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Restatement of the Law of Contracts Annotated with Kentucky Decisions

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TOPIC 4. SPECIFIC PERFORMANCE.

Special Note.—This Topic deals with the specific enforcement of a contract, the breach of which is either threatened or has occurred. It includes judicial decrees, both affirmative and negative in form, whether called a decree for specific performance or an injunction. It does not include remedies that are available where no contract exists or where no breach has occurred or is threatened. It does not include reformation of documents or declaratory decrees of rescission. The discharge of contractual duties by repudiation or non-performance is dealt with in Chapter 13 on “Discharge of Contracts” and in Chapter 10 on “Conditions and Breach of Promise as an Excuse for Failure to Perform a Return Promise.”

SECTION 358. Inadequacy of money damages as ground for specific enforcement.

SECTION 359. Discretionary character of the remedy and of the terms of the decree.

SECTION 360. Specific enforcement of contracts for the transfer of land.

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SECTION 364. Specific enforcement of the whole when damages would be an adequate remedy as to part.

SECTION 365. Specific enforcement in part, with compensation for the remainder.

SECTION 366. Promises binding solely because of a writing, a seal or nominal consideration.

SECTION 367. Effect of unfairness, hardship, mistake and inequitable conduct.

*This is a continuation of the Kentucky Annotations to the Restatement of Contracts. The work is being done by Professor Frank Murray of the College of Law, University of Kentucky, assisted by the other members of the faculty in co-operation with the Kentucky State Bar Association. The Topic on Specific Performance was annotated by Professor Roy Moreland. William Fanning, Ashland, a graduate of the College of Law, University of Kentucky, rendered valuable assistance.

This will be the last of the annotations to the Restatement of the Law of Contracts to be published in the Kentucky Law Journal. The American Law Institute will publish the restatement annotated with Kentucky Decisions in book form within a short time.

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Section 358. Inadequacy of Money Damages as Ground for Specific Enforcement of Contract.

(1) A decree for the specific performance of a contract, either in the form of an affirmative or a negative order, will be granted against a party who has committed a breach, or is threatening one, if the remedy in damages would not be adequate and the requirements of the rules stated in the other sections of this topic are satisfied.

(2) The existence of a remedy other than money damages for breach of a contract is not in itself a sufficient reason for refusing specific enforcement; but it may properly be considered with other facts in exercising the judicial discretion that exists as stated in Section 353.

Annotation:

(1) The Kentucky decisions are apparently in perfect accord with this statement of the law. Our court used this phraseology in one instance: "An agreement will be specifically enforced where the specific thing or act contracted for and not mere pecuniary compensation is the redress practically required; and in such cases where there is good faith, valuable consideration, clean hands, and no unreasonable hardship to result to the defendant, it is as much a matter of course for the chancellor to decree specific performance of a contract as it is for a court of law to give damages for its breach and specific performance will not be denied simply because the party asking for it may have the right to recover for the breach." Louisville Southern Ry. Co. v. Ragland, 15 Ky. L. R. 814 (1894) (contract to grant annual pass for life in consideration of right of way given); Cumberland Tel. and Tel. Co. v. City of Hickman, 129 Ky. 220, 111 S. W. 311 (1908) (where citizens of a city sued to compel a telephone company to exer-
cise its franchise by operating its plant); *L. & N. Ry. Co. v. Zaring*, 9 Ky. L. R. 107 (1887) (where in consideration of a deed to a right of way the railroad agreed to make “a safe and convenient crossing” so that plaintiff could have access to the turnpike road); *Flege v. Covington & Cin. Elevated Ry. Co.*, 122 Ky. 348, 91 S. W. 738 (1906) (where a railroad covenanted to build a retaining wall along the line of plaintiff’s lot and to keep same in repair). In the above cases specific performance was granted in the form of an affirmative order.

Relief was granted in the form of a negative order in the following cases: *Schmidtz v. L. & N. Ry. Co.*, 101 Ky. 441, 41 S. W. 1015 (1897) (where bondholders sued to compel by mandatory injunction the continued operation of a railroad); *Sutton, Etc. v. Head*, 85 Ky. 156, 5 S. W. 410 (1887) (where a grantee covenanted “no intoxicating liquors are to be sold on the premises in less quantities than five gallons”. The court intimates in this case, p. 156, that an important factor influencing them to allow injunction was that it would avoid a multiplicity of actions); *Grant County Board of Control v. Allphin*, 152 Ky. 280, 153 S. W. 417 (1913) (where a co-operative marketing association sued to enjoin the violation of a contract by a member to deliver his crops to the association for four years); *Stovall v. McCutchen, Etc.*, 107 Ky. 577, 54 S. W. 969 (1900) (where merchants of a town entered into a contract binding themselves to close their stores at a certain time each evening). Also, see *Potter v. Dark Tob. Growers Co-op. Assn.*, 201 Ky. 441, 257 S. W. 33 (1923), and *Friedberg, Inc. v. McClary, et al.*, 173 Ky. 579, 191 S. W. 300 (1917).

The court in *Edelen, Etc. v. W. R. Samuels and Co.*, 126 Ky. 295, 303, 103 S. W. 360, 362 (1907) (contract to make whiskey over a long period), states the rule slightly differently from the court in *Louisville So. Ry. Co. v. Ragland*, supra, “The right to a decree of specific performance of a contract is based upon the equitable principle that the ordinary common law remedy of damages for a breach will not afford a full and adequate remedy for the injury arising from the failure to carry out its terms—.” Specific performance, however, was not given in this case because of the adequacy of the remedy at law, weight being given also to the fact that the court would be forced to minutely supervise the performance, if allowed.

As stated in the latter part of subsection one, the requirements of the Sections 359–380 must be satisfied before the court will grant specific performance.

If there is a probability that damages awarded cannot in fact be collected, the court will grant a decree in its discretion. See cases collected under clause (d) of the annotation to Section 361.

If there is a probability that full compensation cannot be had without multiple litigation, the court may grant a decree in its discretion. See cases collected under clause (e) of the annotation to Section 361.

As to the effect of the fact that compensation in money would be
an adequate remedy for failure to render one part of the promised performance, see the annotation to Section 364.

As to the effect of unfairness, hardship, mistake, or inequitable conduct, see the cases collected in the annotation to Section 397.

As to promises binding solely because of a seal, a writing, or nominal consideration, see the cases collected in the annotation to Section 378.

There is dictum in this state to the effect that a violation of a contract for the services of an artist of special merit, where it contains negative covenants, will be restrained by injunction. *Cain v. Garner*, 169 Ky. 633, 185 S. W. 122 (1916). See Section 380.

Where a chattel is unique, the remedy at law is not adequate. It was held in *Steinway & Son v. Massey*, 198 Ky. 265, 248 S. W. 884 (1923), that a piano was not such a unique chattel as to be the subject of a decree of specific performance unless the plaintiff showed that other pianos of equal qualities could not be bought in the market. Chattels real are generally held the subject of decrees for specific performance. Where a landlord refused to put a tenant in possession of leased premises, the lease was enforced, both landlord and prior tenant being proper parties to such suit. *Mattingly's Exr. v. Brent*, 155 Ky. 570, 159 S. W. 1157 (1913).

(2) No cases.

Section 359. Discretionary Character of the Remedy, and of the Terms of the Decree.

(1) If the remedy in damages is found by the court to be inadequate, the determination of whether specific enforcement shall be decreed and what shall be the terms of the decree rests in the sound judicial discretion of the court, subject to the rules stated in Sections 360–380.

(2) The decree need not be absolute in form, and the performance that it requires need not be identical with that promised in the contract; it may be so drawn as best to effectuate the purposes for which the contract was made, and it may be granted on such terms and conditions as justice requires.

Comment:

a. The exercise of sound judicial discretion is something other than decision by arbitrary whim or by emotional desire or as a personal favor. There are working rules that are to be applied, as may be seen in the other Sections of this Topic. But at almost every step in the application of these rules, the court must determine the existence of many facts and must weigh their relative importance as parts of an inter-related whole. How great is the degree of uncertainty in
amount of harm? Are the terms of a contract unfair, oppressive, or unconscionable? Is the hardship of enforcement disproportionate to the need for enforcement? To what extent is the public interest involved? The solution of questions like these requires judicial experience and knowledge of life; and the process is described as the exercise of sound judicial discretion.

b. The function of the court is to do complete justice; and it has power to mold its decree to that end. The mandatory order may be directed against the plaintiff, when properly requested, as well as against the defendant; it may be conditional upon some performance to be rendered by the plaintiff or by some third person, such as making a money compensation for defects or the giving of security; it may even be conditional upon the plaintiff’s assent to the modification of the contract that he seeks to enforce. The flexibility in the form and the terms of the decree require a sound judicial discretion in every step in its drafting.

c. The exact performance that is promised in a contract may be, in part or in whole, very difficult of enforcement, it may have become impossible or unlawful, and it may be such that exact enforcement would work unreasonable hardship. The court may nevertheless be able to achieve substantially the same result without undue difficulty, without hardship to the defendant, and without violation of law or of the rights of third persons. In such cases the decree may be so drawn as best to achieve this result. It may command a performance by the defendant that is not identical with that which he promised to perform; it may create an economic pressure to induce an affirmative performance for the plaintiff, as by an injunction excluding the defendant from similar transactions with third parties (see Section 380, dealing with negative promises). The rule stated in Subsection (2) shows that the court’s power is not confined by narrow mechanical limits; but it also indicates that the power must be used only to effectuate the purposes of the contract. There is greater freedom in limiting the decree by imposing conditions on enforcement than in varying the performance that is to be compelled. The burden of obedience to an ill-considered order may be made so great as to be unreasonable and out of proportion to the harm that it is intended to prevent. The rules stated in Sections 360–380 indicate limits within which the power of the court is exercised.

d. There are circumstances under which the court has power, by virtue of its own decree and without commanding any performance at all, to create substantially the same legal effects that the promised performance would have created. A contract to make a will or to execute a deed transferring specified land cannot be specifically performed after the promisor’s death; but the transfer of such land can nevertheless be compelled and it will be compelled if the rights of third persons have not intervened. The same is true of a contract that a child shall, by adoption or otherwise, be given certain rights as
heir; the court may be able to create these rights in the child, even though it has become impossible for the promisor to create them, by reason of his death or disability. There are statutes in many States empowering the court to effect the transfer of title to land by virtue of its own decree or the deed of an officer without the execution of a deed of conveyance by the previous owner.

