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The Factor of Time in Specific Performance

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legal title.[21] If equitable title inured, he would be protected against secret equities.

The second distinction might lie in the fact that the grantee might have the alternative of taking the title, or refusing it and suing for damages—but this is also immaterial for the equitable title inures, leaving the grantee no choice. This is just, for he is getting what he expected, he never contemplating having the choice of money or land.

The only logical theory if one wishes to be consistent is under the equitable principle that where one having no title or an imperfect one, purports to convey good title to another, and afterwards acquires that good title, he may be compelled to convey such title by equity under the specific performance theory. But there is no practical difference in the theories used.

We must note, too, that all these general rules apply equally to a mortgage, as was shown in *Hirsch v. Tillman*,[22]

> "A mortgage is a deed in form and for some purposes is treated as a conveyance, and the doctrine of estoppel by deed has been held to apply to cases of mortgages, estopping the mortgagor and his privies from setting up against the mortgagee an after-acquired title to the estate.

Millard Ullman.

THE FACTOR OF TIME IN SPECIFIC PERFORMANCE

The effects of the passage of time upon legal relationships in general are innumerable; and even when considering only the subject of specific performance, it is evident that almost endless variations of cases in which the time element is material present themselves. However, there are certain fundamental principles involved in this connection which are relatively few in number, and which this note proposes to consider. An attempt will be made to develop these conceptions in the light of the Pennsylvania cases, since they differ at times in this jurisdiction from the rules as they are generally applied.

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[21]Lightner v. Mooney, 10 W. 407 (1840); Caider v. Chapman, 52 Pa. 359 (1866).

[22]2 Pa. Dist. Reports 662; 13 Pa. C. C. 251 (1891); Appeal of Boro. of Easton, 47 Pa. 225 (1861); Hayes v. Leonard, 10 Pa. C. C. 648 (1891).

WHEN TIME IS NOT ESSENTIAL

Pennsylvania judges, in deciding specific performance cases, have uniformly held that ordinarily time is not essential in contracts for the sale of real property.

Justice Gibson held in *Decamp v. Feay*,[1] in 1819: "Where time admits of compensation, as it perhaps always does, where lapse of it arises from money not having been paid at a particular day, it is never an essential part of the agreement." This rule has been followed without interruption in Pennsylvania, and the mere passing of the date set for the performance of the contract does not prevent a decree of specific performance of the contract.[2]

As first stated this rule concerned itself only with time as an essential element of performance upon the part of the vendee. Although the vendor's suit for specific performance in Pennsylvania is usually an action of assumpsit for the purchase price, and although time is usually of the essence in an action at law, it is held in this state that the same equitable principles which govern the vendee's bill for specific performance will be applied in the vendor's suit for the purchase price and that time is not ordinarily essential.[3]

These rules are governing when the contract is completely executory; and when the contract has been partly performed there is even more reason for applying them.[4]

Although time is not essential in the ordinary suit for specific performance of a contract to convey land, it cannot be said to be immaterial. As the delay continues there may come a time when the suit for specific performance will be barred for any one of several reasons.

It is said that "Where time is not either expressly or impliedly of the essence of the contract, if a party seeking specific execution has been guilty of gross laches or inexcusable negligence in performing the contract on his part, or there has been a material change of circumstances affecting the rights,

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[1]5 S. and R. 323 (1819).

[2]Remington v. Irwin, 14 Pa. 143 (1850); D'Arras v. Keyser, 26 Pa. 249 (1856); Morrell v. Broadbent, 291 Pa. 503.

[3]Musselman's Appeal, 65 Pa. 480 (1870), (Orphans' Ct.); Townsend v. Lewis' Admr., 35 Pa. 125 (1860), (Sci. fa on P. M. Mtg.); Coates v. Cotteral, 290 Pa. 237 (1927). "We have repeatedly held that a suit for the purchase money named in an agreement of sale, is in legal effect equivalent to a bill in equity for specific performance of the contract of sale, and is governed by the equitable principles applicable thereto." Black v. American Int. Corp., 264 Pa. 260 (1919); Hoover v. Pontz, 271 Pa. 285 (1921); Ritter v. Hill, 282 Pa. 115 (1925).

