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NOTES

A DOCTRINE OF SPECIFIC PERFORMANCE: CHALLENGED BUT UPHELD

The equitable remedy of specific performance is said to be "a remedy by which a party to a contract is compelled to do or omit the very acts which he has undertaken to do or omit."¹ To determine more fully the significance of this definition, certain observations may be made.

Let us first examine the element of compulsion. It will be noticed the definition states that the remedy "compels" a party to perform. Practically the decree of the court can only cause in the mind of the party the will or desire to perform — it does not compel by the exercise of superior force. Actually a party may not perform in spite of the compulsion exerted by the court. So here is one restriction on the words of the definition.

Secondly, in some cases of so-called specific performance, the courts are not able to decree performance precisely in accordance with the terms of the contract. Instead they may substitute a decree for substantial or partial performance.² However, sometimes courts have refused to decree any performance unless as an entirety, basing their refusal on the ground of impossibility of perform-

¹36 Cyclopedia of Law & Proc. 543

²Neil vs. Thompson (1835), 4 Watts 405; Graft vs. Loucks (1891), 138 Pa. 453; Sidle vs. Kaufman (1942), 345 Pa. 549; Whiteside vs. Winans (1905), 29 Pa. Superior 244

ance.³ Then, the phrase, ". . . to do or omit the very acts," must be viewed in the light of such probable modification.

Thirdly, consider the time element. What is commonly called specific performance is one's doing the act agreed to be done after the time when it was agreed to be done is past — hence, not until the contract is broken. However, the force of this defect has been reduced by the adoption of the doctrine of anticipatory breach.⁴ An illustration of this doctrine is where the owner of land agreed to sell it by contract providing for payment of the purchase money in future installments and for delivery of the deed when all the money was paid. Later the vendor broke and wholly repudiated the contract. It was held that the vendee could establish his rights immediately under the contract and on payment of the installments have his deed at the same time agreed upon in the contract.⁵

Finally, we might question the name given to this remedy, since in many cases equity exercises its jurisdiction by compelling performance, making it always as specific as possible. The answer seems to be that the term, "specific performance," is used, not to indicate that relief given by equity in contract cases differs from relief given by equity in other cases, but to mark the distinction between relief given at equity and at law in such actions.

The desirability of the remedy is not doubted. Primarily it prevents the unfairness of allowing one party to a contract to refuse performance at pleasure by electing to pay damages for the breach. As typical of the many statements of the reason is: "The normal end and termination of every contract is performance in accordance with the agreement. . . . Lightly to permit a contracting party to disregard his obligation and compel the obligee to accept, not the thing contracted for, but money damages, is to put a premium on contractual insincerity."⁶

To be specifically enforceable in equity, the contract must have certain legal and equitable essentials.⁷

The primary legal essential is that the contract should be valid and binding at law, because it is useless to ask specific performance of a contract that does not exist. For such a contract there must be clear understanding and positive assent on both sides as to the terms.⁸ The contract must be definite, certain, and clear of description.⁹ It must not be illegal, immoral or against public policy,¹⁰ nor may it have been made by parties under an incapacity.¹¹

³Bannerot vs. Davidson (1910), 226 Pa. 287

⁴Estis vs. Mountain Terrace Land Co. (1926), 214 Ala. 638, 108 So. 740; Bear vs. Fletcher (1911), 252 Ill. 206, 96 N. E. 997; Miller vs. Jones (1911), 68 W. Va. 526, 71 S. E. 248

⁵Miller vs. Jones, supra.

⁶M. M. & D. D. Brown vs. West Md. R. Co. (1919), 84 W. Va. 271, 99 S. E. 457

⁷58 Corpus Juris 849

⁸Cortelyou's Appeal (1883), 102 Pa. 576

⁹Cortelyou's Appeal, supra; Whiteside vs. Winans, supra.

