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EQUITY - SPECIFIC PERFORMANCE OF CONTRACT TO LEND MONEY

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EQUITY — SPECIFIC PERFORMANCE OF CONTRACT TO LEND MONEY — Plaintiff, through the Mortgage Service Bureau, which acted as intermediary, negotiated a loan from defendant bank, secured by a mortgage on plaintiff's land. Plaintiff executed and delivered notes and a mortgage, and defendant drew a check for one of the loan installments payable to plaintiff and the bureau. The latter without authority took the check, forged plaintiff's signature, and kept the money. The bureau being out of business and insolvent, plaintiff, with an unfinished house on his hands and without funds to complete it, sought specific performance of the agreement to lend. *Held*, plaintiff was entitled to specific performance, and defendant was required to pay the money to plaintiff. *Jacobson v. First National Bank of Bloomingdale*, 129 N. J. Eq. 440, 20 A. (2d) 19 (1941).

Three reasons have been given for the general rule that specific performance of a contract to lend money normally will not be granted,[1] although most of the courts passing on the question have relied solely on precedent.[2] The reason most commonly advanced, without apparent consideration or discussion, is the adequacy of the legal remedy,[3] but the closely interrelated reasons of impracticability of enforcement [4] and of want of mutuality of performance,[5] more aptly described as "hardship," [6] likewise have been influential. The court in the principal case ignores and, by implication, overrules its own earlier decision denying specific relief.[7] The court also ignores the usual reasons given for refusing to grant such a remedy and cites no authorities on either side of the question. Even

[1] 5 POMEROY, EQUITY JURISPRUDENCE, 2d ed., § 2175 (1919); 5 WILLISTON, CONTRACTS, rev. ed., § 1421 at p. 3970 (1937); 41 A. L. R. 357 (1926), and cases there cited.

[2] For example, Gideon v. Putnam Development Co., 113 W. Va. 200, 167 S. E. 140 (1932); Steward v. Bounds, 167 Wash. 554, 9 P. (2d) 1112 (1932). See discussion in 24 MICH. L. REV. 195 (1925).

[3] The courts merely assert that the legal remedy is adequate, without further discussion. See Norwood v. Crowder, 177 N. C. 469, 99 S. E. 345 (1919); Columbian Mutual Life Assurance Society v. Whitehead, 193 Ark. 598, 101 S. W. (2d) 455 (1937).

[4] Where the agreement was to make a loan secured by a mortgage and vendor's lien on real estate and a pledge of corporate stock, "It would be impossible for a court of justice to enforce the execution of a judgment ordering the defendant to carry out the details involved in or incident to a transaction of that kind." Kenner v. Slidell Savings & Homestead Assn., 170 La. 547 at 549-550, 128 So. 475 (1930).

[5] Where plaintiff was insolvent, loan would be equivalent to gift. Bradford, E. & C. R. R. v. New York, L. E. & W. R. R., 123 N. Y. 316, 25 N. E. 499 (1890). The court cannot guarantee the value and adequacy of the security, nor can it assure repayment. 24 MICH. L. REV. 195 (1925); Pound, "The Progress of the Law, 1918-1919 —Equity," 33 HARV. L. REV. 420 at 432 (1920).

[6] It is hardship to force a bad investment on the defendant. If the investment were good, i.e., if the plaintiff's credit were good, he could get the loan elsewhere, and specific relief would be unnecessary. See 24 MICH. L. REV. 195 (1925).

[7] Conklin v. Peoples Bldg. Assn., 41 N. J. Eq. 20, 2 A. 615 (1886). The plaintiff acted to her detriment in reliance on the defendant's commitment, but the court summarily denied specific performance. There was, however, a partial failure in the security.

the fundamental test of adequacy receives only passing mention, without discussion of the facts controlling it.[8] In at least three cases the courts have found the circumstances sufficient to justify equitable relief.[9] The legal remedy is not always adequate,[10] and the difficulties of enforcement and hardship in some instances are negligible.[11] Courts have also invoked the traditional jurisdiction of equity over land [12] and over mortgages,[13] and the principal case mentions this latter ground.[14] Courts might well give more consideration to the circumstances

[8] The court said only this: "the only adequate relief that the complainants can have is by decree of specific performance. . . . the complainants have changed their position by the creation of the mortgage, so that it is clear to my mind that the remedy at law would be inadequate." Principal case, 20 A. (2d) at 20, 21. The mortgage probably would be cancelled by a court of equity.