[4]White v. Patterson, 139 Pa. 429 (1890), (possession 33 years); Remington v. Irwin, 14 Pa. 143 (1850), (nothing done); MacLaughlin v. Shields, 12 Pa. 283 (1849), (purchase price paid). Specific performance was decreed after 18 years.

interests and obligations of the parties, rendering it unjust to decree specific performance, equity will refuse to direct it."[5]

This is one of those general rules which cannot be applied to a specific factual situation with any certainty. However, it is more a guiding principle than a rule of law, for a decree for specific performance is not a matter of course, but rests in the sound discretion of the chancellor.[6]

It has been suggested that unexplained delay alone will bar an action for specific performance,[7] and this is certainly so when the plaintiff has given the defendant cause to suppose that the contract has been abandoned.[8]

Delay, coupled with changes in the value of the property and the circumstances of the parties will bar a suit for specific performance.[9] Neither party will be permitted to speculate upon the contract.[10]

On the other hand, long lapses of time have been disregarded in situations where the plaintiff was able to explain his delay satisfactorily.[11]

If the vendee has gone into possession under the contract it is usually held that the defense of laches will not be permitted.[12] Possession is strong evidence that the contract has not been abandoned, and when possession has been taken the typical situation is presented in which, when the vendee sues, the lapse of time can be compensated for by the payment of interest. If the vendor sues for the purchase price, the vendee, since he has been in possession, has not usually been materially damaged by the delay.

It has been suggested that mere payment of the purchase price will bar the defense of laches.[13] This is certainly strong evidence that the contract has not been abandoned, and it is difficult to understand how one who has fully performed can be guilty of laches.

In Pennsylvania the statute of limitations must be kept in mind when

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[5]Tiernan v. Roland, 15 Pa. 429 (1850); Russell v. Baughman, 94 Pa. 400 (1880); Callen v. Ferguson, 29 Pa. 247 (1857).

[6]Friend v. Lamb, 152 Pa. 529 (1893).

[7]Miller v. Henlan, 51 Pa. 265 (1865); Foster's Estate, 6 Co. Ct. 223 (1888); DuBois v. Baum, 46 Pa. 537 (1864); McGrew v. Foster, 113 Pa. 642 (1886). But see 237 Pa. 260—More than five years unprejudicial delay no bar.

[8]Rennyson v. Rozell, 106 Pa. 407 (1884); Washabaugh v. Stauffer, 81* Pa. 497 (1874).

[9]Miller v. Henlan, 51 Pa. 265 (1865); Andrews v. Bell, 56 Pa. 343 (1867); Ruff's Appeal, 117 Pa. 310 (1887); DuBois v. Baum, 46 Pa. 537 (1864).

[10]Ley v. Huber, 3 Watts 367; Miller v. Henlan, 51 Pa. 265 (1865); McGrew v. Foster, 113 Pa. 642 (1886).

[11]Tiernan v. Roland, 15 Pa. 429 (1890), (6 yrs.); Penna. Mining Co. v. Thomas, 204 Pa. 325 (1903), (4 yrs.).

[12]White v. Patterson, 139 Pa. 429 (1890); Masters v. Roberts, 244 Pa. 343 (1914).

[13]MacLaughlin v. Shields, 12 Pa. 283 (1849).

considering suits for specific performance of contracts to sell land. The Act of 1856[13a] provides that actions for specific performance of contracts for the sale of real property must be brought within five years after the contract was made.

It is problematical whether or not this statute applies to suits by the vendor for the purchase price.[14] It has been held in one lower court case that this statute does so apply.[15]

If the five year statute regarding specific performance is inapplicable, it seems that the usual six year limitation upon contract actions would govern the vendor's suit for the purchase price, although this would permit a situation in which, between the end of the fifth and the end of the sixth year after the contract was made, the vendor could get specific performance while the vendee could not. It has been held that the six year statute governs the vendor's suit for the purchase price.[16]

TENDER

The question of tender, although it is usually mentioned in decisions on specific performance cases, is not really involved in determining the time limit within which the suit must be brought. Rather, it is one of the conditions to be fulfilled before bringing suit, after it has been determined that the passage of time has not barred the right to specific performance.

