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Specific Performance of Contracts for Arbitration or Valuation

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Specific Performance of Contracts for Arbitration or Valuation

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The doctrine that equity will not specifically enforce contracts for arbitration or valuation developed more than a hundred years ago. It has been almost uniformly adhered to, not only in England, where the doctrine arose, but also generally in the United States. Two main grounds have been assigned for the rule: (1) The inability of the court of equity to fully execute any decree which it might make for specific performance of such an agreement. It is powerless either to compel a party to perform the discretionary act of choosing an arbitrator or valuer, or to require such person to act when chosen. This is simply one application of the rule that equity cannot make a decree requiring the performance of personal acts calling for the exercise of skill or discretion. (2) The unwillingness of the court to aid in holding parties to an agreement, the object of which is to exclude the determination of controversies by the judicial tribunals.

The first reason seems to be the more persuasive, particularly as the basis for a distinctive rule of equity relative to specific performance. If the contract calls for the arbitration of controversies which by the law of a particular jurisdiction cannot be lawfully withdrawn from the cognizance of the courts, the contract may well be held invalid both at law and in equity. Doubtless, however, both of these grounds have been relied upon as a basis for the rule. In *Street v. Rigby*,[1] a case in which a partnership agreement provided for the reference of disputes to arbitration, Lord Eldon said in 1802 that no instance was to be found of a decree for specific performance of an agreement to name arbitrators, and that no discussion upon it had taken place in his experience for twenty-five years. He stated that in *Price v. Williams*, other phases of which are reported in 1790 and 1791,[2] a case in which he had himself been counsel, Lord Thurlow was of the opinion that the court would not perform such an agreement. Apparently Lord Eldon's opinion is based upon the

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[1] 6 Vesey 815 (1802).

[2] 3 Bro. C. C. 163 (1790); 1 Vesey 365 (1791).

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difficulties in the way of the court. He mentions as Lord Thurlow's ground that arbitrators might or might not be able to come to a decision, and then adds: "The court, if it is not part of the agreement, cannot give them authority to examine upon oath; and the agreement itself cannot authorize any person to administer an oath." On the other hand, in the case of *Mitchell v. Harris*[3] in 1793 an arbitration clause in an agreement relative to the smelting of copper ore was held not a bar to an action at law, the court's decision not turning on any difficulty as to equitable relief. That the rule was not as yet firmly established is indicated from the opinion of Sir William Grant, Master of the Rolls, in *Hall v. Warren*[4] in 1804, in which case he held that the fact that the defendant vendor had become a lunatic, thus precluding valuation by nominated persons, did not interfere with equitable relief. The question has come up most frequently in connection with cases of this type, namely, those in which there was a proviso for valuation of property, either by designated persons or by persons to be nominated by the parties, frequently with a clause that such parties should, in case of disagreement, select an umpire. Typical cases refusing specific performance under these circumstances are *Milnes v. Gery*,[5] *Blundell v. Brettargh*,[6] and *Agar v. Maclew*.[7] Any relief on such contracts is difficult in any form, because, price being an essential term of the contract, and the parties having agreed upon some specified mode for its determination, if the court is unable to require the fixing of value in the prescribed way, it will be making a new contract for the parties rather than enforcing one which they have made, if it substitutes some method of its own for fixing the price. This difficulty is recognized in actions at law.[8]

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[3] 2 Vesey Jr. 129 (1793). [4] 9 Vesey 605 (1804).
[5] 14 Vesey 400 (1807). [6] 17 Vesey 232 (1810).
[7] 2 Simons & Stuart 418 (1825); Wilks v. Davis, 3 Mer. 507 (1817); Firth v. Midland Co., L. R. 20 Eq. 100 (1852); Morgan v. Millman, 3 DeG. M & G 124 (1853); Eads v. Williams, 4 DeG. M. & G. 674 (1854); South Wales Railway v. Wythes, 5 DeG. M. & G. 880 (1854), *semble*.

[8] Burdick on Sales (3d ed., 1913), 39, states that in cases where the valuation is to be fixed by a third party "if the chosen arbitrator does not appraise the property, the contract of sale should be deemed avoided, inasmuch as it was conditioned upon his performance of the stipulated act; but if the purchaser has appropriated any of the goods under such a contract, he is liable for a reasonable price; and if the failure of the arbitrator to act is due to the fault of either party, he is liable for damages to the other."

