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THE FACTOR OF TIME IN SPECIFIC PERFORMANCE

The element of time is present in every contract either by express stipulation of the parties or by implication of law. Will it be held of the very essence so that failure to perform on the day will be fatal to any rights under contract, or merely material so that performance within a reasonable time only will be required? Or will it be cast aside as immaterial and the contract be enforced regardless of the passage of time? Of what influence is the time factor in equity? This note will be confined to a treatment of the problem as applied to specific performance in the light of the West Virginia cases.

1

When Time is not Essential. Contrary to the usual position of the common law, time is not ordinarily considered essential either in West Virginia¹ or elsewhere in equity cases. Failure to perform on the very day will not in the ordinary case bar relief regardless of the nature of the action the performance of which is delayed whether it be the payment of the purchase price,² delivery of a deed,³ or the performance of other acts.⁴ This is true when the contract is entirely executory on both sides, and nothing has been done in reliance upon it. In equity an executory contract is treated as an executed transaction vesting the equitable title in the vendee *ab initio*. Consequently, equity will in a proper case refuse to enforce strictly a stipulation as to time so as to forfeit a vested equitable interest. *A fortiori*, time will not be considered essential when the contract has been executed in whole or part on one side, or the plaintiff has changed his position in reliance on the contract.⁵ Clearly here the element of hardship

¹ Ballard v. Ballard, 25 W. Va. 470 (1885); Vaught v. Cain, 31 W. Va. 424, 7 S. E. 9 (1888); Jarvis v. Cowger's Heirs, 41 W. Va. 268, 23 S. E. 522 (1895); Bowden v. Laing, 103 W. Va. 733, 138 S. E. 449 (1927).

² Ballard v. Ballard, *supra* n. 1.

³ Rader v. Neal, 13 W. Va. 373 (1878); Core v. Wigner, 32 W. Va. 277, 9 S. E. 36 (1889); Vaught v. Cain, *supra* n. 1; Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69 S. E. 195 (1910); Broemsen v. Agnic, 70 W. Va. 106, 73 S. E. 253 (1911); Rollvson v. Bourn, 85 W. Va. 15, 100 S. E. 682 (1919).

⁴ Castle v. Gibson, 77 W. Va. 116, 87 S. E. 174 (1915); W. Va. O. & O. Co., v. Vinal, 14 W. Va. 637 (1879).

⁵ Abbott v. L'Hommedieu, 10 W. Va. 677 (1877) (Plaintiff in possession and paying taxes); Ballard v. Ballard, *supra* n. 1 (Plaintiff in possession); Jarvis v. Cowgers' Heirs, *supra* n. 1 (Part payment of purchase price); Castle v. Libson, *supra* n. 4 (Plaintiff dismissed suits against defendant).

comes into the picture making a strict adherence to the letter of the contract inequitable.

It must be noted, however, that although time will not ordinarily be essential, it may be and generally is, material, in the sense that delay will under certain circumstances interpose a bar. Where possession is not taken under the contract, time will always be material, the burden being placed on the defaulting party to show excuse for his delay, particularly where specific execution would involve hardship to the opposite party.⁶ The taking of possession is an important step towards performance, which rebuts any presumption of abandonment.

A plaintiff must show himself to have been "ready, desirous, prompt, and willing" to perform on his part to invoke the power of the court. This maxim will be invoked against one whose delay is for speculative purposes,⁷ or where valuable evidence has been lost because of the delay,⁸ or where there has been a substantial change in the circumstances and parties,⁹ or where the interests of third parties have intervened.¹⁰ Delay will raise an inference of abandonment or an admission of no just right.¹¹ It is frequently said that a change in the value of the subject matter will not in itself be sufficient to bar specific performance.¹² This is on the theory that the parties assume the risk of fluctuations. In fact, however, the West Virginia cases show that change in value, particularly if great, will influence the court in finding laches,¹³ and for that reason refuse its aid.

Where no particular hardship is shown, however, and there is no evidence of bad faith on the part of the plaintiff, any facts and circumstances which show an excuse for delay will be sufficient to rebut the inference as to abandonment.¹⁴ As to just what will constitute an excuse in this situation does not admit of exact defini-

⁶ *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. 87 (1892); *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433 (1903); *Buffalo Coal & Coke Co. v. Vance*, 71 W. Va. 143, 76 S. E. 177 (1912); *Wilkinson v. Poling*, 74 W. Va. 399, 82 S. E. 47 (1914).