¹⁰Foll's Appeal (1879), 91 Pa. 434

¹¹Henderson vs. Hays (1834), 2 Watts 148

The equitable essentials necessary for the contract to be specifically enforceable very often depend on the discretion of the court. "Decree of specific performance is not a matter of right, but of grace, and rests within the sound discretion of the court."¹² However, some general statements as to the equitable prerequisites may be made. Foremost of these is the rule that the remedy at law must not be full, adequate, and complete. Damages, of course, are the normal remedy at law for breach of contract. Damages may be inadequate because the injured party cannot procure a commensurate substitute with them, or because he can do so only with great difficulty, or because the amount of damages cannot be estimated with reasonable accuracy, or because of the breacher's insolvency they cannot be collected.

Other equitable essentials often mentioned by the courts as being necessary to specific performance of the contract are: the decree must not be impossible, useless, or nugatory;¹³ it must be enforceable without unduly taxing the time of the court;¹⁴ terms of contract must be certain enough to enable the court to frame a decree;¹⁵ must be the possibility of mutuality of performance;¹⁶ neither misrepresentation as to a material fact, nor fraud, either actual or constructive, must be involved;¹⁷ the decree must not be harsh or work an injustice.¹⁸

Also to be included as equitable essentials are the two maxims of equity: "He who seeks equity must do equity"; and "One who comes into equity must come with clean hands."¹⁹

Finally, the "remedy of specific performance is governed by the same rules which control the administration of other equitable remedies. The right to it depends upon elements, conditions and instances, which equity regards as essential to its peculiar modes of relief."²⁰

* * * * *

With these general principles in mind, we come to a consideration of a more particular rule of equity in regard to specific performance, the one challenged

¹²Byrne's Est. (1936), 122 Pa. Superior 413; See also, Stein vs. North (1802), 3 Yeates 324; Latta vs. Hax (1908), 219 Pa. 483; Kane vs. McClenachan (1931), 104 Pa. Superior 417; Rison vs. Newberry (1894), 190 Va. 513, 18 S. E. 916

¹³Bangor & P. R. Co. vs. Amer. Bangor Slate Co. (1902), 203 Pa. 6; Bannerot vs. Davidson, supra; Rommel vs. Summit Branch Coal Co. (1901), 18 Pa. Superior 482; Fowler Utilities Co. vs. Gray (1907), 168 Ind. 1, 79 N. E. 897

¹⁴DeRivafnoli vs. Corsetti (1833), 4 Paige (N. Y.) 264, 25 Am. Dec. 532; Port Clinton R. Co. vs. Cleve, etc., R. Co. (1862) 13 Ohio St. 544

¹⁵Stein vs. North, supra; Ballon vs. March (1890), 133 Pa. 64

¹⁶Ballon vs. March, supra; Byrne's Est., supra; Phila. Ball Club vs. Hallman (1890), 8 Pa. Co. Ct. Rep. 57

¹⁷Orne vs. Kittanning Coal Co. (1886), 114 Pa. 172; Reynolds vs. Boland (1902), 202 Pa. 642; McBrety vs. Hyde (1905), 211 Pa. 123; Kane vs. McClenachan, supra.

¹⁸Latta vs. Hax, supra; Caton vs. Wellershhouse (1921), 77 Pa. Superior 331

¹⁹Reynolds vs. Boland, supra; Caldwell vs. Va. F. & M. Ins. Co. (1911), 124 Tenn. 593, 139 S. W. 698

²⁰Pomeroy, Eq. Jur., vol. 3, sec. 1404; quoted in Caldwell vs. Va. F. & M. Ins. Co., supra.

and upheld in a recent Pennsylvania case,²¹ thus provoking this note; namely, equity will not decree specific performance of a personal service contract.

Various reasons have been given for this rule. Two recent Pennsylvania Superior Court cases²² felt that as long as no specific skill was required by the personal service contract, the value could be measured and therefore damages at law for its breach were adequate. Williston recognized, however, that damages may not be sufficient in all cases: "Even though the remedy at law is inadequate, contracts for personal services are not ordinarily enforceable specifically; but the reason is often not because it is undesirable, but because of the inherent difficulties in enforcing a decree to perform the services."²³

Is it possible to conceive of a breach of personal service contract in which relief by damages might be so inadequate and specific performance so desirable as to overcome the difficulty of enforcement reason and justify the court in granting the decree? This was the dilemma of *McMenamin, et al., vs. Philadelphia Transportation Company*, 356 Pa. 88 (1947).