**Annotation:**

(1) Kentucky cases are in accord. While the remedy is generally spoken of as resting in the discretion of grace of the chancellor, this is more a form of expression than an accurate definition of the rights of the injured party as to his remedy by specific performance. In other words, while the chancellor has a discretion, it is not an arbitrary but a legal discretion. Edelen v. W. B. Samuels & Co., 126 Ky. 295, 103 S. W. 360 (1907); Posey v. Kimsey, 146 Ky. 205, 142 S. W. 703 (1912). A more careful expression of the rule is: "The right of specific performance is not an absolute right, and whether the same will or will not be enforced in a given case rests in the sound judicial discretion of a chancellor, to be exercised by him after a full consideration of all the facts and circumstances and equities involved." Hogg v. Forsythe, 198 Ky. 462, 248 S. W. 1008 (1923). Similar statements may be found in Clifton Land Co. v. Reister, 186 Ky. 155, 216 S. W. 342 (1919); Robinson v. Yann, 224 Ky. 56, 5 S. W. (2d) 271 (1928); Warren v. Goodloe's Exr., 230 Ky. 514, 20 S. W. (2d) 273 (1929). And so, specific performance has been refused where the enforcement of a contract would be unfair and inequitable. Polk v. White, 9 Ky. Opinions 185 (1876); Jones v. Previtt, 128 Ky. 496, 108 S. W. 867 (1908); Lexington & Eastern Ry. Co. v. Williams and Wife, 183 Ky. 343, 209 S. W. 69 (1919); harsh and oppressive, Eastland v. Vanarsdel, 6 Ky. (3 Bibb) 274 (1814); Darnell v. Alexander, 178 Ky. 404, 199 S. W. 17 (1917); or would do one party great injury and the other but comparatively little good, McCutcheon's Heirs v. Rawleigh, 25 Ky. L. R. 549, 76 S. W. 50 (1903). Likewise, specific performance has been refused where the consideration for the promise sought to be enforced was grossly inadequate. Wootlums v. Horsley, 93 Ky. 582, 20 S. W. 781 (1892); Wofford v. Steele, 27 Ky. L. R. 88, 84 S. W. 327 (1905); Cox v. Burgess, 139 Ky. 699, 29 Ky. L. R. 372, 96 S. W. 577 (1906); Lexington & Eastern Ry. Co. v. Williams and Wife, 183 Ky. 343, 209 S. W. 59 (1919); where the contract was induced by inequitable conduct, sharp practice, and misrepresentation, Hart v. Diggs, 10 Ky. Opin. 206 (1878); Robenson v. Yann, 224 Ky. 56, 5 S. W. (2d) 271 (1928); Taylor v. Johnson, 248 Ky. 280, 58 S. W. (2d) 392 (1933); where the parties made a mistake as to the quantity of land, Smith v. Smith, 7 Ky. (4 Bibb) 81 (1815); Fannin v. Bellemy, 63 Ky. (5 Bush) 663 (1869); where the obligor by reason of his own mistake entered into the contract and the obligee was not injured by the refusal of specific performance, Louisville Ry. Co. v. Kellner-Dehler Realty Co., 148 Ky. 765, 147 S. W. 424 (1912).
where the complainant has slept on his rights, and acquiesced for
great length of time, Pond Creek Coal Co. v. Coleman, 204 Ky. 221, 263
S. W. 748 (1924); Glenn v. Lowther, 219 Ky. 383, 293 S. W. 947 (1927);
and where it appeared that a decree would call for an undue amount
of supervision by the court, Edelen v. Samuels, 126 Ky. 295, 103 S. W.
360 (1907) (contract to manufacture whiskey over long term of years).
Language in accord with this subsection will be found in a score or
more cases. Specific application of the rule will be found in many
cases under Sections 360–380.

Subsection (2).

This subsection, in effect, illustrates the discretion given the chan-
cellor in making his decree. Thus, in Tyree v. Williams, 6 Ky. (3 Bibb)
365 (1814), where the contract was for the exchange of land
with a warranty, one of the parties became insolvent. Specific per-
formance was decreed on the condition that a solvent person join in
the warranty. And, in Hagins v. Sewell, 124 Ky. 588, 30 Ky. L. R. 750
99 S. W. 673 (1907), (where a deed contained a provision whereby the
vendee was to build a party wall), the vendee failed to erect the wall
within time prescribed. The vendor sued for specific performance. The
court held that the vendor was entitled to a judgment for the cost of
the wall in case the vendee should fail to perform within the time
allowed by the court. And, where there is an encumbrance on prop-
erty contracted to be sold which can be satisfied out of the purchase
money, the court may decree that this be done and specific perform-
ance be granted. Poor v. Mechanics Bank, 144 KY. 682, 139 S. W. 840
(1911). And, see the decree in Posey v. Kimsey, 146 Ky. 205, 142 S. W.
703 (1912).

However, under this section the Court has no right to formulate
an entirely new contract between the parties and against the objec-
tion of either or both of them adjudge its specific performance. L. & N.
R. R. Co. v. Herd, 14 Ky. L. R. 670 (1893). And, see Wheeler v. Gahan,

Section 360. Specific Enforcement of Contracts for the
Transfer of Land.

Damages are regarded as an inadequate remedy for the
breach of a promise

(a) to transfer any interest in specific land, or

(b) to buy and pay for such an interest, so long as the
transfer has not yet been made.

and specific enforcement will be decreed, subject to the rules
stated in Secs. 359–380.

Comment:

a. The remedy in money damages for breach of a contract for
the transfer of a specific tract of land is regarded as inadequate without regard to quantity, quality, or location. A specific tract is unique and impossible of duplication by the use of any amount of money. Specific performance is available to enforce a contract the purpose of which is the transfer of any recognized interest in land to the purchaser, even though it is less than a fee simple.

b. The fact that the vendee has made a contract for the resale of the land to a third person does not deprive him of the right to specific performance. He will be liable in damages for breach of this new contract, and these damages cannot be accurately determined without litigation. He has a right that the vendor shall make the transfer as agreed, in order to enable him to perform specifically his contractual duty to the new vendee and to avoid litigation and the payment of such damages.

c. Before conveyance has been made by the vendor his remedy in damages is not an adequate one. He cannot get judgment for the full price, because he still has the land. His damages are usually measured by the contract price less the value of the land retained; but the land is a commodity that has no established market value, and the vendor may not be able to prove what his real harm will be. Even if he can make this proof, the land may not be immediately convertible into money, and he is deprived of the power to make new investments. Prior to getting a judgment, the existence of the contract, even though broken by the vendee, operates as a clog on salability, so that it may not be possible to find a purchaser at any fair price. In addition, the fact that specific performance is available to the vendee is of some weight, because of the rule as to mutuality of remedy (see Sec. 372 (2)).

d. . . 

e. . .

f. All requirements for the granting of a decree for specific performance, other than the inadequacy of money damages, are applicable to executory contracts for the sale of land as in other cases.

Annotation:

Kentucky decisions, with the exception of Cox v. Sharpe, 1 Ky. Op. 358 (1866), are in accord with this section. The section may be properly construed as stating that where land is the subject matter of a contract, there is a conclusive presumption that damages will not afford an adequate remedy. Such is the weight of authority and the conclusion is further strengthened by the fact that Section 361 points out the factors to be considered in determining the adequacy of damages—"as to contracts other than for a transfer of an interest in land." Furthermore, the section reads, "subject to the rules stated in Secs. 359–380." Section-358, making inadequacy of money damages the ground for specific enforcement of a contract, is not included in the limitation. Note also, Comment (a).
In a minority line of cases in other jurisdictions the fundamental rule of equity jurisdiction, as stated in Section 358, is applied to land contracts. There are those who consider this the proper test of equity jurisdiction in all cases, including land contracts. See Hume, "Specific Performance of Contracts to Sell Land", 21 Ky. L. Jour. 348; Jones, 22 Ky. L. Jour. 143; Bird and Fanning, 23 Ky. L. Jour. 380. The rule of the Restatement is supported by Cox, 16 Ky. L. Jour. 338.

The rule that the common law remedy of damages does not afford an adequate remedy for the threatened breach of land contracts dates back to early Kentucky decisions. It has been accepted and applied consistently without question or discussion, with the exception of the decision in Cox v. Sharpe, to be discussed infra. Thus, in Mills v. Metcalf, 8 Ky. 477 (1819), the court said, "as the contract is for the sale of land, there is no doubt but that, according to the settled doctrine in equity, . . . the chancellor's aid in obtaining specific performance might be obtained." Accord, M'Gee v. Beall, 13 Ky. 190 (1823).

