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SALE OF PERSONAL PROPERTY—DELIVERY—EXTENT OF COMMON CARRIER'S LIABILITY.—A., a commission merchant in Philadelphia, received from B. an order for 250 boxes of Thompson's seedless raisins, and from C. an order for 250 boxes of Muscatel raisins, the two kind being of different quality. A. did not have the raisins in stock, but ordered them from "The Fruit Growers' Association," of California. They were shipped to "The Fruit Growers' Association," Philadelphia, the railroad receipt, with draft attached, being sent to A., who accepted and paid the draft. The custom of the trade is that raisins sold in this way are to be paid for spot cash, subject to the right of inspection. When the car arrived in Philadelphia, both B. and C. inspected the raisins, said they were all right and paid for them. A. then

gave B. a delivery order on the railroad company for 250 boxes Thompson's seedless raisins, and C. a delivery order for 250 boxes of Muscatel raisins. Both lots were in the same car, the kind of raisins the boxes contained being plainly stamped on the end of each box.

B. presented his order for 250 boxes seedless raisins and was delivered 250 boxes of raisins, but by mistake of the railroad company, seventy-one of these boxes were Muscatel raisins, to which B. was not entitled and which his delivery order did not call for. C. then presented his order for Muscatel raisins to the railroad, but received only 179 boxes, the other seventy-one boxes having previously been delivered to B. as explained. The seventy-one boxes of seedless raisins remaining are still in the possession of the railroad, both A. and C. refusing to receive them. C. seeks to hold A. for the purchase price for the seventy-one boxes Muscatel raisins he did not receive and for which he had paid A. A. claims that C. must adjust the matter with the railroad company. The case has not yet reached the courts.

The facts stated present an interesting case. C. contends: (1) That the delivery order given him by A. was only an order conveying authority to obtain the goods—it did not pass the title nor operate as a delivery. (2) That A. was obliged to deliver the goods. (3) That the railroad company was the bailee of A. and therefore A., not the railroad company, is liable to C. for the loss.

A. contends: (1) That there was never any obligation upon him to make a delivery other than he did make. (2) That payment of the price by C. and the delivery order given him by A., at once transferred title to C. and operated as a constructive delivery to him. (3) That even though the delivery order did not operate as a delivery and as a transfer of title to C., yet when C. presented the order to the railroad company and they delivered to him a part of the goods, that in itself was a recognition of C.'s title, and made the railroad from that moment the bailee of C., and, therefore, A. is released from all liability and C.'s only remedy is against the railroad. (4) That aside from the questions of law involved, by the custom of the trade, payment of the price and acceptance of the delivery order by the vendee, operated as a delivery to him so as to release the vendor from further liability for non-delivery.

Benjamin says there is no branch of the law of sale more confusing than that of delivery. This results from the fact that the word is used in entirely different senses, and unless these different significations are understood, it is impossible to comprehend the principles involved in the decisions of the cases or in the text of the writers. Delivery is sometimes used in the sense of a transfer of *title.* It is often used to signify delivery of *possession,* as required under the statute of frauds in order to prove

the *formation* of the contract. It is also used to indicate delivery in *performance* of the contract, so as to enable the vendor to defend in an action by the buyer for non-delivery.

The various significations attached to the word may be seen from the text of the writers. Thus in Section 174, Benjamin on sales, "If the seller have goods in possession of a warehouseman, wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not effect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it or consents to act in accordance with it; and until he has so agreed, he remains agent and bailee of the vendor": *Bentall* v. *Burn,* 3 B. & C. 423 (1824); *Barney* v. *Brown,* 19 Amer. Dec. 720 (1829). Here delivery is spoken of in the sense of delivery of possession required by the seventeenth section of the statute of frauds, which provides that "no contract for the sale of any goods, wares or merchandises for the price of ten pounds, sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The section from Benjamin above quoted refers only to the delivery and the acceptance and receipt required by the statute in order to enable an action to be maintained for the price where payment has not been made or where there is no written contract. It is not intended to apply and is not applicable to a case such as the one under discussion, where both the contract for the sale of the raisins was in writing and where payment was made. In *Cushing* v. *Breed,* 14 Allen, 376 (1867), where there was no actual delivery and where payment had not been made, Chapman, J., said: "If the vendor gives an order on the agents to deliver the property to the vendee and the agents accept the order, and agree with the vendee to store the property for him and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee." So where the owner of corn gave an order on the agent at the depot where the corn was to arrive, to deliver 600 bags to a person designated and the agent, before its arrival, recognized the person's right to the property, it was held that this was a valid constructive delivery and the vendee was allowed to recover the corn from the vendor, who upon its arrival had taken possession of it: *Sohlman* v. *Mills & Co.,* 51 Amer. Dec. (S. C.) 630 (1849). See also, *Townsend* v. *Hargraves,* 118 Mass. 325 (1875); *Tuxworth* v. *Moore,* 9 Pick. 347 (1830); *Legg* v. *Willard,* 17 Pick. 140 (1835); *Hunter* v. *Wright,* 12 Allen, 548 (1866); *Hoffman* v. *Culver,* 7 Brodw. 450 (1880); *Williams*

