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SPECIFIC PERFORMANCE-MARKETABLE TITLE TO REALTY-PERFECTING TITLE BY LITIGATION AS AN INCIDENT TO SPECIFIC PERFORMANCE

J. R. Mackenzie S.Ed.
University of Michigan Law School

SPECIFIC PERFORMANCE—MARKETABLE TITLE TO REALTY—PERFECTING TITLE BY LITIGATION AS AN INCIDENT TO SPECIFIC PERFORMANCE—The normal action on land contracts is two-sided, vendor against purchaser or purchaser against vendor, to settle the rights of the parties on the basis of the condition of *V*'s title at the time of the decree. This action is quite satisfactory where *V* and *P* agree as to the condition of the title, whether free and clear or not, but must we adhere to this pattern when there is a controversy between them concerning the title? To make the question concrete, suppose that *V* claims he has an unencumbered fee simple while *P* asserts there is a paramount easement in favor of *X*, or, a faint echo of the same case, *V* claims unencumbered fee simple and *P*, though not positively asserting the existence of the easement, points to some evidence of an easement and insists that this makes *V*'s title unmarketable. The crux of such a case is the controversy between *V* and *X*, an actual, present controversy if *X* is actively pressing his claim, a potential controversy if he is not, and this *V*-*X* controversy cannot be conclusively adjudicated in a suit between *V* and *P*. Yet the normal way, the almost universal way, to deal with this type of case is the two-sided *V*-*P* suit, wherein the court, not attempting to decide whether *X*'s claim is valid, for this is beyond its power in the *V*-*P* action, deals instead with the elusive question whether *X*'s claim is sufficiently plausible to render *V*'s title unmarketable.[1] If such is the fact, complete specific performance cannot be ob-

[1] See Aigler, "Title Problems in Land Transfers," 24 MICH. S.B.J. 202 at 212 (1945); 57 A.L.R. 1253 (1928).

tained in the normal two-sided action, and the plaintiff must content himself with rescission or damages.[2]

But a choice between these remedies may be less satisfactory to *P* than some device to make *V* try to obtain marketable title. Or, on the other hand, *V* may wish to clear up some doubtful element in his title and complete the contract, rather than let *P* rescind or have an action for damages. Equity courts, in whose eyes the legal remedy for breach of land contracts is inadequate, might find merit in remedies aimed at litigation to perfect the title with complete performance of the contract.

Relief of this nature has been available to either party, in some cases, by making *X* a party defendant to the action. With both *V* and *X* before it, the court will settle the controversy between them and, if *V*'s title is good, decree specific performance.[3] Lack of jurisdiction over *X* is not necessarily fatal if the land is in the jurisdiction, for the in rem powers of the court may be invoked to determine *X*'s rights.[4] But this three-sided action is not always available. The court may, in its discretion, find the action multifarious. If *X* is entitled to a jury trial and insists upon his right, he cannot be joined unless jury trials are provided in equitable actions, and even where juries are available in equity, the court may refuse to interfere with the usual ejectment procedure.[5] As may be expected, where *V*'s conduct is subject to criticism, there is some tendency to sustain *P*'s objection to the joinder of *X*.[6]

A possible alternative to the three-party action is a decree ordering one of the parties to commence litigation to perfect the title as an inci-

[2] See Linville, "Purchaser's Remedies for Absence of Marketable Title," 36 MICH. L. REV. 56 (1937). Presumably no court would, in the type of case where *X*'s claim is of unpredictable validity, decree specific performance with abatement of the price. See Brisbane v. Sullivan, 86 N.J. Eq. 411, 99 A. 197 (1916).

[3] WALSH, EQUITY, § 75 (1930); Huber v. Johnson, 174 Ky. 697, 192 S.W. 821 (1917) (*X* claimed under a prior deed); Maynard v. Lowe, 231 Ky. 258, 21 S.W. (2d) 285 (1929) (*X* in adverse possession); Noyes v. Bragg, 220 Mass. 106, 107 N.E. 669 (1915) (*X* claiming as second purchaser from *V*); Sutliff v. Smith, 58 Kan. 559, 50 P. 455 (1897) (*V* contracted to remove *X*'s claims, but *P* acquired them).