Either vendor or vendee is entitled to relief. The vendor was permitted an action in M'Gee v. Beall, 13 Ky. 190 (1823), and Johns v. Union Ice Cream Co., 145 Ky. 178, 140 S. W. 145 (1911). The vendee was allowed specific performance in Baxter v. Brand, 36 Ky. 296 (1838); Honaker v. Honaker, 5 Ky. Op. 543 (1871). Relief will be granted to the assignee of the vendee, Benjamin v. Dinwiddie, 226 Ky. 106, 10 S. W. (2d) 620 (1928) (dictum). Relief has been granted where the contract was for a fee, Hart v. Brand, 8 Ky. 159 (1818); Johns v. Union Ice Cream Co., 145 Ky. 178, 140 S. W. 145 (1911); Clifton Land Co. v. Reister, 186 Ky. 155, 216 S. W. 342 (1919); or for a lease, Mattingly's Executor v. Brents, 155 Ky. 570, 159 S. W. 1157 (1913); or for an exchange, Overstreet v. Rice, 67 Ky. 1 (1868); to repair and maintain a right of way, Flege v. Covington & Cincinnati Elevated Railway & Transfer & Bridge Company, 122 Ky. 348, 31 S. W. 738 (1906).

Cox v. Sharpe, 1 Ky. Op. 358 (1866), is the only case which we have found differing with the rule of the restatement. See, however, the dictum in Edelen v. Samuels & Co., 126 Ky. 295, 303, 103 S. W. 360, 362 (1907). In the Cox case the court laid down the following proposition: "When a party to a sale of real estate has an adequate legal remedy for a breach of the contract by the other party, a court of equity will not enforce a specific execution unless it is necessary for justice. In this case, so far as we can judge from the record, the vendee has neither parted with anything, nor has been, or will be, subject to any special damage or inconvenience by a failure to get the legal title. It does not even appear that he would lose a fair speculation. On the contrary, a dismissal of his bill for a conveyance would leave both parties equitably in statu quo." The case is somewhat complicated by a dispute as to the terms of the contract and the refusal of the vendor's wife to release her dower interest, but it is our opinion that the rule laid down in the case cannot be explained away
and that it is contra to the restatement and to other Kentucky decisions on the question.

Section 360 closes with the following provision: "... specific performance will be decreed, subject to the rules stated in Secs. 359-380." As stated in Comment (f) to the restatement, the effect of this provision is that all requirements for the granting of a decree for specific performance, other than the inadequacy of money damages, are applicable to executory contracts for the sale of land as in other cases.

The Kentucky cases are in full accord with the restatement on this point and with the interpretation of it as quoted above from Comment (f). The standard expression in Kentucky is, "The right of specific performance of course is not an absolute right, and whether the same will or will not be enforced in a given case rests in the sound judicial discretion of a chancellor, to be exercised by him after full consideration of all the facts and circumstances and equities involved." Hogg v. Forsythe, 198 Ky. 462, 248 S. W. 1008 (1923). Again, in Posey v. Kimsey, 146 Ky. 205, 142 S. W. 703 (1912), the court pointed out that the discretion to be exercised by the chancellor is not "an arbitrary or capricious one, but a sound judicial one controlled by established equitable principles." Some cases quote a section from Story's *Equity Jurisprudence*, to illuminate the matter. This section may be found, Story's *Equity Jurisprudence*, 14th Ed., Sec. 1027. Language similar to that quoted above may be found in almost every case. For example, see Hart v. Brand, 8 Ky. 159 (1818); Woollums v. Horsley, 93 Ky. 532, 20 S. W. 781 (1892); Cocanougher v. Green, 93 Ky. 519, 20 S. W.: 542 (1892); Ratterman v. Campbell, 26 Ky. L. R. 173, 80 S. W. 1155 (1904); Faraday Coal & Coke Co. v. Owens, 26 Ky. L. R. 243, 80 S. W. 1171 (1904); Jones v. Prewitt, 128 Ky. 496, 108 S. W. 867 (1908); Wren v. Cooksey, 147 Ky. 825, 145 S. W. 1116 (1912); Bluegrass Realty Co. v. Shelton, 148 Ky. 666, 147 S. W. 33 (1912); Clifton Land Co. v. Reister, 186 Ky. 155, 216 S. W. 342 (1919); Kentucky, Pennsylvania Oil & Gas Corporation v. Clark, 247 Ky. 438, 57 S. W. (2d) 65 (1933). The court has repeatedly quoted Pomeroy's *Equity Jurisdiction*, Sec. 1404, in attempting to lay down the limits of discretion. See, also, the annotation to Section 359.

Although the court states consistently in these cases that specific performance lies in the discretion of the chancellor, it is submitted that no Kentucky case, other than Cox v. Sharpe, will be found where the chancellor's discretion is considered as extending to the point of inquiry into the adequacy of damages.

In the case of M'Gee v. Beall, 13 Ky. 190 (1823), a court of equity granted relief to the vendor although the contract was fully executed on his part. This case is not in conflict with Section 360 (b), for although the vendor has a remedy at law, where he would be able to recover the same as in a court of equity, it happened that he held a lien on the land for the purchase money, and, therefore, had a right to
resort to equity to enforce the lien. The court did not subject the land to be sold in virtue of the lien, but it might have done so.

Section 361. Factors Involved in the Determination of the Adequacy of Damages.

In determining the adequacy of the remedy in damages, as to contracts other than for the transfer of an interest in land, the following factors are influential and may singly or in combination justify specific enforcement:

(a) the degree of difficulty and uncertainty in making an accurate valuation of the subject matter involved, in determining the effect of a breach, and in estimating the plaintiff's harm;

(b) the existence of sentimental associations and esthetic interests, not measurable in money, that would be affected by breach;

(c) the difficulty, inconvenience, or impossibility of obtaining a duplicate or substantial equivalent of the promised performance by means of money awarded as damages;

(d) the degree of probability that damages awarded cannot in fact be collected;

(e) the probability that full compensation cannot be had without multiple litigation.

Comment:

a. The enumeration that is made in the Section does not purport to be exclusive of all other factors; nor are the enumerated factors mutually exclusive and independent of each other. When the remedy in damages is regarded as adequate to do justice, specific performance is not available to the injured party. The question of its adequacy turns upon the opinion that is formed by the court after weighing all the factors that exist in the particular case.

Illustrations:

3. A contracts to sell to B the 21-foot racing sloop “Pollyanna”, this sloop being one of a class of substantially identical boats manufactured by a particular boat builder. Although other boats of this class are easily obtainable in the market, A knows that B believes that the “Pollyanna” is a witch in light airs and is, therefore, superior to most of the others. To prove that another of the class is her equal it would be necessary to try out an indefinite number of such boats in a series of races. A decree compelling A to sell the sloop as agreed may properly be granted.
Annotation:

(a) There are cases where the adequacy of the plaintiff's remedy is dependent on the difficulty and uncertainty of valuing the subject matter of the contract. This, it would seem, is the basis of the decision in *Louisville & Southern R. R. Co. v. Ragland*, 15 Ky. L. R. 814 (1894), where an agreement by defendant railroad to give plaintiff an annual pass over its road during his life was specifically enforced. Accord, *L. & N. R. R. Co. v. Zaring*, 9 Ky. L. R. 107 (1887) (agreement to construct and maintain a crossing for benefit of plaintiff); *Anderson v. Mt. Sterling Telephone Co.*, 27 Ky. L. R. 868, 86 S. W. 1119 (1905) (agreement to furnish plaintiff with a telephone).

There are, of course, many cases in this jurisdiction, where the court decreed specific performance because of the difficulty and uncertainty in estimating the plaintiff's harm in damages. In many cases it is "impossible to estimate in money the damages for non-performance". *Flege v. Covington & Cincinnati Elevated Railway & Transfer & Bridge Co.*, 122 Ky. 348, 28 Ky. L. R. 1257, 91 S. W. 738 (1906); *Owen County Burley Tobacco Society, Etc. v. Brumback*, 128 Ky. 137, 32 Ky. L. R. 916, 107 S. W. 710 (1908); *Com. v. Collins*, 75 Ky. 386 (1876); *Grant County Board of Control v. Allphin*, 152 Ky. 280, 153 S. W. 417 (1913). It is apparent, however, that "extreme difficulty" or some other phrase short of "absolute impossibility" is sufficient. In some cases there is "impossibility" in the literal sense. In other cases the damages are "conjectural" (*Louisville & Nashville R. R. Co. v. Zaring*, 9 Ky. L. R. 107 (1887), or "the breach could not well be measured in damages" (*Grant County Board of Control v. Allphin*, supra), or it is "impractical" to attempt to estimate them, etc. The section provided that the "degree" of difficulty in estimating damages will be considered. That flexible standard is the test rather than "absolute impossibility". A reading of the Kentucky cases bears out this deduction.

(b) We have found no Kentucky case based exclusively on the existence of sentimental associations or esthetic interests. However, specific performance has been denied, and one of the grounds for such denial was said to be the failure to allege a sentimental, peculiar, or unique quality in the subject matter of the contract. *Steinway & Sons v. Massey*, 198 Ky. 265, 248 S. W. 884 (1923).

