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Specific Performance—Fair and Equitable Contracts

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ration, Section 5 of the same chapter vests the title to the property of state institutions in that Board. The decision of the court in the principal case rested upon the assumption that the suit was properly brought against the State Board of Control. Is it going too far to say that the State Board of Control is an entity apart from the state and subject to suit in those cases where its agents wrongfully inflict injuries upon others in the performance of non-governmental duties?

—E. L. D.

SPECIFIC PERFORMANCE—FAIR AND EQUITABLE CONTRACTS.—P took an option from D for a lot 60 feet deep, P indicating that he was purchasing for the city. Evidence was conflicting as to whether D made the contract with the understanding that she did not mean to convey any part of two houses situated on the rear of the lot. A lot of the depth agreed upon would include a part of the houses. P sought to enforce the contract as an individual. *Held*, specific performance refused. *Hastings v. Montgomery*, 122 S. E. 155 (W. Va. 1924).

The court said that to entitle one to a decree for specific performance, the contract must be "free from fraud and mistake, and fair and equitable in its terms." There are many instances in which, though no actual fraud exists, there is a want of that equality and fairness which may be said to be essential for specific performances. FRY, SPECIFIC PERFORMANCE, 6TH ED. 185; STORY, EQUITY JURISPRUDENCE, 1026, 1034, 1037; POMEROY, EQUITY JURISPRUDENCE, 2D ED. 785. The statement that the contract must be fair is one which is common in many cases, but the definition of the word, or a correct understanding of what unfairness is necessary to refuse specific performance, is not always clear. Conceding the contract to be valid, should a court of equity, under all the circumstances, specifically enforce the contract? If the enforcement of the contract would impose a burden "utterly disproportionate to the benefit secured to the plaintiff," the contract is unfair, and specific performance will be refused. *City of London v. Nash*, 3 Atk. 512; *Kimberly v. Jennings*, 6 Sim. 340; *Clark v. Rochester L. and N. F. R.R. Co.*, 18 Barb. 350 (N. Y. 1854). See also *Conger v. New York W. S. and B. R. R. Co.*, 120 N. Y. 29, 23 N. E. 983. The

¹³ Cf. *Sargent County v. State*, doing business as the Bank of North Dakota 47 N. D. 561, 182 N. W. 270. See note to this case in 35 HARV. L. R. 335.

fact that the defendant has made a losing bargain is not a sufficient reason for relieving him from specific performance. *Adams v. Weare*, 1 Brown Chan. Cas. 567. But if unfairness results from old age, poverty, ignorance, or inexperience, such a losing bargain would not be enforced. *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S. E. 524. Thus a gas lease by which the lessor expected prompt development of his land, but which by its terms could be made a speculative lease for an indefinite period, was held to be unfair. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923. It is frequently stated that unfairness means unfairness at the time the contract was made. *Prospect Park and C. I. Ry. Co. v. Coney Island and B. R. R. Co.*, 144 N. Y. 152, 39 N. E. 17. But a leading case stands for the proposition that if events subsequent to the making of the contract will make it unfair, specific performances will be denied. *Willard v. Tayloe*, 75 U. S. 557. So also, where delay by the vendor has allowed a change in the conditions to make a contract unfair, equity will not enforce the contract, *Lowther Oil Co. v. Miller-Selby Oil Co.*, 53 W. Va. 510, 44 S. E. 433. As to contracts between husband and wife, the rule is even more strict, and the contract must be as fair and just as one which a court of equity might have imposed. *Switzer v. Switzer*, 26 Grat. 574. Thus inadequacy of consideration for a conveyance of real estate renders such a contract unfair. *Hartigan v. Hartigan*, 58 W. Va. 10, 52 S. E. 720. Thus it can be seen that there is some difference in the way in which unfairness is recognized and treated by the courts. In seeming contrast to the "utterly disproportionate burden" theory, our court has said that any trace of unfairness renders specific performance impossible. *Eclipse Oil Co. v. South Penn Oil Co.*, *supra*. In the principal case, there was that lack of fairness in the contract, it would seem, sufficient to defeat the plaintiff's case.

—H. L. S., Jr.

CORRECTION OF ERROR—CARBON COPY ADMISSIBLE AS A DUPLICATE ORIGINAL.—In a note on the case of *Waddell v. Trowbridge*, 119 S. E. 290, which appeared in the W. Va. Law Quarterly, Vol. XXX, No. 2, January 1924, it was stated that the dictum in that case to the effect that a carbon copy of a letter was secondary evidence was, with a dictum to the same effect in a previous case, the only expression in the decided cases of the opinion of the