Volume 40 | Issue 3 Article 16

April 1934

Specific Performance--Foreclosure of Land-Purchase Contract--Where Time is of the Essence

Robert W. Burk
West Virginia University College of Law

gage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity and given its original priority as a lien.''[5] A court of equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction.[6] However, the courts seem to make a distinction in the cases where the reinstatement will work a hardship on innocent third parties,[7] or where the intervener is a *bona fide* purchaser for value without notice,[8] or where the first mortgagee had actual notice of the subsequent lien or mortgage;[9] and in these instances, refuse to grant reinstatement. The court in the earlier case of *Atkinson v. Plum*[10] had employed the theory of actual notice to refuse reinstatement, saying that the first mortgagee showed an intention to waive his prior lien when he released with actual notice.[11] It is submitted that while this is the first decision in West Virginia on the point, the court has correctly followed the weight of authority.[12]

—MORRIS S. FUNT.

SPECIFIC PERFORMANCE — FORECLOSURE OF LAND-PURCHASE CONTRACT — WHERE TIME IS OF THE ESSENCE. — Plaintiff vendee had entered into possession under a land-purchase contract, but title was not to be delivered until a certain part of the consideration was paid. The contract provided that in case of vendee's

---

[6] Stimpson v. Pease, and Greib v. Reynolds, both *supra* n. 4; Linn v. Linn, 122 Mich. 130, 80 N. W. 1000 (1899); Liggett v. Himle, 38 Minn. 421, 38 N. W. 201 (1888); Bruce v. Bonney, 12 Gray (Mass.) 107, 71 Am. Dec. 739 (1858).

[7] Security Trust Co. v. Martin, 178 Ark. 518, 12 S. W. (2d) 879 (1928); Wells v. Huffman, 69 Ind. App. 379, 121 N. E. 840 (1919); Williams v. Libby, 118 Me. 80, 105 Atl. 855 (1919); Downing v. Hill, 165 Mich. 559, 130 N. W. 1115 (1911).

[8] Deleski v. Peters Trust Co., 115 Neb. 574, 213 N. W. 829 (1927); Cherry v. Welsher, 196 Iowa 640, 192 N. W. 149 (1923).

[9] Lomas & Nettleton v. Isaacs, 101 Conn. 614, 127 Atl. 6 (1924) (constructive notice, *i. e.*, recordation, is not enough); Atkinson v. Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788 (1901) (The court draws a clear distinction between the principle case and this one on basis of notice); Nommenson v. Angle, *supra* n. 4. (The courts grant reinstatement where constructive notice existed on the theory of mistake of fact, *i. e.* mistake as to the consequences of the release and that under modern recording statutes the first mortgagee is not bound to look beyond his own lien which was prior).

[10] *Supra* n. 8.

[11] Per Brannon, J., ''Intention is the pole star in the matter.''

[12] See POMEROY, *loc. cit. supra* n. 3 and JONES, *loc. cit. supra* n. 3. See also for a recent decision reaching a similar result, Federal Union Life Insurance Co. v. Deitsch, 127 Oh. St. 505, 189 N. E. 440 (1934).

failure to pay the instalments in the specified time, defendant vendor by giving written notice could declare the agreement null and void, and could also retain the payments made theretofore as rental. Plaintiff defaulted and was dispossessed by an action of unlawful entry and detainer. He then filed a suit in the circuit court, seeking specific performance and an accounting of the contract. On conflicting evidence, the circuit court found that at the date of the notice plaintiff was behind on his payments and, pursuant to the prayer of defendant's answer, forfeited the contract. From this decree, plaintiff appealed. Held: The lower court should have given the vendee a day in which to pay the balance, and, in case of default thereafter, decreed a sale of the property to foreclose his equity therein. Reversed and remanded. *McCartney v. Campbell.*[1]

Time is usually of the essence in an option, both at law[2] and in equity.[3] There must be an acceptance within the specified time by tender of payment[4] or by notice,[5] depending upon the particular offer. In either case, however, there may be a waiver of strict performance,[6] or, if the proposal is unsealed and without consideration, it is revocable at any time regardless of the stipulation.[7]

In contracts for the sale of land, time is not ordinarily of the essence[8] unless made so by stipulation of the parties.[9] Accord-

---

[1] 171 S. E. 821 (W. Va. 1933).

