
contract, the obligation to perform and the right to in-
sist on the performance devolve on the representatives
of the deceased. (3).

Infant or adult heirs may be compelled to fulfill
a contract made by their testator or intestate to con-
vey land, to the extent of the estate they derive from
him, although, they are not named in the contract. (4)

In New York it is provided by statute that the "supreme
court or county court shall have power to decree or com-
pel a specific performance of any contract, or agreement
made by any party who may die before the performance
thereof, on the petition of the executors or adminis-
trators of the estate of the deceased, or of a person
or persons interested in such contract, bargain or

(1) Manor v. Lawrence, 7 Mich. 524.
(2) Donning v. Risley, 15 N. J. Eq. 93.
   McCarty v. Myers, 8 Hun. 33.
   Aushultz v. Appeal. 34 Pa. St. 375.
   Miller v. Henderson, 10 N. J. Eq. 320.
agreement. (1) All the co-heirs of a vendor deceased should be parties and the death of one of them should be proved to excuse his omission as a party to the bill. (2) If the executors of a deceased vendor decline to enforce the performance of a contract made by him in his life time, the suit may be brought by the creditors of his estate against the executors, heirs or purchasers. (3)

PLEADINGS.

The bill must show that the complainant has done or has even been ready and willing to do every thing necessary to entitle him to performance of the contract by the defendant, and that there is a demand on the other party uncompilied with; and that there is not a full, adequate and complete remedy at law. (4) The plaintiff should also allege the facts constituting performance on his part, so that the court can judge whether he has done what he ought; (5) and should set

(2) Morgan v Morgan; 2 Wheat. 290.
(3) Judd v Moseley; 30 Ia. 428.
(4) McClane v White, 5 Minn. 173.
(5) Governeur v Elmdendorf, 5 Johns Ch. 79.
    Crocker v Higgins, 7 Ct. 34.
    Botsford v Beers, 11 Ct. 369.
    Moyes v Marsh, 123 Mass. 286.
forth his case with such clearness that the court can readily see the grounds upon which he relies, (1) and that he ought to have the relief sought. (2)

When the vendor brings the suit, the bill must allege a tender of the purchase money when it became due, a readiness to pay it at any time since, and an offer to bring the same into court. (3)

DEFENCES.

Personal incapacity on the part of the defendant to enter into a binding agreement at the time it is alleged to have been made will, of course, be a defence to a suit for specific performance. (4)

Equity having regard to the substance rather than to the form of contracts will not allow the impossibility of a literal fulfilment to prevail as a defence when the agreement can be substantially carried out so as to effectuate the intentions of the parties; and do entire justice between them.

(1) Forsythe v. Clark, 3 Wend. 657.
So where the subject-matter of the contract is divisible and the disability of the defendant relates only to a portion of it, specific performance may be decreed as to that which is capable of being executed. Within this principle, if, the vendor has no title to a portion of the land agreed to be conveyed, the vendee may compel specific performance of the contract so far as the vendor can perform it and insist upon an abatement as to the residue. (1) A contract to be specifically enforced must not only not be one sided, unjust or unfair but it must not have been obtained by unscrupulous means or by the concealment of material facts.

In looking at a contract with reference to its fairness, regard will be had to the subject-matter, terms and the manner in which it was executed as well as to the price as compared with the real value of the property and also to the circumstances under which the contract was entered into, particularly the character of the parties and the relations they sustain towards each other, such as the mental condition of the person.

Kitchen v Stout, 20 O. 453.
Wright v Young, 6 Wis. 127.
against whom specific performance is sought, his age, his poverty or his acting without an attorney when incompetent to take care of his interests.

When there is evidence to show that there was not a full, entire and intelligent consent to the contract by the defendant, or that it was entered into under circumstances of surprise or want of advice or that one of the parties was an illiterate person or in distress the court will be reluctant to compel him to perform.