(c) An agreement will be specifically enforced where the specific thing or act contracted for and not mere pecuniary compensation is the redress practically required. *Louisville Southern R. R. Co. v. Ragland*, 15 Ky. L. R. 814 (1894) (contract to give annual pass for life); *Schmidt v. Louisville & N. R. Co.*, 101 Ky. 441, 41 S. W. 1015 (1897) (obligation to operate a railroad); *Anderson v. Mt. Sterling Telephone Co.*, 27 Ky. L. R. 868, 86 S. W. 1119 (1905) (contract to place a telephone in home); *Owen County Burley Tobacco Society v. Brumback*, 128 Ky. 137, 32 Ky. L. R. 916, 107 S. W. 710 (1908) (contract to sell crop of tobacco to growers' pool); *Cumberland Telephone & Telegraph Co. v. City of Hickman*, 129 Ky. 220, 33 Ky. L. R. 730, 111 S. W. 311
(suit to compel a telephone company to exercise its franchise by operating its plant); *Grant County Board of Control v. Alphin*, 152 Ky. 280, 153 S. W. 417 (1913) (contract to pool tobacco); *H. Friedberg, Inc. v. McClary*, 173 Ky. 579, 191 S. W. 300 (1917) (sale of tobacco, which plaintiff had contracted to resell to third persons); *Steinway & Sons v. Masney*, 198 Ky. 264, 248 S. W. 884 (1923) (dictum, sale of new Steinway piano); *Potter v. Dark Tobacco Growers Co-operative Association*, 201 Ky. 441, 257 S. W. 33 (1923) (contract to pool tobacco); *Talamini v. Rosa*, 257 Ky. 228, 77 S. W. (2d) 627 (1935) (contract for sale and transfer to plaintiff of shares of stock not readily obtainable elsewhere).

(d) The factor stated in this clause has been considered in two Kentucky cases, both injunction suits to restrain breach of contract, and mentioned in two other cases.

Where damages would fully compensate for the injury and the defendant is solvent and able to respond, an injunction restraining a breach of contract will not be granted. *Campbell v. Irvine Toll Bridge Co.*, 173 Ky. 313, 190 S. W. 1098 (1917). The court treated as significant the fact that the plaintiff failed to allege that the defendant was insolvent, or that difficulty would be encountered in collecting of defendant by execution the amount of any judgment for damages. In *H. Friedberg, Inc. v. McClary*, 173 Ky. 579, 191 S. W. 300 (1917) one of the grounds for an injunction was the fact that the defendant was insolvent and, consequently, unable to respond in damages. The court approved the view that insolvency of the defendant is often an added ground, but might be the sole ground for granting specific performance.


(e) Our court has approved this factor in several cases. In *Stovall v. McCutcheon*, 107 Ky. 577, 21 Ky. L. R. 1317, 54 S. W. 969 (1900), the court said: "The recurring breach each day of the contract would require numerous actions at law, and by different plaintiffs, as well; or, if not, there would at least be a continuing damage up to September 1st. It has repeatedly, if not universally, been held that injunction is proper in either of these classes of cases, to prevent a multiplicity of actions, or to prevent a repeated and recurring cause of action." And, see, *Sutton v. Head*, 36 Ky. 156, 9 Ky. L. R. 453, 5 S. W. 410 (1887) (covenant not to sell intoxicating liquors on premises); *Friedberg, Inc. v. McClary*, 173 Ky. 579, 191 S. W. 300 (1913).

**Section 362. Effect of the Defendant’s Insolvency on the Remedy of Specific Enforcement.**

Specific enforcement will not be decreed if the performance required will constitute a preference of one creditor over others that is inconsistent with the purpose of an existing bankruptcy
statute or of other rules of law governing the distribution of insolvent estates. In case where the performance required will not constitute such a preference, the existing or prospective insolvency of the defendant will be considered in determining the adequacy of the remedy in damages.

Comment:

a. Compare in respect to the final sentence of this Section, Section 361 (d).

b. . . .

c. A decree for the specific performance of a wholly executory contract that provides for a fair exchange of equivalent performances will not operate as a preference over other creditors, because the estate of the insolvent will be enriched as much as it is depleted. But if the contract is executory only on the part of the insolvent, to enforce specific performance will generally operate as a preference in favor of the plaintiff over other creditors.

d. The performance of a contractual duty may be the transfer of land or goods, and the other party may have not only a contractual right to such a transfer, but also property in such land or goods. In such cases, the law protects the interest of the property owner; and even though the obligor is insolvent, a decree for specific performance may involve no improper preference and may be an available method of protection.

e. . . .

Illustrations:

1. A borrows money of B and contracts to transfer to him as security ten shares of stock in the X Company, without creating in B any property in any specific shares. A dies insolvent without having kept his promise to transfer the shares. B sues A’s administrator for specific performance. The decree will not be granted, because it would compel the administrator to commit a breach of duty as trustee of the assets in his charge.

2. . . .

3. . . .

4. A contracts to sell Blackacre and all the farm machinery thereon to B for $5,000 paid in advance, but neglects to convey as agreed. A’s subsequent insolvency will not prevent B from getting specific performance of this contract, because B has acquired a property interest in both the land and the machinery and a decree for specific performance will cause no improper preference.

5. A is the owner of an interest in a ship, the title to which is held by B in trust for A and others. B is insolvent. A assigns his interest to C; and B contracts to effectuate the transfer to C of A’s interest and to terminate his own power. It is proper to decree spe-
specific performance of B's promise in favor of such a grantee. The fact that B is insolvent does not make available to his creditors the interest in the ship that belonged to A; and it tends strongly to show that the remedy in damages against B is not adequate.

c. . . .

Annotation:

In Kentucky there are no decisions affirmative in form, directly in point upon the subject matter of this section. The reader's attention, however, is called to the "Special Note" at the beginning of Topic 4. It is stated there that this topic includes judicial decrees, both affirmative and negative in form, whether called a decree for specific performance or an injunction. See, therefore, H. Friedberg, Inc. v. McClary, 173 Ky. 579, 191 S. W. 300 (1917) (injunction to restrain breach of contract), where the insolvency of the defendant was a material factor in the decision. The court in this case approved the view that the insolvency of the defendant is often an added ground, and, in many cases, the sole ground for an injunction, where, were it not for such insolvency, an action for damages would be an adequate remedy.

And, see, the dictum in Campbell v. Irvine Toll Bridge Company, 173 Ky. 313, 315, 190 S. W. 1098, 1099 (1917) (motion to dissolve a mandatory injunction compelling defendants to accept plaintiff as a lessee), that the insolvency of the defendant will be considered in determining the adequacy of damages as a remedy. See American Snuff Company v. Walker, 175 Ky. 149, 193 S. W. 1021 (1917).

See, also, the dictum in Thurston v. Bailey, 157 Ky. 29, 162 S. W. 525 (1914) where the plaintiff asked for a decree affirmative in form and the court implied that, had the time for performance arrived, he might have had specific performance, if he had alleged and shown the inability of the defendant to pay damages. This dictum is in accord with the restatement.

This section of the restatement is a good statement of the present condition of the law on the insolvency of the defendant as a jurisdictional factor in equity. See Horack, 31 Harv. L. Rev. 702; Moreland, 22 Ky. L. Jour. 1. The above cases indicate a view in accord with the restatement.

Section 363. Damages or Restitution in Lieu of Specific Enforcement.

If a plaintiff in good faith sues for specific enforcement, and that relief is denied, damages or restitution may be awarded in the same proceeding, subject to the rules applicable to those remedies.
Comment:

a. The rule stated in the Section was adopted by courts of equity in order that complete justice might be done without the necessity of bringing another action in a different court. In many jurisdictions, the power of the courts to afford the remedy of damages or restitution, in a suit for specific performance, is governed by statutes providing for the liberal amendment of pleadings or uniting law and equity jurisdiction in a single system of courts. The present Section does not deal with the procedure appropriate for obtaining the substituted remedy or with the defendant's right to a trial by jury.

Illustrations:

1. A makes a contract for the conveyance of land to B and later wrongfully repudiates it. B brings suit to compel specific performance, in ignorance of the fact that A has already transferred the land to an innocent purchaser for value. The remedy asked will not be granted; but the court may award damages in lieu thereof.

2. A brings suit against B for specific performance of B's contract to sing leading roles in grand opera, knowing that the remedy will be refused under the rule stated in Section 379. Damages will not be awarded in lieu thereof, unless there is an applicable statute permitting it.

Annotation:

Our decisions, generally, are in accord. McConnell's Heirs v. Dunlap's Devisees, 3 Ky. (Hardin) 44 (1805); Jones v. Shackleford, 5 Ky. (2 Bibb) 410 (1811); Gerault v. Anderson, 5 Ky. (2 Bibb) 543, 544 (1812); Warford v. Camron, 6 Ky. (3 Bibb) 434 (1814); Rankin v. Maxwell, 9 Ky. (2 A. K. Marsh.) 488, 489 (1820); Thomas v. Haly Coal Co., 189 Ky. 698, 225 S. W. 1053 (1920). Reading v. Ford's Heirs, 4 Ky. (1 Bibb) 338 (1809), is apparently contra as to the requisite of good faith.


If it appears that the suit for specific performance or damages is solely for the purpose of recovering damages, they will not be awarded. The remedy is at law, Bradford v. Long, 7 Ky. (4 Bibb) 225 (1815); Slaughter v. Nash, 11 Ky. (1 Litt.) 325 (1822); Fisher's Heirs v. Kay, 5 Ky. (2 Bibb) 434 (1811) (dictum); Reading v. Ford's Heirs, 4 Ky. (1 Bibb) 338 (1809) is contra. However, if the plaintiff is in doubt as to whether the contract can be specifically enforced, damages will be
awarded, if it in fact cannot be specifically enforced. *Slaughter v. Tindle*, 11 Ky. (1 Litt.) 358 (1822).