[2] John v. Elkins, 63 W. Va. 158, 59 S. E. 961 (1907).

[3] "At one time it was the equitable doctrine that the parties could not make time so material as to become of the essence of the contract, but long ago this doctrine was abrogated, and it is now well established that this can be done. The optionor, by the express language of the option made time of the essence. . . . . The offer ceased when not accepted within the stated time . . . . It was nothing but a proposition of sale upon one side, with the privilege of acceptance upon the other. And, ... it was essential that it be accepted before the right to do so had expired by lapse of time." Pollock v. Brookover, 60 W. Va. 75, 83, 53 S. E. 795, 798 (1906).

[4] ". . . . if an option is . . . . to be accepted by payment within a given time, then the time of payment is certainly essential; in fact . . . . a condition precedent to the vesting of any right in the vendee." Watson v. Coast, 35 W. Va. 463, 474, 14 S. E. 249, 252 (1891).

[5] Casto v. Cook, 91 W. Va. 209, 112 S. E. 502 (1922).

[6] West Virginia Power and Transmission Co. v. Mary E. Voight *et al.*, 91 W. Va. 581, 114 S. E. 138 (1922).

[7] Corbin, *Option Contracts* (1914) 23 YALE L. J. 641.

[8] Contract not void for uncertainty where time not expressed. Broemsen *et al.* v. Agnic, 70 W. Va. 106, 73 S. E. 253 (1911).

[9] Whether time is essential depends on intent of parties. 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1407. Collins v. Thomas *et al.*, 87 W. Va. 597, 105 S. E. 897 (1921). But there may be waiver of time by subsequent agreement, Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762 (1908); or acts *in pais*, Colburn v. Keyser, 96 W. Va. 507, 123 S. E. 430 (1924).

ing to the authorities,[10] it would seem that time was thus of the essence in the instant case. If the element of time be made a condition precedent,[11] strict adherence is usually required.[12] But even so, the right of a delinquent vendee to specific performance will depend largely upon whether the performance is to be that of an affirmative act,[13] or of mere payment of money, the delay in which may be compensated by damages,[14] — whether the vendee has entered into possession of the land under the contract of sale,[15] — and, especially, whether the extent of the performance[16] is of such a degree that forfeiture or severe detriment will result from an adverse decree.[17]

Equity reluctantly enforces forfeitures[18] but readily relieves from them.[19] This is particularly true where the forfeiture is in

---

[10] Time may become of the essence by the insertion of provisions clearly contemplating such precise performance, — such, for example, as a forfeiture clause and one rendering contract null and void upon default in payments. Marshall v. Porter, 73 W. Va. 258, 80 S. E. 350 (1913); 4 POMEROY, *op. cit. supra* n. 9, at § 1408 note 3.

[11] Condition precedent as used here means that performance must be within specified time or no right vests. Adams *et al.* v. Guyandotte Valley Ry. Co., 64 W. Va. 181, 61 S. E. 341 (1908).

[12] Thompson v. Robinson, 65 W. Va. 506, 64 S. E. 718 (1908). 1 POMEROY, *op. cit. supra* note 9, § 455.

[13] In Adams *et al.* v. Guyandotte Valley Ry. Co., *supra* n. 11, the court distinguishes between the element of time regarding an act, such as building a railroad, and mere payment of money.

[14] Where time admits of compensation, as it always does where lapse arises from failure to pay money at particular day, it is not essential. Abbott v. L'Hommedieu, 10 W. Va. 677 (1877). Interest will be sufficient compensation. Wheeling Creek Gas, Coal & Coke Co. v. Elder, 54 W. Va. 335, 46 S. E. 357 (1903).