Williston on Sales (1909), section 174: "The requirement of valuation is in such a case an express condition or a condition implied in fact, qualifying the obligation of the buyer to pay the price. Instead of promising to pay a specified price or a reasonable price, he promises to pay such price only as the valuers shall fix. In the nature of the case this promise cannot be performed unless the valuation first takes place."

The New York Sales Act (chapter 571, laws of 1911), section 91, has the following provision: "Where there is a contract to sell or a sale of goods at a price or

Lord Justice Fry thus states the rule as to valuation:[9]

"Where the contract appoints a way of determining the price, the courts have, in some cases, deemed that way essential; in other cases they have deemed it non-essential, and have treated the contract as essentially one to sell at a fair price. In all cases where the principal subject of a contract is to be valued in a specific manner, the manner has, it is believed, been held essential; the manner has often been held non-essential where it has applied only to an incident of the main subject, as timber to land, fixtures to a house, or plant to a business."

"Where the contract specifies a way of ascertaining the price, which is essential, the contract is conditional until the ascertainment, and is absolute only when the price has been determined in the manner agreed upon. In case of default in this respect, the contract remains imperfect and incapable of being enforced, for the court will never direct the payment of such a sum as A. may fix."

In Pomeroy on Specific Performance of Contracts (2d ed., 1897), the same principle is thus stated at section 149: "It is a settled doctrine that whenever the price is thus made to depend upon the decision of valuers, or upon any other future action or event, the contract is not completed and will not be enforced until the price has been actually fixed in the manner provided, or in some equivalent manner satisfactory to the court. A decree of specific performance will never be made ordering payment of such an amount as certain arbitrators may thereafter award."

The same rule, both as to agreements for arbitration and for appraisal, was early recognized in the United States and has been generally followed.[10]

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on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby voided, but if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor. Where such third person is prevented from fixing the price or terms by the buyer or the seller, the party not in fault may have such remedies against the party in fault as are allowed by the appropriate parts of this article."

[9]Fry, Specific Performance, sections 355, 356.

[10]Tobey v. County of Bristol, 3 Story 800 (1845); Manning v. Ayers, 77 Fed. 690 (1897); Caldwell v. Caldwell, 157 Ala. 119 (1908); Preston v. Smith, 67 Ill. App. 613 (1896); Saunt v. Martel, 127 La. 73 (1910); Noyes v. Marsh, 123 Mass. 286 (1877); Miles v. Schmidt, 168 Mass. 339 (1897); City of St. Louis v. St. Louis Co., 70 Mo. 69 (1879); Ferrell v. Ferrell, 253 Mo. 167 (1913), in which case Judge Brown says, without dissent, "Nothing is better settled than that an agreement to name arbitrators cannot be specifically enforced;" Woodruff v. Woodruff, 44 N. J. Eq. 349 (1888); Smith v. Compton, 20 Barb. (N. Y.) 262 (1855); Greason v. Keteltas, 17 N. Y. 491 (1858); Mutual Life Insurance Co. v. Stevenson, 214 N. Y. 488 (1915), *semble*; Conner v. Drake, 1 Ohio St. 166 (1853); Pillow v. Pillow, 3 Humphrey (Tenn.) 644 (1842); Baker v. Glass, 6 Munf. (Va.) 212 (1818). The rule is somewhat uncertainly stated in Schneider v. Hildebrand,

The effect of the rule, however, has been very greatly modified, both by a number of well defined exceptions in its application, and to some extent by statute,