It is a general rule that if the contract was fair when it was entered into, it will not be deemed otherwise, in consequence of the happening of unforeseen and unexpected events afterwards. (1) The question in such cases always is: was the contract at the time it was made a reasonable and fair one? If such were the fact the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property and such fluctuations are not allowed to prevent its specific enforcement; accordingly where after the making of the contract houses on the property sold are destroyed by fire the loss must be

(1) Low v Treadwell, 12 Me. 441.
borne by the purchaser. (1)

A defendant will in general succeed in procuring the dismissal of a suit for specific performance if he can convince the court that the exercise of its jurisdiction in granting the plaintiff's prayer for relief would operate with unreasonable hardship upon him under the circumstances of the case; it being one of the established principles of courts of equity not to entertain a bill for the specific enforcement of any agreement when it is doubtful whether the court may not thereby become the instrument of injustice or deprive a person of rights which he is fairly entitled to have protected. (2) A contract may be free from actual fraud or illegality and not contain elements of hardship or oppression and yet be so unequal as to be incapable of specific enforcement. Not that the court will nicely weigh the relative advantages or disadvantages of a bargain fairly made, but it will consider whether the agreement is such an one as a court seeking to do equity

(1) Paine v Mellor, 6 Ver. 349.
(2) Margraf v Muir 37 N.Y. 155.
Rodeman v Zilly, 1 N.J.Eq. 320.
Stotenburgh v Tompkins, 9 Id., 332.
Society etc., v Butler, 12 Id., 403.
Smith v Wood, 12 Wis. 382.
ought to compel a party to perform. (1) Although inadequacy of consideration in contracts for sale, either in the price or the property sold, may be a ground of defence, yet the facility of contracting and the free exercise of the judgement and will of the parties require that as a general rule, they should be the sole judges, as to the value, of the benefits to be derived from their bargains. It is therefore, manifestly just and expedient that mere inadequacy of consideration or value should not in itself be deemed by the court a sufficient reason to refuse to specifically enforce a contract. (2) But the inadequacy of consideration is always a material circumstance to be weighed in connection with other circumstances existing in a case, conducing to show that it would inequitable to enforce the contract. (3) But when the inadequacy is such as to shock the moral sense of mankind, it constitutes a defence, though fraud is of the essence of the ob-

ligation to the contract in such a case. (4)

(1) Leau v Chouteau, 23 Ill. 39.
Crane v DeCamp, 21 N.J. Eq., 414.
(2) Hyre v Potter, 18 Hou. 42.
Harris v Tyson, 24 Pa.St. 342.
Kidder v Chamberlain, 41 Vt. 62.
(3) Stanton v Miller, 14 Hun. 333.
(4) Osgood v Franklin, 2 Johns. Ch. 1
Hodman v Zilley, 1 N.J. Eq. 320.
THE STATUTE OF FRAUDS.

The statute of frauds enacts that no "contract or sale of lands, tenements or hereditaments, or any interest in or concerning them" shall be enforceable "unless the agreement or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." The statute will be satisfied by any writing, however informal which contains expressly or by necessary inference all the terms of the agreement, to wit; the names of the parties, the subject-matter of the contract, the consideration, promise and signature of the party sought to be charged, leaving nothing open to future treaty. (p) Although law courts will not take cognizance of parol contracts for the sale of land, yet courts of equity in their desire to do justice, will enforce them, in certain cases notwithstanding the statute. These are 1.--when a written agreement has been prevented by fraud; 2.--in case of part performance of a parol contract; and, 3.--where the defendant admits the agreement and does not set the statute
up in defence. (2) 1.-- If the reduction of the contract to writing was prevented by the fraud of one of the parties, specific performance will be decreed upon proof of the parol agreement and of the fraud. (1) 2.-- It has been settled in England that part performance of a parol agreement may take the case out of the operation of the statute of frauds; and in this country the same doctrine has been adopted in most of the states; the statutes in some of them expressly excepting part performance. In Michigan, Minnesota, Maryland, New York and Wisconsin, the language of the statute on the subject is as follows; to wit; "Nothing in this title contained shall be construed to abridge the power of courts of equity to compel specific performance of agreements in cases of part performance of such agreements." But in order that the contract be withdrawn from the operation of the Statute of Frauds it must be characterized as follows, to wit; 1.--It must possess all the elements which are essential to a written contract. 2.-- The acts of part performance must be done in view of the contract as a part performance