Section 364. Specific Enforcement of the Whole When Damages would be an Adequate Remedy as to Part.

The fact that compensation in money would be an adequate remedy for failure to render one part of the promised performance does not prevent a decree specifically enforcing the contract as a whole, if in all other respects the requisites for granting the remedy of specific enforcement exist.

**Comment:**

a. Compensation in money may be an adequate remedy for the failure to render one part of a promised performance and at the same time be inadequate as to another part. In such cases, justice requires complete relief in a single action. This relief may properly be a decree for the specific performance of the entire contract, if there is no sufficient reason for refusing the decree other than the adequacy of damages as a remedy. The decree may therefore be molded in such manner as will best afford a complete remedy under the existing circumstances. The rule in respect to the awarding of two kinds of relief in the same decree is stated in Section 365.

**Illustrations:**

1. A contracts to sell his land with buildings and stock in trade to B. In case of breach, a decree specifically enforcing the entire performance promised by A may properly be granted, even though the stock in trade is of a kind that could be purchased elsewhere. It is also within the court's discretion to require A to convey the land and to pay damages for failure to deliver the stock. If B has disposed of some of the stock so that it cannot be recovered, complete relief necessarily requires the awarding of damages (see Section 365).

**Annotation:**

There are no Kentucky decisions upon this point. Our court tends to render complete relief in a single action, if it is possible. See the cases collected under Section 365, infra.
Section 365. Specific Enforcement in Part with Compensation for the Remainder.

The fact that a part of the promised performance cannot be rendered, or is otherwise such that its specific enforcement would violate some of the rules stated in Sections 360-380, does not prevent the specific enforcement of the remainder, if in all other respects the requisites for specific enforcement of that remainder exist. Compensation for the partial breach that still remains may be awarded in the same proceeding, either as damages, restitution, or an abatement in price. An indemnity against threatened future harm may also be required.

Comment:

a. Part of the performance promised by the defendant may be impossible to be rendered or may be of such a character as to make specific performance unavailable for other reasons. In either case, if the requisites for granting the remedy exist with respect to a part, in spite of the fact that they do not exist as to the remainder, a decree for the specific performance of that part, with compensation in a just and proportionate degree as to the remainder, may properly be granted.

b. Sometimes the remedy in damages is fully adequate as to the part of the contract that is still possible of specific enforcement. Sometimes the specific enforcement of only a part of the promised performance will cause unreasonable hardship and bring the rule stated in Section 367 into operation or cause results unforeseen when the contract was made and substantially different in character from any expected from or required by the contract. The plaintiff may have had knowledge that full performance was impossible, and the defendant may not have had such knowledge. Facts such as these must be considered in determining whether specific performance of part of a contract, with compensation or an abatement in price will be decreed under the rule stated in the section.

c. A vendor of land who can not perform as agreed by reason of a shortage in area or a defect in title may be decreed to transfer all that is within his power, with compensation or indemnity for the partial breach. The court has wide discretion in the character of the remedy given for the shortage or defect. It may be compensatory damages, restitution of money already paid, or a proportionate abatement of the price that has not yet been paid. The apportionment will take into consideration acreage, improvements, and relative values of the parts involved. An indemnity also may be required against future harm; and in some cases such an indemnity may be the only remedy that is necessary. . . .
Illustrations:

4. A contracts to convey a perfect title to Blackacre to B. A's wife, who has a dower interest in the land, refuses to join in the deed. B may properly be given decree that A shall transfer all his interest in the land, with either an abatement in price measured by the difference in value caused by the non-conveyance of the dower interest or with sufficient indemnity against future injury to B in case A's wife survives him and enforces her rights.

5. A, who is a celebrated artist, contracts to sing in opera at B's theater for a specified period and during that time not to sing in a competing theater in the same city. The fact that specific performance of A's affirmative promise to sing for B will not be deemed is not in itself sufficient to prevent the specific enforcement of A's negative promise by injunction. For other illustrations of this type, see Illustrations 6-9 under Section 380.

Annotation:

Kentucky is in accord with the rule of this section. All of the cases decided upon the point have involved contracts for the sale of realty.

In the early case of McConnell's Heirs v. Dunlap's Devisees, 3 Ky. (Hardin) 44 (1805), our court laid down the proposition that an undertaking to sell a larger interest than the vendor owns does not relieve him from carrying out the contract as to the interest he does own with compensation for the remainder. The rule has been consistently followed since that time. The cases indicate that the court has wide discretion in the character of the remedy given for the shortage or defect. It may be compensatory damages, restitution of money already paid, or a proportionate abatement of the price that has not yet been paid. Generally, where the vendee has sued, the court has permitted him to elect which of these remedies he desired, the form of the relief depending upon his election, limited, however, in some instances by circumstances of the individual case. McConnell's Heirs v. Dunlap's Devisees, supra; Jones v. Shackleford, 5 Ky. (2 Bibb) 410 (1811); Kelly's Heirs v. Bradford, 6 Ky. (2 Bibb) 317 (1814); Rankin v. Maxwell's Heirs, 9 Ky. (2 A. K. Marsh.) 488 (1820); Morgan's Heirs v. Barnes' Heirs, 20 Ky. (4 T. B. Mon.) 291 (1827); Preece v. Wolford, 196 Ky. 710, 246 S. W. 27 (1922); Wheeler v. Gahan, 206 Ky. 366, 267 S. W. 227 (1924) (dictum).

If the principal part of the contracted property is destroyed between the time when the contract is made and the time when it is to be performed, the court will not grant specific performance with abatement of price commensurate with the loss. Wheeler v. Gahan, supra (here buildings on the land, which constituted the chief value of the property, were destroyed by fire).

Where the inability of the vendor to convey the agreed interest
arises from the refusal of his wife to join in the conveyance and release her dower interest, the vendee may have specific performance with abatement in price, the abatement to be measured by the present value of the wife's potential right of dower. Will B. Miller Company v. Bannon, 221 Ky. 677, 299 S. W. 567 (1927); City of Murray v. Holcomb, 243 Ky. 287, 41 S. W. (2d) 1026 (1932). Formerly, the rule was probably different. Plum v. Mitchell, 16 Ky. L. R. 162, 26 S. W. 391 (1894). However, in this case the wife was not made a party to the action, and the case is not quite clear. Query: Is the wife a necessary party under the present rule?

In Kentucky the rule stated in this section has been qualified to the extent that specific performance with compensation will not be granted in favor of a purchaser who at the time the contract was made, knew that the vendor had a limited interest in the land. Haag v. Dixon, 151 Ky. 768, 152 S. W. 930 (1913).

If the deficiency in title or subject matter contracted to be conveyed is considerable and material to the purchaser's enjoyment of what he purchased, specific enforcement at the suit of the vendor as to the part that may be conveyed with abatement for the remainder will not be decreed. L. & N. R. R. Co., v. Fuson, 203 Ky. 708, 262 S. W. 1086 (1924) (discrepancy of fifty per cent held too great). However, in McConnell's Heirs v. Dunlap's Devisees, supra, the court granted specific enforcement at the suit of the purchaser with compensation for the remainder, although the deficiency was fifty per cent. These cases indicate the fact that the court is more apt to decree specific performance, where deficiency is rather material, if the suit is by the vendee rather than by the vendor. However, even where the vendee is suing the rule has its limitations, as illustrated by Wheeler v. Gahan, supra, where the court refused specific performance with compensation at the suit of the purchaser, where five-sixths of the value of the property was destroyed. If the discrepancy is trifling, and the vendor offers to make a proper reduction in the price, there is no objection to enforcement of the vendee's promise. Coleman's Exr. v. Meade, 76 Ky. (13 Bush) 358 (1877) (dictum).

In connection with this section the reader should consider the annotation to Section 375, as to specific performance with compensation, where the vendor is plaintiff.

Section 366. Promises Binding Solely Because of a Writing, A Seal or Nominal Consideration.

A contract that is binding solely by reason of its being under seal, or in writing, or having a nominal consideration will not be specifically enforced, unless some performance constituting a fair exchange is a condition of the defendant's duty.
Comment:

a. . . .
b. In order that specific performance may be available as a remedy, it is not enough that the promise is in a sealed writing or that a merely nominal consideration was actually given (see Secs. 81, 82). This does not mean that adequacy of consideration, in the sense of equivalence of market values is necessary, except to the degree that the rule stated in Section 367 may require. If there is a legally enforceable contract, it is enough that the contractual obligation is based upon any of the following elements (this enumeration not being necessarily exhaustive): (1) A substantial consideration in exchange for the promise; (2) a substantial performance rendered in the past and causing the making of the promise as belated compensation therefore; (3) substantial action in justifiable reliance on the promise; (4) a substantial performance to be rendered as a condition of the defendant's duty and as an exchange for the performance that is specifically decreed.

Illustrations:

1. For the express consideration of $1, A makes a written contract under seal to transfer valuable land to B. The latter holds this contract for several years, reasonably believing that A will keep his promise, but makes no such change of position as would in itself, irrespective of the seal, make A's promise binding. These facts are not sufficient to entitle B to a decree for specific performance.

2. A promises in a writing under seal to make a gift of land to his daughter B. The latter, in reliance thereon, takes possession of the land, makes it her home for many years, and builds valuable improvements upon it. B can get a decree for specific performance of A's promise. A's promise would be binding, even in the absence of the seal, because of substantial action in reliance upon it by B (see Sec. 90). The contract therefore is specifically enforceable under the rule stated in Section 358.

