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SPECIFIC PERFORMANCE OF CONTRACTS TO CONVEY REAL ESTATE

It is well known that the underlying principle upon which equity jurisprudence is based is the inadequacy of legal remedies. The rule that equity will grant specific performance of contracts for which actions at law are insufficient and incomplete, is so well established in our system of law that no authorities need to be cited. The general rule is that contracts will not be specifically enforced by equity unless it is alleged and shown that the remedy at law is inadequate. To this rule however, there is an outstanding exception which is, perhaps, as old as the rule itself. This exception governs the specific performance of contracts to convey real estate; and in this exception it is emphatically laid down that equity will grant specific performance of contracts to convey real estate regardless of legal remedies and their adequacy to give relief. It is clearly expressed in the opinion of Vice Chancellor Leach in the case of *Adderly v. Dixon*.¹ The rule began in England and has always been applied in English Courts. The courts of this country have adopted the rule for the same reason that the English Courts applied it. In the case of *Kitchen v. Herring*² it is clearly stated in the opinion of Judge Pearson and is much like the opinion of Vice Chancellor Leach in the above cited case: "Equity adopts this principle not because the land is fertile or rich in minerals, but merely because it is land, a much favored subject in England and other countries of Anglo-Saxon origin."

The expediency of such a law in England at the time it was first applied cannot, I think, be doubted. It seems to the writer to have been in harmony with the social and governmental system. Land, partly because of its scarcity, perhaps, but generally because of its power to determine the financial, social and political status of every British subject, was naturally a highly favored subject in the courts of Britain. The courts of that country it seems, were fully justified in assuming, under the existing circumstances, that all land did have a special and

¹ 1 Eng. Chan. 607, 57 Eng. Rpts. 239 (1824).

² 42 N. C. 137 (1851).

peculiar value. Land was power and influence and those were things much desired.

We are of the opinion that with us the law is hereditary and is not based upon the grounds of expediency. There is no doubt but that the rule applies in this country and is sustained by the great weight of authority. Most of the states of this country have followed the rule blindly. Most of the states are inclined to give specific performance for contracts to convey real property even though there is an adequate remedy at law, the court assuming that all land has a special and peculiar value as did the English courts.

The Alabama courts hold that a plea of adequate remedy at law is no defense, and specific performance will be decreed regardless. This is exactly in accord with the old English view.³ But in *Rushton v. McKee & Co.*⁴ we find Mayfield, J., speaking for the court, saying: "Specific performance will not be had, if the performance, as distinguished from damages or compensation in money for the breach, cannot be of importance to the complainant."

The Arizona courts hold that when the contract itself is valid and unobjectionable, specific performance will be granted as a matter of course.⁵ The appellate court of Arkansas in two late cases⁶ also holds that specific performance should be given without regard to adequacy of remedy at law.

The courts of California have gone so far as to hold that specific performance will be granted even though there is a statute providing an adequate remedy.⁷

Michigan courts have held that specific performance is a matter of judicial discretion and not arbitrary discretion, and that the courts should follow the weight of authority which is to grant specific performance as a matter of course.⁸ New Hampshire also agrees with the English doctrine as to specific performance of contracts to convey land.⁹

³ *Stone v. Gover*, 173 Ala. 1, 55 So. 618 (1911); *Williams v. Kilpatrick*, 195 Ala. 563, 70 So. 742 (1916).

⁴ 201 Ala. 49, 77 So. 343 (1917).

⁵ *Timbal v. Statler*, 20 Ariz. 81, 176 Pac. 843 (1918).

⁶ *Dollar v. Knight*, 145 Ark. 522, 224 S. W. 983 (1920); *Wilkins v. Eanes*, 126 Ark. 339, 190 S. W. 99 (1916).

⁷ *McCarty v. Wilson*, 184 Calif. 194, 193 Pac. 578 (1920); Calif. Code of Civil Procedure 1554.