[15] As to granting specific performance to vendee in default — "This is especially true when the vendee has been put in possession under the contract. In such case, time of payment is rarely, if ever, regarded as material." Liskey v. Snyder, 56 W. Va. 610, 620, 49 S. E. 515, 519 (1904).

[16] If nothing has been paid, possession neither parted with nor acquired, nothing is involved except mere value of bargain and the time will be enforced strictly. If large payments and substantial performance, time is less material. West Virginia Power and Transmission Co. v. Mary E. Voight *et al., supra* n. 6; Henry v. Dudley, 91 W. Va. 696, 114 S. E. 286 (1922). No cases were found attempting to state limit to which performance must be made. All say that it lies within the discretion of the court.

[17] Hukill v. Meyers *et al.*, 36 W. Va. 639, 15 S. E. 151 (1891); Pound, *The Progress Of The Law, Equity* (1919) 33 HARV. L. REV. 929, 951.

[18] Affirmative relief against penalties and forfeitures was one of the springs or foundations of equity jurisdiction; and it would be going in the very opposite direction, and acting contrary to its essential principles affirmatively to enforce a forfeiture. Craig v. Hukill, 37 W. Va. 520, 523, 16 S. E. 363, 364 (1892); Dutterer *et al.* v. Logan *et al.*, 103 W. Va. 216, 137 S. E. 1 (1927).

[19] 1 POMEROY, *op. cit. supra* n. 9, § 450. In W. Va., a prominent field for equitable relief from forfeitures is in oil and gas, and coal leases. Beech Fork Coal Co. v. Pocahontas Corp., 109 W. Va. 39, 152 S. E. 785 (1930); Engel *et al.* v. Eastern Oil Co. *et al.*, 100 W. Va. 301, 130 S. E. 491 (1925).

the nature of penalty,[20] or where payments are forfeited for default in the performance of a pecuniary covenant.[21] However, in seeking such relief, the vendee must be free from negligence and design, and the duration of the delay must not have been sufficient to permit a material change in the value of the property.[22]

In relieving from the forfeiture, the principal case has merely reiterated the precedents.[23] Yet if it be construed as holding that, in event of default by vendee as to payment of the balance, his equity must always be foreclosed by a sale, the decision goes a step farther than the earlier precedents.[24] Such a methods of foreclosure is already employed in the enforcement of vendor's liens[25] and common law mortgages,[26] in both of which the rights of the parties are analogous to those under land-purchase contracts.[27] This relief is the more striking, since time had here been made of the essence. In effect, the court is treating the executory contract as though in equity it were executed in fact, the vendee being given a day in which to redeem the premises.[28] By the decree, the

[20] Givens *et al.* v. United Fuel Gas Co., 84 W. Va. 301, 99 S. E. 476 (1919). 3 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 1732. Mere acceleration clauses will be enforced. Burlew v. Smith *et al.*, 68 W. Va. 458, 69 S. E. 908 (1910).

[21] Wheeling & Elm Grove R. R. Co. v. Town of Triadelphia, *et al.*, 58 W. Va. 487, 52 S. E. 499 (1905).

[22] Westerman *et al.* v. Dinsmore *et al.*, 68 W. Va. 594, 71 S. E. 250 (1911). In Wheeling & Elm Grove R. R. Co. v. Town of Triadelphia, *et al.*, *supra* n. 21, at 519, the court decreed specific performance saying, ". . . . . there must be full performance of the covenant as a condition of relief . . . . We do not take away either the right to have the delinquency made good or the power to forfeit for future delinquencies."

[23] But *cf.* Watzman v. Unatin, 101 W. Va. 41, 131 S. E. 874 (1926), where parties had provided for re-entry and had enforced it themselves, the court of equity would not relieve.

