

DEPARTMENT OF EQUITY.

EDITOR-IN-CHIEF,
RICHARD C. McMURTRIE, LL.D.

Assisted by
SYDNEY G. FISHER, JOHN DOUGLASS BROWN, Jr.,
ROBERT P. BRADFORD.

BIRMINGHAM NATIONAL BANK *v.* RODEN.¹ SUPREME COURT
OF ALABAMA.

Specific performance—Purchase of stock.

In a suit against a bank to compel it to register plaintiff as a stockholder for forty shares of stock, or pay the value of the stock and the dividends declared thereon as compensation in lieu of the stock, the defendant demurred upon the ground that the plaintiff had a complete remedy at law. *Held*, that plaintiff could in equity enforce a specific performance by having the stock registered in his name and compel the issue of certificates to him or, in the alternative, if the corporation was unable to perform its contract, have his remedy by compensation in damages.

SPECIFIC PERFORMANCE OF CONTRACTS AND THE PURCHASE OF STOCK.

The subject of the specific performance of contracts to purchase stock possesses an ever increasing interest owing to the growth in the number of corporations affording, as these latter do, through their capital stock, a popular medium of investment. Indeed, corporate stock may almost be styled a "commodity," and as it absorbs a large portion of the means of the community it becomes important to see in what way the various principles of equity jurisprudence have been applied to such contracts in cases where the particular relief sought has been their specific enforcement.

First, however, as to the form of contracts for the sale of stock. In England it has been firmly established since the

¹ Reported in 11 So. Rep. 883.

case of *Duneuff v. Albrect*, 12 Lim. 189 (1891), that these contracts are not within the seventeenth section of the Statute of Frauds. In the United States, on the other hand, whenever that section is in force it has generally been decided that it governs such contracts. Especially in this case wherever the words "goods, wares and merchandise" are used. A good illustration of the general opinion is seen in the case of *Pray v. Mitchell*, 60 Me. 430 (1872), which was an action of assumpsit. The question before the court was whether a verdict obtained by the plaintiff in an action to recover damages for the breach of a verbal agreement to transfer to him stock in a certain joint stock company should stand; and the decision was that it could not because such a contract was within the seventeenth section of the Statute of Frauds. For this view the court found strong support in the opinions in *Tisdale v. Harris*, 20 Pick. 9, and in *North v. Frost*, 15 Conn. 400, from which the conclusion was derivable that there was nothing in the nature of public corporate stocks which in reason or sound policy ought to exempt contracts respecting them from those restrictions designed by the framers of the Act for the prevention of fraud in the sale of other kinds of personal property.

A similar view has prevailed in the other states: *Fine v. Hornsby*, 2 Mo. App. 61 (1876); *Boardman v. Cutter*, 128 Mass. 388 (1880).

An agreement in relation to the sale of stock which is not to be performed within the year comes also under the operation of the statute where that particular provision is in force. Of course, however, when there is an option given, by the exercise of which the agreement may be performed within the time, the statute does not apply. See *Sedden v. Rosenbaum*, 85 Va. 928 (1887).

The question is somewhat of a vexed one and in some of the states it has been practically settled by statutory enactment. Such is the case in those states where capital stock is declared to be personal property: Rev. Stat., Fla., 1892, § 1996; *Southern Life Co. v. Cole*, 4 Fla. 359.

Coming now to the enforcement of stock contracts it may

be well to call attention to the fact that, though capital stock may be an anomalous kind of property, yet contracts of which it forms the subject-matter are not at all a peculiar species governed by a set of exceptional equitable principles and for which there exist separate and rigid rules. Some of the text writers, however, notably Fry, seems to make this very mistake and when they come upon a case wherein the court has compelled specific performance, as in certain cases of railway stock, they treat it as an exception to the general rule. See Tryon Spec. Perf., §§ 24 and 27.