The facts of that case were that prior to and until August 1, 1944, McMenamin and three others, appellants, were employed by the Philadelphia Transportation Company, appellee, as street car conductors and operators. During their terms of employment each had acquired certain rights as to seniority, pension plans, vacations with pay, job preferences, and other desirable privileges of employment. On August 1, 1944, appellants went on strike, called by the Transportation Workers' Union. The Secretary of War took over the transportation functions of appellee and ordered the strikers to return to work. When the four appellants reported, they received written notices of "discharge for cause" in violation of their employment contract. Then, on refusal of a hearing before appellee's industrial relations committee, the appellants filed this bill in equity against their former employer for a mandatory injunction to compel their reinstatement. The appellee raised three preliminary objections to the bill: it was multifarious; it requested specific performance of a contract for personal services; and there was an adequate remedy at law. The lower court sustained the second and third objections and certified the bill to the law side of the court for further proceedings.

On appeal Mr. Justice Patterson, writing the opinion of the court, said that such rights are property rights which equity will protect but distinguished between existing property rights, whose source is a valid and subsisting contract of employment, and inchoate or potential rights, which can become real only by establishment or reestablishment of such a contract. If in the latter group, as here, the rights no longer exist because of termination of the contract. Then he points

²¹*McMenamin, et al., vs. Phila. Transportation Co.* (1947), 356 Pa. 88

²²*Byrne's Est., supra; Kapcia vs. Lessig* (1936), 122 Pa. Superior 421

²³Williston, *Contracts*, sec. 1450

out that a recognition of such rights could be had only by a decree compelling an employer to rehire an undesired employee. Such a decree would be a grant of specific performance of a personal service contract. This equity will not do.

The appellants urged the abrogation of this doctrine. One of their contentions was that the rule "was evolved in a period of history when the current phenomena of mass employment by a single employer did not exist and when the relationship between employer and employee was actually a personal one." The court was not moved. Changing conditions of employment will not avail to change this well settled rule.

The appellants cited an Arizona²⁴ and a Kentucky²⁵ case as authority for their contention of abrogation. The court found both inapposite because they were actions to enforce seniority rights under existing contracts. They were distinguishable from the present action and therefore no authority for a change of the doctrine.

Further, the appellants argued that the labor relation acts established an exception to the rule. But the answer was that the power for any court which directs reinstatement is derived from the legislature and limited to an enforcement of a proper order of the labor relations board. So, no change has been effected in the jurisdiction or power of a court of equity.

The court concluded that such rights were not independent but arose only as incidents to a valid, subsisting contract of employment; that the termination of the contract, whether wrongful or not, extinguished the rights; that these rights will not be recreated by a decree of court requiring specific performance of a contract for personal services; and that the remedy, if any, was at law.

It is obvious from a reconsideration of the facts that money damages were not adequate for the loss of these jobs, if the employment contract were wrongfully breached. Specific performance was desirable for sufficient relief. Still the court reiterated the rule.

It is also significant that the case was decided at a time when the labor-management pendulum had swung so irrationally to the labor side. Labor and her unions were enjoying unbelievable concessions in every field. In the face of this, the court maintained the precept.

It is true that such a decree may have been inconvenient to enforce and may have taxed the time of the court, but is this not the conceivable case where the desirability of specific performance and inadequacy of damages would overcome such burdens? Is this not a successful challenge to the maxim that equity will not specifically enforce personal service contracts? The court upheld the doctrine.

EDGAR R. BARNES, JR.

²⁴Grand Brotherhood of Locomotive Engineers vs. Mills (1934), 43 Ariz. 379, 31 P. 2d 971

²⁵Gregg vs. Starks (1920), 188 Ky. 834, 224 S. W. 459