(1) Ryan v Dox, 34 N.Y. 507.
(2) Prof. H.H. Hutchins Lec. on Eq. Jurisprudence.
of such contract. 3.-- The acts must be done with the knowledge and express or implied consent of the other party. 4.-- Acts done prior to the contract merely introductory thereto, are not considered as part performance. 5.-- The payment of the purchase-price in whole or in part is not such a part performance as will take the contract out of the operation of the statute. (1) 6.-- The important acts to do so are the actual, notorious and open possession of the property or valuable improvements made thereon, or both combined. (2)

The act performed should tend to show, not only that there has been an agreement, but also, to throw light on the nature of that agreement, so that neither the fact of an agreement nor even the nature of that agreement rest wholly upon parol evidence, the parol evidence being auxiliary to the proof afforded by the circumstances of the case itself. The act also should be one which would be prejudicial to the party seeking performance if the agreement were not enforced. (3)

(1) Cogger v Lansing, 43 N.Y. 559.
Odell v Montrose, 69 N.Y. 499.
Cole v Potts, 10 N.J.Eq. 67.
(2) Prof. H. B. Hutchins, Lec. on Eq. Jurisprudence.
(3) Welsh v Bayard, 21 N.J.Eq. 136.
Lester v Kniss, 37 Conn. 9.
Davenport v Mason, 13 Mass. 84.
If improvements are relied upon by the vendee; to constitute part performance, they must be of a permanent nature and such as will not reasonably admit of compensation in damages; and be consistent with and made on the faith of the contract. Proof of the parol contract must be clear and definite and the contract proved must be substantially that set forth in the bill. (1)

3.--- If the defendant admits the parol agreement and does not insist upon the statute as a defence, specific performance will be decreed. (2)

F R A U D.

Another defence which may be interposed, is that of fraud. A statement to constitute fraud, must contain the following characteristics, to wit;

1.---It must be an affirmation of some fact and not merely a matter of law, opinion, judgement or intention.

2.---The representation must be made with the design that the other party shall act thereon.

3.---The statement must be untrue.

4.---It must be believed to be untrue by the party

(1) Prof. H.B. Hutchins' Lec. on Eq. Jurisprudence.
(2) Bispham's Equity Jurisprudence Sec. 387.
making the statement, or made with reckless disregard
whether it be true or false.

5. --The statement must be relied upon by the party
to whom it was made.

6. --The statement must in its nature be material
to the transaction. (1) Where relief is sought on this
ground the burden of proof is on him, who alleges it,
and the fraud must be proved as alleged; (2) and the
proof clear and conclusive. (3)

M I S T A K E.

Mistake is another defence to a suit for specific
performance. By mistake is meant an erroneous conclu-
sion induced by ignorance, misapprehension or misunder-
standing of the truth, but without fault or negligence,
which results in some act or omission done or suffered
by one or both parties. (4)

The principle upon which mistake is allowed as a
defence is, that where there is a mistake, there is not
that full and free consent which is essential to a con-

(1) Prof. H.B. Hutchins Lec. on Eq. Jurisprudence.
(2) Eyre v Potter, 18 Nov. 47.
(3) Gress v Sayre, 3 Pet. 244.
(4) Prof. H.B. Hutchins Lec. on Eq. Jurisprudence.
tract in equity.

Mistakes are of two kinds, to wit: 1. -- mistakes of law and 2. -- mistakes of fact. The latter will but the former will not, in general, be a ground for resisting the specific performance of an agreement. But a mistake to be a defence must be material; i.e., of the essence of the transaction, and without which it is not probable that the transaction would have taken place.

