

Equity--Construction Loan Agreements Specifically Enforceable (Southampton Wholesale Food Terminal, Inc. v. Providence Warehouse Co., 129 F. Supp. 663 (D. Mass. 1955))

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based its denial of compensation on the fact that the taken parcel had ". . . no specifically demonstrative and directly effective utilization or function."²⁴ The Court reasoned that the depreciating injury to the remainder was, in a legal sense, only a consequence of the proximity of the air base generally, and not a result of the use to which the taken tract was put. Under the facts in the instant case, such a finding appears unrealistic. There is no doubt that land may be utilized without constructing or depositing something on its surface.²⁵ An air base could not well serve its purpose unless there were open lands surrounding it to permit planes to approach the runway proper and to provide a buffer zone for planes disabled on takeoff or landing. Viewed in this light, the land taken from the appellants was put to a "specific use."

The Court suggested that the complainants may have a future cause of action for damages resulting from the operation of the air base. Compensation for the present taking, however, is in no way affected by the existence of this possible future action; the action could be brought irrespective of whether there had been a prior taking.²⁶ In order completely to indemnify the appellants, they must be returned to the position they occupied before a portion of their property was condemned. That, it is submitted, cannot be done without compensating them for the damages sustained because of the use of the taken land as part of an air base.



EQUITY — CONSTRUCTION LOAN AGREEMENTS SPECIFICALLY ENFORCEABLE.—Plaintiff-borrower sued for specific performance of a construction loan agreement. The plaintiff failed to allege inadequacy of remedy at law. The Court, denying a motion to dismiss the complaint, *held* that construction loan agreements are specifically enforceable and are exceptions to the rule that equity will refuse to exercise jurisdiction to enforce loan contracts because of adequacy of remedy at law. *Southampton Wholesale Food Terminal, Inc. v. Providence Warehouse Co.*, 129 F. Supp. 663 (D. Mass. 1955).

Equity developed as an extraordinary medium for granting relief which was otherwise unavailable to aggrieved parties because of the rigid and formalistic character of actions at law.¹ Because of its

²⁴ *Boyd v. United States*, 222 F.2d 493, 495 (8th Cir. 1955).

²⁵ See *Cormack, Legal Concepts In Cases Of Eminent Domain*, 41 YALE L.J. 221 (1931).

²⁶ See, *e.g.*, *Causby v. United States*, 109 Ct. Cl. 768, 75 F. Supp. 262 (1948).

¹ See CLARK, EQUITY § 5 (1954); RE, SELECTED ESSAYS ON EQUITY xi (1955).

supplementary nature, the equitable remedy of specific performance has been granted only where actions at law proved inadequate.² However, this prerequisite to equity jurisdiction has undergone some modification with respect to ordinary chattels through the extensive adoption of the Uniform Sales Act.³ Section 68 permits a buyer to obtain specific performance of a contract to sell goods if the court "thinks fit." While some jurisdictions have viewed this provision as a statutory liberalization of the doctrine,⁴ others regard it as a mere codification of the common law.⁵ The Uniform Commercial Code also proposes a more liberal exercise of discretion in determining whether or not chattel sales contracts will be specifically enforced.⁶ Recently, the Massachusetts Legislature provided that specific performance is not barred by an available remedy at law if that remedy is not ". . . the equivalent of the performance promised by the contract. . . ." ⁷ Despite such modifications, the doctrine of inadequacy of remedy remains substantially intact in both federal ⁸ and state ⁹ courts.

Since an action at law for breach of a loan contract is adequate,¹⁰ equity will not, as a general rule, specifically enforce such agreements.¹¹ However, construction loan contracts have been specifically enforced in at least two jurisdictions. In *Columbus Club v. Simons*¹² the mortgagee refused to tender the amount of the mortgage after having obtained a defeasible title to the property. The court reasoned that the facts were analogous to a contract for the sale of land with payment as the sole executory obligation, a circumstance clearly war-

² *Wirth & Hamid Fair Booking, Inc. v. Wirth*, 265 N.Y. 214, 222, 192 N.E. 297, 301 (1934) (dictum); see *Buzard v. Houston*, 119 U.S. 347 (1886); *Trainor v. Mutual Life Ins. Co.*, 131 F.2d 895 (7th Cir. 1942).