The fact, of course, is that contracts in regard to stock are contracts in regard to personalty and has been well said, "a bill to compel the purchase of stock seeks to secure the transfer of mere personal property and is subject to and clothes the suitor with all the disqualifications which attach to such a proceeding." And see *Cutting v. Dāna*, 25 N. J. Eq. 265 (1874). For breaches of personal contracts the pecuniary damages given at law have generally been approved as affording sufficient compensation. And though the doctrine of specific performance usually works out a different result when applied to a contract for the sale of land the principle in both cases is the same. That principle is that unless there is something more involved than the mere breach of a contract equity will not assume jurisdiction since the remedy at law for such an injury is full and adequate.

In a leading case upon the subject under consideration Lord ELDON made the remark, "It is now perfectly well settled that this court will not enforce specific performance of an agreement for a transfer of stock:" *Nutbrower v. Thornton*, 15 Ves. Such a dogmatic statement is misleading if not erroneous. He probably meant by "stock" government and other public stock, for the term is a generic one in England, having that meaning, the capital stock of private corporations being designated as "shares;" but even in that case the Lord-Chancellor overlooked the progressive spirit of equity jurisprudence and its incompatibility with the laying down in reference to such subject-matter a rigid and unyielding rule. It is time that such contracts will not generally appeal successfully to the discretion of the

chancellor, but the court does not approach the question in the spirit indicated by Lord ELDON. Rather, it takes into consideration that all such stock is practically alike and easily obtainable in the market, and requires the plaintiff to show that his case presents exceptional features, which demand consideration.

As, for example, in the case of *Doloret v. Rothschild*, 1 *Lim. & S.* 590 (1824), where the court enforced specifically a contract to purchase certain stock of a foreign government upon the plaintiffs showing that it was necessary that he should have the certificates which gave him the legal title. Unless the circumstances present some such peculiar claim upon the chancellor's discretion the plaintiff will be obliged to be satisfied by the pecuniary damages granted by a court of law. As was said in *Eckstein v. Downing*, 64 *N. H.* 248 (1887), "we do not hold that specific performance of contracts for the sale of stock or shares in a manufacturing company cannot be decreed under any circumstances but the plaintiff has not shown, what it is essential he should show, that he has no adequate remedy at law.

A few moments consideration will show that there are likely to be in contracts for the purchase of government or other public stock in this country but few cases which will present the required exceptional features, and that in the majority of cases the contract will be practically no more than a contract in regard to personal property for a breach of which an adequate remedy at law exists. So that following the principle above stated the courts have rarely granted the prayer for a decree that such a contract should be specifically enforced: *Ross v. Union Pacific Ry. Co.*, 1 *Woolw.* 26 (1863).

STOCK OF PRIVATE CORPORATIONS.

Where the remedy at law is plain, adequate and complete courts of equity will not enforce contracts for the purchase or transfer of shares of stock in private corporations: *Jones v. Newhall*, 115 *Mass.* 244 (18). But such contracts have much to differentiate them from the class just considered. As was well said by the vice-chancellor in *Duncuft v. Albrecht*:

“There is no sort of analogy between public stock, as it may be called, and a certain number of railway shares of a particular description which are limited in number and which cannot always be had in the market.”

In the United States the capital stock of private corporations is by far more largely the subject of contract than public stock; and it requires but little thought to see that the character of the former and the circumstances surrounding particular cases much frequently appeal successfully to this favorable consideration of the chancellor in the matter of specific performance. A good illustration of this is found in the case of *Treasurer v. Commercial Coal Mining Company*, 23 Cal. 391 (1863), which was a suit to compel the defendant to issue a certificate for forty-six shares of its capital stock which it had contracted to issue to the plaintiff and others in return for a mining claim located by them. It was argued that a court of equity would not compel the specific performance of such contracts, but the court, while admitting a general rule to that effect where public stocks were concerned took a different view of the case at bar. “In the peculiar condition of business and mining operations in this state where numerous mining and other corporations are in existence, whose stock is often of fluctuating and uncertain value, and where certain kinds of stock have a peculiar value to those acquainted with [the affairs of different companies] where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great. Courts should be liberal in extending the full, adequate and complete relief afforded by a decree of specific performance.” (*Frue v. Houghton*, 6 Colo. 318 18 .)

