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## Specific Performance—Must Plaintiff Plead Adequacy on Consideration?

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sustained, on a narrow ground, by reading this option clause as in *pari materia* with the vacancy clause, and thereby limiting the latter. The insured could not repair the building without trenching on the right of the insurer until its option was exercised. The vacancy clause would thus not be operative before action on the option clause. Since the insurer had notice of the first fire, and perhaps did not wish to continue the insurance he could, when the forty day period expired, have canceled the policy. Not having done so, the policy should remain in effect.<sup>5</sup>

The court, however, goes on a broader ground: namely, that the parties contracted on the basis of the house being inhabitable. This reasoning would apply, no matter for what reason the house was vacated, if it, in fact, were uninhabitable.<sup>6</sup> This probably exceeds the bounds of construction but the burden of risk is not a reasonable one. It should be noticed that such a rule increases the burden on the court and defense counsel since inhabitability is a variable matter of proof.

—FREDERICK W. FORD.

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SPECIFIC PERFORMANCE — MUST PLAINTIFF PLEAD ADEQUACY OF CONSIDERATION? — The plaintiff, C, instituted an action against W, administrator of the estate of S, for the specific performance of an oral agreement between C and S, whereby the latter promised to devise property to the former if the plaintiff would come and live with her and assist her in domestic affairs and bring J, the plaintiff's husband, to assist her in her business affairs. C performed in full but S died without having made the proposed will. The petition alleged in detail extensive services claimed to be as valuable as the property decedent had agreed to devise petitioner. *Held*: The failure to allege the value of the services rendered by the plaintiff to the deceased, or the value of the land

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<sup>5</sup>If the company did not have notice of the damage it is suggested that they should be given a reasonable length of time to cancel the policy. Where the second fire destroys the house after the vacancy clause expires, but before notice, probably the insured should bear the loss.

<sup>6</sup>*Gash v. Home Ins. Co. of N. Y.*, 153 Ill. App. 31 (1910). In this case, a flood damaged the property and the day before the insured moved back to the house, which was after the vacancy clause elapsed, the house was destroyed by fire. The insured recovered even though there had been no notice of the vacancy.

which the plaintiff was to receive, warranted a refusal to decree specific performance of the contract. *Huggins v. Meriweather*.<sup>1</sup>

The weight of authority does not permit a court of equity to refuse a decree for specific performance on account of mere inadequacy of consideration.<sup>2</sup> Mere inadequacy is not even a defense. The defendant must allege other elements making out hardship or oppression.<sup>3</sup> In some jurisdictions it is not necessary to allege the value of the services and of the property in a petition for specific performance of an agreement to devise land in consideration of personal services, where the plaintiff had rendered the services, and in such cases the court will not inquire into the adequacy of the consideration.<sup>4</sup> But, by statute in California and Georgia, inadequacy of consideration is alone sufficient to justify a court of equity in refusing to decree specific performance;<sup>5</sup> by statute in Montana and South Dakota, the consideration must be adequate;<sup>6</sup> and by judicial decision in Alabama and South Carolina, mere inadequacy of consideration is sufficient to constitute a basis for the denial of specific performance.<sup>7</sup>

<sup>1</sup> 170 S. E. 485 (Ga. 1933). The court follows prior cases in Georgia decided upon the Code of Georgia. The Statute of Frauds is not considered. Two judges dissent to the holding in this case.

<sup>2</sup> *Morrison v. Peay*, 21 Ark. 110 (1860); *Pestal v. O'Donnell*, 81 Colo. 202, 254 Pac. 764 (1927); *Kuehne v. Augustin*, 333 Ill. 31, 164 N. E. 194 (1928); *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582 (1905); *Scott v. Habinck*, 188 Ia. 155, 174 N. W. 1 (1919); *Greenwood v. Greenwood*, 96 Kan. 591, 152 Pac. 657 (1915); *Durnell v. Alexander*, 178 Ky. 404, 199 S. W. 17 (1917); *Warren Manufacturing Co. of Baltimore County v. Mayor, etc. of the City of Baltimore*, 119 Md. 188, 86 Atl. 502 (1913); *Woodworth v. Porter*, 224 Mich. 470, 194 N. W. 1015 (1923); *Moore v. McKillip*, 110 Neb. 575, 194 N. W. 465 (1923); *Ward v. Albertson*, 165 N. C. 218, 81 S. E. 168 (1914); *Sweeney v. Brow*, 35 R. I. 227, 86 Atl. 115 (1913); *Garten v. Layton*, 76 W. Va. 63, 84 S. E. 1058 (1915); *Barrett v. Miner*, 119 Misc. Rep. 230, 196 N. Y. S. 175 (1922).