v. *Evans,* 39 Mo. 201 (1866); *Boswell* v. *Green,* 25 N. J. L. 390 (1856); *Warren v. Milliken,* 57 Me. 97 (1869); *King* v. *Jarman,* 35 Ark. 190 (1879); *Phillips* v. *Ocmulgee Miles,* 55 Ga. 633 (1876); *Adone* v. *Seeligson,* 54 Texas, 593 (1881). In the American Notes to "Benjamin on Sales," fourth edition, p. 192, the editor says: "In most cases where notice to the bailee of the sale has been held sufficient to consummate it without writing for his assent, it will be found that the bailee has assented in advance, either expressly or by implication from trade custom, to hold for such person as may buy the goods": *Salter* v. *Woolams,* 2 M. & G. 650 ( ); *Wood* v. *Manley,* 11 Ad. & E. 34 (1839).

"The transfer of a delivery order, dock warrant or other document, which operates only as a token of authority to take possession, and not as a transfer of possession, does not divest the seller's lien, but the person in whose custody the goods are, must first accept the order, or in some way attorn to the buyer, and until such attornment, the seller may countermand his authority": "Tiffany on Sales," p. 211. If this be accepted as a correct statement of the law, it is evident that in the principal case, the title to the raisins passed, because no man can have a lien on his own property. It is clear that in cases where payment has not been made, the vendor has a lien on goods sold, as stated in the text, until they have been received by the vendee, but if payment has been made and there is no intention on the part of the vendor to have anything further to do with the goods, and no understanding by the vendee that anything remains to be done by the vendor, it would seem that a transfer of a delivery order might be considered a sufficient delivery in performance of the contract.

Of course, where parcels of goods differ from each other in quantity or value, the property does not pass by a sale, until so designated as to be distinguishable from the bulk. To pass the title the quantity of goods sold must be separated from the bulk, and until this is done, they are at the risk of the vendor: *Dennis* v. *Alexander,* 3 Pa. 50 (1846); *Lester* v. *McDowell,* 18 Pa. 91 (1851); *Nesbit* v. *Burry,* 25 Pa. 208 (1855); *Nicholas* v. *Tyler,* 31 Pa. 128 (1858); *Holdeman* v. *Duncan,* 51 Pa. 66 (1865); *Hutchinson* v. *Hunter,* 17 Pa. 140 (1847); *Golden* v. *Ogden,* 15 Pa. 528 (1850). In the case under discussion, the contents of the boxes were plainly stamped on the end of each box, and there were only the two lots of raisins in the car, so that nothing remained to be done by the vendor so far as marking or separation is concerned. As between vendor and vendee, the passing of the title upon a sale of chattels depends largely upon the intention of the parties, to be derived from the contract and its circumstances. Actual delivery, weighing and setting aside, are only circumstances from which the intention may be inferred.

In *Commonwealth* v. *Hess,* 148 Pa. 98 (1892), Chief Justice Paxon quotes from "Benjamin on Sales," Sec. 357: "The general rule is that it is the contract to sell a chattel, and not payment or delivery, which passes the property." He further quotes from Section 329: "The rule that the contract of sale passes the property immediately, before payment or change of possession has been universally recognized in the United States."

