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SPECIFIC PERFORMANCE-SCARCITY AS JUSTIFICATION FOR SPECIFIC PERFORMANCE OF CONTRACT FOR PURCHASE OF NEW CAR

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SPECIFIC PERFORMANCE—SCARCITY AS JUSTIFICATION FOR SPECIFIC PERFORMANCE OF CONTRACT FOR PURCHASE OF NEW CAR—In two recent cases, prospective purchasers entered into written contracts with local automobile distributors for the purchase of new cars. Because of the scarcity of new cars, the prospective purchasers' names were put on waiting lists establishing a priority for delivery as new cars were received by the distributors. In both cases the distributors refused without excuse to perform when cars became available for delivery. The prospective purchasers sought specific performance on the basis that the current scarcity of new cars and the difficulty of obtaining them elsewhere for cash alone made the legal damage remedy inadequate. *Held,* (a) specific performance granted. *Heidner v. Hewitt Chevrolet Co.,* (Kan. 1948) 199 P. (2d) 481, (b)

specific performance denied. *McCallister v. Patton,* (Ark. 1948) 215 S.W. (2d) 701.

The reluctance of equity to grant specific performance of a contract for the purchase of chattels,[1] while granting it freely for contracts involving interests in land, is traditional.[2] Unless the chattel contracted for has such special and peculiar qualities as to meet the vague requirement of "uniqueness," so that a legal damage[3] remedy would be clearly inadequate,[4] equity will not intervene. The recent inflation and shortage of consumer goods have raised anew the question of what constitutes "uniqueness,"[5] and cases concerning contracts for purchase of new cars have been an apt vehicle for re-investigation of the problem. The courts are not wholly in agreement, as is evidenced by the principal cases. However, only a very few recent cases[6] have held that scarcity of the subject matter of the contract, and the difficulty of securing a substitute on the market for the same cost, will make the chattel "unique."[7] Thus, there seems to be no appreciable tendency on the part of modern equity courts to relax the strict

[1] When a contract involves land as well as chattels, specific performance of the entire contract is usually available. 152 A.L.R. 4 at 16 (1944). Regardless of the subject matter, specific performance is freely given if the contract presents an independent basis of equity jurisdiction. L.R.A. 1918E 609.

[2] Originally, the basic requirement for specific performance was a showing of inadequacy of the legal remedy. As the legal remedy was more often found inadequate in regard to land contracts, some equity courts have tended to think in terms of the subject matter of the contract. To the effect that the law of specific performance primarily relates to realty contracts, see Gallagher v. Studebaker Corp., 236 Mich. 195, 210 N.W. 233 (1926).

[3] If, under the contract, title has already passed to the purchaser, equity may refuse to act on the ground that the legal remedies for the protection of property interests are adequate. 152 A.L.R. 4 at 42 (1944).

[4] When dealing with chattel contracts, equity will require clear inadequacy, despite the commonly stated rule [see, e.g., Elk Refining Co. v. Falling Rock Cannel Coal Co., 92 W.Va. 479, 115 S.E. 431 (1922)] that "the remedy at law must be plain and adequate, and as certain, prompt, complete, practicable and efficient to attain the ends of justice and its prompt administration as the equity remedy sought." For discussion of factors considered in determining adequacy of the damage remedy, see 152 A.L.R. 4 at 20 (1944); 2 CONTRACTS RESTATEMENT, §361 (1932).

[5] Scarcity does not constitute "uniqueness," because the special quality must be of significance to plaintiff alone and not to the world in general. Kalmon v. Thornton-Fuller Co., 62 Pa. D & C 397 (1948).

[6] Subsequent to the principal cases, a Missouri intermediate court granted specific performance on similar facts on the authority of the Heidner case. Boeving v. Vandover, (Mo. App. 1949) 218 S.W. (2d) 175.

