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Specific Performance--Contract for Sale of Real Property--Hardship as a Defense--Zoning Regulations (Clay v. Landreth, 45 S.E.2d 875 (Va. 1948))

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At common law, some authorities hold that service of process on Sunday is valid,[12] saying it is merely a ministerial act; although the day itself is non-judicial so that no valid judicial act, such as entering a judgment, can be performed. However, most states have enacted statutes in regard to Sunday service, as in the principal case.

C. I. O.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF REAL PROPERTY—HARDSHIP AS A DEFENSE—ZONING REGULATIONS.—Action by vendor to compel specific performance of a contract for the sale of real property. At the time the contract was made, both parties knew of the vendee's intention to erect a storage plant on the premises, which use of such property was not prohibited by any zoning ordinance then in existence. Thereafter, but prior to the date set for the closing, the area was rezoned, so that the lot could be used only for residences, thus frustrating the purpose for which the vendee desired to use the lot. *Held,* specific performance, being a discretionary remedy, will not be decreed where it will produce hardship through a change of circumstances not contemplated by the parties. *Clay v. Landreth,* 187 Va. 169, 45 S. E. 2d 875 (1948).

The court, while admitting the existence in Virginia, of the doctrine of equitable conversion, namely, that equity ". . . looks upon things agreed to be done as actually performed,"[1] and that generally where there is a valid contract for the sale of real estate, equity will treat the buyer as the owner of the property and the vendor as the owner of the purchase price, denied that its application was a matter of right. The doctrine is a mere fiction invented by courts of equity to be applied only when necessity and justice require its exercise. Where a change in circumstances, not contemplated by either party, has rendered the contract harsh and oppressive, it will not be enforced.[2] Equity will regard that which is agreed to be done as actually performed, only ". . . where nothing has intervened which ought to prevent a performance."[3] Whether or not specific performance will be decreed, lies within the sound discretion of the court. Here in the light of the complete defeat of the purpose of the contract, it was deemed inequitable to require the vendee to specifically perform.

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12 50 AM. JUR., Sundays and Holidays § 81 (1944); 60 C. J. 1138 (1932).

1 Dunsmore v. Lyle, 87 Va. 391, 392, 12 S. E. 610, 611 (1891).

2 Tazewell Coal & Iron Co. v. Gillespie, 113 Va. 134, 75 S. E. 757 (1912).

3 Craig v. Leslie, 3 Wheat. 563, 4 L. ed. 460 (1818).

In the case of *Anderson v. Steinway*,[4] relied on by the Virginia court, involving substantially the same fact situation as the Virginia case, the New York court arrived at the same result, on the same ground that specific performance would not be decreed where it would result in hardship, due to a change in circumstances not contemplated by the parties. The court relied strongly upon *Willard v. Taloe*[5] and *Gotthelf v. Stranahan.*[6] While these two cases support such a holding, the weight of authority in New York is to the contrary, and supports the view that where a contract has been fairly obtained, without fraud, mistake or inequitable conduct, the right to have it specifically performed is a positive right, which the court is bound to enforce,[7] and the fact that there is such a change of conditions as will unfavorably effect a party to the contract, is no reason for refusing to decree specific performance.[8]

If we examine the *Anderson* case in the light of the *Biggs* case,[9] which arose out of the same transaction, and was decided only a few years later, the fact that the *Anderson* case is an exception becomes much clearer. In each case, the defendant-vendee contracted for the purchase of a lot, the two lots involved adjoining one another, with the intention of erecting one structure covering the two lots. It was provided in each contract that if either vendor was unable to convey marketable title, the vendee would not be required to take the lot. A subsequent zoning regulation made it impossible for the vendee to use the Anderson lot, as he desired, but did not affect the Biggs lot. The court refused specific performance in the *Anderson* case on the ground of hardship, but when the *Biggs* case came up for decision, it granted specific performance. The court's basis for distinction was that in the *Anderson* case, the vendor's land was affected, whereas in the *Biggs* case, it was not. However, the *Anderson* case was decided on the basis of hardship alone, and the contract was equally onerous in the *Biggs* case, for the vendee needed both lots free of restrictions to effectuate his intentions. If this were purely a doctrine of hardship, specific performance would have been refused in both cases. Nor can the cases be reconciled in the only other manner possible, that is, on the ground that the court treats a zoning restriction as an