It is everywhere the law that there may be a constructive delivery of goods. Where there has been a bona fide purchase of personal property, and the purchase price has been paid, slight acts are sufficient to show a delivery that will avail the buyer against third persons. Thus the delivery of a lot of iron, of great weight, in a pile by itself, after an agreement as to its price, by the vendor saying to the vendee, "I deliver this iron to you at that price," has been held sufficient under the statute of frauds: *Calkins* v. *Lockwood,* 17 Conn. 154 (1845). So where A. purchased of B. a lot of horseshoes, B. saying, "Take them, there are the shoes, I deliver them to you," this was held a sufficient delivery, although by agreement the shoes were left in the vendor's shop, and a few days afterwards were attached by his creditors: *Stevenson* v. *Clark,* 6 Allen, 341 (1863). Where the vendor and vendee of a horse in the ekeping of a third person wrote to that person, the one that he was no longer responsible for the keeping of the animal, the other that he was answerable for the keeping from that date, these acts were held a sufficient delivery as against a subsequent attaching creditor of the vendor: *Tuxworth* v. *Moore,* 9 Pickering, 347 (1830).

"Property in the goods will pass though they are in the possession of a third person. . . . Where the goods are in the possession of the seller's bailee, notice to such bailee and his assent are needful to constitute an acceptance and receipt to satisfy the Statute of Frauds. But if the statute is otherwise satisfied, as by part payment or signing a memorandum, the title passes without notice to the bailee: *Crill* v. *Doyle,* 53 Cal. 713 (1879). In *Gibson* v. *Stevens,* 8 Howard, 400 (1850), the sale was by transfer of a warehouse receipt, and the court adjudged that "it transferred to the vendee the legal title and constructive possession of the property, and the warehouseman from the time of the transfer became his bailee." "Benjamin on Sales," Sec. 333: *Burton* v. *Durgen,* 40 Ill. 325 (1866); *How* v. *Borper,* 8 Cal. 614 (1857); *Bank* v. *Wolbridge,* 19 Ohio, 419 (1869); *Newcomb* v. *Cabill,* 10 Bost. 460, 468 (1874); *Townsend* v. *Hargraves,* 118 Mass. 325, 332; *Davis* v. *Russell,* 52 Cal. 611 (1878); *Puckett* v. *Reed,* 31 Ark. 131 (1876); *King* v. *Jameson,* 35 Ark. 190 (1879). Under the title of Constructive Delivery, Tiffany, p. 181, says: "It seems that whatever will constitute such a delivery as to satisfy the Statute of Frauds will constitute a delivery in performance of the contract.

In both the preceding paragraphs the word delivery is used in the sense of a transfer of title. When the goods are in the possession of a bailee the Statute of Frauds must be satisfied before title will pass. It may be satisfied by an acceptance and receipt of the goods by the vendee. It may also be satisfied by a written contract, by payment or part payment of the price. In the principal case, there were both a written contract and payment so that the title passed. Suppose the raisins had been destroyed by fire over night before the delivery order had been presented to the railroad, but after it had been received by the vendee, whose would have been the loss? If the title had passed, the vendee should suffer the loss. And if the loss in such a case fall upon him, and the vendor is free from liability, it seems reasonable that in the event of accident to the goods or of negligence on the part of the carrier subsequent to the receipt of the order by the vendee, that the vendee should be obliged to look to the carrier and not to the vendor for the resulting damage.

"The common law makes a distinction between the transfer of bills of lading and other documents, such as dock and wharf warrants and warehouse receipts, the transfer of which operates only as a token of authority to take possession and not as a transfer of possession. It is possible, however, that the transfer of such a document, making the goods deliverable to order, if the goods represented by the instrument were subject to no liens or charges, would be sufficient in performance of the contract, on the ground of an attornment in advance." "Tiffany on Sales," p. 181. "In the absence of a contrary agreement, the seller is not bound to send or carry the goods to the buyer. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that he may obtain them without lawful obstruction. If the goods are on the premises of a third person, the seller must obtain the license of such person for the buyer to come and remove the goods, and if the goods are in the custody of such third person as bailee, his attornment to the buyer, but such license or attornment may be given in advance." "Tiffany on Sales," p. 183. There is no doubt but that attornment may be expressly made in advance. This was done in the English cases of *Salter* v. *Woolams* and *Wood* v. *Mouley,* above referred to. The only difficulty arises in cases where it is sought to hold that there has been an implied attornment in advance. It is hard to see how an implied attornment can exist in the case of a bailee who is a private individual and a vendee. Thus where A. loaned B. a threshing machine, and while it was still in the possession of B., sold it to C. and gave him an order on B. for its delivery, B. refused to deliver it; and in an action by A. against C. to recover the purchase price, it was held that there had been no delivery and A. was not permitted to recover. The court said the delivery order did not vest title in C., in the absence of

