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SPECIFIC PERFORMANCE - ORAL OPTION TO BUY STOCK - EFFECT OF PROVISION TO FIX PRICE BY ARBITRATION

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SPECIFIC PERFORMANCE — ORAL OPTION TO BUY STOCK — EFFECT OF PROVISION TO FIX PRICE BY ARBITRATION — Defendant, who owned all the common stock of a bank, gave an oral option to sell it at a fixed price to plaintiff. Plaintiff was to investigate the bank's books, assets, and liabilities in order to determine the true value of the stock. If the true value did not equal the agreed price, the parties were to meet and set the amount of the diminution. In the event of disagreement, a third party was to be called in. Plaintiff expended considerable sums for investigation before defendant renounced the option and prevented further investigation. In an appeal from an interlocutory order restraining defendant, *held*, because specific performance cannot be given of a contract to set the price by arbitration, the lower court abused its discretion and the order must be dissolved. *Simmons Co. v. Crew*, (C. C. A. 4th, 1936) 84 F. (2d) 82.

Unless peculiar circumstances render the action at law inadequate, specific performance of a contract to sell stock will be denied.[1] While the adequacy test is obviously vague, the circumstance that defendant owned all the stock made a clear case on this point.[2] A contract that is incomplete, uncertain, or indefinite will not be specifically enforced in equity.[3] It follows that generally equity will not enforce an agreement to fix an essential term by arbitration.[4] What constitutes an essential term is uncertain. Where arbitration relates to a collateral matter,[5] or where the parties cannot be returned to status quo,[6] or where the

[1] Rimes v. Rimes, 152 Ga. 721, 111 S. E. 34, 22 A. L. R. 1030 (1922).

[2] Newton v. Wooley, (C. C. Ark., 1900) 105 F. 541; Waddle v. Cabana, 220 N. Y. 18, 114 N. E. 1054 (1915); Duncuft v. Albrecht, 12 Sim. 189, 59 Eng. Rep. 1104 (1841). Under the circumstances, assessment of damages requires valuation of the stock by reference to balance sheets, earnings statements, and forecasts of future operations. The jury is called on to exercise the function of an investment expert.

[3] Kirch Co. v. Goerke Kirch Holding Co., 118 N. J. Eq. 1, 176 A. 902 (1934); POMEROY, SPECIFIC PERFORMANCE, 3d ed., § 145 (1926). Pomeroy points out that if the plaintiff would otherwise be remediless, equity is less apt to complain because the contract is incomplete.

[4] POMEROY, SPECIFIC PERFORMANCE, 3d ed., § 145 (1926); Milnes v. Gery, 14 Ves. Jun. 400, 33 Eng. Rep. 574 (1807), the leading case; Hayes, "Specific Performance of Contracts for Arbitration or Valuation," 1 CORN. L. Q. 225 (1916). These two reasons are given: (1) inability to execute such an agreement, (2) unwillingness to aid the parties in an agreement which divests the court of jurisdiction. It is then pointed out that the first is the only reason with merit. 5 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 2180 (1919). The principal case is noted in 23 VA. L. REV. 89 (1936), where it is pointed out that there is a confusion of the terms "arbitration" and "appraisal" and that the present case is one of "appraisal." It is submitted that it is an appraisal by means of arbitration.

[5] Hydraulic Power Co. v. Pettebone-Cataract Power Co., 194 App. Div. 819, 186 N. Y. S. 1 (1921), noted 31 YALE L. J. 670 (1922); Hayes, "Specific Performance of Contracts for Arbitration or Valuation," 1 CORN L. Q. 225 at 228 (1916); 3 STORY, EQUITY JURISPRUDENCE, 14th ed., § 1900 (1918).

[6] Castle Creek Water Co. v. City of Aspen, (C. C. A. 8th, 1906) 146 F. 8; Morris v. Ballard, (App. D. C., 1926) 16 F. (2d) 175, noted 36 YALE L. J. 707 (1927).

arbitration is a mere matter of form,[7] equity will specifically enforce the contract and itself fix the uncertain term.[8] This is, in effect, a substituted performance to prevent the miscarriage of justice. Where the arbitration is a condition precedent to the exercise of the option, equity hesitates to fix the term because the optionee might render the decree nugatory by not accepting the option.[9] In England and several of the states statutes now provide for enforcement of arbitration agreements. In the absence of a statute, the present case appears to be in accord with the authorities. But it is submitted that, under these facts, damages must be so conjectural that the law action is unsatisfactory.[10] It is further submitted that a restraining order, in the instant case, would have eliminated some of the doubts in a damage action and might even have caused the contract to be executed without arbitration, since a tentative price was set by the contract.

[7] POMEROY, SPECIFIC PERFORMANCE, 3d ed., § 151 (1926), states "The tendency of the later English decisions is to consider these stipulations for determination of price by third persons, rather as matters of form. . . ." Hayes, "Specific Performance of Contracts for Arbitration or Valuation," 1 CORN. L. Q. 225 at 229 (1916), takes issue with the statement and claims that the citations do not sustain it.

[8] Castle Creek Water Co. v. City of Aspen, (C. C. A. 8th, 1906) 146 F. 8.

[9] Mutual Life Insurance Co. v. Stephens, 214 N. Y. 488, 108 N. E. 856, L. R. A. 1917C 809 (1915). The annotation is entitled "Specific Performance for Appraisal of Property Preliminary to Exercise of the Option." Electric Management & Engineering Corp. v. United Power & Light Corp., (C. C. A. 8th, 1927) 19 F. (2d) 311, where the facts were similar to the present case and a great deal of weight was given to this point. The case induced Van Hecke to write an article, "Specific Performance of Right of Inspection Incident to Option," 12 MINN. L. REV. 1 (1927). See also 58 C. J. 1046 (1932).

[10] Van Hecke, "Specific Performance of Right of Inspection Incident to Option," 12 MINN. L. REV. 1 at 5 (1927), asks whether any amount of money could be a measure of the damages suffered.