[4] See HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY 13-25 (1915) for the development of statutes on in rem powers. Courts have sometimes exceeded statutory authority: Rourke v. McLaughlin, 38 Cal. 196 (1869); Tennant's Heirs v. Fretts, 67 W. Va. 569, 68 S.E. 387 (1910).

[5] Hughes v. Hannah, 39 Fla. 365, 22 S. 613 (1897). See also, Basey v. Gallagher, 20 Wall (87 U.S.) 670 (1874).

[6] Marsh v. Lorimer, 164 La. 175, 113 S. 808 (1927), (*V* cannot object to dismissal of his second vendee, whose contract he sought to have cancelled in order to enforce his first contract against *P*); Braxton Realty Inv. Co. v. Schellenberg, (Mo. 1940) 142 S.W. (2d) 1006.

dent to specific performance. Such a decree was issued in the recent case of *Henschke v. Young*.[7] In that case, *V* agreed to furnish an abstract or Torrens certificate showing marketable title, and to correct written objections to it within 90 days of the time they were made. If the corrections were not made, the contract was to be void. In fact, *V* never furnished any certificate of title.[8] On *P*'s suit for specific performance, the court, unable to determine the validity of certain outstanding liens on the land, ordered *V* to conduct an action to determine them, and to convey to *P*. *P* was ordered to pay into court a sum large enough to assure payment of the balance due after the discharge of such outstanding claims as should be found valid.

The above decision, requiring *V* to litigate claims against his title, raises some interesting questions. Under what circumstances will litigation be ordered, and for the removal of what type of defect? Will *P* ever be required to bring an action to clear the title? What of the situation where either *V* or *P* desires to perfect the title himself, with specific performance of the contract if his action succeeds?

The question as to requiring *P* to litigate the title may be quickly answered: *P* need not "buy a lawsuit"; surely the courts will not order him to prosecute one, absent unusual contract provisions! *V*'s position is not improved by an offer to pay the estimated cost of the litigation, which may lessen *P*'s expense but not the risk of loss of title, nor by a showing that *P*'s action would probably be successful.[9]

The vendor who desires to litigate the title himself is in a somewhat stronger ethical position. His problem is to obtain judicial assurance that *P* cannot terminate the contract before his litigation is ended.[10] Yet the justice of granting an interlocutory decree to protect him is doubtful. It would deprive *P* of the right to make the time element material and rescind the contract, without making the time of performance certain.[11] It would establish *V*'s right to performance by *P* while giving no assurance of his own ultimate ability to perform.[12]

[7] (Minn. 1947) 28 N.W. (2d) 766 (1947).

[8] Therefore, no written objections were made, the 90-day period never began to run, and the contract was not void.

[9] Wakeland v. Robertson, (Tex. Civ. App. 1920) 219 S.W. 842 (*V* tendered the estimated cost of the litigation); Triplett v. Bucholtz, 99 Fla. 1112, 128 S. 265 (1930) (*V* tendered a deed stating that his tenant's lease was in default).

[10] In Haumersen v. Sladky, 220 Wis. 91, 264 N.W. 653 (1936), a vendor obtained an interlocutory decree for specific performance before removing defects in the chain of title and an outstanding tax deed. No litigation was involved in clearing his title, however.

[11] *P* has such a right. Ames, "Mutuality in Specific Performance," 3 COL. L. REV. 1 at 7 (1903); Bank of Columbia v. Hagner, 1 Pet. (26 U.S.) 455 at 467 (1809); Dresel v. Jordan, 104 Mass. 407 (1870).

[12] On the doctrine of mutuality of obligation, see Durfee, "Mutuality in Specific Performance," 20 MICH. L. REV. 289 at 305 (1922).