⁷ *Wilkinson v. Poling*, *supra* n. 6; *Crawford v. Workman*, 64 W. Va. 10, 61 S. E. 319 (1908).

⁸ *Snyder v. Charleston & Southside Bridge Co.*, 65 W. Va. 1, 63 S. E. 616 (1909).

⁹ *Wellman v. Virginian Ry. Co.*, 85 W. Va. 169, 101 S. E. 252 (1919); *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540 (1894).

¹⁰ *Snyder v. Charleston & Southside Bridge Co.*, *supra* n. 8.

¹¹ *Harrison v. Harrison*, *supra* n. 6; *Wellman v. Virginian Ry. Co.*, *supra* n. 9; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493 (1893); *Kunst v. Mabie*, 72 W. Va. 202, 77 S. E. 987 (1913).

¹² *Abbott v. L'Hommiedieu*, *supra* n. 5.

¹³ *Buffalo C. & C. Co. v. Vance*, *supra* n. 6.

¹⁴ *Blake v. Blake*, 98 W. Va. 346, 128 S. E. 139 (1925).

tion. A mistake or ignorance of the law as well as of fact has been held sufficient,¹⁵ and there is language to the effect that any excuse which lays hold on the conscience of the chancellor will meet the requirement.¹⁶

Where the delay is on the part of the vendor in perfecting title, specific performance will ordinarily be granted, provided the delay has not otherwise interposed a bar, if the vendor is able to convey a good title at the time of the decree.¹⁷ Obviously, this will be true when at the time of the contract the vendee knew of the defect and knew that it would take some time to remove the flaw.¹⁸ This rule contrasts, however, with the situation at law, where tender of performance prior to bringing suit is ordinarily a prerequisite to recovery. There appears to be in the ordinary case, little hardship on the vendee involved in this equity rule. If time is not essential, and the vendor is not chargeable with laches in tendering performance or bringing suit, it would seem to be of small concern whether during this period he had the power to tender a valid title. At the time of suit if the vendor knowingly conceals the defect, however, he will not be granted specific performance even if, after suit is brought, the defects are cured, if the vendee objects before the decree.¹⁹ This is, of course, because the transaction thus tainted with fraud may be rescinded by the vendee. By the English rule, the vendee may rescind upon learning of the defect in title. There is no indication that this rule would be followed in West Virginia.

Time is given least weight in cases where the vendee goes into possession under the contract and retains it with constant assertion of his right,²⁰ especially so if he has not only gone into possession but also paid the purchase price in whole or in part, or made valuable improvements, or both.²¹ In this situation a delay for a longer period than that of the Statute of Limitations will

¹⁵ *Applegate v. Wellsburg Banking & Trust Co.*, 68 W. Va. 477, 69 S. E. 901 (1910).

¹⁶ *Blake v. Blake*, *supra* n. 14.

¹⁷ See cases cited *supra* n. 6.

¹⁸ *Rader v. Neal*, *supra* n. 3.

¹⁹ *Spencer v. Sandusky*, 46 W. Va. 582, 33 S. E. 221 (1899).

²⁰ *Mills v. McLanahan*, 70 W. Va. 288, 73 S. E. 927 (1912); *Bartlett v. Johnson*, 89 W. Va. 45, 108 S. E. 431 (1921).

²¹ *Nuttall v. McVey*, 63 W. Va. 380, 60 S. E. 251 (1908); *Norman v. Bennett*, 32 W. Va. 614, 9 S. E. 914 (1889).

not bar the action.²² There is apparently no disposition to apply the statute by analogy here.

II

When Time is Essential. Although time is not ordinarily essential it may be so by reason of the nature of the subject matter or the object of the sale, or it may be made essential by express stipulation either at the inception or after default of one party.

It is well settled law elsewhere that time may be of the essence because of the nature of the subject matter, as where it is perishable or of fluctuating value.²³ Apparently, a mere change in the value of land does not bring it within this rule, although it may be one of the circumstances to be considered on the question of the effect of delay.²⁴ Mining properties so fluctuate in value as to come within the rule.²⁵ No case in West Virginia holds time essential for this reason, although the principle is cited with favor in *dicta* by our court.²⁶

It is recognized in West Virginia as elsewhere that time may be of the essence because of the purpose or object of the contract. In *Clay v. Deskins*,²⁷ A, while suit for sale of his land was pending, contracted to sell to B, \$250 to be paid in hand, the remainder within ten months. After the date for payment and B not having tendered performance, the land was sold at public auction. B sued for specific performance. The court denied relief on the theory that time was of the essence because of the implied intention of the parties that payment should be made before the public sale. The decision is clearly sound.