I. Where the clause as to arbitration or valuation relates to some subsidiary or non-essential term, the court will nevertheless grant specific performance. While, of course, the court of equity is no better able to enforce such a provision where it relates to some minor term of the contract than in any other case, the doctrine is well settled that in certain cases specific performance of a contract in a modified form from that agreed upon by the parties can be enforced, as in the well-known instance of performance with compensation where there is a partial defect. Such performance may be granted either at the instance of the vendor or vendee. In several of the cases where a valuation clause was thus disregarded, the court argued, in support of its position, from the analogy to performance with compensation. This is substantially the position of Lord Hatherly in *Richardson v. Smith*,[10a] which is a bill by the purchaser for the performance of a contract for the sale of an estate for £24,000, the furniture and other articles on the estate to be valued. Such articles were worth about £2,000. The vendor refused to appoint a valuer, but the contract was enforced as to the estate without reference to the other articles. This modification of the rule is thus stated in the article on Specific Performance in Lord Halsbury's Laws of England, published in 1913, an article for which Sir Edward Fry takes responsibility, along with Mr. R. A. Wright: "Where the thing to be valued is subsidiary to the main purpose of the contract, the court treats the mode of valuation as non-essential, and the contract as one for sale at a fair price, as for example, in the case of a provision for the valuation of furniture or of plant and machinery; similarly, where partnership articles provide for a valuation when the partnership expires, the particular mode may be treated as non-essential, and the court provides for the fixing of a reasonable value."

Mr. Pomeroy says:[11] "The tendency of the later English decisions is to consider these stipulations for a determination of the price by

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14 Tex. Civ. App. 34 (1896). In a number of these cases the refusal of equity to act has been definitely grounded on the illegality of a general arbitration agreement. Saunt v. Martel, *supra;* Miles v. Schmidt, *supra;* Smith v. Compton, *supra.* In part Greason v. Keteltas was based upon this ground, and in Mcacham v. Jamestown Company, 211 N. Y. 346 (1914), a stipulation in a contract that the engineer of a railroad company should determine all disputes was held invalid as ousting the courts of jurisdiction by the convention of the parties.

[10a] 5 Ch. 648 (1870).

[11] Pomeroy's Specific Performance of Contracts, section 151.

third persons rather as matters of form than of substance; to construe them in such manner that they become incidental only to the main object of the agreement.

An examination of the English cases does not indicate any such tendency where the provision as to valuation relates to the principal subject matter of the sale, unless it be incident to some other contract, such as a partnership agreement.[12]

Where the agreement can be construed as a sale at a fair value, of course, specific performance can be given.[13] The result is the same if the parties provide for judicial determination of value in case the method by appraisal breaks down.[14]

Where the clause does not directly relate to value, but to some preliminary determination as to quantity or quality upon which the price depends, or some clause not affecting price, the question may arise as to whether such a term is essential. It would seem that a difference might well be drawn between a determination where the principle was clearly fixed, as in the case of a mere question of quantity. Where price, however, is dependent upon a determination of quality, involving skill or discretion, the same objection to the court adopting another mode for determining such question than

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[12]The cases cited by Mr. Pomeroy are: Binham v. Bradford, L. R. 5 Ch. 518 (1870), where a partnership agreement contained a provision for purchase at the termination of partnership on a valuation. In giving specific performance, Lord Hatherly not only relies upon the fact that the property has been fully enjoyed by the partnership, but also on the ground that the clause was incidental. He says: "But here is a man who has had the whole benefit of the partnership in respect to which this agreement is made, and now he refuses to have the rest of the agreement performed on account of the difficulty which has arisen. It is much more like the case of an estate sold and the timber on a part to be taken at a valuation. The adjustment of matters of that sort forming a part of the arrangement but by no means being the substance of the agreement, and in cases such as these the court has found no difficulty."

Richardson v. Smith, 5 Ch. 648 (1870), as stated *supra;* Smith v. Peters, L. R. 20 Eq. 511 (1875), similar to the case of Richardson v. Smith, where the agreement was for the sale of a lease of a public house for £10,700, the furniture and fixtures to be taken at a valuation. Sir George Jessel, Master of the Rolls, says: "There is no evidence that the value of the fixtures and furniture was so large as to be an essential portion of the contract." He also comments on the refusal of the defendant to permit the valuation to be taken. Other English cases where the arbitration clause did not relate to the principle subject matter of the sale are: Jackson v. Jackson, 1 Sm. & Gif. 154 (1853); Paris Chocolate Co. v. Crystal Palace Co., 3 Sm. & Gif. 119 (1854).