⁸ *Baller v. Spivack*, 213 Mich. 436, 182 N. W. 70 (1921).

⁹ *Kann v. Wausan Abrasives Co.*, 81 N. H. 535, 129 Atl. 378 (1925).

The courts of New York are also in accord with the weight of authority as may be seen by a statement in the opinion of Judge Chester in the case of *Jones v. Barnes*.¹⁰ "The fact that the defendant was responsible at law and that the plaintiff has an adequate remedy at law does not preclude the plaintiff from suing for specific performance." Other New York cases following this view are *Stone v. Lord*, and *Crary v. Smith*.¹¹ However, in the recent case of *276 Spring Street Corporation v. Forbes*¹² on demurrer it was held that in a purchaser's action for specific performance, an allegation that the purchaser had adequate remedy at law was good as a complete defense, if sustained by proof.

North Carolina follows the English doctrine and holds that if the contract is valid it will be specifically enforced on the assumption that there can be no adequate remedy.¹³

In North Dakota the legislature adopted the English doctrine as to specific performance of contracts to convey real property.¹⁴

Oklahoma holds emphatically that damages are not an adequate remedy for the breach of a contract to convey land.¹⁵

The courts of Wisconsin in the case of *Hunholz v. Helz*¹⁶ specifically enforced a contract to exchange lots. Damages could have been given, but it was assumed that they were not sufficient. The earlier case of *Curtis Land and Loan Co. v. Interior Land Co.*¹⁷ is a better reasoned case.

Utah is in accord with the English view.¹⁸

There are a number of cases that hold expressly that the inadequacy of legal remedy need not be alleged, for it will be assumed from the subject matter, which is land, that the remedy would be inadequate.¹⁹

¹⁰ 94 N. Y. S. 695 (1905).

¹¹ 80 N. Y. 6 (1880); 2 N. Y. 60 (1848).

¹² 235 N. Y. S. 523 (1929).

¹³ *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141 (1900); *Boles v. Caudle*, 133 N. C. 528, 45 S. E. 835 (1903).

¹⁴ *Orfield v. Harney*, 33 N. D. 568, 157 N. W. 124 (1916); Compiled Laws of North Dakota, 1913, Secs. 7189, 7194.

¹⁵ *Kelley v. Mosby*, 34 Okla. 218, 124 Pac. 984 (1912); *Berry v. Church*, 37 Okla. 117, 130 Pac. 535 (1913).

¹⁶ 141 Wis. 222, 124 N. W. 257 (1910).

¹⁷ 137 Wis. 341, 118 N. W. 853 (1908).

¹⁸ *Gledhill v. Walruf*, 58 Utah 105, 197 Pac. 725 (1921).

¹⁹ *Steensland v. Noel*, 28 S. Dak. 522, 134 N. W. 207 (1912).

The federal courts also follow the English doctrine. In the case of *Williams v. Cow Gulch Oil Co.*²⁰ Judge Sanborn says: "An action at law for damages for the breach of a contract to convey land does not afford as adequate a remedy as a suit in equity for specific performance. . . . The action at law does not place the parties in the same position as before the agreement and it is not prompt, complete, and efficient." Other federal cases may be noted.²¹

There are a few states that appear to be overthrowing the old English rule and insisting that the real property have some peculiar and special value to the one seeking the enforcement. The most noticeable of these cases is the recent case of *Duckworth v. Michel*.²² While the theory of the action is not clear, it was in substance an action seeking the specific performance of a lease contract. The court, speaking through Tolman, Judge, says: "The rule is not infallible and ought not to be applied where an action for damages will afford adequate relief."