<sup>3</sup> *Saint v. Beal*, 66 Mont. 292, 213 Pac. 248 (1923); *Sturtz v. Ommen*, 32 S. D. 396, 143 N. W. 288 (1913).

<sup>4</sup> *Colby v. Street*, 146 Minn. 290, 178 N. W. 599 (1920); *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742 (1898); *Pemberton v. Pemberton's Heirs*, 76 Neb. 669, 107 N. W. 996 (1906); *Barrett v. Miner*, *supra* n. 4; *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832 (1901).

<sup>5</sup> CIV. CODE OF CAL. (1931) § 3391, par. 1 and 2; *Cornblith v. Valentine*, 211 Cal. 243, 294 Pac. 1065 (1930); GA. ANN. CODE (Michie, 1926) § 4673: "Mere inadequacy of consideration, though not sufficient to rescind the contract, may justify a court in refusing to decree a specific performance; so also any other fact showing the contract to be unfair or against good conscience."

<sup>6</sup> Other statutes provide that the vendor must receive adequate consideration. S. D. REV. CODE (1919) § 2345, applied in *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142 (1908); MONT. CODE OF CIV. PROC. (1921) § 4417, applied in *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123 (1903).

<sup>7</sup> *Gasque v. Small*, 21 S. C. Eq. 71 (1848); *Andrews v. Andrews*, 28 Ala. 432 (1856). *Cf.* *Norris v. Clark*, 72 N. H. 442, 57 Atl. 334 (1904): "Although

Thus the Georgia court requires that the value of the land and the value and extent of the services be alleged in the bill to enable the chancellor to determine the question of adequacy.<sup>8</sup> That notion is hardly persuasive. If the burden is imposed on the defendant he can allege the facts relative to adequacy of consideration. The very language of the Georgia Code, that "mere inadequacy . . . may justify a court in refusing to decree a specific performance", seems to assume that adequacy is not a part of plaintiff's case since the court "may" rely on inadequacy to deny relief. The only sound basis for relying on inadequacy of consideration in resisting specific performance is a combination of unfairness and hardship,<sup>9</sup> and it depends upon the particular transaction whether inadequacy even suggests such a combination. If the plaintiff has a binding contract supported by a consideration<sup>10</sup> and the legal remedy is inadequate it seems both logical and just to impose the burden of establishing special objections to specific relief upon the defendant.<sup>11</sup>

—EDWARD S. BOCK, JR.

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USURY — INSURANCE — REQUIRING BORROWER TO TAKE LIFE INSURANCE POLICY TO BE USED AS COLLATERAL. — Proceedings were begun to enjoin a sale under a deed of trust and to purge

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mere inadequacy of price, independent of other circumstances, is not of itself sufficient to set aside a transaction, yet it may . . . stay the exercise of its (equity's) power to enforce the specific performance of a contract." However, the court did not depend upon mere inadequacy of consideration alone.

<sup>8</sup>In addition to the principal case see *Shropshire v. Rainey*, 150 Ga. 566, 104 S. E. 414 (1920); *Potts v. Mathis*, 147 Ga. 495, 100 S. E. 110 (1919). "In the absence of allegations . . . as to the value of the lands, or of the value and extent of the services alleged as the consideration of the contract, it is impossible for a court to determine whether the services performed constituted an adequate or grossly inadequate price for the estate of the person with whom the alleged contract was made; nor could it be determined, in the absence of such essentials, whether the contract was unfair, or unjust, or against good conscience." *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148 (1905) (The complaint or petition must show the adequacy of the consideration). *Contra*: *Finlen v. Heinze*, *supra* n. 6 (The burden of proof is on the party resisting specific performance, and though inadequacy of consideration alone is a defense, complete in itself, adequacy of the price or consideration need not be alleged); *Saint v. Beal*, *supra* n. 3.

<sup>9</sup>See *Harrison v. Town*, 17 Mo. 237 (1852), quoted in *WALSH*, *Equity* (1930) 482, n. 34.

<sup>10</sup>There is no sound reason why equity should refuse to enforce a contract under seal enforceable at law but that is the case. See *Pound*, *Consideration in Equity* (1919) 13 ILL. L. REV. 667. *Cf.* *Fletcher v. Fletcher*, 4 Hare 67 (1844).

<sup>11</sup>*Bauermeister v. Sullivan*, 37 Ind. App. 628, 160 N. E. 105 (1928).