Cases in the United States involving a similar principle are: Union Pacific Co. v. Chicago Co., 51 Fed. 309 (1892), where in a contract for the joint use by railroad companies of a joint bridge over a river there was a stipulation for the regulation of schedules by referees; Joy v. St. Louis, 138 U. S. 1 (1890), regulations for use of railroad tracks; Burton v. Landon, 66 Vt. 361 (1894), principal agreement being for the settlement of a suit; Kipp v. Hann, 146 Wis. 591 (1911), real estate of manufacturing company sold for $82,000, other assets to be valued.

[13]Meyer v. Jenkins, 80 Ark. 209 (1906).

[14]Springer v. Boardman, 154 Ill. 668 (1895).

that agreed upon by the parties applies as in the case of valuation. In *Hutton v. Moore*[15] a provision for the grading of cotton and the fixing of its price was held an essential condition. In the case of the *Southern Timber Company v. Doyle*,[16] which was a bill by the vendor for enforcement of a contract for the sale of standing timber at $2.00 per thousand feet for all merchantable timber of certain specified varieties, the court decreed rescission. The court, however, suggests the somewhat refined distinction that this result is reached because the parties had agreed upon named estimators, namely, C. A. Schenck & Co., and the result might well have been otherwise had the provision been simply for the selection of estimators. This suggested distinction would seem to be an undue refinement neither warranted by the cases nor supportable in principle. In *Howison v. Bartlett*[17] the bill was for specific performance of a sale of certain timber land at $6.00 per acre, with a provision that the premises were to be surveyed by some competent surveyor, to be mutually agreed upon. This provision, although it related to the principal subject matter of the contract, was held non-essential. There are few cases similar to this, and the result can only be sustained on the principle that a survey to determine quantity is a purely mechanical act.

In the following cases specific performance was refused, the proviso relating to some material term other than valuation: *Gourley v. Duke of Somerset*,[18] in which a lease was to contain all such usual and proper agreements as might be judged reasonable by John Gale; and *Tillet v. The Charing Cross Company*,[19] a contract for the purchase of certain leaseholds where named persons were to decide in case of difference as to the character of houses to be erected. In this case Sir John Romilly, Master of the Rolls, says: "Now here undoubtedly this is not a case of price, but the question is the same if the mode in which the houses were to be rebuilt is an essential part of the contract, and I think it is."

A like result was reached in a very late case in which the solicitors of the purchaser of a leasehold house were to approve the title to and the covenants contained in the lease, the title from the freeholder, and the form of contract.[20] Similarly, specific performance was refused where the contract was for the purchase of 10,000 acres of land, to be designated by the defendants,[21] and where one-half share of stock was to be transferred to a friend to be agreed upon.[22]

[15]26 Ark. 382 (1870). [16]204 Fed. 829 (1912).

[17]141 Ala. 193 (1904); similar result on second appeal, 147 Ala. 408 (1906); Omaha Lumber Co. v. Co-operative Investment Co., 55 Colo. 271 (1913) is a like case (quantity of merchantable timber to be determined by cruisers).

[18]19 Vesey 429 1815). [19]26 Beav. 419 (1859).

[20]Van Hatzfeldt-Wildenburg v. Alexander, L. R. (1912), 1 Ch. 284.

[21]Alabama Mineral Co. v. Johnson, 121 Ala. 72 (1898).

[22]Kennedy v. The Monarch Manufacturing Co., 123 Ia. 344 (1904).

II. Acts may have been performed under the contract creating such an equity that the court must give some relief in spite of a proviso for valuation.

Most of the cases where the valuation clause is spoken of as incidental may be explained on the ground that they are contracts which would be performed without reference to the valuation of some minor sort of property, the transfer of which is unimportant as compared with the principal subject matter of the contract. Certain cases, while referable in part to the same doctrine, may perhaps be more strongly grounded on the principle that the parties by performance have put themselves into a position which necessitates equitable relief. Thus, in such a case as *Binham v. Bradford, supra*, the partnership had been fully enjoyed and some disposition of the partnership assets necessarily had to be made. In *Castle Creek Company v. City of Aspen*,[23] a water company was allowed to enforce specifically a contract for the purchase of a system of water works where the city, at the expiration of a twenty-year period, had given notice of its election to purchase. By the contract the price was to be determined by appraisers. The court overruled a demurrer on the ground that the contract to sell did not stand alone, but was simply a subsidiary part of another contract for a more extensive purpose. Such contract had been in part performed. Another case based on the same principle is *Bristol v. The Bristol Company*.[24]