proof that the parties so intended: *Edwards, Hudmon & Co.* v. *Meadows,* 71 Ala. 42 (1881). This case is directly in point so far as the effect of a delivery order is concerned. But it would seem that a difference should be made in a case such as this, where the bailee is a private individual and in a case like the principal one, where the bailee is a common carrier. In the former there is no obligation or intention to do anything with the goods except to return them to the owner upon the termination of the bailment. But in the latter the carrier's duty is to deliver the goods to the person entitled to them, and as the holder of a bill of lading is always recognized as entitled to the goods, so here it would seem there is no valid reason why the holder of a delivery order which has been given the consignee of goods, should not be recognized by the common carrier as entitled to the goods which it calls for. In other words, there seems to be no reason why a common carrier should not be considered to have attorned in advance to the holder of an order calling for the delivery of goods which it has carried for hire. And if the order is recognized as being sufficient to compel the carrier to deliver the goods to the holder, it follows that possession of the order must be regarded as carrying the ownership of the goods with it. In the case of *The National Bank of Green Bay* v. *Dearborn,* 115 Mass. 219 (1874), which was an action of replevin brought by the bank to recover 100 barrels of flour, the owner of the flour had delivered to the bank a common carrier's receipt for it, not negotiable in its nature, or security for an advance of money, with the intention to transfer the property in the goods. This was held to be a symbolical delivery of the goods to the bank. Ames, J., said: "When the draft was discounted and the receipt delivered to the plaintiff, both parties understood that it was an advance by the bank on the flour. Both parties understood that the property should be, and understood that it was, by that transaction transferred to the bank, as security for that advance. . . . The carrier must be considered as the bailee of the bank and as holding the property for it."

"The endorsement and transfer to the buyer of bills of lading, dock and wharf warrants, delivery orders and other like instruments, which among merchants are known as representing the goods, would form a good delivery *in performance of the contract,* so as to defeat any action by the buyer against the vendor for non-delivery of the goods. . . . The transfer of such documents would of course not be a sufficient delivery by the vendor if the goods represented by the documents were subject to liens or charges in favor of the bailees." "Benjamin on Sales," Sec. 1044. This section would seem to cover the facts of the case in question. While the vendee really never had actual possession of the raisins, and while it may seem a hardship that when one purchases goods he should be liable for the price without ever

obtaining possession, still the usual rule that delivery is necessary should give way to a custom of the trade which is greatly beneficial from the standpoint of convenience and which usage has rendered almost a business necessity. Whenever attornment is necessary it is submitted that a common carrier should be regarded as having attorned in advance because the delivery order is recognized as between the parties as carrying the title and right to possession and if the course of business demand that it should be regarded as carrying not only the right to possession, but also the property in the goods, there is no reason why it should not be so considered. Thus in Chicago a purchase of grain in the wholesale market is satisfied by delivery of warehouse receipts for grain of the quantity sold, such being the course of trade in that market: *Bailey* v. *Bensley,* 87 Ill. 556 (1877); *McPherson* v. *Gale,* 40 Ill. 368 (1866). After all, the question of delivery is one of intention of the parties. In the principal case when the raisins were paid for there was no intention on the part of the vendor to exercise any subsequent right or to retain any subsequent disposition thereover, and there was no understanding on the part of the vendee that anything further remained to be done by the vendor. It is submitted that in such a case, while the custom of the trade here has never been passed upon, still it ought to be, as it in fact is, that the vendee becomes the absolute owner upon payment of the price and receipt of the delivery order and the carrier ceases from that moment to be the bailee of the vendor and becomes the bailee of the vendee.

