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HARDSHIP AS A DEFENSE TO SPECIFIC PERFORMANCE IN WEST VIRGINIA

Like all other forms of equitable relief, specific performance of a contract is granted in the discretion of the court. In many cases the relief may be refused because circumstances make it a hardship on the defendant to perform his contract. The court governs itself as far as may be by general rules and principles, but at the same time withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. The most that can be done is to note the various factors which have been stressed by the courts in granting or refusing relief. A survey of the West Virginia cases shows them to be in accord with the general authorities on the subject.

The most usual form of hardship is that of inadequacy of consideration, although it is generally stated that where there is no unfairness or other equitable defense specific performance will not be denied for inadequacy of consideration alone unless it be so grossly inadequate as to justify the presumption of fraud and collusion. To justify the presumption, the inadequacy must be so

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Between second Monday in February, 1937, and second Monday in December, 1938

<table>
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<tr>
<th>Period within which private purchaser at tax sale must procure his deed. Original owner or person holding under him may redeem at any time before deed is procured.</th>
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| Between April, 1938, and December, 1939

| Within two years after land becomes irredeemable (four months' notice by publication having been given), the state commissioner of forfeited lands (the auditor holding the position ex officio) must by statute certify a list of such lands to the circuit court. Suits are instituted to sell property forfeited to the state. If there is no private purchaser at this court sale, the sheriff must purchase the land for the state, and the title to the land so purchased vests absolutely in the State of West Virginia. Property may be redeemed at any time before sale is confirmed. |

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2 McClintock, Equity (1936) §§ 67, 69; Fry, Specific Performance of Contracts (3d ed. 1884) §§ 397-417.

3 Deepwater Council etc. v. Renick, 59 W. Va. 343, 53 S. E. 552 (1906); Ralphsnyder v. Titus, 74 W. Va. 204, 82 S. E. 257 (1914) (fiduciary relationship of attorney and client).
gros as to shock the conscience and confound the judgment. 4 Half the estimated value is not such inadequacy. 5

Apparently inadequacy as a negative defense and as an affirmative ground for rescission is governed by the same rule. 6 In the case of Duncan v. Duncan, 7 P executed certain writings purporting to be deeds in which there was a recited consideration of one dollar which never passed. P sued to remove cloud on title and the court held that there was such inadequacy as to prove fraud, and that P was entitled to have the deeds cancelled.

In Cady v. Gale, 8 the property the subject of the contract had increased in value subsequent thereto because of the discovery of oil, and D refused to convey according to the terms. The consideration for D's promise was the assignment of a patent right, which the court found was worth more than the land at the date of the contract. It is well settled that courts of equity will not withhold their aid to enforce such contracts merely because of the appreciation or depreciation of the property sold. The question of the hardship of the contract is to be determined as of the date of the contract. 9

Hardship alone may in some cases justify the refusal of relief, but less hardship will be required where other inequitable incidents are present. Laches accompanied by a change in conditions and circumstances is a common example of this. In Urpman v. Lowther Oil Co., 10 P sought to enforce a contract for the sale of land after a delay of nine years, during which time the land had increased greatly due to D's development of the land under an oil and gas lease from the vendor. It was held that he who seeks performance must have shown himself prompt and willing to comply

7 104 W. Va. 600, 140 S. E. 689 (1927).
8 5 W. Va. 547, 555 (1871).
9 McClintock, Equity § 69.
with the terms of the contract on his part. Performance will not be granted if due to a change in conditions it would be inequitable or would work a hardship on the defendant or third persons. In the Urpman case, laches accompanied by the increase in value of the subject matter was sufficient reason to deny the relief. Similarly, sale by the vendor to a third party after an unreasonable delay by the vendee in asserting his rights under the contract is sufficient ground for denying relief.11

Hardship to the public is often a factor having great weight with the courts. In Harper v. Virginian Ry. Co.,12 D, as part of the consideration for a right-of-way, agreed to maintain on P’s land, a depot for the general public, and P sued for performance of this agreement. Relief was granted, the court holding that such agreements will be enforced unless to do so would subordinate public to private interests or would so hamper the railway company that it could not discharge its duties to the public generally. Hardship to individuals who are not parties to the contract may also defeat specific performance.13

Courts have frequently made the statement that to be specifically enforceable a contract must be fair and reasonable, but not a great many cases have had to rely solely on this principle in refusing relief. Almost always when one enters into an unfair or harsh contract he is induced to do so by some other factor which justifies refusal of equitable relief. In Eclipse Oil Co. v. South Penn Oil Co.,14 P induced the lessor to sign a lease, the covenants of which in reality gave P the right to hold the premises indefinitely if the lessor remained quiet, without either exploration or payment of a definite rental, though apparently binding P to drill or pay. The court said that it is a settled doctrine of equity that only those contracts which are fair, just and reasonable will be specifically enforced, any trace of unfairness rendering specific

11 Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339 (1894) (the court found no contract but said, assuming a valid contract for the purpose of argument, it was not enforceable).


14 47 W. Va. 84, 34 S. E. 923 (1899).
performance impossible.15 Finding this contract to be unfair and manifestly one-sided, the court denied relief.

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THE INCONTESTABILITY CLAUSE IN LIFE INSURANCE POLICIES

A thorough search of the law digests will reveal only two West Virginia decisions on the law of incontestability clauses in life insurance policies, those having been decided but recently and on a single phase of the subject. It is therefore obvious that a discussion which attempts to consider the West Virginia law on this topic will be hopefully prophetic rather than critical.

A typical incontestable clause reads:

Incontestability. — This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity and Disability Benefits.3

Such clauses, peculiar to life insurance policies, are of recent origin.4 Prior to their adoption, it frequently happened that the insured, after paying premiums for many years, was found to have left nothing to his beneficiaries but a disputed claim — the dispute too often being fraudulent. As a consequence, insurance began to lose favor in the eyes of the purchasing public. To induce future business,5 the companies began to write into their contracts a promise that they would not dispute the claim after a period of time. This developed into the incontestable clause as we know it today — a private period of limitations between the company and the insured.6

2 This statement is verified in a marginal note to Equitable Life etc. Society v. Deem, 91 F. (2d) 569, 571 (C. C. A. 4th, 1937).
3 Policy of New York Life Insurance Company.
4 COOKE, LIFE INSURANCE (1891) 232 refers to the clause only by a brief footnote.
5 See Wright v. Mutual Benefit etc. Co., 118 N. Y. 237, 23 N. E. 168, 6 L. R. A. 731 (1890), the earliest case interpreting the clause.