A very large number of cases have arisen where leases have provided either for a renewal upon a rental to be fixed by appraisers, or for the sale of improvements upon the expiration of the lease, the value of which was to be similarly determined. It is obvious that in such cases it would be grossly inequitable either to permit the lessor to appropriate improvements without payment, or to allow a lessee to continue in the enjoyment of premises when the rental value might have largely increased. While equity is powerless to secure the valuation in the prescribed manner, it must in some way work out the equities of the parties. The only question is, What shall the remedy be? The sound solution, and the one which has been very generally adopted, is to ignore the provision as to mode of valuation, the court itself fixing value. The court in such a case is not enforcing the contract. The contract has failed. The court is merely protecting the parties from injustice.

In an early English case dealing with the problem, *Gregory v. Mighell*,[25] in which the rent was to be fixed by arbitrators, the lessor

[23] 146 Fed. 8 (1906). [24] 19 R. I. 413 (1896). [25] 18 Vesey 328 (1811).

had refused to sign the arbitration bonds. Sir William Grant, Master of the Rolls, says: "That is a case in which the failure of the arbitrators to fix the rent can never affect the agreement. It is in part performed and the court must find some means of completing its execution; as I have already said, the plaintiff is not to be considered as a trespasser. Some rent he must pay; the amount must be fixed in some other mode; and it seems to me, that it should be ascertained by the master without sending it to another arbitration; which might possibly end in the same way."

In a large number of American cases under these circumstances the court has itself determined the value of buildings which have been erected or the amount of rental which should be paid upon renewal.[26]

In a number of cases the courts appear to have taken the position that enforcement of the agreement for valuation must be given in cases of this type.[27] These cases apparently proceed on the theory that specific performance is not impossible in such cases, but that it is merely declined on the grounds that ordinary inadequacy of the legal remedy is not sufficient to induce the court to undertake the task of enforcing an arbitration. This result is similar to that reached in cases requiring performance of contracts calling for continuous acts. While ordinarily in such cases equity declines relief, it has granted performance in a few cases relating to railroads, where the public interest is deemed to counterbalance the incon-

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[26]Biddle v. Ramsey, 52 Mo. 153 (1873); Hug v Van Burkuleo, 58 Mo. 202 (1874); Strohmaier v. Zeppenfeld, 3 Mo. App. 429 (1877); Robinson v. Ketelтas, 4 Edw. Ch. (N. Y.) 67 (1842); Dunnell v. Keteltas, 16 Abb. Pr. (N. Y.)205 (1863); Kelso v. Kelly, 1 Daly (N. Y.) 419 (1865); Viany v. Ferran, 5 Abb. Pr. N. S. (N. Y.) 110 (1868); Weir v. Barker, 104 App. Div. (N. Y.) 112 (1905); Mutual Life Insurance Company v. Stevens, 214 N. Y. 488 (1915). This case held that specific performance to secure an appraisal of the value of the demised premises could not be granted. By the contract, on the making of such appraisal, the lessee was to have an option of purchase. The plaintiff had not yet elected to make the purchase. Judge Miller explains the cases in which equity has given relief upon leases on the ground that the provision for appraisal is incidental and subsidiary tc the substantive part of the agreement. Since the appraisal relates to the principal subject matter of the contract, this explanation of cases seems less satisfactory than recognition of the necessity of fixing the value because of the equity created by performance. Lowe v. Brown, 22 Ohio St. 462 (1872); Kaufmann v. Liggett, 209 Pa. 87 (1904). The court here recognizes the true grounds for the rule, saying, "The grossest inequity would be worked otherwise." Grosvenor v. Flint, 20 R. I. 21 (1897); Richardson v. Harkness 59 Wash. 474 (1910); Hopkins v. Gilman, 22 Wis. 476 (1868); Schneider v. Reed, 123 Wis. 488 (1905).

