

Equity--Right of Subvendee to Specific Performance (Clark Co. v. N.Y., N.H. & Hartford R.R., 279 App. Div. 39 (1st Dep't 1951))

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parte divorce.¹² New York has carried the policy to the extreme of awarding alimony to a bigamist.¹³

Still, the policy is not inflexible. Prior to the *Estin* case it was consistently held in New York that a wife would be estopped from enforcing a prior support order if she took it upon herself to migrate and dissolve the marriage in a suit based on constructive service.¹⁴

However, Judge Callahan, dissenting in the instant case, stated that these holdings were based on the concept that the survival of a support order in a separation decree depended upon the continuance of the marriage, a concept which, he argued, was altered by the *Estin* case, and by the theory of separability therein promulgated.¹⁵ The intimation was that the prior holdings are no longer binding and that the wife now should be entitled to the support provisions of a prior separation decree regardless of who procured the foreign divorce. This would seem consonant with the *Estin* decision, since in both instances the support order would survive the divorce. As a practical matter, however, such a conclusion would have a pernicious effect upon the enforcement of the divorce laws of New York State.

It would open a broad new vista to those seeking to evade the New York divorce laws. A wife would be permitted to first obtain, in New York, a separation decree with its attendant support provision, and then to obtain a "bargain counter" divorce in a sister state. She could thus have her "easy" divorce, and a New York support provision, too—without having to contend with this state's stringent divorce laws. Fortunately, this possibility is nullified by the present holding.



EQUITY—RIGHT OF SUBVENDÉE TO SPECIFIC PERFORMANCE.—
Defendant railroad contracted to sell forty-one acres of land to co-defendant vendee. Plaintiff, assignee of the subvendee of eleven acres of this tract, sued for (1) specific performance of the vendor-vendee contract, and (2) specific performance of his assignor's con-

¹² Woods v. Waddle, 44 Ohio St. 449, 8 N. E. 297 (1886); Spradling v. Spradling, 74 Okla. 276, 181 Pac. 148 (1919); Adams v. Abbott, 21 Wash. 29, 56 Pac. 931 (1899).

¹³ Johnson v. Johnson, 295 N. Y. 477, 68 N. E. 2d 499 (1946). See Sparacio, *Alimony and the Bigamist: A Comment on Section 1140-a of the New York Civil Practice Act*, 21 ST. JOHN'S L. REV. 1 (1946).

¹⁴ Harris v. Harris, 197 App. Div. 646, 189 N. Y. Supp. 215 (1st Dep't 1921); Glennan v. Glennan, 197 Misc. 899, 97 N. Y. S. 2d 666 (Sup. Ct. 1950); Gibson v. Gibson, 81 Misc. 508, 143 N. Y. Supp. 37 (Sup. Ct. 1913).

¹⁵ MacKay v. MacKay, 279 App. Div. 350, 358, 110 N. Y. S. 2d 82, 90 (1st Dep't 1952).

tract with the vendee. The complaint alleged that defendant railroad had notice of the contract of subpurchase, and that co-defendant vendee had been unable to obtain title from the railroad and was hence unable to carry out its own contract with plaintiff. Defendant railroad's motion to dismiss the complaint for failure to state a cause of action was granted. *Held*, reversed, new trial granted. The trial court will determine if an equitable decree can be rendered protecting all parties. *Clark Co. v. N. Y., N. H. & Hartford R. R.*, 279 App. Div. 39, 107 N. Y. S. 2d 721 (1st Dep't 1951).

