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Present Tendency Toward Specific Enforcement of Building Contracts in Pennsylvania

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PRESENT TENDENCY TOWARD SPECIFIC ENFORCEMENT OF BUILDING CONTRACTS IN PENNSYLVANIA

Whether or not building contracts will be specifically enforced today seems to be largely a question of the amount of supervision required. It is held beyond dispute that relief in equity can only be asked for where, and when, there is an absence of a complete and adequate remedy at law. It may be assumed that any case not discussing that point has previously decided it in favor of the plaintiff, where equity has taken jurisdiction. Williston on *Contracts* states it thus: "Where the inadequacy of damages is great and the difficulties not extreme specific performance is granted, and the tendency in modern times has been increasingly towards granting relief where under the particular circumstances of the cases damages aren't adequate".[1] The result usually depends on whether the court considers it reasonably within its function to enter upon supervision of work of an extended and complicated sort.[2]

Edison Illuminating Co. v. *Eastern Penna. Power Co.*[3] reveals that Pennsylvania courts will hesitate to order specific performance of contracts where execution of the decree depends on supervision extending over long periods of time, or calls for knowledge of technical matters which neither the court nor its officers may be expected to possess, but the court turned this particular case on a declared exception to the rule where public interests were involved. Cases involving public utilities have been declared to be so invested with public interest that the general rule against granting specific performance can be suspended. The court turned the case on this point notwithstanding the statement in *Pittsburgh v. Pittsburgh Railway Co.*[4] that the character of the parties did *not* affect the matter and that the rights were the same as those "of one individual against another". However, the court did resort to the proposition that the granting of specific performance was largely within the discretion of the court in each particular case.

Where the work is to be done by the defendant on the land in possession of the plaintiff, equity courts will rarely enforce the contract in the absence of grave inequity, due to the adequacy of a remedy at law, since the *plaintiff* is able to do the work called for and sue on the breach of the contract. It will be noted, however, that a necessity for a great expenditure, or inability to collect from the defendant may even make this a situation calling for specific performance. The situation and reasoning must be different where the defendant, ignoring the covenant, is in possession of the land on which the building is to be done. Here there is no complete and adequate remedy at law, for damages will not fully compensate the plaintiff for the loss of his contract. Equity can therefore entertain jurisdiction if the plaintiff can show a valid contract, the terms of said contract being certain

1 Williston, CONTRACTS, Section 1423.
2 164 A.L.R., Annotations, 809 (1945).
3 253 Pa. 457, 98 A. 652 (1916).
4 234 Pa. 193, 83 A. 67 (1912).

enough for enforcement at law.[5] Equity will fill in gaps, by inserting reasonable terms in a contract vague in detail, to avoid imposing great hardship upon the plaintiff.[6]

Courts formerly drew a distinction between contracts to build and contracts to repair, and denied specific performance of contracts to repair on the ground that the impracticability of enforcement was too great a hardship on the court. This reason was also given where there was no time limit set on the completion of the contract, or where no specific acts were provided for in the contract. Today this point receives slight attention due to the sound policy that the courts can waive the question of impracticability at their discretion; this waiver usually occurs where the injustice of a refusal of a decree would outweigh the burden imposed on the courts.

Today the general rule in re building contracts, as stated in *Armour v. Connolly*,[7] "This court will not ordinarily enforce performance of building contracts not only on the ground that damages at law are an adequate remedy but also on the ground of the inability of the court to see that the work is carried out," is subject to exceptions. Generalization is impossible. Specific performance has been granted in the past through employment of subterfuges like Lord Eldon's double negatives,[8] or restricting exceptions such as Mr. Justice Miller's three requirements in *Zygmunt v. Avenue Realty Co.*,[9] calling for (1) land to be in the possession of the one agreeing to build, and (2) the consideration for the agreement being the sale or conveyance of land on which the building is to be erected, with the plaintiff already having executed his part of the contract by conveying said land, and (3) the building essential to the use, or contributing to the value of the adjoining land of the plaintiff; cases on record are rare that incorporate all three factors. Today a decree will be handed down granting specific performance whenever the court in its discretion finds that the injustice of a refusal outweighs the burden it must assume by granting it. This statement, admittedly vague, is the bulwark of the courts' reasoning whenever the conscience of the court is stirred by a case containing elements not usually conducive to the granting of a decree of specific performance. In *Patton Township v. Monongahela Street Railway Co.*[10] the court decreed specific performance of a building contract where the railway company obtained possession of a right of way only because of the plaintiff's reliance on defendant's convenants to build. Here the defendant was ordered to fulfill the contract completely despite the objecion raised that the supervision would be a strain on the court's convenience. The court found that the injustice imposed by the refusal would outweigh the burden. The *Chambersburg Railway* case[11] fol-