This is the principle upon which relief was granted in the case of the famous Pusey Horn and the silver altar-piece of the Perceys, namely, that the subject-matter possessed a peculiar and unique value for the plaintiff. Sometimes, however, the court makes use of the fact that the subject-matter is peculiarly valuable to the defendant. This is seen in a case in which the plaintiff sought to enforce a contract whereby

the defendant who had sold her some stock represented by shares in a certain steamboat agreed in case of a misunderstanding arising between them to take the stock off of her hands. The misunderstanding when it arose extended even to the performance of the contract. The court, however, compelled the defendant to carry out his undertaking on the ground that were the position reversed, he could have compelled the plaintiff to allow him to repurchase the stock inasmuch as it was of a peculiar kind which could not be obtained elsewhere: *Bumgardner v. Leavitt*, 35 W. Va. 194 (1891).

When the contract relates to the stock of a company not yet chartered the case has been held to make a special demand upon the consideration of the court. In *Austin and the North Carolina Railroad Company v. Gillespie et al.*, 1 Jon. Eq. 261 (1854), the defendants had agreed that, if the plaintiff (Austin) would subscribe unconditionally for certain stock in a corporation just being organized, they would later take part of it off of his hands by subscribing for it in their own names.¹ The plaintiff carried out his part of the program but the defendants afterwards refused to relieve him. The court made a decree for the specific performance of the contract on the ground that this was a case which differed materially from that of a company already in existence whose stock was on the market and was represented by a definite sum of money. "Here the company was just struggling into life and the subscribers for its stock were taking upon themselves very heavy burdens with a dim prospect of future advantage and it would be impossible to give the plaintiff in an action at law damages at all commensurate with the injury he might sustain by the failure of the defendants to perform their contract."

Where the company, however, after securing its charter, seeks to compel a subscriber to take the shares he contracted for the case is different, as there is only one party to the contract: *Strasburg Railroad Co. v. Echnernacht*, 21 Pa. 220

¹It is well settled that such contracts are valid and binding: *Meyer v. Blair*, 109 N. Y. 600 (18); *Morgan v. Struthers*, 131 U. S. 246 (1888).

(1853), in some of the states, however, the subscription contracts have been enforced.

Whenever a trust is involved in a contract for the sale or transfer of stock, a court of equity will always compel the defendant to specifically perform his agreement. As in the case of *Chafee v. Sprague*; 16 R. I. 189 (1886), in which it was sought to enforce a contract to transfer certain corporate stock as collateral security for the performance of the conditions of a trust deed. The court took the position that, though it was a contract relating to personalty, yet as the property in question was contracted to a trustee in aid and enforcement of the provisions of a trust mortgage, they would assume jurisdiction and enforce the contract specifically: *Dousman v. Wisconsin, L. S. M. & S. R. Co.*, 40 Wis. 418; *Johnson v. Brooks*, 93 N. Y. 337 (18); *Weaver v. Fisher*, 110 Ill. 146 (1884).

Courts of equity likewise approve strongly of family compromises, and if the transfer of stock is one of the considerations for such a contract, the plaintiff will not appeal in vain for relief: *Leach v. Forbes*, 11 Gray, 506 (18).

So, too, if the defendant is insolvent or not pecuniarily responsible, so that practically he cannot respond in damages, the chancellor in the exercise of his sound discretion may make the desired decree: *Draper v. Stone*, 71 Me. 175 (1880); *Avery v. Ryan*, 74 Wis. 591 (1889).