When specific performance was enforced by an action of ejectment it was necessary for the vendee to bring the money into court.[17] Today, however, the usual procedure is by a bill in equity and the rules regarding tender have been relaxed somewhat.

When the covenants for performance are mutual, concurrent and dependant the general rule is that the party seeking specific performance must have tendered performance of his portion of the contract before bringing suit;[18] and if it is not otherwise provided in the contract it is presumed that the

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[13a]P. L. 532.

[14]See Article on the Statute of Limitations of 1856, 39 Dickinson Law Review 158, by Harold S. Irwin.

[15]Federal Realty Company v. Bolland, 54 Pitts. L. J. 474 (1911).

[16]Taylor Adm'rs v. Whitman's Adm'rs, 3 Grant 138 (1861); Reed v. Reed, 46 Pa. 239 (1863), (20 year presumption of payment); McSorley v. Mamaux, 68 Pitts L. J. 267 (1920).

[17]Minsker v. Morrison, 2 Yeates 344 (1798); Gore v. Kinney, 10 Watts 139 (1840).

[18]Cassel v. Cooke, 8 S. and R. 268 (1882); Adams v. Williams, 2 W. and S. 227 (1841); Baum v. DuBois, 43 Pa. 260 (1862); Club Laundry and Cleaning Co. v. Murphy, 266 Pa. 183 (1920); Irvin v. Bleakley, 67 Pa. 24 (1870).

covenants for performance are concurrent and dependent.[19]

If the covenants are not concurrent the contract must be scrutinized to determine whose performance was to take place first. If performance on the part of the plaintiff was to precede performance by the defendant tender is necessary.[20] If the defendant's performance was to take place first no tender is required.[21]

Of course, if the defendant has repudiated the contract by acts or words tender will not be required. Equity will not compel the doing of a useless act.[22]

It has been suggested in dicta in several cases that where the covenants for performance are mutual and concurrent it is enough that the plaintiff proves a readiness and willingness to perform and a tender is unnecessary, but this rule is by no means established.[23]

Logically, where the covenants are concurrent, and the other party has not repudiated the contract, it would seem that there should be a tender by the plaintiff before suing for specific performance. One should not be permitted to seek specific performance in the courts until it has been definitely ascertained that it cannot be obtained otherwise.

The question of tender is further complicated by the rule in Pennsylvania that in the vendor's suit for the purchase price it is sufficient if title can be made at the time of the decree,[24] provided the vendor had not been acting in bad faith.

TIME ESSENTIAL

Although time is not ordinarily of the essence in contracts for the sale of land, it may be made so by any one of three methods. Pomeroy, in his book

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[19]Club Laundry and Cleaning Co. v. Murphy, 266 Pa. 183 (1920); Boyd v. McCullough, 137 Pa. 7 (1890). After the time set has passed the conditions are presumed to be mutual and concurrent. Hatton v. Johnson, 83 Pa. 219 (1867).

[20]Lykens v. Tower, 27 Pa. 462 (1856).

[21]Lowry v. Mehaffay, 10 Watts 387 (1824); Stitzel v. Kopp, 9 W. and S. 29 (1845); Edgar v. Boies, 11 S. and R. 445 (1840); Parmentier v. Wheat, 33 Pa. 192 (1859).

[22]Tiffany v. Wightman, 18 Dist. 915 (1908); Kunkel v. Roberts, 16 Dist. 179 (1903); Lamb and Co. v. Adams, 18 Dist. 110 (1908); Whiteside v. Winans, 29 Pa. Super. 244 (1905); Penna. Mining Co. v. 210 Pa. 53 (1904).

[23]Douglas v. Husted, 216 Pa. 292 (1907); Gerhard v. McCarty, 23 Lanc. 241 (1906); Zents v. Lengard, 70 Pa. 192 (1871); Williams v. Bently, 27 Pa. 294 (1856).