3. . . .

4. A gives B a sealed option for thirty days to buy certain land for $10,000. Within the thirty days, and with knowledge, that A has repudiated the contract, B notifies A of his acceptance. B can get a decree for specific performance, conditional on payment of the price. The option was binding only because of a seal; but after acceptance the contract becomes a bilateral one for the exchange of performances of value, and the decree will be made conditional upon performance of the agreed exchange by the plaintiff.

Annotation:

Kentucky decisions are in accord with the rule of this section. The distinction between sealed and unsealed instruments has been abolished in Kentucky by statute. Kentucky Statutes, Sec. 471.
An agreement in writing will not be enforced merely because it is solemnized by the signature and seal of the party. Buford’s Heirs v. McKee, 31 Ky. (1 Dana) 107 (1833). Nor will equity enforce a mere promise to make a gift, where there is no consideration to support the promise, although it is in writing. Rain v. Sturgeon’s Admr., 5 Ky. Opin. 575 (1872) (dictum).

Our court early announced the rule that a “consideration either good or valuable is necessary in every contract which equity will enforce”. Banks v. May’s Heirs, 10 Ky. (3 A. K. Marsh.) 435 (1821); Buford’s Heirs v. McKee, supra (valuable or meritorious consideration); Northup v. Ward, 12 Ky. L. R. 735, 15 S. W. 247 (1891) ($1 for a half interest in mineral rights held insufficient).

Kentucky has repeatedly held that a consideration of one dollar is not sufficient to support a mineral option in equity. Litz v. Goosling, 33 Ky. 185, 19 S. W. 527 (1892); Berry v. Frisbie, 120 Ky. 337, 27 Ky. L. R. 724, 86 S. W. 555 (1905); Noble v. Mann, 32 Ky. L. R. 30, 105 S. W. 182 (1907); Killebrew v. Murray, 151 Ky. 345, 151 S. W. 662 (1912) (five dollars recited consideration); Stamper v. Combs, 164 Ky. 733, 176 S. W. 247 (1915). In these cases the court takes the view that the consideration is merely nominal and, hence, specific enforcement is denied. However, considerable doubt has been cast upon these decisions by Thomas, J., in the recent case of Union Gas & Oil Co. v. Wiedeman Oil Co., 211 Ky. 361, 277 S. W. 323 (1925). In the case of other options one dollar has been held to be sufficient consideration. Sparks v. Ritter, 204 Ky. 623, 265 S. W. 26 (1924); City of Murray v. Holcomb, 243 Ky. 287, 47 S. W. (2d) 1026 (1932).

Section 367. Effect of Unfairness, Hardship, Mistake and Inequitable Conduct.

Specific enforcement of a contract may be refused if

(a) the consideration for it is grossly inadequate or its terms are otherwise unfair, or

(b) its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or to third persons, or

(c) it was induced by some sharp practice, misrepresentation, or mistake.

Comment:

a. If a party is induced to make a contract by the fraudulent representations of the other, it is voidable; and after avoidance no remedy for its enforcement is available to the defrauder. The present Section, however, includes practices that are not fraudulent, representations that are innocent, and mistakes by the defendant in which the plaintiff does not participate and for which he is not at all responsible.
Even though the plaintiff's conduct has not been such as to cause a court to refuse him a judgment for damages or even such as to entitle the defendant to any affirmative remedy against him, it may be such as to disentitle him to the remedy of specific performance.

b. Mere pecuniary inadequacy of consideration will not generally make the terms of a contract seem too unfair for enforcement unless the degree of inadequacy is extreme. The court will consider all the other facts of the case before determining the existence of the necessary degree of unfairness. A slight inadequacy of consideration, accompanied by other facts, such as are enumerated in the Section, may prevent specific enforcement, even though no one of the existing facts, standing alone, would be sufficient. Such facts exist in varying combinations and in each case must be considered as a whole. The application of the rule stated in the Section must depend upon the moral standards of enlightened judges.

Illustrations:

1. ...
2. ...
3. B is the owner of land X. A is a manufacturer who intends to locate a factory in the town where land X lies. A does not disclose his intention to B. In consideration of $100 in cash, B contracts to sell his land to A at the latter's option for $10,000 if paid within three months. Ten thousand dollars is a fair price for the land at then existing market prices. Later, A's intentions become generally known, prices of land rise immediately, and B repudiates his contract. A brings suit for specific performance within the three months and pays $10,000 into court. On these facts, the decree asked by A may properly be granted.

4. A contracts to sell to B Lot No. 23, as indicated on a recorded plan, for $600. This price is fixed by A at 20c per foot, the area of the lot being believed by him to be 3,000 square feet. In fact, the lot contains 9,000 square feet. B knows that the lot is much larger than A supposes; but he does not know just how the price was determined. The court may properly refuse a decree for specific performance, even though there may have been no such mistake or fraud as would prevent B from maintaining an action for damages.

5. ...

6. A effectively conveys a right of way to B, a railroad company, and B contracts in return to maintain a convenient road crossing for A's use. Later B is compelled by public authority to raise its tracks fifteen feet, in order to eliminate a grade crossing over another railway. B builds a fifteen-foot embankment and offers to maintain a grade crossing for A if he will permit the use of his own land for the necessary approaches. A refuses this and demands the building and maintenance of a tunnel. The cost of such a tunnel would be $5,000. The total value of A's land is $1,500. Specific enforcement against B may properly be denied, and damages may be awarded instead.
7. . . .

8. A leases land to B for a term of years and gives to the latter an option to buy it at a named price at any time before the termination of the lease. Later the property is greatly increased in value by reason of sewers, pavements, and sidewalks constructed by public authority and assessed against A as owner of the land. When the lease was made, the possibility of these improvements and assessments was not contemplated by the parties. In a suit for specific performance by B, the court may properly make its decree conditional upon B's paying a just share of the assessments in addition to the contract price.

Annotation:

Kentucky is in accord with the rules of this section:

(a) Our Court lays down the principle that it "will not specifically enforce a hard and unreasonable bargain where the ability and knowledge of the contracting parties is so unequal as to result in one being overreached, and his property sacrificed by the inadequacy of the consideration". Wolford v. Steel, 27 Ky. L. R. 88, 90, 84 S. W. 327 (1905) ($1.50 for mineral rights worth $15 to $25 per acre); Woollums v. Horsley, 93 Ky. 582, 20 S. W. 781 (1892) (40¢ for mineral rights worth $15 per acre).

As intimated in the above quoted extract from Wolford v. Steele, supra, mere inadequacy of consideration is probably not alone sufficient to justify a refusal to grant specific performance, but is a fact which, coupled with other circumstances showing the unfairness of the contract, may be sufficient to justify the court in refusing relief. Darnell, et al., v. Alexander, 178 Ky. 404, 199 S. W. 17 (1917); specific execution of a contract in equity is a matter not of absolute right in either party, but of sound and reasonable discretion in the court, and will never be adjudged except when it is strictly equitable to do so. Cocanaugher v. Green, 93 Ky. 519 (1892). Nor is the fact that the property has depreciated in value, or increased in value, between the time of the making of the contract and the time for performance a sufficient ground for refusing specific performance. Wren v. Cooksey, 147 Ky. 825, 145 S. W. 1116 (1912); Cox v. Burgess, 139 Ky. 699, 96 S. W. 577 (1906) (this case expresses the rule admirably, in substance that, although equity will not sanction a contract founded upon fraud, imposition, mistake, undue advantage, or gross misapprehension, or where, from a change of circumstances or otherwise, it would be unconscionable to enforce it, nevertheless it will not attempt to substitute the judgment or business sagacity of the chancellor for that of the contracting party, nor to relieve one of his bad bargain when fairly entered into, pp. 703, 704).

Disparity in age, experience, and mental condition of the parties to a contract which is hard and unconscionable may result in the denial of specific performance. Woollums v. Horsley, supra; Ratterman v. Campbell, 26 Ky. L. R. 173, 80 S. W. 1155 (1904) (eighty-year-
old man induced to name a much lower price than his property was worth); *Eastland v. Vanarsdel*, 6 Ky. (3 Bibb) 274 (1814).

(b) A contract resulting in disproportionate loss to the defendant will not be specifically enforced. *L. & E. Ry. Co. v. Williams and Wife*, 183 Ky. 343, 209 S. W. 59 (1919) (plaintiffs use of a right of way, for which he had paid very small consideration would result in a flooding of defendant's land); *Polk v. White*, 9 Ky. Op. 185 (1876) (enforcement inequitable and oppressive); *Williamson v. Dils*, 114 Ky. 162, 72 S. W. 292 (1903) (vendee, required by contract to survey land, was driven off by force and threats, and rendered unable to survey, and was held not amenable to an action for specific performance); *Jones v. Prewitt*, 128 Ky. 496, 108 S. W. 867 (1908) (enforcement unjust and inequitable); *Bluegrass Realty Co. v. Shelton*, 148 Ky. 666, 147 S. W. 33 (1912) (vendor sought to reserve burial ground in plot sold by the deed, but such reservation was not in title bond. *Held*: It would be unjust to require specific performance in view of the purpose for which the vendee desired the land); *Darnell v. Alexander*, supra.

The rule as stated by this clause is limited by our Court in the recent case of *Rogers Brothers Coal Devel. Co. v. Day*, 222 Ky. 443, 1 S. W. (2d) 540 (1927), in the following language: "the rule is not applicable except where such consequences cannot be deemed to have been contemplated by the parties at the time of the making of the contract sought to be specifically enforced."