West Virginia recognizes that time may be made of the essence by express stipulation.²⁸ This a recognition of the doctrine that the intention of the parties should govern, when clearly and unequivocally expressed.²⁹

In *Gas Co. v. Elder*,³⁰ the contract contained the following: "It is expressly understood and agreed that if the first payment is

²² In *Nuttall v. McVey*, *supra* n. 21, the delay was for 47 years, and in *Norman v. Bennett*, *supra* n. 21, for 28 years, yet the court showed no inclination to apply the statute by analogy.

²³ POMEROY, *SPECIFIC PERFORMANCE* (2d ed. 1926) 813.

²⁴ *Abbott v. L'Hommedieu*, *supra* n. 5.

²⁵ POMEROY, *op. cit. supra* n. 23, at 818, n. 4 (b).

²⁶ *Ballard v. Ballard*, *supra* n. 1.

²⁷ *Clay v. Deskins*, 36 W. Va. 350, 15 S. E. 85 (1892).

²⁸ *Thompson v. Robinson*, 65 W. Va. 506, 64 S. E. 718 (1908).

²⁹ *Thompson v. Robinson*, *supra* n. 28, at 507.

³⁰ 54 W. Va. 335, 46 S. E. 357 (1903).

not made on the 30th . . . , or as soon thereafter as the title shall be examined and accepted by the party of the second part . . . , this agreement shall be considered as rescinded and neither party shall be bound thereby."³¹ It was held that these words did make time essential, but that due to the wording, the condition as to time was subsequent and not precedent, and therefore, worked a forfeiture which could be relieved against and this though the vendee had done nothing under the contract and thus would suffer no great hardship from a denial of specific performance.

The court in distinguishing the language of this case from similar wording in the case last cited, deeming one to create a condition precedent and the other a condition subsequent was simply juggling words; the intention in each case was obviously the same.

Of course, the mere fixing of a time for performance does not, in itself, make time essential. And this is true even if the contract expressly states — "It is . . . agreed that papers and consideration are to be executed and passed within thirty days." This statement does not clearly evidence an intention to make time of the essence.³²

The case of *Cosby v. Honaker*³³ recognizes the firmly settled doctrine that either party may after the time set for completing the contract make time of the essence by notice to the other party. Apparently West Virginia would follow the orthodox view that the notice cannot arbitrarily terminate the contract, but must stipulate a reasonable time. Under our decisions, the intention to make time essential must be stated in clear and unequivocal language, and the mere notice that the opposite party must perform by a specified date is insufficient.³⁴ This power is not objectionable. It may be exercised only after the other party would be in default at law, and has practical value in preventing unwarranted delay and in substituting a definite time for the indefinite one of a reasonable time for performance. If time was not originally of the essence, it may be made so by express agreement or by subsequent conduct which makes it clear that such was the intention of the parties.³⁵

Where the performance of certain conditions precedent before

³¹ *Ibid.*, at 336. In addition to the point discussed in this paragraph the court also relied on several other grounds for reversal.

³² *Bowden v. Laing*, *supra* n. 1, at 735.

³³ 57 W. Va. 513, 50 S. E. 610 (1905).

³⁴ *Ibid.*

³⁵ *Henry v. Dudley*, 91 W. Va. 696, 114 S. E. 286 (1922).

or by a fixed date are required before any rights vest under the contract, such performance on time will be held essential. In *Frame v. Frame*,³⁶ involving suit by a son against a father for specific performance of a parol gift of land, there was some evidence that the gift was conditional on the making of certain improvements, which were not shown to have been made on time. Specific performance was denied. The case seems unobjectionable, on its own facts, or as applied to the ordinary contract situation. Before the performance of the condition precedent, no rights, legal or equitable, vest in the party subject to the conditions.

