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Equity - Specific Performance of Contracts

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the acts are not authorized, also hold the principal liable without fault on his part for false representations, deceit and other wrongs of the agent.

Here the driver had obtained the confidence of both plaintiff and defendant, for the driver had collected and turned over the proceeds for three years without a dishonest act. The court held that the plaintiff was not negligent in relying on the accuracy of the driver's receipt, and held the defendant express company liable for the agent's false representations and overcharging.

LESTER WOGAHN,

EQUITY—SPECIFIC PERFORMANCE OF CONTRACTS. The Tennessee Power Company, defendant, petitioned White and Van Buren counties, plaintiffs, for permission to raise its dam to a height of 75 feet above the low water mark in Caney Fork river, the dividing line between the two counties. It was apparent that the erection of a larger dam would cause the waters in the river and tributaries to flood certain bridges and fords which the counties maintained. As a condition to the granting of the permission sought, the company proposed to raise the bridges and build others where the fords were destroyed, without cost to the counties, agreeing to bear the "cost of continued maintenance of said bridges." The bridges were raised or erected and maintained until March, 1929, when an unprecedented flood damaged them in varying degrees. Upon the refusal of the power company to repair them, suit was brought to compel performance of the contract. Specific performance was denied by the court, upon the following grounds: That proper performance would invoke an extensive supervision of a series of acts, which a non-expert could not give, and that there was a complete and adequate remedy at law, in a suit for damages. *Tennessee Electric Power Company vs. White County*, 52 Federal 1065 (1931).

The general rule is that the courts will not decree specific performance of contracts for the erection of and repair of buildings, the construction of works, and the conduct of operations requiring special knowledge, skill or foresight. *Pomeroy's Specific Performance of Contracts* (3rd Ed.) paragraph 23; *Beck vs. Allison*, 56 N.W. 366. However, this supposed doctrine is burdened with many exceptions, and its validity frequently denied. *Jones vs. Parker*, 163 Mass. 564. *Walsh*, in his treatise on Equity, states "Where the remedy at law is clearly inadequate, the boggy developed by the courts in the earlier cases of the difficulty of necessary superintendence has been disregarded. The courts now realize that superintendence by the courts or its representative is unnecessary, and that the court is called on

merely to construe the contract and to make the decree, ordering its performance accordingly, leaving to the plaintiff the privilege of raising the question thereafter as to whether or not the decree has been complied with, with undoubted power in the court to compel full performance. Consequently, impracticability of specific performance because of difficulty of superintendence by the courts may be regarded as an exploded doctrine under the prevailing and better considered cases." See *Standard Trust Co. vs. Tenn. Ry. Co.*, 191 S.W. 334; *Brummel vs. Clifton Realty Co.*, 125 Atlantic 905.

The one important question involved in cases of this type is whether or not enforced specific performance is as expedient as the performance of the work by the plaintiff himself through another contractor, or otherwise, and the recovery of the cost by an action for damages. In the case under discussion, the latter relief seems most suitable and practical, for all the parties concerned, for the reason that the counties could themselves do the work or have it done, and recover costs thereof from the defendant by way of damages. There even need be no delay in bringing the suit, because the cost of repairs could readily be ascertained.

It is well established that where public interest demands specific performance, equity will decree it and if necessary supervise it for an indefinite period. *Joy vs. St. Louis* 138 U.S. 1. In the principal case, the public was, of course, interested in the restoration of the bridges, but nevertheless that interest was no of such a character as to justify a decree of specific performance, such as where a utility corporation fails or refuses to operate its franchise, there being no one else to operate it. In that situation, damages could not measure the loss the public would sustain.

It might be contended for the plaintiff that the doing of the work at a reasonable expense must depend upon the control of the stages of the water behind the dam, and as that control is in the defendant, it is not practicable to do the work economically, unless the power company does the work itself. However, it would be against the interest of the defendant company not to cooperate in the work, for they would have to bear any additional expenses incurred by reason of their conduct.

It is to be remembered that the fundamental basis of specific performance of contracts is the inadequacy of damages as a remedy, and any other ground relied upon is simply a supporting argument. Consequently, the holding of the court in the principal case is sound, for without a doubt damages are sufficient relief for the plaintiffs.

CARL F. ZICK