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[4] Anderson v. Steinway & Sons, 178 App. Div. 507, 165 N. Y. Supp. 608 (1st Dep't 1917), *aff'd*, 221 N. Y. 639, 117 N. E. 575 (1917).

[5] Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501 (1869) (court refused specific performance of option contract where value of new currency which was made legal tender was much less than gold and silver which was in use when contract was made).

[6] Gotthelf v. Stranahan, 138 N. Y. 345, 34 N. E. 286 (1893) (court refused specific performance of contract to convey free of incumbrances where heavy assessment laid on the property after contract).

[7] Losee v. Morey and Cramer, 57 Barb. 561 (N. Y. 1865).

[8] Prospect Park and Coney Island R. R. v. Brooklyn R. R., 144 N. Y. 152, 39 N. E. 17 (1894).

[9] Biggs v. Steinway & Sons, 229 N. Y. 320, 128 N. E. 211 (1920).

incumbrance, for the court specifically states that it is not an incumbrance. Furthermore if it were an incumbrance, the vendee would not have been liable under the contract, as it released him if the title to either lot were unmarketable. Therefore, the case of subsequent zoning regulation must be treated as an exception to the general rule in New York, that where a bargain is fair when made, the fact that changing circumstances have made it a hard one, is no defense to specific performance.[10]

M. S. R.

STATUTE OF FRAUDS—ORAL AGREEMENT FOR PARTITION OF LAND—INVALIDITY OF DEFENSE OF ORAL AGREEMENT NOT TO PARTITION IN ACTION BROUGHT FOR PARTITION.—An action was brought in the Court of Chancery in New Jersey for the partition of land. The defendants interposed an answer alleging that they and the complainants agreed orally with each other not to bring any suit for the partition of land before August 23, 1948, the maturity date of a certain mortgage. The complainants moved to strike out the answer upon the ground that the alleged agreement was unenforcible under those sections of the New Jersey Statute of Frauds known as R. S. 25:1-2 and 5(d) N. J. S. A. The first of these sections provides that no interest in real estate shall be surrendered unless by deed or note in writing. The second that no action shall be brought upon an "oral contract or sale of real estate, or any interest in or concerning the same." *Held,* that the agreement set forth in the answer was within the statute and unenforcible, constituted no defense to the action and had to be stricken out. *Wujciak v. Wujciak, et al.,* — N. J. Eq. —, 55 A. 2d 164 (1947).

The precise question involved apparently had never previously been presented to the New Jersey courts for consideration; but the second section of the statute which forbids the bringing of an action has been construed to preclude the use of such an oral contract as a defense.[1]

The court found support for its conclusion in other comparable situations. Thus it was held that the oral consent of one who enjoys an easement of light and air that the owner of the servient tenement might build in disregard of the easement was unenforcible;[2] likewise the oral permission given an abutting owner to erect a building en-

[10] Sanford v. Smith, — Misc. —, 66 N. Y. S. 2d 780 (Sup. Ct. 1946); Urbis Realty Co. v. Globe Realty Co., 235 N. Y. 194, 139 N. E. 238 (1923); Froehlich v. K. W. W. Holding Co., 116 Misc. 275, 190 N. Y. Supp. 324 (Sup. Ct. 1921).

[1] Brands v. Cassidy, 125 N. J. Eq. 346, 5 A. 2d 685 (Ch. 1939); *id.,* 124 N. J. Eq. 417, 1 A. 2d 639 (Ch. 1938).

[2] Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746 (Ch. 1888).