Only where *P* is willing to await the outcome of the litigation and accept whatever *V* can eventually convey would such a decree be warranted, and in that situation it is hardly necessary. This type of relief has been denied whether *V*'s suit to clear title is prospective or already pending.[13]

It is easier to justify a decree ordering further litigation at *P*'s request than at *V*'s request. Language of court and text writer lays down the general duty of a vendor to perform to the extent of his ability, which would seem to remove the stigma of "making a contract."[14] Where *V* has a contract to buy the land, *P* can, in a suit for specific performance, compel him to exercise his right to purchase under the first contract in order to be able to perform the second.[15] To make him exercise the right to perfect his title would seem somewhat akin to this, although the analogy cannot be pressed.[16] *V*'s expense should not be materially greater than where *P* deducts from the purchase price the costs of defending actions brought against him by *X*. Enforced perfecting of the title would often be preferable to abatement of the price, as it would reduce the element of uncertainty in the transaction. Mutuality of performance could be assured by the decree, and it seems probable that *V*'s self-interest in preventing the loss of his estate would assure a vigorous prosecution of the action. Since two actions are required, however, this procedure will be less efficient than the three-party action, and there is always the danger that *V*'s suit against *X* may not be prosecuted competently. This type of remedy would seem most attractive in situations where ejectment must be brought against *X*, so that he cannot be joined in the original action.

The device of requiring a vendor to perfect his title by litigation has not been used so frequently that any general pattern of law has developed around it. It must be expected that some courts will, without adequate consideration of the alternatives, apply the age-ripened formula of the traditional two-party action, that equity will not require conveyance of what the defendant does not possess.[17] This occurred in *Cattell*

[13] McAllister v. Harman, 101 Va. 17, 42 S.E. 920 (1902), and Wold v. Newgaard, 123 Iowa 233, 98 N.W. 640 (1904) (suits pending); People v. Open Board, 92 N.Y. 98 (1883) (suits not yet commenced).

[14] WALSH, EQUITY, § 76 (1930); MCCLINTOCK ON EQUITY, 2d ed., § 64 (1936); Bailey v. Conley, 16 Ky. L. Rep. 129, 26 S.W. 391 (1894).

[15] Brin v. Michalski, 188 Mich. 400, 154 N.W. 110 (1915); Cutler v. Lovinger, 212 Mich. 272, 180 N.W. 462 (1920).

[16] The contract right may be more certain than the right to remove a cloud. Whether the amount due on a contract can be paid out of the purchase price is readily ascertainable; not so, perhaps, with regard to the cost of a lawsuit.

[17] The common tendency of the courts has been to emphasize the hardship of requiring a vendor to perform, rather than the usually superior equitable position of the purchaser. See 34 MICH. L. REV. 890 (1936).

v. Jefferson,[18] a case where the device would have been peculiarly appropriate.[19] But the remedy has been employed occasionally, and some observations on the decisions may be useful.

The holding in *Henschke v. Young*[20] does not go as far as one might suppose from the statement that litigation to clear the title was ordered. The purpose of this litigation was merely to ascertain what outstanding claims were valid, to be discharged by *P* out of the purchase price.[21] The similarity to cases where purchase money is used to satisfy liquidated claims against the land is manifest. It appeared, furthermore, that *P* desired a conveyance from *V*, whether or not any of the outstanding claims was removed. One may wonder whether the court would have ordered an action to determine claims which might prove to be paramount and irredeemable. The answer might depend on the purchaser's willingness to accept partial performance rather than insisting upon rescission if the litigation should be determined adversely.[22]

In *Douglass v. Ransom*,[23] relied on in *Henschke v. Young*, the contract called for marketable title which *V* failed to provide. The decree of the trial court, ordering him to prosecute actions to perfect his title, was affirmed, although it appeared that the title could be cleared more quickly and cheaply by the use of affidavits and court orders. The decision is a square holding on the power of a court of equity to compel litigation to make a title marketable. It adds little to *Henschke v. Young*, however, in laying down a test to determine when such an order may be obtained, or what the nature of the defect must be: there seemed to be no doubt that the litigation would be successful and that *P* intended to accept whatever title *V* could convey.