[7] The only case found prior to the first principal case granting specific performance of a contract for the purchase of a new car on the basis of scarcity is De Moss v. Conart Motor Sales, Inc., 34 Ohio L. R. 535; 72 N.E. (2d) 158 (1947). In a similar situation, without ruling on the availability of specific performance, a constructive trust was imposed on the distributor in Maas v. Weitzman, 77 N.Y.S. (2d) 300 (1947). Where the contract was for a specific type of copper and brass, specific performance on the ground of scarcity was granted in Oreland Equipment Co. v. Copco Steel and Engineering Corp., 310 Mich. 61, 16 N.W. (2d) 646 (1944). In support of the second principal case, see Kirsch v. Zubalsky, 139 N.J. Eq. 22, 49 A. (2d) 773 (1946); Poltorak v. Jackson Chevrolet Co., (Mass. 1948), 79 N.E. (2d) 285; Welch v. Chippewa Sales Co., 252 Wis. 166, 31 N.W. (2d) 170 (1948); Hysock v. Palermo, 57 Pa. D & C 253 (1948); Griscom v. Childress, 183 Va. 42, 31 S.E. (2d) 309 (1944).

requirements governing specific performance of chattel contracts.[8] Furthermore, the adoption by thirty-five states[9] of the Uniform Sales Act has not tended to increase the availability of specific performance for chattel contracts, as was anticipated.[10] Although the act does not speak in terms of either "uniqueness" or "inadequacy,"[11] the prevailing view[12] is that it merely codifies existing equity practice without adding any new powers.[13] Thus it appears that the conscience of equity has so far crystallized that a promisee under a contract for a somewhat standardized chattel will rarely be able to secure specific performance.[14] This is true despite the scarcity of the chattel and the superior equities of the promisee as compared to a promisor who is usually guilty of bad faith and suffering no legal hardship. It seems questionable whether this strictness serves the ends of justice.[15] By relegating a promisee to a damage remedy, which neither gives him what he bargained for nor compensates him for the inconveniences suffered,[16] while leaving the promisor relatively free to perform if he wishes, a premium is placed on contractual insincerity.[17]

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[8] The statement made in Hughbanks v. Browning, 9 Ohio App. 114, 115 (1917), that there is such a tendency, aside from the influence of statutes, is not supported by the cases.

[9] Arkansas has adopted the Sales Act while Kansas has not. However, the court in the principal Arkansas case did not refer to the act.

[10] The draftsmen of the Sales Act believed it would enlarge the number of cases where specific performance is allowed. 3 WILLISTON, SALES, rev. ed., §601 (1948). But see Masterson, "Specific Performance of Contracts to Deliver Ascertained Goods," ESSAYS IN HONOR OF O. K. MCMURRARY 439 (1935).

[11] Sec. 68 states that an equity court may, "if it sees fit," decree specific performance of a contract for "specific or ascertained" goods.

[12] Cohen v. Rosenstock Motors, Inc., 65 N.Y.S. (2d) 481 (1946). Contra, Hughbanks v. Browning, 9 Ohio App. 114 (1917).

[13] In fact, it seems to have had the opposite effect. Generally a greater degree of certainty in the terms of the contract will be required for specific performance than for damages for its breach. 2 CONTRACTS RESTATEMENT, §370 (1932). Courts have interpreted sec. 68's requirement of "specific or ascertained" goods as imposing even stricter requirements. Contracts for sale of new cars, involving somewhat fungible future goods, are particularly susceptible to challenge for failure to satify this requirement; specific performance has been denied in several cases on this basis. See Cohen v. Rosenstock Motors, Inc., 65 N.Y.S. (2d) 481 (1946); Goodman v. Henry Caplan, Inc., 65 N.Y.S. (2d) 576 (1946); Daub v. Henry Caplan, Inc., 70 N.Y.S. (2d) 837 (1946); Gellis v. Falcon Buick Co., Inc., 76 N.Y.S. (2d) 94 (1947); Kalmon v. Thornton-Fuller Co., 62 Pa. D & C 397 (1948).

[14] See cases collected in 152 A.L.R. 4 (1944).

[15] The argument that the innocent, rather than the guilty, party should have the election of getting damages at law or specific performance is not new. See 2 STORY, EQUITY JURISPRUDENCE, 13th ed., §717a (1886). There seems to be no inherent reason for the courts' strictness. Specific performance of chattel contracts is granted freely in Europe and Scotland. 3 WILLISTON, SALES, rev. ed., §601 (1948).

[16] Specific performance of a contract to purchase a new car was denied on the basis that the promisor had an adequate remedy at law, namely, the recovery of nominal damages. Kalmon v. Thornton-Fuller Co., 62 Pa. D & C 397 (1948). See 1946 Wis. L. Rev. 461. Cf. Boeving v. Vandover, note 6, supra, decreeing that the distributor deliver the new 1946 car contracted for, or, in lieu thereof, a 1947, 1948 or 1949 car of the same make and model at the 1946 contract price.

[17] Brown v. Western Maryland Ry. Co., 84 W.Va. 271, 99 S.E. 457 (1919).