And, in the Florida case of *Le Noir v. McDaniel*²³ Judge Ellis says: "The exercise of equity jurisprudence for the specific performance of contracts for the purchase of property does not depend upon any distinction between real and personal property, but depends on the question whether damages at law may not in the particular case afford a complete remedy." To the same effect is the case of *Frue v. Houghton*.²⁴ The language of Judge Ellis seems to us to indicate the logical point of view. Why should the complaining party not be forced to show a peculiar value in real property as well as personalty? Should he not be compelled to allege and show that his remedy for the breach in a court of law is inadequate? Much of the property transactions that are carried on now are speculative and the property is not intended to be used as such. If this is not the intention of the parties buying, then it would seem to us that they could very easily show that to them the property had a special and peculiar value and that damages would not be sufficient. We cannot in general see the uniqueness of land in this

²⁰ 270 Fed. 9 (1921).

²¹ *McLung v. Crawford*, 209 Fed. 340 (1913); *Boyce v. Grundy*, 3 Peters 210 (1830); *Donahue v. Franks*, 199 Fed. 262 (1912).

²² 19 Pac. (2nd) 914 (Wash., 1933).

²³ 80 Fla. 500, 86 So. 435 (1920).

²⁴ 6 Colo. 318 (1882) (dictum).

country. It is not the basis of our social, political, or governmental system, nor does it, just because it is land, bring any power to the owner. If the buyer would be empowered by holding such land, then he could easily show a peculiar and special value in the land and receive the equitable relief. Real property is not sacred and should not be considered so. In fact, in the recent case of *Duckworth v. Michel*²⁵ we find Tolman, Judge, saying: "To the common law title to real estate was as sacred as was a prerogative of the King. Under modern conditions, title to real estate is but a property right, little, if any, superior in the eyes of the law to any other property right." And, in this country where money "does the talking" rather than land, why shouldn't money satisfy in all cases where there is no special or peculiar value attached to the land by the party complaining? This seems to be the logical holding for this country. Among other cases that approve of this view are *Forrister v. Sullivan*²⁶ in which the court said, "The contract must be grounded on adequate and legal consideration and it must clearly appear to the chancellor that law could not give adequate relief in damages."²⁷ Some of the courts of this country hold that where the party buying has already agreed to sell to a third party, he cannot get specific performance because the inadequacy is rebutted and it is shown that money will satisfy.²⁸

There is an interesting case that arose in Mississippi.²⁹ In this case A contracted to sell a certain tract of land to B. A then contracted to sell to C. The land rose in value. It was apparent that B only wanted the land because it was worth more than he had contracted to pay. The court held that damages for the breach would afford an ample redress. It is submitted that the court took the proper stand and rightfully refused specific performance.

Very few Kentucky cases can be found. The prevailing tendency is to follow the majority rule.³⁰ However, there is a

²⁵ 19 Pac. (2nd) 914 (1933).

²⁶ 231 Mo. 345, 132 S. W. 722 (1910): parol contract to convey land.

²⁷ *Herryford v. Moore*, 181 S. W. 389 (1915); *Dazey v. Elwin*, 153 Mo. App. 435, 134 S. W. 85 (1911); *Oliver v. Johnson*, 238 Mo. 359, 142 S. W. 274 (1911).

²⁸ *Marthison v. King*, 150 Fed. 48 (1906); *Thweatt v. Jones*, 87 Fed. 268 (1898); *Hazelton v. Miller*, 25 A. P. 337 (1905).

²⁹ *Curtis v. Blair*, 26 Miss. 309 (1853).

³⁰ *McGee v. Beall*, 13 Ky. 190 (1823).

recent case, *Clifton Land Company v. Reister*,³¹ which holds "Specific performance of a contract for the sale of land does not go as a matter of course, but it is withheld or granted according as equity and justice demand under the circumstance." However, the court probably only has reference to those cases where it would be manifestly inequitable to decree specific performance due to some objectionable feature of the contract, and not because the plaintiff could be compensated in damages.

It is the belief of the writers that specific performance of contracts to convey real estate should never be decreed unless the complainant alleges and proves that an action at law for damages would not afford an adequate relief for the breach. This is in accord with the principles of equity as to other contracts, and reaches a desirable result.

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³¹ 186 Ky. 155, 216 S. W. 342 (1919).