Easton v. Lockhart[24] goes further on its facts than the two more recent cases discussed above. *V*'s title was clouded by a mortgage,

[18] (App. D.C. 1931) 51 F. (2d) 317.

[19] *V* contracted to clear his title by litigation. *P*, who had advanced $1000 to finance the litigation with the understanding that this sum was to be deducted from the price of the land as to which good title was secured, offered all necessary additional funds on the same basis. Specific performance against the vendor was denied.

[20] (Minn. 1947) 28 N.W. (2d) 766 (1947). The facts of the case are presented, supra.

[21] "In this manner the court may, if necessary, determine the nature, validity, and amount of all outstanding liens." Id. at 770.

[22] It seems probable that, on a theory of mutuality, the courts would ordinarily require assurance that *P* will accept whatever title *V* can ultimately convey, before ordering *V* to litigate his title. Such relief might well be denied a purchaser who will not accept partial performance, but will rescind if the litigation is not successful. But see Easton v. Lockhart, 10 N.D. 181, 86 N.W. 697 (1901), discussed, infra.

[23] 205 Wis. 439, 237 N.W. 260 (1931).

[24] 10 N.D. 181, 86 N.W. 697 (1901).

a contract, and a deed. It appeared that *P* could not finance the transaction at all unless the title were perfected and that the success of the litigation was at least uncertain. Still, the trial court ordered prosecution of actions in the district and circuit courts to clear title. The case seems to be authority, then, for the granting of such relief even though the effort to clear title may be unsuccessful, and even though *P* will rescind the contract in that event. As such, however, it is somewhat weakened by the fact that the decree was reversed on other grounds.[25]

The equities in favor of the purchaser seeking litigation to perfect an unmarketable title would seem to be strengthened where there is a contract provision for litigation by the vendor. Yet in *Cattell v. Jefferson*, noted above, this factor was ignored. Perhaps the court thought it unconscionable for *P* to insist on strict performance when he knew of defects in the title at the time of the contract.[26] Since knowledge of a defect militates against specific performance with abatement of price, it might be thought to preclude specific performance with litigation at *V*'s expense. But the comparison is strained: ordering litigation which was promised is not super-adding something to the remedy of specific performance; it is only a strict enforcement of the contract. The old rule followed in *Cattell v. Jefferson* is founded on the doctrine of hardship, but the express promise for which consideration is given should remove enforced litigation from the "hardship" category.[27]

From *P*'s viewpoint, a decree permitting him to bring an action against *X*, with specific performance if he is successful, might be more desirable than one ordering *V* to commence such litigation, for it would give *P* control of the action. Such a decree may be justified on the ground that *P* is the real party in interest, and that this is not far removed from applying to the purchase price *P's* costs of defending an ejectment action brought against him by *X*. Some protection of *V*'s interest in the controversy would have to be worked out—a problem which would be minimized where a considerable portion of the purchase money has already been paid. As noted above, however, this remedy would be most useful when *X* cannot be joined in the original action against *V*, as where ejectment must be brought. But it is in precisely the case where ejectment must be brought against *X*, that this remedy may be the least practicable. In many states, the plaintiff

[25] Performance by *P* had not been assured by requiring him to pay the purchase money into court, and the contract itself was not specifically enforceable under the circumstances of the case. Later litigation of the case, 62 N.D. 767, 89 N.W. 75 (1902), did not involve the present problem.

[26] See Peeler v. Levy, 26 N.J. Eq. 330 (1875).

[27] See note 17, supra.

in ejectment actions must own legal title. In such jurisdictions, as a prerequisite to suing *X*, *P* would have to complete his payments and obtain a conveyance from *V*. Where *P* is sufficiently concerned over *X*'s asserted interest in the land to raise the issue, it is doubtful that his desire to control an action against *X* would induce him to invest the total contract price in the land before having *X*'s claim adjudicated.

Despite its limitations, then, the traditional two-party action will probably remain the most practicable remedy for the purchaser who cannot settle the claims of the third party in one action, until the courts have developed further the remedies suggested by the decree in *Henschke v. Young*.

J. R. Mackenzie, S.Ed.