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Equity—Specific Performance by Partial Sub-Purchaser Against Original Vendor

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E. 951 (1894). Nevertheless, it has been maintained that due to the personal nature of the privilege the spouse confided in should not be allowed to circumvent the rule by acting in connivance with a third person so as to bring the conversations within the ambit of the "eavesdropper" exception to the privilege, 8 *Wigmore On Evidence* §2339 (3rd Ed. 1940), *Richardson On Evidence* §515 (7th Ed. 1948). Despite the apparent validity of the arguments propounded by text-writers, many jurisdictions which have passed upon the question have held such evidence admissable, *McNeill v. State* 117 Ark. 8, 173 S. W. 826 (1915), *State v. Buffington* 20 Kan. 599, 27 Am. Rep. 193 (1878). The reasoning of the court in the principal case, to the effect that the plaintiff ought not to be allowed to procure indirectly and through his agent an advantage not otherwise available to him, would appear to be the preferred approach towards a rule of law which has as its ultimate objective the strengthening of the marriage relationship by investing it with a bond of mutual trust and confidence between the spouses.

Gerard J. O'Brien

EQUITY—SPECIFIC PERFORMANCE BY PARTIAL SUB-PURCHASER AGAINST ORIGINAL VENDOR

The New York, New Haven & Hartford Ry. Co. leased a parcel of real property to Bronx-Whitestone Terminals, Inc. The lease contained an option to purchase. Bronx contracted to convey a part of the leasehold to Geo. V. Clark Co., and thereafter gave notice to the Railroad of its exercise of the option. Clark tendered performance to Bronx, but Bronx refused to deliver a deed, on the grounds that (1) it could not get title from the Railroad, and (2) that the title was unmarketable. Clark sued for specific performance, joining Bronx and the Railroad. A motion to dismiss, on the grounds that the complaint failed to state a cause of action, was granted in favor of the defendant Railroad in the Supreme Court, County of Bronx, where it was declared that a suit could not be brought on a contract by a plaintiff who is neither a party nor privy to it. On appeal, the order was reversed, Callahan J. stating that (1) . . . "although there is no privity of contract between Clark and the Railroad, privity of estate exists, and equities have arisen in favor of Clark entitling him to specific performance of the Bronx-Railroad contract, and his own contract of sub purchase . . ."; (2) "in any event the complaint states a cause of action for specific performance against Bronx, . . . and the Railroad is a necessary party to such suit to avoid circuity of action . . . ." Van Voorhis, J., dissented. *Geo. V. Clark Co., Inc.* et. al. v. *New York, New Haven & Hartford Ry. Co.* et. al., ———App. Div.———, 107 N. Y. S. 2nd 721 (1st Dept. 1951).

Equity will entertain a cause of action for specific performance of an ex-

ecutory contract where the remedy is inadequate at law. *Pennsylvania Coal Co. v. Delaware & H. Canal Co.* 31 N. Y. 91 (1865); *Chabert v. Robert & Co.* 273 App. Div. 237; 76 N. Y. S. 2nd 400 (1st Dep't. 1948). Land by its very nature is unique, and when land is the subject matter of an executory contract, damages at law will be inadequate. See 49 *Am. Jur., Specific Performance, Sec. 92.* Accordingly, in the instant case, the plaintiff was entitled to submit a bill for specific performance.

But the problem which confronted the Court was whether the plaintiff could sue for specific performance of the Bronx-Railroad contract, an agreement to which he was not a party.

As a general rule, the obligation arising out of a contract is due only to those between whom it is made, and suit cannot be brought by a third party. *Lorillard v. Clyde,* 122 N. Y. 498, 25 N. E. 917 (1890). Certain exceptions exist, however:

> (1). *Where the contract was made for the express benefit of the party suing on it. Decicco v. Schweizer,* 221 N. Y. 431, 117 NE 807 (1917). In New York, this exception is limited to suits where the plaintiff is either (a) a creditor beneficiary, *Lawrence v. Fox,* 20 N. Y. 268 (1859); (b) a donee beneficiary, supported by a close moral relationship, *Seaver v. Ransom,* 224 N. Y. 233, 120 N. E. 639 (1918); (c) a donee beneficiary, promise running to both donor and beneficiary, *Rector of St. Mark's Church v. Teed,* 120 N. Y. 583 (1890); (d) a citizen beneficiary on a public contract, *Pond v. New Rochelle Water Co.* 183 N. Y. 330, 76 N. E. 211 (1906).
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> (2) *Where the contract was assignable, and suit is brought by the assignee. Epstein v. Gluckin,* 233 N. Y. 490, 135 N. E. 861 (1922); *H & H Corp. v. Broad Holding Co.* 204 App. Div. 569, 198 N. Y. Supp. 763 (2nd Dept. 1923).
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> (3) *Where the contract was made with an agent, and suit is brought by his disclosed or undisclosed principal. Leman v. Jones,* 222 U. S. 51, (1911); *Lagumis v. Gerard,* 116 Misc. 471, 190 N. Y. Supp. 207 (Sup. Ct. 1921).

In the instant case, the plaintiff was a *sub-vendee.* A sub vendee is neither a party to the original contract, nor within any of the exceptions outlined above.