Courts of equity have long recognized the right of a purchaser's assignee to specifically enforce contracts for the sale of realty.¹ "The assignee of such a contract succeeds by force of the assignment to the position of the original vendee as 'the equitable owner' of the subject of the sale . . . Equity, while recognizing his right, will not leave him powerless to vindicate it, by withholding the equitable remedies without which the right is ineffective."²

The right of the subpurchaser to the same relief is not as universally recognized.³ It has been stated by some authorities that this relief should be equally available to the subpurchaser;⁴ and some courts have, in practical effect, so held.⁵ The prevailing rule would accord to the subpurchaser of the entire tract a right to specific performance if the original vendee has been joined as a party to the action.⁶ In such case, a complete adjudication of the rights of all parties is possible. Both the vendee's equity in his profit and the vendor's equity in his purchase price may thereby be properly protected. The complainant in effect asks performance of the vendor-vendee contract, so that his (the subvendee's) contract with the vendee may be enforced.⁷ Complete relief, however, requires that the vendee be fully able to perform his part of the bargain, and where his inability to do so prevents the giving of a decree suitably designed to protect the vendor, conveyance will not be directed.⁸

An additional problem arises where the complainant is a subpurchaser for only *part* of the original tract. Manifestly the vendor should not be compelled to convey to the subvendee part of his land

¹ *Epstein v. Gluckin*, 233 N. Y. 490, 135 N. E. 861 (1922).

² *Id.* at 492, 135 N. E. at 863.

³ See Note, 141 A. L. R. 1432 (1942).

⁴ See Pound, *The Progress of the Law, 1918-1919*, 33 HARV. L. REV. 823 (1919); McCLINTOCK, *EQUITY* § 115 (2d ed. 1948).

⁵ *Lenman v. Jones*, 222 U. S. 51 (1911) (by implication); *accord*, *Duntz v. Ames Cemetery Ass'n*, 192 Ia. 1341, 186 N. W. 443 (1922).

⁶ *Miedema v. Wormhoudt*, 288 Ill. 537, 123 N. E. 596 (1919); *Waggoner v. Saether*, 267 Ill. 32, 107 N. E. 859 (1915); *cf.* *Mechanick v. Duschanek*, 99 N. J. Eq. 23, 132 Atl. 854 (1926). *Contra* *McCarthy v. Cauch*, 37 Minn. 124, 33 N. W. 777 (1887) (specific performance denied as plaintiff was neither in privity with, a party to, nor an assignee of the initial contract).

⁷ See *Miedema v. Wormhoudt*, 288 Ill. 537, 123 N. E. 596, 597 (1919).

⁸ Compare *Dyer v. Pulteney*, Barn. C. 160, 169, 27 Eng. Rep. 596, 600 (1740), with *Hoover v. Bough*, 108 Va. 695, 62 S. E. 968 (1908).

for part of the initial purchase price.⁹ To allow recovery to a sub-purchaser in that situation would ". . . subject [the vendor] to an indefinite number of suits . . .,"¹⁰ and operate to impair the vendor's security.¹¹ The leading New York case of *Lord v. Underdunck*¹² is illustrative. There one Lord contracted to buy one hundred acres of land from the heirs of the vendee who in turn had been under contract to purchase the entire tract of eight hundred acres. The bill, brought solely against the vendor, was dismissed without prejudice.¹³ Elsewhere, however, where the vendee is before the court and no outstanding equities militate against decreeing a conveyance, specific enforcement has been granted.¹⁴

The decision in the instant case does no more than establish plaintiff's right to present his prayer for equitable relief. Whether or not the suppliant is entitled to specific performance can only be determined after a consideration of all those factors to which Equity must have reference when fashioning a decree which will conform to established notions of substantial justice. Exactly what these factors are has not been clearly set forth in the decided cases. Certainly, the vendee's ability to perform will have important bearing.¹⁵ So too will a measuring of the plaintiff's interest as contrasted with the co-defendants' right to mutual abrogation of their contract.¹⁶

⁹ *Hancock's Heirs v. Hancock*, 1 T. B. Mon. 121, 15 Am. Dec. 92 (Ky. 1824).

¹⁰ *Lord v. Underdunck*, 1 Sandf. Ch. 46, 50 (N. Y. 1843).

¹¹ *Hoover v. Bough*, 108 Va. 695, 62 S. E. 968 (1908).

¹² 1 Sandf. Ch. 46 (N. Y. 1843).

