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## SPECIFIC PERFORMANCE-FAILURE OF VENDOR'S TITLE

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**SPECIFIC PERFORMANCE—FAILURE OF VENDOR'S TITLE**—The defendant leased his ice plant to the plaintiff with an option to purchase at a certain price and to pay an additional \$50 in ice at the market price for the "east 15 ft. of lot 4." The plaintiff exercised the option and performed all the conditions. The defendant failed to execute a deed to the "east 15 ft. of lot 4," claiming that he did not own it, although he had accepted part of the purchase price for the parcel not owned and it was necessary for the operation of the ice plant. In an action for specific performance by the purchaser, the court *held* the defendant should be required to obtain title to the tract in question, or, if unable to do so, the purchase price should be abated by the value of the property to which the title failed. *Reed v. Phillips*, (Ark. 1935) 83 S. W. (2d) 554.

A number of decisions have held that want of title in the vendor of land or personalty will be a complete defense to an action for specific performance.<sup>1</sup> This result is most clearly justified where the subject matter is not in existence, so that impossibility of performance would defeat both legal and equitable remedies aimed at enforcement of the contract.<sup>2</sup> But the same result has been reached where the vendor's failure to secure title constitutes an actionable breach of contract<sup>3</sup> and even where he has since the execution of the contract conveyed away the property to a bona fide purchaser.<sup>4</sup> These cases can only be explained as an extreme extension of the defense of hardship. But the possibilities of equitable relief have been inadequately considered by most of the decisions. The courts have emphasized the position of the vendor instead of realizing the

<sup>1</sup> See 58 C. J. 886, note 76 (1932) for list of cases.

<sup>2</sup> *Ward v. Newbold*, 115 Md. 689, 81 A. 793, Ann. Cas. 1913A 919 (1911).

<sup>3</sup> *Cusano v. Mecaskie*, 76 Pa. Sup. 221 (1921); *Redwine v. Hudman*, 104 Tex. 21, 133 S. W. 426 (1911); *Cattell v. Jefferson*, (App. D. C. 1931) 51 F. (2d) 317.

<sup>4</sup> *Jones v. Carpenter*, 13 Del. Ch. 172, 117 A. 559 (1922). See 58 C. J. 888, note 88 (1932) for additional cases.

superior equities in the purchaser who is not at fault. Although no relief in these cases can be had against the third party, equity has given relief where it was in the power of the vendor to cure the defect.<sup>5</sup> Then it would seem that the court should take the next step and require the vendor to make a reasonable effort to cure the defect, especially where the inability to perform was caused by the vendor's own wrongful act. The primary objection is the matter of procedure in protecting the interests of both parties. The remedy would be effective for the vendor would have to show that he had used reasonable effort, and failure to do so would subject him to contempt proceedings. If the vendor has acted reasonably without success and other factors prevent specific performance with abatement, the purchaser would be left to his remedy at law. In general, it is no objection to specific performance that the legal title is held by one not a party to the contract when such third party is before the court and can be ordered to convey.<sup>6</sup> If the vendor has merely a contractual right to conveyance, specific performance will be decreed when the title holder is made a party to the suit.<sup>7</sup> This is also the position taken by the courts where the vendor having title makes a conveyance to a third person with notice of outstanding equities, or subject to purchaser's rights, or where the third person offers to convey or release the land to the purchaser.<sup>8</sup> Some courts have gone further, when the vendor is in a position to obtain the title and the title holder is not joined, and have required the vendor to obtain the title and then to perform his contract.<sup>9</sup> Where the vendor has merely an agency to sell the land, specific performance may be enforced against the undisclosed principal if the contract was entered into by his duly authorized agent in his own name within the scope of his agency;<sup>10</sup> though where the agent acts without authority in making a contract concerning the sale or encumbrance of property, it cannot be specifically enforced against the principal.<sup>11</sup> But specific performance in some jurisdictions is enforced against the interest of the agent if he owned part of the land.<sup>12</sup> The court in the principal case, having assumed no agency existed, so that specific performance could have been had against the title holder, seems to be going further than most courts in requiring the defendant to acquire title to the property.<sup>13</sup> The decision is

<sup>5</sup> *Ogooshevitz v. Arnold*, 197 Mich. 203, 163 N. W. 946 (1917).

<sup>6</sup> *Zipperer v. Helmly*, 148 Ga. 480, 97 S. E. 74 (1918); *Pearson v. Courson*, 129 Ga. 656, 59 S. E. 907 (1907); *Brin v. Michalski*, 188 Mich. 400, 154 N. W. 110 (1915); *East River etc. Land Co. v. Kindred*, 128 App. Div. 146, 112 N. Y. S. 540 (1908).

<sup>7</sup> See note 6, *supra*.

<sup>8</sup> See 1 CAL. L. REV. 298 (1913).

<sup>9</sup> *Beekman v. Sonntag Inv. Co.*, 67 Fla. 293, 64 So. 948 (1914).

<sup>10</sup> *Forgey v. Gilbirds*, 262 Mo. 44, 170 S. W. 1135 (1914); *Diamond v. Talbot*, 123 Misc. 339, 205 N. Y. S. 309 (1924); *Ritz v. Rubin*, 201 N. Y. S. 99 (1923); *Thomson v. Playfair*, 25 Ont. L. R. 365, 20 Ont. W. R. 867 (1912).

<sup>11</sup> *Faramakis v. Crown*, 271 Pa. 140, 114 A. 364 (1921).

<sup>12</sup> *Swift Coal & Timber Co. v. Sheperd*, 199 Ky. 54, 250 S. W. 492 (1923); *Naylor v. Parker*, (Tex. Civ. App. 1911) 139 S. W. 93.

<sup>13</sup> North Carolina takes the extreme position of decreeing specific performance when vendor had no title or right to demand title, but even in that state lack of title is a defense where the vendor has made reasonable effort to secure it. See 10 TEX. L. REV. 114 (1931) for criticism.

made more equitable by the provision for abatement of the purchase price if the vendor could not acquire the property, and this provision would alleviate the hardship on the vendor in having to pay a hold-up value to the present owner of the tract in question. The principal case is to be commended for requiring some reasonable effort to perfect the vendor's title, before decreeing specific performance with abatement.

H. J. B.