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Specific Performance of Contracts for the Conveyance of Real Estate

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mere willful infliction of injury is not enough without further proof of express malice. Therefore, in the absence of property destruction, though malice may have been proved, the correctness of the decision of Commonwealth v. Wing is doubtful. Apparently, there is no precedent for the decision. Certainly, it is believed that a contra decision should be rendered today, either under the common law or prevailing statutes.

Martha T. Manning.

Specific Performance of Contracts for the Conveyance of Real Estate.—"Where a party to a sale of real estate has an adequate legal remedy for breach of the contract by the other party, a court of equity will not grant specific enforcement of the contract, unless it be necessary for justice." Cox v. Sharpe, 1 Ky. Opinions, 358 (1866). In the case from which the above extract is taken the court refused to grant specific performance of the contract, upon the ground that the plaintiff could be adequately compensated by damages.

The general rule in this country, in regard to contracts for the conveyance of real estate may be stated as follows: Where land, or any estate or interest in land is the subject matter of an agreement, the jurisdiction of equity to specifically enforce this agreement is undisputed. This prevailing rule is well expressed in the case of Belanewsky v. Gallaher, 105 N. Y. Supp. 77 (1907). In this case the plaintiff was seeking specific performance of a contract to convey land, the defendant demurred to the complaint, and urged in support of his demurrer that the plaintiff had failed to specifically allege that there was no adequate remedy at law. The court, in overruling his demurrer said, "Such an allegation is not necessary in an action to compel specific performance of a contract to convey real estate. The courts will specifically enforce such an agreement even when the vendor is financially responsible and the vendee has an adequate remedy at law for damages."

The crystallization of this rule is probably due historically to the peculiar respect and consideration which has been accorded to land in the English law. Since the latter part of the 15th century, English courts have consistently granted specific performance of contracts for the sale of land, usually upon the ground that damages for breach of the contract are always considered inadequate. The reason upon which this historic rule is based has been well stated by Judge Pearson in the case of Kitchen v. Herring, 42 N. C. 191 (1851), in which he says, "The principle in regard to land was adopted, not because it was fertile or rich in minerals, or valuable for timber, but simply because it was land—a favorite and favored subject in England and every country of Anglo-Saxon origin."

This historic English rule, as regarding the inadequacy of damages for breach of a contract to convey land, has seemingly been taken over intact, by the courts of this country. There has, however, been a re-
cent tendency by the courts of some of the states, to break away from this rule, in cases where there is obviously an adequate remedy at law. Probably the most outstanding of these "exceptional cases" is the case of Hazelton v. Miller, 25 App. D. C. 337 (1905). In this case the defendant contracted to sell land to the plaintiff for $9,000.00, and the plaintiff in turn had agreed to sell this same land to the government for $14,000.00, the plaintiff asks for specific enforcement of this contract. The court hold that inasmuch as the plaintiff, by his own showing, has an adequate remedy at law, the court of equity will not allow specific performance of the contract. Another recent case which holds parallel to Hazelton v. Miller, supra, is Oklahoma Gas Corp. v. Municipal Gas Co., 38 F. (2d) 444 (1930). This case states that if the remedy at law is certain, prompt, complete, and efficient, so as to obtain the ends of justice then this will preclude remedy by specific performance, even if the contract involves real estate. The cases of Lenoir v. McDaniel, 80 Fla. 500, 86 So. 435 (1920); and Clark v. Flint, 22 Pick. (Mass.) 231, 33 Amer. Dec. 733 (1839), both hold that a party will be denied relief by specific performance if it is shown that the party can be adequately compensated by damages.

While the vast majority of cases in this country hold that it is a "conclusive" presumption of law, that damages do not constitute an adequate remedy for breach of a contract to convey real estate, it seems that all the weight of legal logic and reason support those few cases composing the minority view upon the question. The application of such a strict doctrine as set out by the majority of the courts, may be justified in England by the social and economic conditions of that country. Land in England has always been considered unique, the scarcity of land available to purchasers rendering such a view necessary. In this country no like justification for such a rule can be found. As Pomeroy very aptly states it, "Land, is often, in this country, bought and held simply as merchandise, for mere purposes of pecuniary profit, possessing no other interest in the eyes of the purchaser and owner other than its market value." Pomeroy, Specific Performance (3d Ed.) Section 10. To say that land in most of the western states of this country is unique would be doing a great injustice to that word. In most cases arising in these states in which a vendor fails to perform a contract to convey land, the vendee can, with very little additional trouble and expense, secure other land which will fulfill his purpose just as well as that land for which he originally contracted.

Therefore, in these cases we cannot truthfully say that the vendee cannot be adequately compensated by money damages. Bearing this fact in mind we might well ask ourselves, why do our courts continue to follow a rule of stare decisis whose only reason seems to rest in its antiquity? It is quite probable that Chancellor Kent was referring to a situation like the one presented here when he made the following remark: "I do not wish to be understood to press too strongly the rule of stare decisis. It is probable that the records of the courts of this
country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of our system destroyed by the perpetuity of error." 1 Kent's Comm. 477.

Kentucky seems to line up with the majority of the states upon the problem of the adequacy of damages for breach of a contract to convey realty. Mills v. Metcalf, 8 Ky. 477, (1819); Flege v. Covington & Cincinnati Elevated R. R. and Bridge Co., 122 Ky. 348, 91 S. W. 738 (1906); McGee v. Bell, 3 Littell (13 Ky.) 190 (1823). However, there are few cases in this state with direct language to this effect; probably the case which best illustrates the view of the Kentucky courts is the case of Mills v. Metcalf, supra. In this case the plaintiff filed a bill in equity with a double aspect of either gaining specific execution or cancellation of contract for the sale of 1,600 acres of land. The court held that although a complainant may maintain an action at law for a breach of such a contract he may further, if he elects to do so, resort to equity for specific execution of the contract. In the principle case, however, it is quite evident that the court has departed from the beaten path as set out in the majority of the cases, and to the writer this view seems to be the better one.

In conclusion, it might be said, that in spite of the overwhelming number of cases bearing out the so-called majority view, it cannot be said that the status of contracts concerning the sale of land is definitely settled. Now, more than ever before, the courts of this country seem to realize that they cannot support this rule, and at the same time, line up with some of the basic principles of equity. From the attitude taken by the court in some of the recent cases, it may be safely predicted, that in the near future the courts will take a less arbitrary attitude toward this problem and refuse to grant relief by specific performance unless the plaintiff affirmatively shows that he has no adequate relief in a court of law.

W. R. Jones.

CRIMES—CONTEMPT BY PUBLICATION.—In a recent case the question of summary punishment by the court for contempt by publication again arises. Defendant was the publisher of the San Diego Herald, a paper printed and circulated in San Diego, Cal. On March 13th, 1930, this newspaper contained an article captioned as follows: "New Grand Jury is Sweet Scented Bunch of Hollyhocks Designed to 'Protect San Diego'. Judge Andrews Picked Them but Could Have Added More. (By A. R. Sauer)"; and contained a lengthy article berating the court and its officers in the same vein. On March 20th, 1930, Judge Andrews filed an affidavit for contempt and had the sheriff attach the body of Sauer and bring him before the court. When the case came to trial the accused filed an affidavit alleging the disqualification of the respondent judge and made application to have the case transferred to another department of the San Diego Superior Court. The applica-