Where the defendant puts it out of his power to fulfill his contract the court may compel him to accept compliance on the part of the plaintiff and be liable to him in damages for the value of the stock: *Burton v. Shotwell*, 13 W. Bush, 271 (1877). Such contracts are, of course, subject to the general principles of courts of equity, and the exercise of the high prerogative under consideration will be denied where the contract is not equally enforceable against either party as, for instance, in the case of *Danforth v. Phila.*, M. S. L. Ry. Co., 30 N. J. Eq. 12 (1879), where the court was asked to compel the defendant to transfer certain stock which it had agreed to convey in return for services in the building and equipment of the road. In such a case it would be entirely outside the

province of a court of equity to compel the plaintiff to perform his contract, and consequently he cannot have such relief himself. See 45 N. J. Eq. 122.

Nor will the court lend its aid where the bargain is unconscionable or where it is sought to keep the stock afloat for speculative purposes: *Mississippi & Missouri Railroad Co. v. Cromwell*, 91 V. S. 643 (1875).

Nor again will the court interfere where its decree would be nugatory as is seen in the principal case. There, though the contract was binding and in other respects enforceable, yet as decree for specific performance could only have been enforced by compelling the defendant to issue additional shares of stock, when in fact it had already issued all that by law it was allowed to issue, the court declined to do more than grant the alternative relief prayed for, that is, compensation in damages.

The case of *Foll's Appeal*, 91 Pa. 434 (1879), is interesting as showing how carefully the court probes contracts for the sale of stock when asked to enforce them. In that case the plaintiff was endeavoring to get control of a majority of the stock of a certain national bank. He, with two others, had borrowed sufficient money and purchased almost the required number of shares, and the few remaining shares he had contracted for with Foll. Foll refused to fulfill his contract, and the plaintiff filed his bill for specific performance to compel him to sell and deliver the shares in question. The court below made a decree in accordance with the prayer of the bill, but this was reversed on appeal on the ground that it was against public policy to interfere to place one man in control of an institution such as a national bank. The plaintiff might secure control if he could, but a court of equity would not help him. The court, Mr. PAXSON, J., went further, and said that it knew of no instance in Pennsylvania in which a court of equity had decreed specific performance of a sale of stock, and the same statement appears in a later case where the court enforced specifically the right of a stockholder given by statute to subscribe to new stock at par: *De la Cuesta v. Insurance Co.*, 136 Pa. 62, 78 (1890). But the facts of the

Pennsylvania cases warrant no stronger proposition than this, that a court of equity will not enforce specifically a contract for the sale and purchase of stock where other shares of the same kind can be bought in the market.

The authorities above cited, when carefully considered, seem to establish the proposition that the granting or withholding specific performance of a contract for the purchase of corporate stock in any given case, while depending indirectly upon the character of the property involved, is governed by the answer to the question whether or not there is an adequate and complete remedy afforded by an action at law. And see *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365 (1879). This will, of course, depend upon circumstances, but it may be safely said that if the stock in question has no fixed marketable value, is not commonly offered for sale, and is actually rarely sold, a contract for its sale or transfer will generally be specifically enforced. It must not be forgotten, however, that such relief rests in the sound discretion of the chancellor, and that general rules on such subjects are apt to be misleading, for a court of equity will "grant or withhold relief according to circumstances of each particular case when general rules will not furnish any exact measure of justice between the parties." See 2 Story Eq. Jur. § 742.

The reason for Lord ELDON'S dogmatic assertion seems to have been overlooked. It is that a purchaser of personal property that has a *market* never should have the aid of Chancery to give specific performance, unless there are circumstances such as justify that remedy, and these are that the property cannot be bought. The reason for applying the remedy in case greatly is this, and the necessity of being able to rely on the capacity to get in the title to the particular property.¹ It is quite likely that this wise rule will, like so many others, be frittered away for want of appreciation of the true foundation of the rule giving specific performance.

¹Without it no one could venture to touch property held merely by contract. Possession which perfects the title to personalty amounts to nothing in case of land.