¹³ The court in the instant case dismisses the *Underdunck* decision by noting that the holding there turned on a failure of parties. *Clark v. N. Y., N. H. & Hartford R. R.*, 279 App. Div. 39, 41, 107 N. Y. S. 2d 721, 724 (1st Dep't 1951), and notes as significant the fact that the complaint in a later action, *Smith v. Underdunck*, 1 Sandf. Ch. 579 (N. Y. 1844), was sustained over defendant's demurrer. It is to be noted, however, that this latter complaint was filed on behalf of the original vendee, and the overruling of the demurrer was therefore in accordance with authority.

¹⁴ *Miedema v. Wormhoudt*, 288 Ill. 537, 123 N. E. 596 (1919).

¹⁵ See note 6 *supra*.

¹⁶ It is a fundamental principle of contract law that parties to an agreement may effect a mutual rescission of their promises. See 6 WILLISTON, CONTRACTS § 1826 (Rev. ed. 1938). But even this right may be subject, however, to limitations. It is an established policy of the law that where the rights of third parties have intervened, contracting parties may be estopped to deal with their bargain to the exclusion of such third party's rights. See, e.g., *Lawrence v. Fox*, 20 N. Y. 268 (1859) (right of a third party beneficiary to sue in contract); *Meinhardt v. Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928) (partner held liable for profits gained to the exclusion of the partnership); *Eisenberg v. Lefkowitz*, 142 App. Div. 569, 127 N. Y. Supp. 595 (1st Dep't 1911) (holder in due course takes free of the defense of fraud perpetrated by the payee). For a discussion of a subvendee's possible remedy in tort, see Note, 40 HARV. L. REV. 749, 752 (1926).

Other factors of equal, or at least comparable, importance may demonstrate themselves at the trial.¹⁷

In any event, the soundness of the instant ruling is patent. The equitable process, making provision as it does for a balancing of rights and hardships, is ample protection for the rights of defendants, and ample reason for allowing plaintiff to voice his bill.



EVIDENCE—DELAY IN ARRAIGNMENT—ADMISSIBILITY OF CONFESSIONS.—While under lawful arrest on an assault charge, the petitioner was interrogated concerning a murder unconnected with the assault. He confessed to the murder and was convicted thereof. The federal district judge refused to permit him to testify to facts indicative of the alleged involuntary nature of his confession. The conviction was reversed by the Court of Appeals on the sole ground that the confession, procured before arraignment on the murder charge, was inadmissible. *Held*, modified and affirmed. Although the trial judge's refusal to admit the petitioner's testimony was reversible error, failure to arraign him on the murder charge did not, per se, render the confession inadmissible. *Carignan v. United States*, 72 Sup. Ct. 97 (1951).

Coerced confessions are inadmissible as evidence of guilt in both state and federal courts of the United States.¹ Introduction of such a confession into evidence clearly violates the defendant's constitutional right to "due process of law."² However, coercion is not to be presumed from the mere fact that a confession was obtained while the accused was in police custody.³ The validity of a confession was formerly tested by its voluntary nature,⁴ even those obtained by planned deception remaining available to aid the prosecution's case.⁵

In 1943, the opinion of the United States Supreme Court in *McNabb v. United States*⁶ established a new rule of evidence ap-

¹⁷ For an exhaustive treatment of the factors considered by courts of Equity in granting or denying specific performance, see Note, 65 A. L. R. 7 (1930).

¹ *Malinski v. New York*, 324 U. S. 401 (1944); *Chambers v. Florida*, 309 U. S. 227 (1940); *Brown v. Mississippi*, 297 U. S. 273 (1936); *Bram v. United States*, 168 U. S. 532 (1897); see *Lisenba v. California*, 314 U. S. 219, 237 (1941).

² *Ibid.*

³ See *McNabb v. United States*, 318 U. S. 332, 346 (1943); *Sparf and Hansen v. United States*, 156 U. S. 51, 55 (1895).

⁴ See *Ziang Sun Wan v. United States*, 266 U. S. 1, 14 (1924); *Wilson v. United States*, 162 U. S. 613, 623 (1896).

⁵ See *Young v. United States*, 107 F. 2d 490, 492 (5th Cir. 1939); *Lewis v. United States*, 74 F. 2d 173, 177 (9th Cir. 1934).

⁶ 318 U. S. 332 (1943).