³ See 1A UNIFORM LAWS ANNOTATED Table III (Supp. 1954) (The act has been adopted by thirty-three state legislatures.).

⁴ See, e.g., *Hunt Foods, Inc. v. O'Disho*, 98 F. Supp. 267 (N.D. Cal. 1951); *Pittinger Equipment Co. v. Timber Structures Inc.*, 189 Ore. 1, 217 P.2d 770 (1950).

⁵ See, e.g., *Glick v. Beer*, 263 App. Div. 599, 33 N.Y.S.2d 833 (1st Dep't 1942); *McCallister v. Patton*, 214 Ark. 293, 215 S.W.2d 701 (1948).

⁶ See UNIFORM COMMERCIAL CODE § 2-716, comment 1 (1952).

⁷ MASS. LAWS ANN. c. 214, § 1A (1955).

⁸ See, e.g., *Jamison Coal & Coke Co. v. Goltra*, 143 F.2d 889 (8th Cir. 1944); *Trainor v. Mutual Life Ins. Co.*, 131 F.2d 895 (7th Cir. 1942).

⁹ See, e.g., *Lee Builders, Inc. v. Wells*, 95 A.2d 692 (Del. Ch.), *rev'd on other grounds*, 99 A.2d 620 (Del. Sup. Ct. 1953); *Wagner v. Savage*, 195 Ore. 128, 244 P.2d 161 (1952).

¹⁰ *Hixson v. First Nat'l Bank*, 198 Iowa 942, 200 N.W. 710, 711 (1924) (dictum); *Norwood v. Crowder*, 177 N.C. 469, 99 S.E. 345, 346 (1919) (dictum); see *Leach v. Fuller*, 65 Colo. 68, 173 Pac. 427 (1918).

¹¹ *Conklin v. People's Bldg. & Loan Ass'n*, 41 N.J. Eq. 20, 2 Atl. 615 (Ch. 1886); *Sickel v. Mosenthal*, 30 Beav. 371, 54 Eng. Rep. 932 (Rolls 1862); *Bradford, E. & C.R.R. v. New York, L.E. & W.R.R.*, 123 N.Y. 316, 327, 25 N.E. 499, 501 (1890) (dictum).

¹² 110 Okla. 48, 236 Pac. 12 (1925).

ranting specific performance.¹³ A New Jersey equity court decreed specific performance of a loan agreement where the mortgagor had so changed his position as to render inadequate a remedy at law.¹⁴ In reliance on these two cases, it was held in *City of Camden v. South Jersey Port Commission*¹⁵ that when specific performance presents the only possible medium of relief, it may be utilized to enforce a loan agreement.

In the instant case, no importance was attached to the plaintiff's failure to allege inadequacy in his complaint. The Court merely restated the general rule requiring inadequacy and indicated its awareness of the absence of such an allegation. The law of Massachusetts, which was apparently controlling in the principal case,¹⁶ does not permit of such facile treatment. There is no indication in the reported cases of that state that inadequacy of remedy at law is not prerequisite to equity jurisdiction. Similarly, the Massachusetts statute which permits specific performance where the remedy at law is not equivalent to the promised performance, seems merely to codify the existing law "[w]ithout broadening the jurisdiction of equity whatsoever. . . ." ¹⁷ Moreover, the Court did not consider this statute in arriving at its determination. The Court cited only two cases to support its position that construction loan agreements, as such, are exceptions to the general rule. Actually, these cases merely demonstrate that such agreements will be specifically enforced under special circumstances which have been traditional bases for equity jurisdiction.¹⁸ Specific performance will be denied construction mortgages absent such special conditions.¹⁹ In both cases, the fact that construction loan agreements were involved was in no way controlling.

The instant case seems to represent a departure from the well established rule that equity will not decree specific performance if

¹³ See *Greene v. Marshall*, 108 F.2d 717 (1st Cir. 1940); *Merten v. Fertig*, 281 Fed. 908 (8th Cir. 1922); *Chemical Bank & Trust Co. v. Simon*, 66 N.Y.S.2d 806 (Sup. Ct. 1946).