Where the hardship on the defendant has been brought about by the delay of the complainant in performing his part of the contract, and an adequate compensation for such delay cannot be ascertained, specific enforcement will be denied. *Meaux v. Helm*, 2 Ky. (Sneed) 252 (1803). This case is also authority for the proposition that where, in a contract for the conveyance of real estate, the vendor dies and suit is brought by the vendee against the vendor's heirs for specific execution, the fact that the vendor's executors had obtained judgment for the consideration agreed to be paid will not be considered such confirmation as will bind the heirs to specific execution of a hard, unconscionable contract.

If to specifically enforce an agreement would cause one party great injury and bring the other but comparatively little good, its execution will not be required. *McCutcheon's Heirs v. Rawleigh*, 25 Ky. L. R. 549, 76 S. W. 50 (1903).

(c) Our Court will refuse to enforce a contract that was induced by inequitable conduct, sharp practice, misrepresentation, or mistake—*Eastland v. Vanarsdel*, supra; *Louisville Ry. Co. v. Kellner-Dehler Realty Co.*, 148 Ky. 765, 147 S. W. 424 (1912) (defendant not required to take lots because he was unintentionally deceived as to their proximity to his own land); *Robenson v. Yann*, 224 Ky. 56, 5 S. W. (2d) 271 (1928) (agreement between plaintiffs and parties controlling auction sale whereby lots were sold at much lower price than that bid by
plaintiffs at auction); Meaux v. Helm, supra (delay by plaintiff amounting to fraud).

Our Court has never defined the term "sharp practice", but it is well settled in this state that failure to communicate material facts of which fair dealing demands the disclosure, will preclude specific performance of contracts between vendor and vendee—Bowman v. Bates, 5 Ky. (2 Bibb) 47 (1810) (vendee connived with vendor's agent to prevent vendor from finding out the true value of the land to be sold); Woollooms v. Horsey, supra; Welford v. Steele, supra.

In many of the cases involving sharp practice, the vendor was old, uneducated or inexperienced, while the vendee was an alert experienced trader, or had the trust and confidence of the vendor. Byrne v. Long, 12 Ky. L. R. 910, 15 S. W. 778 (1891) (vendor, while intoxicated, was induced by vendee to sign a contract of sale which the vendee represented was only a lease); Wolford v. Steele, supra; Darnell v. Alexander, supra (vendee was nephew of vendor); Hart v. Digs, 10 Ky. Op. 206 (1879) (vendor, physician of vendee with great influence over him, sold him a house at a high price while intoxicated); Taylor v. Johnson, 248 Ky. 280, 53 S. W. (2d) 392 (1933) (false statements as to amount house to be sold was renting for).

Where the plaintiff knowingly deceived the defendant, specific performance of a contract will be denied—Eastland v. Vanarsdel, supra; Earned v. McCarty, 9 Ky. L. R. 638, 6 S. W. 153 (1887) (fraudulent warranty as to fitness of a Jack); Warfield v. Erdman, 19 Ky. L. R. 1559, 43 S. W. 708 (1897) (false representations in regard to value and quality of land); Meaux v. Helm, 2 Ky. (Sneed) 262 (1803). But it will also be denied, where the defendant was induced by the misrepresentations of the plaintiff to enter into the contract, even if misrepresentations were innocently made. Matthey v. Wood, 75 Ky. (12 Bush) 293 (1876); Louisville Railway Co. v. Kellner-Dehler Realty Co., supra (slightly stronger case, evidence strongly tending to show active concealment, rather than unintentional misrepresentation).

In some cases a mistake by the parties, though not sufficient to prevent the formation of a contract or to give equitable ground for its reformation or rescission will nevertheless, excuse liability in a suit for specific performance—Eastland v. Vanarsdel, supra (gross or palpable error together with unreasonable hardship on defendant); Smith v. Smith, 7 Ky. (4 Bibb) 81 (1815) (mistake as to amount of land conveyed); Fannin v. Bellamy, 68 Ky. (5 Bush) 663 (1869) (similar mistake). Unilateral mistake is ground upon which an equity court may refuse specific performance, Louisville Ry. Co. v. Kellner-Dehler Realty Co., supra. Unilateral mistake has been held a sufficient ground upon which an equity court may refuse specific performance.
Section 368. Enforcement of a Promise to Render a Performance that is Impossible, Illegal, or a Breach of Duty to a Third Person.

Specific enforcement will not be decreed if the performance sought is impossible, or is tortious or criminal, or is in violation of the rights of a third person which are superior to those of the plaintiff. If the rights of the plaintiff and those of a third person are equal, the court may prorate performances.

Comment:

a. Impossibility of performance sometimes prevents the formation of a contract and sometimes discharges an existing contractual duty (see Sections 455, 456). Specific performance will not be decreed in cases of this sort. The present Section, however, includes cases in which performance by the defendant is impossible, either subjectively or objectively, and yet in which he is not discharged from duty. A judgment for damages can be obtained against him; but specific performance by him will not be ordered if such performance is impossible. He will not be ordered to render a performance that requires action by a third person who refuses to perform and who is under no duty to do so.

b. The fact that a promised performance is a tort or a crime in some cases precludes the existence of a contract; in other cases it does not (see Sections 598-609). In either case, however, the remedy of specific performance is not available.

c. There are cases in which the rendition of a performance due to another under a contract would be the breach of a duty to a third person, either of a fiduciary character or under another contract. If the right of the third person is not for some reason inferior to the right of the plaintiff, specific performance in favor of the plaintiff and in breach of the third person's right will not be decreed. In some instances of this sort, there may be a prorating of performances; and specific performance of a part, with compensation for the deficiency, may be decreed (see Section 365).

Illustrations:

1. A contracts to transfer to B an interest in land that he does not own and has no power to transfer. B cannot get a decree against A that he shall make a conveyance of that interest.

Annotation:

Where the performance of a contract is in fact impossible, specific enforcement will, of necessity, be denied. Jenkins v. Dawes, 133 Ky. 25, 207 S. W. 689 (1919). Kentucky holds that where impossibility is caused by neither the plaintiff nor defendant, specific performance will not be decreed, but if the defendant causes the Imposs-
bility, the court will, nevertheless, give the plaintiff performance as near as possible to carry out the spirit of the contract, if practicable, or will give the plaintiff damages. *Burton v. Shotwell*, 76 Ky. (13 Bush) 271 (1877); *C. & O. R. R. Co. v. City of Dayton*, 177 Ky. 502, 187 S. W. 969 (1917). This section does not purport to cover the cases where only a part of the promised performance can be rendered. These cases are covered by Section 365.

A contract for the sale of land which violates a statute against champerty will not be enforced. *Cyrus v. Holbrook*, 32 Ky. L. R. 466, 106 S. W. 300 (1907). Likewise, a contract by which one party binds himself to settle on vacant land, procure a title, and then convey it to another in violation of the laws granting lands to settlers will not be enforced. *McDermed v. McCastland*, 3 Ky. (Hardin) 21 (1805).


Section 369. Specific Enforcement Denied if Contrary to the Public Welfare.

Specific enforcement will not be decreed if either the performance to be compelled or the use of compulsion itself is contrary to public welfare.

Comment:

a. Contracts contrary to public policy are generally unenforceable by any remedy; but there are cases in which the bargain would not be held to be void, but which are nevertheless such that the performance promised would be distinctly against public welfare. In such cases specific performance may be refused, even though it may be possible for the plaintiff to get a judgment for compensation in money.

Illustrations:

1. Two railroad companies, A and B, make a contract whereby A promises to maintain a certain grade crossing. Later, traffic conditions become such that the grade crossing is a public menace; and A begins the construction of an underpass, interrupting B's traffic no more than is reasonably necessary. An injunction or a decree for specific performance against A may properly be denied.

2. A effectively conveys a right of way to the B Railroad Company, the latter promising to locate a station at point X and to stop all of its express trains there. It turns out that X is an inconvenient
place for the public at large; and the location of a station and stopping trains there will cause loss to B greatly disproportionate to any advantage accruing to A. Specific performance may properly be denied.

Annotation:

As distinguished from contracts held by the courts to be illegal and thus void, there are contracts which, while recognized as valid and subject to the recovery of damages in case of breach, are yet so contrary to public welfare as to cause a court of equity to deny specific performance, even though all the other requisites for such a decree exist. It is with this type of contract that the above section of the restatement deals, not with contracts void at law as being against public policy; in such cases equity will, of course, refuse to grant specific performance.

Our court refused to specifically enforce a contract between a city and a gas company, whereby the gas company was to furnish gas to light the streets, etc., over a long period of years, where it was shown that the public interest and welfare would be better served by lighting the streets with electricity. At the time the contract was entered into, electricity had not been developed sufficiently for the uses contemplated under the contract. *City of Newport v. Newport Light Co.*, 14 Ky. L. R. 845, 21 S. W. 645 (1893); *City of Newport v. Newport Light Co.*, 17 Ky. L. R. 31, 30 S. W. 607 (1895) (Interpreting the prior decision); *Covington Gas Light Co. v. City of Covington*, 22 Ky. L. R. 796, 802, 58 S. W. 805, 808 (1900). Similarly, where specific performance might seriously impede a common carrier from properly discharging its duties to the public, it will be denied. *Ecton v. Lexington & F. Ry. Co.*, 22 Ky. L. R. 1133, 59 S. W. 864 (1900) (covenant by defendant railroad to erect and maintain a depot at a certain place; the depot would not be convenient to the general public and probably never of any substantial benefit, while interfering at least in part with the general service of the railroad).