M. L. V.

SPECIFIC PERFORMANCE—ENFORCEMENT OF A CONTRACT TO CONVEY STOCK—COMMON LAW RULE—LAW IN THE UNITED STATES COURTS AND IN PENNSYLVANIA—THE NEW YORK DOCTRINE.—The question treated in this note may be stated hypothetically as follows: The X. Railroad Company made an issue of certain bonds, secured by a first mortgage on the corporate property. It was stipulated in the mortgage deed, that the bondholders might, at any time, exchange their bonds for preferred stock of the company, at par, equivalent in value to their holdings of bonds.

Subsequently a number of bondholders notified the company that they desired to effect the exchange of securities provided for in the deed. The company refused to make the exchange. The bonds matured and thereafter the X. company offered to redeem the bonds. The offer was declined. It is to be supposed that at the present time the X. Railroad does not possess a share of its preferred stock. The interesting question now arises, whether the bondholders by means of a bill in equity can obtain specific performance of this contract? In other words, will

equity compel the X. Railroad Company to either issue sufficient additional preferred stock to enable it to fulfill its contract with the bondholders, or to buy enough shares on the market to answer the same purpose?

Legally the question is, will equity enforce the transfer of stock —a chattel—or leave the promisees to recover damages at law, for breach of contract, from the promissor?

The correct answer to this query is to be sought first, in the foundations of the doctrine of specific performance. Thus we read that, "the ground of the jurisdiction is, that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation might require. Wherever, therefore, the party wants the thing in specie, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance": 1 Story's Eq. Jur., Vol. I, par. 716. The foregoing statement is axiomatic, and it need only be said that the exception to it is strictly construed. See "Pomeroy on Contracts" (Specific Performance), p. 9.

The above statements apply generally to the subject of "Specific Performance." Let us see what is the law with regard to the specific performance of a contract to sell or transfer a chattel.

In the famous case of *Duke of Somerset* v. *Cookson,* 3 P. Wms. 389, the plaintiff obtained restitution by bill in equity, of an antique silver altar piece, on the ground that said altar piece being of a peculiar design and very old, possessed an especial value in specie, which could not be calculated in money. See also *Pusey* v. *Pusey,* 1 Ves. 273; *Buxton* v. *Lister,* 3 Atk. 384; *Falls* v. *Reid,* 13 Ves. 70, and *Nutbrown* v. *Thornton,* 10 Ves. 161.

It will be seen upon examination, that in all of these cases there exists some peculiarity inherent in the article sought to be recovered, which renders its value incalculable in money and which takes it out of the general rule: "That equity will not enforce specific execution of a contract relating to personal chattels": 3 "Parsons on Contracts," 364. The reason for the general rule undoubtedly is, that equity is averse to interfering in a case where there is already an adequate remedy at law.

Equity will, however, give relief, as above indicated, in cases where there is no adequate legal remedy.

It will be well to ascertain how the foregoing rules are applied to particular cases involving the transfer of stock and then to deduce the probable decision of our hypothetical case. The scope of our inquiry being now well defined, let us examine some of the cases bearing upon the question in the United States Courts, Pennsylvania and New York.

Little comment is necessary upon the decisions of the United States Courts, for unless money damages are inadequate (and

the exception is strictly construed), the United States Courts will not compel specific performance, the common law rule squarely controls.

See *Rollins Investment Co.* v. *George et al.,* 48 Fed. 776 (1891); *American Box Co. et al.* v. *Crosman et al.,* 57 Fed. 1021 (1892); *Mechanics Bank of Alexandria* v. *Seton,* 1 Peters, 299 (1828); *Smith* v. *Bourbon County,* 127 U. S. 105 (1887); *Brewster & Co.* v. *Tuthill Spring Co. et al.,* 34 Fed. 769; *Lacombe* v. *Forstalls Sons,* 123 U. S. 562. If specific performance be denied alternative money damages cannot be recovered by a bill in equity. *Zeringue* v. *Texas and P. R. Co.,* 34 Federal, 239 (1888). See also *Summerlin* v. *Fronteriza Mining and Milling Co.,* 41 Fed. 249 (1890).