[24]Moss v. Hanson, 17 Pa. 379 (1851); Irvin v. Bleakley, 67 Pa. 24 (1870); Mussleman's Appeal, 65 Pa. 480 (1870); Holt's Appeal, 98 Pa. 257 (1881); Cohen v. Shapiro, 298 Pa. 27 (1929), (bad faith).

on "The Specific Performance of Contracts" says:[25]

"There are three cases to be examined, in the first two of which time is made essential by the terms of the original contract, while in the third, not being originally essential, it becomes so by the subsequent acts of one of the parties. They are (1) where the essential quality of time inheres in the very nature of the subject matter or in the object of the agreement; (2) where it is the subject of an express stipulation; and (3) where time not being originally essential, one of the parties delays in fulfilling his terms of the agreement, and the other party, by a notice, prescribes a definite period within which the contract must be completed or else abandoned."

This paragraph may be accepted as a concise summary of the law in Pennsylvania.[26]

There do not seem to have been any cases in this state in which time was held to be of the essence because of the nature of the subject matter of the contract or the object of the agreement. As seen before, changes in the value of the subject matter of the contract will make time material and pave the way for the defense of laches; and if such changes were clearly forseeable beforehand and the parties have set a day for the performance of the contract, most courts presume that it was the intention of the parties to make time of the essence.[27]

In *Dauchy v. Pond*,[28] it was held: "It was at one time seriously doubted whether time could be made of the essence of the contract, but that this can be done must now be conceded; so that in those cases where there is a default in payment at the day, without a just cause, and without any waiver afterwards, a court of chancery will not interfere to help the party in default."

It has long been possible, then, to make, by express stipulation, time of the essence of a contract to convey land. Parties should be allowed to contract under such conditions as they may see fit to impose, and if they desire to declare that the contract shall be at an end if performance is not made on a day certain the courts should not interfere and virtually re-write their contract.

The stipulation in Pennsylvania has usually been to the effect that the contract shall be null and void unless performed on the day set.[29] It is neces-

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[25]Pomeroy, Specific Performance of Contracts, 3rd. ed., sec. 382.

[26]Tiernan v. Roland, 15 Pa. 429 (1850), dicta; Piacentino v. Young, 272 Pa. 556 (1922), dicta.

[27]Tiernan v. Roland, 15 Pa. 429 (1850), dicta. See Pomeroy, Specific Performance of Contracts sec. 383.

[28]Dauchy v. Pond, 9 Watts 49 (1839).

[29]Dauchy v. Pond, 9 Watts 49 (1839); Lord v. Grow, 34 Pa. 84 (1861); Axford v. Thomas, 160 Pa. 8 (1894); Russell v. Stewart, 204 Pa. 11 (1902).

sary to do more than merely stipulate that performance is to be made on a certain date, and it would seem to be the safest course, when it is desired to make time of the essence, to follow the English custom and insert the clause "time shall be of the essence of the contract."

Time may be made of the essence by notice—but the time set must not be immediate, but a reasonable time in the future.[30]

When time has been made of the essence of the contract the plaintiff must have tendered performance on or before the day set or his right to enforce the contract is lost.[31]

As regards the party who desires to declare the agreement void because of non-performance on the day set, it is said in some jurisdictions that he must show that he himself was ready and willing to perform on the specified day. A party in default will not be permitted to declare the agreement voided because of the other party's default.[32] However, there seems to have been no definite holding to this effect in Pennsylvania.[32a]

OPTIONS

In considering option agreements, which are very frequently involved in suits for the specific performance of contracts to sell land, the rules regarding the element of time are found to be somewhat different. In a contract for the sale of land the naming of a definite time for performance does not make time of the essence of the contract, but, due to the differences between an offer and a contract, such a stipulation in an option agreement does make time of the essence.

This difference was expressed concisely by Justice Williams, in *McMillan v. Phila. Co.*:[33] "The distinction between an option and a contract of sale or lease is broad and plain. An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder is willing to accept them within the time limited. If the holder does so elect he must give notice to the other party, and the accepted offer

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[30]Tiernan v. Roland, 15 Pa. 429 (1839); Reed v. Breeden, 61 Pa. 460 (1869).