[24] Where vendee is in default and refuses to go on he cannot recover on the contract at law, Stewart v. Elkins, 101 W. Va. 557, 138 S. E. 125 (1926). Or when he sues for specific performance under such conditions, he is usually required to tender the purchase price, Liskey v. Snyder, *supra* n. 15. Vendee, not in default, was permitted to have lien on land for amount paid, Bryan v. Lofftus's Adm'rs, 1 Rob. (Va.) 12 (1842). In Clarke, *et al.* v. Curtis, 11 Leigh (Va.) 559 (1841), a proceeding by vendor for specific performance of the contract after defendant had defaulted in paying purchase price, it was held proper to decree sale of property covered by the contract, unless the vendee within a reasonable time, designated by the court, pay the amount fixed by the decree; the surplus to be paid to the vendee.

[25] Miller v. Hawker, 85 W. Va. 691, 102 S. E. 470 (1920). A similar foreclosure decreed in suit by vendor for specific performance, where the vendee was in possession. Hempfield R. R. Co. v. Thornburg, 1 W. Va. 267 (1866).

[26] Abney-Barnes Co. *et al.* v. Davy-Pocahontas Coal Co. *et als.*, 83 W. Va. 292, 98 S. E. 298 (1919).

[27] 5 POMEROY, *op. cit. supra* n. 9, § 2238.

[28] Under a similar situation in Abbott v. L'Hommedieu, *supra* n. 14, 713, it is said that the ownership of the land vests in the vendee and that of the purchase price in the vendor, so that the right thus acquired will not be forfeited by a failure to execute a conveyance or pay the price at the ap-

vendee is afforded relief, while the vendor is placed in much the same position as if he were suing on his implied lien.[29] A sound decision has been reached in this litigation, achieving a result that challenges current theory as to the decadence of equity.[30]

—ROBERT W. BURK.

TAXATION — CONSTITUTIONAL LAW — DUE PROCESS OF LAW AS PRESCRIBING MAXIMUM LIMITS FOR DIRECT PROPERTY TAXES. — The town of Carolina Beach, having defaulted in payment of principal and interest of bonds issued for certain public improvements, the holder thereof obtained judgment and afterwards a writ of mandamus requiring the town to levy a tax upon real and personal property sufficient to pay the total amount of the bonds and the costs of the suit. Plaintiff, a hotel company, sues to restrain the collection of the tax "on the ground that such tax is exorbitant and confiscatory." The writ of mandamus necessitated an increase in the tax levy from one dollar to three dollars, per hundred, over a period of three years. *Held*: The judgment against the town was binding on the inhabitants: *dictum*, that plaintiff was not deprived of its property without due process of law. *Pate Hotel Company v. Morris.*[1]

As to procedural objections, it is the recognized rule that a judgment or decree against a municipality imposes an obligation upon its citizens which they are compelled to discharge, ex-

---

pointed time. And, that the chancellor treats the contract as executed in fact though it is executory in form.

[29] Fisher v. Brown, 24 W. Va. 713 (1884); King v. Burdett *et al.*, 44 W. Va. 561, 29 S. E. 1010 (1898). It is said in MeNeely v. S. P. Oil Co. *et al.*, 52 W. Va. 616, 44 S. E. 508 (1902) the vendors only remedy against vendee would be to specifically execute the contract, have balance due decreed, and in default of payment after a day given therefore, a decree to sell and have vendee's equity foreclosed. In Liskey v. Snyder, *supra* n. 15, at 528, it is said that vendor has option to cause the lands to be sold and the proceeds thus disposed of, or to rescind the contract for failure of the vendee to comply with his part. But, even so, the former of these would be his best remedy, for equity would relieve from a forfeiture of vendee's payments in case of a rescission.

The implied lien, where vendor retains the title, is not affected by the statute abolishing implied liens in conveyances. See reviser's note to c. 38, art. 1, § 1, W. VA. CODE (1931). Poe v. Paxton, 26 W. Va. 607, 610 (1885).

[30] Pound, *The Decadence of Equity* (1905) 5 COL. L. REV. 20.

---

[1] 171 S. E. 799 (N. C. 1933).