Accordingly, by traditional concepts, a sub-vendee of a contract for the sale of land cannot maintain a suit for specific performance directly against the original vendor. *Mechanich v. Duschaneck,* 99 N. J. Eq. 986, 132 Atl. 854 (1926); *Lord v. Underdunch,* 1 Sandf. Ch. 46 (N. Y., 1843). The proper remedy to be pursued by the sub vendee is to direct his bill against his vendor (the original vendee),

and join the original vendor as a necessary party in order to avoid circuity and multiplicity. *Allcorn v. Butler,* 9 Tex. 56 (1852); *Allison v. Schilling,* 27 Tex. 450, 86 Am. Dec. 622 (1864); *Moubray v. Dieckman,* 9 App. Div. 120, 41 N. Y. Supp. 82 (2nd Dept. 1896); *Jurgensen v. Morris,* 194 App. Div. 92, 185 N. Y. Supp. 386 (2nd Dept. 1920); and see *Mahr v. Norwich Union Fire Insurance Co.* 127 N. Y. 452, 460 (1891).

However, some courts have departed from the traditional view, although only in theory, not in fact. All courts are in accord as to the result, that the original vendor may be joined as a party defendant in a suit by the sub vendee against the original vendee. [but see *Horwitz v. Kreuzer,* 140 Md. 414, 117 Atl. 563 (1922)]. The departure has arisen in the rationale advanced by the court in sustaining the joinder of the original vendor as a defendant; some courts reason that the joinder may be allowed on the theory that the original vendor is in effect a trustee who holds the land for the benefit of the sub purchaser. *Miller v. Dyer,* 20 Cal. 2nd 536, 127 Pac. 2nd 901 (1942); *McDonald v. Youngbluth,* 46 Fed. 836 (Cir. Ct., S. D., Ohio 1891); other courts argue that the joinder may be sustained on the theory that a sub-purchaser is the same as an assignee. *Welch v. McIntosh,* 89 Kans. 47, 130 Pac. 641 (1913); see Pound, *Progress of Law-Equity* (1920), 33 Har. L. Rev. 813, 823. Both rationale depart from the traditional contract theory in that they imply that a sub-vendee may sue directly against the original vendor, omitting the original vendee.

The New York approach to the problem of whether the original vendor could be joined as a defendant was first seen in *Epstein v. Kroopf,* 218 App. Div. 519, 218 N. Y. Supp. 644 (2nd Dept. 1926). In that case, the sub vendee's assignee brought suit against the original vendee, and joined the original vendor. The original vendor was granted a motion to dismiss on the usual grounds of lack of privity. On appeal, the Court reversed the dismissal, and declared that the original vendor was a necessary party to the action, and quite properly should be joined, because,—the Court reasoned—a sub vendee was no different in genus from an assignee. While the result of the decision was correct, the Courts rationale departed from traditional theory and received unfavorable criticism. 40 Har. L. Rev. 1004 (1926).

Though a sub vendee may submit a *bill* for specific performance against the original vendee and the original vendor, the right to a *decree* rests upon the sound discretion of the Court. *Sherman v. Wright,* 49 N. Y. 277 (1872); *Guokas v. Bishara,* 57 N. Y. S. 2nd 588 (Sup. Ct. 1945). A decree will not be awarded where the results would be harsh or inequitable. *Margraf v. Muir,* 57 N. Y. 155 (1874). The equities of the instant case are complicated by the fact that the Plaintiff is a sub-vendee of only a part of the original parcel. If, as alleged, the title of the property owned by the Railroad is unmarketable, it would be harsh and inequitable to

enter a bill of specific performance that would force upon Bronx a title that was defective; similarly, it would be inequitable to enter a bill that would deny to the Railroad full performance of its contract with Bronx.

In conclusion, it is submitted that the New York Court in the instant case has reached a correct result, but that the Court's reasoning, insofar as it departs from traditional contract theory, by implying that a sub-vendee may sue directly against the original vendor on an agreement to which the sub-vendee was not a party, is erroneous.

Robert Schaus

CONSTITUTIONAL LAW—ADMISSION OF EVIDENCE OBTAINED BY USE OF STOMACH PUMP VIOLATIVE OF DUE PROCESS

A stomach pump and emetics were used to forcibly extract two morphine capsules from the stomach of a narcotics suspect. These capsules were used as evidence to obtain a state conviction for the violation of the California Health and Safety Code, 1947, Section 11500, which makes the possession of narcotics illegal. The conviction was reversed by the United States Supreme Court on the grounds that it had been obtained by methods that "offend the due process clause of the Fourteenth Amendment." JJ Black and Douglas concurred in the result, but propounded the argument that the privilege against self-incrimination which is binding on the federal courts through the Fifth Amendment also extends to the state courts through the Fourteenth Amendment due process clause, and that specifically, the suspect had been forced to incriminate himself by the described extraction and use of the morphine capsules. *Rochin v. People of California,* 72 S. Ct. 205 (1952).

Had this case arisen in the federal courts, the defendant would have had two possible constitutional defenses, viz.: that the evidence was obtained through an illegal search and seizure which is forbidden by the Fourth Amendment, *McNabb v. U. S.,* 318 U. S. 332 (1943); *Jeffers v. U. S.,* 72 S. Ct. 93 (1951); and that the forcible extraction of the capsules offended the defendant's privilege against self-incrimination guaranteed by the Fifth Amendment, *Smith v. U. S.,* 337 U. S. 137 (1949). These defenses, however, are not guaranteed by the Federal Constitution in a state prosecution. In *Wolf v. Colorado,* 338 U. S. 25, 33 (1949) where a conviction for criminal abortion was obtained through the use of records taken from a doctor's office without a search warrant, it was held that "in a prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure;" and in *Twining v. New Jersey,* 211 U. S. 78, 91-99 (1908), the