As has been before stated, specific performance will not be decreed against the vendee when either the legal or equitable title to the property is doubtful. It is a sufficient objection of the facts would throw a cloud on the title and render it suspicious in the minds of reasonable men. (1) Trifling objections however, will not constitute a defence; e.g., the not having title to that which is not material; or a slight misdescription of the vendor's interest; or the existence of insignificant liabilities; or a right of way not affecting the beneficial enjoyment of the property.

TENDER.

Under the rule that a person who seeks specific performance must himself be ready and willing to perform, the question of tender arises. When the bill is filed by the vendor he must show a tender of title and an offer to fulfill on his part. So a tender of the purchase-money must be made by the vendee before a conveyance can be legally required.

With regard to what constitutes an offer to perform it is sufficient, in general, that a party has made a bona fide, reasonable, and earnest effort to fulfill; and the court will disregard technical objections on the other side, which have the appearance of an attempt to get rid of the contract. (1)

In a word, a party cannot call upon a court of equity for specific performance, unless he has shown himself ready, desirous, prompt and eager. (2)

(1) Daily v Litchfield, 10 Mich. 29.
(2) Ld. Advanley in Milward v Earl of Thanet, 5 Ves. 720.
TIME.

Equity, unlike the law, does not always regard time as of the essence of the contract. (1) But the parties may stipulate that time shall be of the essence of the contract, when such stipulations is reasonable and equitable. (2) And when it is so stipulated a party must show performance, or a willingness to perform on the required day in order to maintain his suit.

Parol evidence is admissible to prove that at the making of the contract time was considered as of the essence. (3) When such stipulation is not made; specific performance will be decreed upon satisfactory proof that the delay was not willful or intentional, and did not work irreparable injury to the other party, and was not so great as to constitute laches. However the tendency of the modern courts is to regard time more as of the essence than formerly. (4)

(1) Fryon Specific Performance Sec. 709.
(2) Baldwin v Vonvorst, 10 N.J.Eq. 577.
(3) King v Buchman, 20 id., 316.
DETERMINATION OF THE CONTRACT

It may constitute a defence that although such a contract as is sought to be enforced, was entered into between the parties yet it no longer exists. In other words, it may be contended either that a new agreement was substituted, or that the contract was rescinded by mutual consent. For, of course, if the parties continue sui juris, and capable of contracting, they may determine the contract in either of these modes.

MATTERS INCIDENT to the JURISDICTION.

COMPENSATION.

Cases often occur in which complete justice cannot be done between the parties to a contract by a decree for specific performance without allowance being made to one of them for some defect in the subject matter of the contract or for injury sustained by some act or default of the other and hence arises the salutary doctrine of compensation. If the purchaser chooses to accept less than he contracted for there can be no good
reason why he should not compel the vendor to perform as far as he is able with compensation for the deficiency. And the vendor may notwithstanding he cannot convey strictly according to his contract, be held entitled to a decree compelling the purchaser to fulfill on his part. For if it is out of the vendor's power, from any cause not involving bad faith, to convey each and every parcel of land contracted to be sold, and it is evident that the part which cannot be conveyed is of small importance or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, the vendor may insist on performance with compensation to the purchaser, or a proportionate abatement from the agreed price if that has not been paid.

But this cannot be done when the part with reference to which the defect exists is a considerable portion of the entire subject-matter, or is in its nature material to the enjoyment of the part in which there is no defect, or property is contracted for, which has for the purchaser a peculiar value not capable of pecuniary compensation.
If a party has bona fide brought an action in a court of equity, for the specific performance of a contract, which cannot be specifically enforced, the court will award damages without compelling the parties to resort to another forum; for it is a principle of equity jurisprudence that when the court has once acquired jurisdiction, it will retain it in order to do full, adequate and complete justice between the parties; which is the fundamental and primary object of courts of equity and for which they were instituted.

Finis.