[27]Gunton v. Carroll, 101 U. S. 426 (1879) (demurrer overruled); Destructor Co. v. City of Atlanta, 219 Fed. 996 (1914) (motion to dismiss); Tscheider v. Biddle, 4 Dillon 58 (1877) (demurrer overruled); Coles v. Peck, 96 Ind. 333 (1884) (demurrer overruled); Herrman v. Babcock, 103 Ind. 461 (1885) (demurrer overruled.)

venience to the court involved in enforcement.[28] In these cases, however, while the courts hold that equitable relief will be given, it is not very clear precisely what form such relief will take. In *Tscheider v. Biddle, supra*, Judge Dillon stays the prosecution of a law action for rent, the amount of which was to be fixed, and says that this order "does not contravene the principle contended for by the defendant, that before there can be a decree for renewal, the rental must be fixed by arbitrators and cannot be fixed by the court, since the object of the rule or order is to compel the defendant (lessor) to himself appoint the assessor who is to represent him. If he appoints an impartial person, without instructions, and he is met with an impartial appointment by the lessee, it is probable that an agreement as to the rental will be reached."

Several New York cases seem to indicate that in case of default by either the lessor or lessee, under such an agreement, the court will indirectly coerce performance of the contract, although it could not make such a decree directly. Thus in *Wells v. DeLeyer*,[29] in which there was a lease for five years at a rental of $100 per year, with a right of renewal at a rental to be fixed by arbitration, Judge Daly says that, if the lessor had failed to appoint an arbitrator, the lessor could secure a renewal at the old rate, and that, as in this case the lessee has neglected to act, the lessor may hold him for $200 per year, having given notice of such intention. In *Johnson v. Conger*,[30] the lessor having declined to take part in the arbitration to fix rental, Ingraham, P. J., says: "We think a court of equity can compel the parties to perform this covenant of renewal. If the landlord declines to name an arbitrator on his part, the same can be ascertained by the court or the lease renewed at the old rent."

Similarly in the recent case of *Van Beuren v. Wotherspoon*[31] the lessor, upon the expiration of a lease, having failed to act, it was said that the continuance of the lessees in possession must be regarded as under the lease, and that until the plaintiffs had exercised their election either to renew or take the building on the premises, the lessees were liable only for the original rent. This principle seems very much like that applied in the cases where the negative agreement of an actor or other person rendering unique services not to perform for a rival manager is enforced, although such negative clause is part of a single contract for the rendition of services, which the court

[28] Joy v. St. Louis, 138 U. S. 1 (1890); Union Co. v. Chicago Co. 163 U. S. 564 (1896).
[29] 1 Daly (N. Y.) 39 (1860).
[30] 14 Abb. Pr. (N. Y.) 95 (1861).
[31] 164 N. Y. 368 (1900).

of equity is powerless to enforce in its entirety. The court, by imposing pecuniary loss upon the defaulting party, indirectly coerces such party. There would be no objection to this, were the court simply denying relief to a party declining to do an act of such a nature that the court could require its performance, but, since neither a new rental arbitrarily fixed by a lessor, nor the old rental, bears any relation to the actual value of the premises, such a course seems merely to penalize a defaulting contractor in an arbitrary amount. Either the court should enforce the contract for valuation, or if this is not possible, it should itself determine what equitable relief is demandable by the situation.

III. In England, where this doctrine arose, the situation has been very substantially altered by statute. Section 11 of the Common Law Procedure Act[32] provided that, where by agreement any conditions were to be referred to arbitration, a suit commenced by any of the parties might be stayed, and section 12 gave authority to judges of the superior courts to appoint arbitrators or umpires. In numerous cases this statutory remedy has been acted upon.[33]

The relief under the statute was given even in a case where by a partnership agreement disputes were to be referred to a foreign body, namely, to the Commercial Court of St. Petersburg.[34] Substantially the same provisions are embodied in a later English statute, the Arbitration Act of 1889.[35] The right to the enforcement of such an arbitration is not absolute; the application may be refused by the court for sufficient reason, and has been so refused in a number of cases.[36] In some cases the court directs that some portion of the controversy be determined by arbitration, while retaining control of the action in other respects.[37] Sir Edward Fry states that the

[32]Chap. 125, 17 & 18 Victoria (1854).