[9] Specific performance was granted of a contract to indorse and give receipts for all payments on a note, which was negotiable and might be transferred before it matured in six years; the court seemed to dispense with the traditional test of adequacy and evinced a very liberal attitude toward the specific remedy in general. Kopplin v. Kopplin, 8 Tex. Civ. App. 625, 28 S. W. 220 (1894). Specific performance of a life insurance policy loan provision was given without discussion, since it apparently was not put in issue, although a dissenting judge mentioned it and denied the right to such relief, in Caplin v. Penn Mutual Life Ins. Co., 182 App. Div. 269, 169 N. Y. S. 756 (1918), affirmed without opinion, 229 N. Y. 545, 129 N. E. 908 (1920). The leading and most recent case for this view is Columbus Club v. Simons, 110 Okla. 48, 236 P. 12 (1925), wherein the security was a mortgage on land on which the plaintiff was constructing a large clubhouse, the loan being made to finance this construction. The court recognized the general rule but held that the circumstances there justified making an exception to it and that the plaintiff had performed and could continue to do so, thus being entitled to relief. The court set forth its equitable jurisdiction by saying that the mortgage gave the defendant a defeasible title and that "the case resolves itself into a contract for the conveyance of the interest in land, and falls within the jurisdiction of equity to decree specific performance. . . ." The court was also influenced by the fact that "It is impossible and impracticable to place the plaintiff in its original position." 110 Okla. 48 at 52.

[10] Where the plaintiff proceeded to build without the money the defendant had agreed to lend, it was held that only nominal damages could be recovered in the action at law. See Eaton v. Reich, 258 N. Y. 202, 179 N. E. 385 (1932). Frequently damages might be real but too speculative to be recovered. See 17 CORN. L. Q. 674 (1932); 24 MICH. L. REV. 195 (1925).

[11] Caplin v. Penn Mutual Life Ins. Co., 182 App. Div. 269, 169 N. Y. S. 756 (1918), affirmed without opinion, 229 N. Y. 545, 129 N. E. 908 (1920), wherein the policy issued by the defendant itself was security and the loan was already "repaid" in that only the cash value of the policy would be lent. See also Pound, "The Progress of the Law, 1918-1919—Equity," 33 HARV. L. REV. 420 at 432 (1920).

[12] But there is no real *sale* of land between the parties to the litigation.

[13] The mortgage really is not part of the plaintiff's cause of action, for he is seeking neither to enforce it nor to have it set aside; it certainly is not of itself sufficient to give equitable jurisdiction.

[14] "The court having jurisdiction because of the existence of the mortgage . . . will grant the appropriate relief. . . ." Principal case, 20 A. (2d) at 21. Other courts have invoked the same dubious basis for jurisdiction. Kopplin v. Kopplin, 8 Tex. Civ. App. 625, 28 S. W. 220 (1894); Columbus Club v. Simons, 110 Okla. 48, 236 P. 12 (1925).

of the particular case before denying relief arbitrarily as some have done.[15] Such an approach accords with equity's purpose of exercising its discretion in giving relief wherever it is needed. Conceding that some courts have expressly recognized that there may be circumstances justifying the exercise of their equitable power to enforce contracts to lend [16] and that in several cases there have been factors weakening the plaintiff's position,[17] the principal case is representative of a desirable trend toward a more liberal consideration of the merits of the particular case.

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[15] See cases cited in note 2, supra.

[16] But there is never any specific indication as to what such circumstances are. Leach v. Fuller, 65 Colo. 68, 173 P. 427 (1918).

[17] Failure of security, Conklin v. People's Building Assn., 41 N. J. Eq. 20, 2 A. 615 (1886); partial default of plaintiff, Cohn v. Mitchell, 115 Ill. 124, 3 N. E. 420 (1885); insolvency of plaintiff, Bradford, E. & C. R. R. v. New York, L. E. & W. R. R., 123 N. Y. 316, 25 N. E. 499 (1890); complaint vague and full of errors, Kenner v. Slidell Savings & Homestead Assn., 170 La. 547, 128 So. 475 (1930).