[31]McKuen v. Serady, 269 Pa. 284 (1921); Hawk v. Greensweig, 2 Pa. 295 (1845); Wasserman v. Steinman, 304 Pa. 150 (1931), time still of essence when definite extension has been granted.

[32]Gas Co. v. Elder, 5 W. Va. 335, 46 S. E. 35.

[32a]See Shilanski v. Farrell, 57 Pa. Super. 137 (1914).

[33]McMillan v. Phila. Co., 159 Pa. 142 (1893); Swank v. Fretts, 209 Pa. 625 (1904); Barnes v. Rea, 219 Pa. 279 (1908); Barnes v. Rea, 219 Pa. 287 (1908); Pa. Mining Co. v. Smith, 207 Pa. 210 (1903); Smith and Fleek's Appeal, 69 Pa. 474 (1871).

thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed the owner is no longer bound by his offer and the option is at an end."

If no time was named in the option for acceptance of the offer, time is not of the essence, although acceptance must be made in a reasonable time.[34] It should be remembered in considering options that it is not specific performance of the option which is enforced, but specific performance of the contract which results from the acceptance of the offer embodied in the option. Thus, though time is of the essence in options stating a time limit, it will not ordinarily be of the essence in the resulting contract to convey, under the general rule expressed in the first part of this discussion. In *Penna. Mining Co. v. Smith*[35] it was said: "The option to purchase was to extend only to March 27, 1900, and as to the exclusive right to buy, time was of the essence of the contract, but the option to buy having been accepted within the time named, it became an absolute sale in which time of payment of the purchase money is not made the essence of the contract by the parties."

Time being of the essence in the ordinary option, equity will not allow acceptance of it after the day named. However, in certain unusual cases the option may be so worded that acceptance of the offer will be permitted after the passage of the named day. Such a situation was discussed in the case of *McHenry v. Mitchell,*[36] in which the optionee was to accept the offer by a payment on or before a certain date. The court held: "But when, as in the present case, the parties themselves in express terms provide in the option clause that the first payment shall be made as hereinbefore stipulated, and the covenant to which reference is thus made requires the presentation and delivery of a deed before payment can be demanded, the optionor cannot assert a forfeiture on the ground of failure to make payment within the time stipulated, if he fails to first present a deed for delivery within that time."

WAIVER

It seems to be the rule in Pennsylvania that even when time has been made of the essence of a contract, the requirement of performance on or before the day set may be waived. This waiver may take place either before

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[34]Cambria Iron Co. v. Leidy, 226 Pa. 122 (1910); Markley v. Godfrey, 254 Pa. 99 (1916).

[35]Pa. Mining Co. v. Smith, 207 Pa. 210 (1903); Pa. Mining Co. v. Martin, 210 Pa. 53 (1904); Smith and Fleek's Appeal, 69 Pa. 474 (1871).

[36]McHenry v. Mitchell, 219 Pa. 297 (1908).

or after the day set in the contract for performance, although in some states waiver after the day set is not permitted, if the waiver is oral, because of the statute of frauds.

The following quotation from Pomeroy has been adopted in several Pennsylvania cases:[37] "Where time is made essential, either by nature of the subject matter and object of the agreement, or by express stipulation, or by a subsequent notice given by one of the parties to the other, the party in whose favor this quality exists—that is, the one who is entitled to insist upon a punctual performance by the other, or else that the agreement be ended—may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will act as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting and not ended by the other party's default."

These rules as to waiver apply to option agreements as well as to contracts.[38]

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[37]Piacentino v. Young, 272 Pa. 556 (1922); Van Kirk v. Patterson, 285 Pa. 112 (1921); Hopp v. Bergdoll, 269 Pa. 357 (1926); Mansfield v. Redding, 201 Pa. 90 (1902); Welsh v. Dick, 236 Pa. 155 (1912).

[38]Barnes v. Rea, 219 Pa. 279.