5 163 Pa. 381, 80 A. 484 (1907).
6 8 Watts 374 (Pa. 1829).
7 49 A. 1117 1910).
8 Lane v. Newdigate, 10 Vesey 192, Chancery (1084).
9 108 N.J. Eq. 462, 155 A. 454 (1931).
10 226 Pa. 372, 75 A. 589 (1910).
11 258 Pa. 57, 101 A. 922 (1917).

lows a similar trend, without discussion, in ordering a street railway company to keep the streets in repair, although here again public policy is in evidence.

This same "burden of supervision" can be suggested by the defendant but it will rarely, if ever, serve as an absolute defense, since the court can, and will, waive it when the circumstances warrant. This principle is laid down specifically in *Edison Illuminating Co. v. Eastern Pennsylvania Power Co.*[12] by the Pennsylvania Supreme Court speaking through Mr. Justice Frazier:

> "As a general rule there will be no specific enforcement of contracts where the execution requires supervision extending over a long period of time or calls for a knowledge of technical matters incidental to its performance which neither the courts nor its officers can be expected to possess—but an exception to the rule has been applied frequently; where the contract is invested with public interest or convenience, specific performance will be granted although certain oversight or discretion is required."

From this exception has come the further universally accepted statement of reason that "public interest investment is always a major exception to the general rule". Mr. Justice Fuller in *Union Pacific Railway Co. v. Chicago, Rock Island and Pacific Railway Co.*[13] stated:

> "Where a corporation contract is forbidden by statute or hostile to public advantages, the courts will disapprove. But where there is no express prohibition and the contract is one for public advantages and convenience the rule is always otherwise."

This rule was laid down by Mr. Justice Fuller after quoting from *Jacksonville M. R. P. and Navigation Co. v. Hooper*:[14]

> "Although the contract power of railways is restricted to the general purpose for which they are designed, courts may be permitted to put a favorable construction upon such exercise of power by railway companies to contribute to the comfort and convenience of those who travel thereon".

To the same effect is *Gray v. Citizens Gas Co. of Port Allegheny*[15] as well as *Edison Illuminating Co. v. Eastern Pennsylvania Power Co.*[16]

Pennsylvania adopts this doctrine, and later cases rarely mention public interest by name, usually interpreting the facts as demanding interference in the interest of justice or pointing to the inadequacy of the remedy at law. *See Norristown v. Reading Transit and Light Co.*[17] and *Ambridge v. Philadelphia Co.*[18]

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12 *Supra*, note 3.
13 163 U.S. 564, 16 S. Ct. 1173, 41 L.Ed. 265 (1896).
14 160 U.S. 514, 16 S. Ct. 379, 40 L.Ed. 515 (1894).
15 206 Pa. 303, 55 A. 988 (1903).
16 *Supra*, note 3.
17 277 Pa. 459, 121 A. 495 (1923).
18 283 Pa. 5, 129 A. 67 (1925).

All reasons point to the same inference: specific performance will be decreed in cases involving situations where the courts can find experts to take over the burden of supervision, where the plaintiff's equities rank higher than the burden imposed, where there is a valid contract, where the land is held by the defendant; in other words, where the remedy at law is inadequate and execution of the decree is at all practicable. The question is not whether the courts have jurisdiction, but whether they can feasibly exercise it.

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