[33]Seligmann v. LeBoutillier, L. R. 1 C. P. 681 (1866); Willesford v. Watson, L. R. 14 Eq. 572 (1870); Plews v. Baker, 16 Eq. 564 (1873); Newton v. Taylor, L. R. 19 Eq. 14 (1874); Gillett v. Thornton, L. R. 19 Eq. 599 (1875); Russell v. Russell, 14 Ch. Div. 471 (1879); Hack v. London Provident Building Society, L. R. 23 Ch. Div. 103 (1883); Municipal Bldg. Society v. Kent, 9 App. Cases 260 (1884); Brierley Board v. Pearson, 9 App. Cases 595 (1884).

[34]Law v. Garrett, L. R. 8 Ch. Div. 26 (1877).

[35]52 & 53 Victoria, chap. 49. A case involving the dissolution of a partnership of two physicians to which this act was applied is Vawdrey v. Simpson, L. R. 1896, 1 Ch. 166.

[36]Lyon v. Johnson, L. R. 40 Ch. Div. 579 (1889), question between physicians who were partners as to whether a certain lady was a patient and whether a bequest from her was a pecuniary emolument under the terms of the partnership articles; Klegg v. Klegg, L. R. 44 Ch. Div. 200 (1889), directing that the application for arbitration stand over until after the basis for defense appeared; Barnes v. Youngs, L. R. 1898, 1 Ch. 414, claim of fraud; Bonnin v. Neame, L. R. 1910, 1 Ch. 732, arbitrators had expressed strong opinions.

[37]Pini v. Roncoroni, L. R. 1892, 1 Ch. 633, application for receiver granted; Ives & Barker v. Willans, L. R. 1894, 2 Ch. 478, arbitration ordered except as to certain matters outside of the contract.

Common Law Procedure Act was applicable only to arbitrators appointed to settle a previously existing dispute and did not apply to valuers who are to ascertain the value of the subject matter of a sale, and he conceives that this is also true of the Arbitration Act.[38] This conclusion was arrived at in *Collins v. Collins*,[39] a case involving a contract for the sale of a brewery and plant at a price to be fixed by arbitrators and an umpire. The same rule was applied in *In Re Dawdy*.[40] Similarly in *Matter of Cavus-Wilson & Greene*,[41] in holding that a provision for the fixing of valuation of timber upon the sale of land was not one for arbitration, Lord Esher states that an arbitration is to settle a dispute which has arisen; a valuation is to ascertain a matter in order to prevent disputes arising. The opposite result was reached by the House of Lords in a Scottish case in which the court said that English law and usage was not concerned.[42]

IV. In the discussion thus far no distinction has been drawn between cases where the arbitration fails without the fault of the parties, as, for example, through the inability of the valuers to act or agree, or the death of a party or arbitrator, and those cases in which one of the parties first declines to carry out the arbitration. If the ground for the declination of equity to enforce these contracts is its powerlessness, it would seem that a decree would be equally futile, whether the failure of the arbitration was with or without the consent of the parties. If the misconduct was simply in preventing the valuers from entering upon the premises or proceeding with the valuation, while there would be no difficulty in the way of equity's enjoining such interference, and possibly this could be justified on the theory that the contract for valuation was subsisting and was in process of performance, it would seem that equity should decline to intervene, since it is powerless to compel the valuers to proceed, and hence cannot give any assurance that the contract will be performed in its entirety. That one of the parties is in default would seem to be no reason why equity should discard their agreement as to a specific mode of valuation and substitute some term of its own for the condition agreed to by the parties. This view is taken by a number of text writers. Thus, Sir Edward Fry[43] says:

"If the contract be between A. and B. to sell and buy at such a price as valuers to be named by them shall fix, it seems that either A. or B.

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[38]Fry, Specific Performance, section 359. [39]26 Beav. 306 (1858).
[40]15 Q. B. D. 426 (1885). [41]18 Q. B. D. 7 (1886).
[42]Stewart v. Williamson, 1910 App. Cases 455.
[43]Fry, Specific Performance, section 357.

may refuse to name a valuer, and the contract will remain incapable of completion without any liability on the part of the refusing party. But if the contract between A. and B. be to sell and buy at such a price as C. shall fix, neither A. nor B. can rightfully prevent C.'s determination and the completion of the contract: and it is presumed that an action might be maintained for such prevention."