However, the promisee may, in the above cases, recover any damage sustained by the refusal of the promisor to carry out the contract. *City of Newport v. Newport Light Co.*, supra. And, see the discussion in *Lexington & Big Sandy Ry. Co. v. Moore*, 140 Ky. 514, 131 S. W. 257 (1910).

A contract by which one person binds himself to settle on vacant land and procure a title and then convey it to another is against public policy and will not be specifically enforced. *McDermed v. McCastland*, 3 Ky. (Hardin) 21 (1805).

As to those cases where specific performance is refused because the performance sought is tortious, or criminal, or the contract is otherwise against public welfare, see the annotation to Section 368.

In connection with specific enforcement where the use of compulsion in contracts for personal services is contrary to public welfare, see Section 379.
Section 370. Uncertainty of Terms.

Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.

Comment:

a. Language is not so perfect an instrument that exact certainty in expression can always be attained; nor does the existence or the enforcement of a contract depend upon the attainment of such complete certainty. It is enough that the parties have agreed in their expressions and that these expressions have a reasonably clear and definite meaning. The approach to certainty is made in varying degrees; and to some extent the severity of the remedy that will be granted depends upon the degree of this approach.

Illustrations:

3. A contracts to lease an apartment to B as soon as the building is completed and reasonably to heat and light it during the term of lease. The building is completed except that A refuses to install sufficient apparatus for heating and lighting. This contract is not too uncertain in its terms, nor does it involve too great difficulty of supervision to justify refusal of specific performance on these grounds alone.

Annotation:

The Kentucky decisions are in accord with this statement. The majority of our cases concern the identification of tracts of land and involve the question of the Statute of Frauds.

In order that a contract may be specifically enforced, it must be reasonably certain as to its subject matter, its stipulations, its purposes, and its parties. Rankin v. Maxwell's Heirs, 9 Ky. (2 A. K. Marsh.) 488 (1820); Fowler v. Lewis, 10 Ky. (3 A. K. Marsh.) 443 (1821) (contract incomplete); McKnight v. Broadway Investment Co., 147 Ky. 535, 145 S. W. 377 (1912) (lease failed to specify the date term was to start); Tharp University School v. Komus Realty Co., 159 Ky. 336, 167 S. W. 136 (1914) (the amount and terms of a first lien and the time of maturity of a second lien were uncertain); Hall v. Cotton, 167 Ky. 464, 180 S. W. 779 (1915) (description of land too indefinite for identification); Weintraub v. Ware, 234 Ky. 169, 27 S. W. (2d) 694 (1930) (indefinite provision with reference to assumption of mortgage on property). For an interesting illustration of the phrase, "that is certain which can be made certain", see Singer v. Campbell, 217 Ky. 830, 290 S. W. 667 (1927). The case is probably correct on its facts.

In many cases, it may be said that the degree of certainty neces-
sary to justify specific performance of the contract, rests, in fact, upon the circumstances of the case, the desirability and need for specific performance, public interest, etc.; in short in the sound discretion of the chancellor. For example, see Schmidt v. L. & N. Ry. Co., 101 Ky. 441, 41 S. W. 1015 (1897) (contract to operate a railroad, the contract failing to fix the number of trains or other details of operation). Here there was a strong public interest and need for specific performance.

As to contracts for the transfer of an interest in land, specific enforcement will not be given unless the parties have described and identified the particular tract of land which is to pass, or unless the contract furnishes the means of identifying with certainty the land to be transferred. Reed’s Heirs v. Hornback, 27 Ky. (4 J. J. Marsh.) 375 (1830); Stoner v. Taliaferro, 9 Ky. Opin. 90 (1876); Hall v. Cotton, supra; Partell v. Bell, 179 Ky. 356, 200 S. W. 644 (1918); Pope v. Myers, 218 Ky. 731, 292 S. W. 318 (1927). But, subsequent acts by the parties, such as taking possession of the land, may render an uncertainty in the contract certain, so that equity will decree specific performance. Overstreet v. Rice, 67 Ky. (4 Bush) 1 (1868); Curry v. Kentucky Western Railway Co., 25 Ky. L. R. 1372, 78 S. W. 435 (1904). And the written contract often refers to other documents which identify subject matter of the contract. Partell v. Bell, supra.

The majority of the cases in Kentucky, as to contracts for the transfer of an interest in land, deal with the problem of uncertainty in connection with the sufficiency of a particular memorandum as a satisfaction of the requirements of the Statute of Frauds. There are many cases where the memorandum failed to sufficiently describe or identify the land. Phelps v. Pinkston, 10 Ky. Opin. 26 (1878); Wortham v. Stith, 23 Ky. L. R. 1382, 66 S. W. 390 (1902); Brice v. Hays, 144 Ky. 535, 139 S. W. 810 (1911); Roberts v. Bennett, 166 Ky. 638, 179 S. W. 605 (1915). For cases holding the description in the contract or memorandum uncertain but not too great, see Tyler v. Onets, 93 Ky. 331, 20 S. W. 256 (1892); Henderson v. Perkins, 94 Ky. 207, 21 S. W. 1035 (1893); Hyden v. Perkins, 119 Ky. 188, 26 Ky. L. R. 1099, 83 S. W. 128 (1904); Campbell v. Preece, 133 Ky. 572, 113 S. W. 373 (1909); Bates v. Harris, 144 Ky. 399, 138 S. W. 276 (1911).

The cases cited above by no means exhaust the list but are merely representative. There can be no doubt that the section represents the well-settled law in Kentucky. Each decision, however, rests upon its particular facts and the court’s interpretation of what is "reasonable certainty" in relation to those facts.

Section 371. Difficulty of Enforcement.

Specific enforcement will not be decreed if the performance is of such a character as to make effective enforcement unreasonably difficult or to require such long-continued supervision by the court as is disproportionate to the advantages to be gained
from such a decree and to the harm to be suffered in case it is denied.

Comment:

a. The rule stated in the Section does not attempt to indicate a method of determining when the degree of difficulty is unreasonable or how long a supervision is disproportionate to the gains and losses involved. When the plaintiff's need is great, especially after part performance rendered, or the public interest is involved, the court does not shrink from the difficulties involved in continued supervision. In such cases, structures may be ordered to be built and the continued maintenance of railway facilities may be compelled. Increasing experience has shown that less hesitation on the score of difficulty of enforcement or length of supervision need be felt, and that attention may well be concentrated on the character of the contract and the purposes to be attained by granting or refusing specific enforcement. See Section 359, with its Comment, and also Sections 370, 379.

Illustrations:

3. State A contracts with State B for the construction of an interstate bridge over a large river. The interest of the inhabitants of A, B, and other States are deeply involved. The officers of A refuse to proceed because citizens have made objections. B may obtain a decree ordering the officers of A to resume performance of the covenants of the contract, to let the necessary contracts for construction work, and to file a periodical report showing the progress made.

4. A, a realty company, sells a lot to B, contracting with him to build a sewer for the premises. B pays the price and builds a house in reliance on the contract. A constructs an inadequate sewer system endangering the comfort and health of B's family. The uncertainty as to details of construction and the difficulty or long continuance of the supervision are not necessarily so great as to make the remedy of specific performance unavailable to B.

Annotation:

Our decisions are in accord.

Where the performance required by the contract is of long duration and its enforcement will require long-continued supervision by the court, specific enforcement will be refused. Edelen v. Samuels, 126 Ky. 295, 31 Ky. L. R. 731, 103 S. W. 360 (1907) (contract to make and sell whiskey over a long period); Haldeman v. Haldeman, 176 Ky. 635, 197 S. W. 376 (1917) (contract to vote stock in specified manner over long period).

However, although the performance required by the contract involves the exercise of skill and judgment and a long-continued series of acts, where the promisor is a public service company and the public
has an interest in the performance, the contract will be specifically enforced. *Schmidt, Etc. v. L. & N. R. R. Co.*, 101 Ky. 441, 19 Ky. L. R. 666, 41 S. W. 1015 (1897) (contract to operate a railroad over a long period of years); *Cumberland Telephone & Telegraph Company v. City of Hickman*, 129 Ky. 220, 33 Ky. L. R. 730, 111 S. W. 311 (1908) (Telephone franchise).

Where the plaintiff's need is great and it is not impracticable, nor too difficult to render continued supervision, our court does not shrink from the difficulties which such a decree will necessitate. Construction contracts will illustrate. In such cases structures may be ordered to be built, rights of way maintained, etc. Apparently Kentucky is in full accord with comment (a) supra, which will be found helpful. See *Louisville & Nashville Ry. Co. v. Zaring*, 9 Ky. L. R. 107 (1887) (to keep crossing in repair); *Flege v. Covington, Etc., Bridge Company*, 122 Ky. 348, 91 S. W. 738 (1906) (to erect and maintain a retaining wall); *C. & O. Ry Co. v. Herringer*, 158 Ky. 267, 164 S. W. 948 (1914) (to put in crossings and keep them in good repair) (dictum). The court in its discretion may order the promisor to build by a certain date or pay the cost of erection. Such a decree is wise, since it will often remove much of the necessity for supervision. *Hagins v. Sewell*, 124 Ky. 588, 99 S. W. 673 (1907) (contract to erect a party wall).

Where a crossing is to be built at a point to be selected by the parties, the chancellor will decree specific performance and if they cannot agree upon a location he will select one. *C. & O. Ry. Co. v. Herringer*, supra.

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