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Correction of Error--Carbon Copy Admissible as a Duplicate Original

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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

West Virginia court on this point. It has since been brought to the attention of the writer that in the case of *G. Elias & Bro. v. Boone Timber Co.*, 85 W. Va. 508, 102 S. E. 488, the court held that a carbon copy was a duplicate original, admissible as primary evidence. In view of this direct decision of the question, the dictum in *Waddell v. Trowbridge* is important only as indicating a possible change in the opinion of the court, and in no sense can it be regarded as of more importance than any other dictum which runs counter to the settled rule as set forth in the case actually deciding the point. The error in the note referred to was due entirely to the fault of the student briefer, and was in no way induced or countenanced by the Editor of the Law Quarterly or any member of the faculty.

—C. L. W.

NEGLIGENCE—IMPLIED INVITATION TO USE RAILWAY TRACK AS PASSAGEWAY.—The defendant coal company constructed houses for the use of its miners facing the railway running from its mine to its tipple, with a space of only a few feet between the gate to the front yard and the track. For several years the track was used by the occupants of the houses as a means of ingress and egress, with the tacit acquiescence of the coal company. *Held*, an invitation to the occupants of the houses to use the track will be implied. *Distiollavi v. United Pocahontas Coal Co.*, 122 S. E. 161 (W. Va. 1924).

In this case the action was brought by the daughter of a miner residing in one of the houses abutting on the track, to recover for personal injuries alleged to have been caused by defendant's negligence in operating a car on the track leading to the tipple. The court held that the plaintiff was an invitee, and that therefore the defendant owed her the duty of ordinary care. This decision is based on the fact of the proximity of the houses to the track, the fact that the defendant had built a concrete walk from one of the houses to the track, and to the "Evident expectation that the track would be used in reaching the front entrance." However, the way was not one of necessity, for there was a highway in the rear of the houses, available for use and reasonably convenient. The court relies on a previous case with similar facts as authority for holding plaintiff to be an invitee. *Smith v. Sunday Creek Coal Co.*, 74 W. Va. 606, 82 S. E. 608. But in that case the track