Will equity relax the time requirement in an option? The two earlier cases of *Cox v. Cox*,³⁷ and *Weaver v. Burr*,³⁸ apparently take the position that in the option situation acceptance within the period limited is necessarily essential. In the case of *Barrett v. McAllister*,³⁹ however, the court, overruling *Weaver v. Burr*, decided that there may be an excuse for non-payment within the time specified although payment is to be the act of acceptance. There the vendor would not have been able to make good title at the stipulated time, and this fact was held sufficient to excuse tender of payment by the optionee on the ground that a person will not in equity be required to do a useless thing. It is difficult to see how it can be said that an act of acceptance is ever a useless thing so far as the creation of the contract is concerned. *Pollock v. Brookover*,⁴⁰ a more recent case, involved similar facts minus the inability of the offeror to perform on time. In that case it was said: "When payment was the act of acceptance . . . , then . . . the act of assent, or payment, must be done within the prescribed time, and time is from the very nature of the contract essential."⁴¹

Thus, the rule in West Virginia would seem to be that in the option situation, time is ordinarily essential, but a short delay may be excused if it can be shown that the offeror himself was unable to perform on the specified day. On principle it would seem that the question in this type of case is not whether delay in performance is excusable, but the more fundamental one of whether a contract has even been created. It is elementary that to create a contract an offer must be accepted according to its terms. That the

³⁶ 32 W. Va. 463, 9 S. E. 901 (1889).

³⁷ 5 W. Va. 335 (1872).

³⁸ 31 W. Va. 736, 8 S. E. 743 (1888).

³⁹ 33 W. Va. 738, 11 S. E. 220 (1890).

⁴⁰ 60 W. Va. 75, 53 S. E. 795 (1906).

⁴¹ *Ibid.*, at 83.

offeror cannot himself perform promptly does not warrant a court in making a new offer for him.

It is important to note in the option cases the distinction between the situation where payment of the purchase price is the act of acceptance, and where it is merely the act of performance. the offer being otherwise accepted. If it is the latter, then whether or not time is essential will depend on the interpretation of the contract.⁴²

West Virginia apparently places an important limitation on the doctrine that time may be *made* of the essence. It is this, — though time is made of the essence, when the covenants are mutually dependent one party cannot set up the default of the opposite party if it is shown that he was not ready and able to perform on his own part, or even that he failed to offer to perform.⁴³ The rule seems to be that in order to take advantage of the stipulation that time is of the essence, the party must show a tender on his part if the covenants are mutually dependent, or at least that he was ready, able and willing to perform on the specified day. Of course, if under the contract the performance on one side was to precede that on the other, although both were to be performed on the same day, it would not be necessary for the latter to make a tender but only to be ready, able and willing to perform. This rule would only apply where acts are to be performed simultaneously. The point is not without difficulty. If the provision making time of performance of certain acts essential is for the benefit of a given party, it is arguable that he should be permitted to insist upon a strict compliance by the other regardless of his own position. On the other hand, this is a situation where to require a tender of performance by one party in compliance with the stipulations as to time would be to require a useless thing since the other party is unable to perform on the day.

Where time is made essential the ordinary rule is that the party in whose favor the stipulation exists may waive his privilege to declare the contract at an end.⁴⁴ The waiver may, of course, be express as by the granting of further time, or it may be implied from the subsequent acceptance of payments under written modifications of the contract which do not expressly stipulate for essentiality of time, or from any conduct which is consistent only with a recognition that the contract is still in force. This seems

⁴² *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249 (1891).

⁴³ *Gas Co. v. Elder*, *supra* n. 30.

⁴⁴ *POMEROY*, *op. cit. supra* n. 23, at 338 *et seq.*

to be the effect of two of the West Virginia cases.⁴⁵ The case of *Thompson v. Robinson*,⁴⁶ however, casts doubt upon and strictly limits the entire doctrine. Recognizing that under our decisions there may perhaps be oral waiver, the court declares that on principle the situation is within the Statute of Frauds and that oral waiver is valid only when it occurs before the expiration of the time set for performance. Thus, it was stated, acts recognizing the contract as existing after the date of performance such as having an abstract made and delivered to the vendee, did not operate as a waiver. This practically excludes all possibility of waiver by conduct. The court's view is based on the concept that the stipulation making time of the essence operates automatically to terminate the contract, while the whole doctrine of waiver is based on the idea that such stipulation gives one or both parties the privilege of termination, the benefit of which may be waived.

—GUY OTTO FARMER.

⁴⁵ *Power Co. v. Voight*, 91 W. Va. 581, 114 S. E. 138 (1922).

⁴⁶ *Supra* n. 29.