Mr. Bogert[44] states that the English cases illustrate the principle that without the valuation the contract of sale is void and inoperative, and says: "In England specific performance will not be granted where valuation has been prevented by the act of one party."

Similarly Mr. Williston[45] says: "If either party was to select a valuer, or notify a man selected for a valuer, or submit property to valuation, and fails to do so, he has broken his contract; he is, therefore, liable in damages. Specific performance will not, however, be given of such a contract. This is in accordance with the general principle of equity denying specific performance of all kinds of agreements for arbitration."

Mr. Pomeroy,[46] while stating the same rule, suggests that its correctness may, in the light of recent English decisions, be well doubted.

In *Wilks v. Davis*,[47] although the defendant had refused to execute the arbitration bond, specific performance was refused. And a like result was reached in *Vickers v. Vickers*,[48] where a partner was to have an option of repurchase upon a valuation. Two valuers had been appointed, but the defendant altered his mind and would not allow the valuation to be proceeded with. Vice-Chancellor Wood says that the only persons who can act are the persons thus to be named. Apparently in *Morse v. Merest*,[49] however, the vendor having refused to allow the three valuers to make the valuation at the time prescribed, was not allowed to take advantage of this. By a like holding in *Mutual Life Insurance Company v. Stevens*, *supra*, it was held that, owing to the defendant's refusal to name an appraiser, the plaintiff's time to exercise his option had not expired. In *Smith v. Peters*, *supra*, where performance of a contract to sell a lease of a public house for £10,700, the furniture and fixtures to be taken at a valuation, the defendant having refused to permit the valuation to be taken, was granted, Sir George Jessel not only rests the case upon the ground that the provision as to the furniture was a subsidiary term of the contract, but also expresses the opinion that in *Vickers v. Vickers* Vice-Chancellor Wood intended to say that if a party pre-

[44]Bogert, The Sale of Goods in New York, pp. 47–48.
[45]Williston on Sales, section 176.
[46]Pomeroy, section 150.
[47]3 Mer. 507 (1817).
[48]L. R. 4 Eq. 529 (1867).
[49]6 Maddock 26 (1821).

vented valuation, substitution could be made in order to give effect to the *bona fides* of the contract. It would not seem that such a construction can fairly be placed upon the opinion in *Vickers v. Vickers*.

Several American cases have dealt with the same aspect of the problem. While it has been held that a person will not be allowed in equity to take advantage of his own misconduct,[50] the complainant having defeated the execution of the agreement while waiting for the land sold to rise in value, default does not do away with the necessity for the performance of a condition upon which liability under the contract is dependent. Thus, in *Elberton Hardware Co. v. Hawes*[51] the court declined to permit an action for damages for breach of contract where the value of a stock of hardware was to be fixed by two named valuers. One of said persons refused to act, such refusal being caused by the act of the defendant. Fish, P. J., says: "The defendant may have rendered himself liable to the plaintiff in damages by preventing the valuers named in the written agreement from valuing the stock in accordance therewith and thus rendering the contract complete, but it cannot be held that by so doing he has estopped himself from claiming that the contract had not become complete."

Both as a matter of principle and authority the following general conclusions seem warranted:

(1) Equity will decline to enforce a contract containing a clause for arbitration or valuation unless such clause relates to some subsidiary or incidental provision of the contract.

(2) Where part performance has so affected the position of parties that an independent equity has been created, equity will prevent injustice, the court itself making any necessary determination as to value or other controverted term.

(3) In England, by statute, agreements as to arbitration of disputes may be enforced, but such statutory provisions are not applicable to clauses providing for valuation.

(4) The declination of equity to give specific performance is not affected by the fact that one of the parties has lawfully prevented arbitration or valuation. It is powerless to require such a party to appoint a valuer, and even if the interference with valuation could be prevented by injunction, since the court cannot be certain of its ability to enforce the entire contract, it should not intervene when such intervention may, in the end, prove to have been futile.

[50] Pillow v. Pillow, 3 Humphrey (Tenn.) 644 (1842).

[51] 122 Ga. 858 (1905). Alabama Mineral Land Co. v. Jackson, 121 Ala. 172 (1898), is a somewhat similar case.