¹⁴ *Jacobson v. First Nat'l Bank*, 129 N.J. Eq. 440, 20 A.2d 19 (Ch. 1941), *aff'd per curiam*, 130 N.J. Eq. 604, 23 A.2d 409 (Ct. of Err. & App. 1942).

¹⁵ 4 N.J. 357, 73 A.2d 55 (1950).

¹⁶ The substantive law of the forum governs in diversity of citizenship cases. *National Fruit Product Co. v. Divinell-Wright Co.*, 47 F. Supp. 499, 503 (1942) (dictum); see *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); 2 MOORE, FEDERAL PRACTICE 334 (2d ed. 1948); Note, 55 YALE L.J. 401, 420 (1946).

¹⁷ Note, 35 B.U.L. REV. 122, 139 (1955). Previous to the adoption of the statute, equity would not assume jurisdiction if an adequate remedy at law were available. See, e.g., *Maguire v. Reough*, 238 Mass. 98, 130 N.E. 270 (1921). The statute has not yet been construed.

¹⁸ See *Columbus Club v. Simons*, 110 Okla. 48, 236 Pac. 12 (1925) (mortgage contract specifically enforceable because analogous to a land sale contract); *Jacobson v. First Nat'l Bank*, *supra* note 14 (specific performance because of complainant's change of position).

¹⁹ See, e.g., *Conklin v. People's Bldg. & Loan Ass'n*, 41 N.J. Eq. 20, 2 Atl. 615 (Ch. 1886); *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271 (*semble*).

there is an adequate remedy at law. However, the extreme brevity of the opinion inhibits a clear understanding of the rationale. The Court mentions that a contract to sell land is specifically enforceable "though the defendant's sole obligation is to pay money." If this allusion was intended to justify the decision on the ground that a construction loan agreement is analogous to a contract to sell land, then perhaps the decision may be regarded, not as a startling departure from precedent, but as adopting the view taken in the *Columbus* case.



INSURANCE — STATUTE OF FRAUDS NO DEFENSE TO PARTY FRAUDULENTLY OBTAINING POLICY FROM ORAL ASSIGNEE.—The insured's widow claimed the proceeds of a life policy in which her sister-in-law, the defendant, was noted as beneficiary. The plaintiff-widow asserted that her deceased husband orally assigned and delivered the policy to her, at which time she was the named beneficiary, and that she thereafter made substantially all premium payments. She further alleged that the decedent secretly removed the policy from her possession, changed the beneficiary, and gave it to the defendant with whom he had conspired. The defendant contended that the oral assignment was unenforceable under the statute of frauds. The Court held that the plaintiff would be entitled to the proceeds of the policy if the allegations were proven. *Katzman v. Aetna Life Ins. Co.*, 309 N.Y. 197, 128 N.E.2d 307 (1955).

An insurance policy is a chose in action.¹ Before the enactment of Section 31, subdivision 9, of the Personal Property Law,² it was well settled in New York that a policy was orally assignable.³ In most other jurisdictions such an assignment is still recognized.⁴ For

¹ *Steinback v. Diepenbrock*, 158 N.Y. 24, 52 N.E. 662 (1899); *Matter of Pastore*, 155 Misc. 247, 279 N.Y. Supp. 200 (Surr. Ct. 1935).

² "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;

" . . .

"9. Is a contract to assign or an assignment, with or without consideration to the promisor, of a life or health or accident insurance policy, or a promise, with or without consideration to the promisor, to name a beneficiary of any such policy. This provision shall not apply to a policy of industrial life or health or accident insurance." N.Y. PERS. PROP. LAW § 31(9) (effective March 11, 1943).

³ *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N.Y. 625 (1877); *McGlynn v. Curry*, 82 App. Div. 431, 81 N.Y. Supp. 855 (2d Dep't 1903).

⁴ See *Loth, Gifts of Life Insurance*, [1945] *INS. L.J.* 515, 517; 25 *MISS. L.J.* 72 (1953). *Contra, Steele v. Gatlin*, 115 Ga. 929, 42 S.E. 253 (1902).