In Pennsylvania the common law rule also governs, and the exception thereto is construed even more strictly than in the United States Courts. In the course of the opinion in Foll's Appeal, 91 Pa. 434 (1879), Mr. Justice Paxson said: "The general rule is, that equity will not enforce specific execution of a contract relating to personal chattels: 3 'Parsons on Contracts,' 364. This is so, even in England, where the equity jurisdiction is much broader than in this state. The reason for the rule is that for the breach of a contract of sale of personal chattels there is an adequate remedy at law, a jury can be in no doubt as to the proper measure of damages. This is specially true of stocks and public securities, which have a known market value. The disappointed purchaser can go into the market and purchase a corresponding number of shares of the same stock." He then notes the existence of the exception of inadequacy of damages to the general rule, and continues, "I know of no instance in this state, in which a court of equity has decreed specific performance of a sale of stock." See also *McGowin* v. *Remington,* 12 Pa. 56 (1848); *Stayton to the use of Bryan* v. *Riddle et al.,* 114 Pa. 464 (1886); Goodwin Co.'s Appeal, 117 Pa. 514 (1888). Foregoing case falls within the exception: *Roland* v. *Lancaster County National Bank,* 135 Pa. 598 (1890); *Edelman et al.* v. *Latshaw et al.,* 159 Pa. 644 (1894); *Rigg* v. *The Reading etc. Co.,* 191 Pa. 298 (1899); *Meehan* v. *Owens,* 196 Pa. 69 (1900); *Sank* v. *The Union S. S. Co. et al.,* 5 Phila. County Reps. 499; *Philadelphia and Reading R. R. Co.* v. *Sticher,* 11 W. N. C. 325. It is also believed that a similar view of the law obtains in most of the other states of the country. See *McLaughlin* v. *Piatti,* 27 Cal. 452 (1865).

A notable exception, however, is found in New York, where the common law rule and its exception are very differently construed. Therefore the cases dealing with the subject in that jurisdiction will be examined with some care since they are more or less opposed by a great weight of authorities in other states.

The first case bearing on the subject seems to be *Phillips* v.

Berger, 2 Barb. 608 (1848), where specific performance of an agreement to compromise a judgment was decreed. In the opinion the learned judge states that, while the jurisdiction of equity to compel the specific performance of contracts relating to lands is "pretty well settled," such is not the case with regard to contracts for personal acts or for the sale and delivery of personal property. He then goes on to say: "The reason for the distinction between the two classes of contracts has long since passed away, yet the distinction still in a measure remains. Judge Story, with great propriety, in his 'Commentaries on Equity Jurisprudence,' remarks that there is no reasonable objection to allowing the party who is injured by the breach to have an election, either to take damages at law, or to have a specific performance in equity. The courts have not yet gone that length; but when they do, they will relieve the subject of specific performance of many of its embarrassments, and remove from this branch of equity jurisprudence many of the artificial distinctions to which the courts have been compelled to have recourse in order to justify their advance towards such a sound general rule.

"The rule in regard to personal contracts yet falls short of that and is extended only to cases where the party wants the thing in specie and he cannot otherwise be compensated; that is, where an award of damages would not put him in a situation as beneficial as if the agreement were specifically performed, or where a compensation in damages would fall short of the redress which his situation might require. The general rule is not to entertain jurisdiction to decree a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a mere personal nature, but the rule is qualified, and is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy."

The foregoing opinion clearly shows that the judge favored a liberal application of the rules of specific performance and was not averse to the abolition of the well-settled qualification that where the breach is capable of adequate compensation, specific performance of the contract will not be enforced. This case may be regarded as the starting point of this question in New York; and its reasoning founded, as it is, on Judge Story's view of the law, is significant because of its apparent influence upon subsequent cases.

The next expression of judicial opinion on this point, is contained in *White* v. *Schuyler,* 31 Howard, Pr. 38 (N. Y. Rep. 1865). It is merely dicta, admittedly so, but it shows that the court's mind followed the line of reasoning indicated in *Phillips* v. *Berger* and went even farther. The court said, "It is not objected that the contract relates to a class of property in regard to which it is not usual to direct specific performance upon the ground that the party has an adequate remedy at law in damages.

But if such objection had been taken, I think it ought not to have been sustained, (1) Because the parties evidently contemplated, and specifically contracted for a re-conveyance of the stock. (2) Because, as well on account of the uncertain value of the stock in market, and the infrequent sales of it, as the varying character and success of the business which the stock represented, it was difficult if not impossible, to do justice between the parties in an award of damages. These are controlling reasons in equity for a specific performance." Can the reasons given be properly called "controlling"? At common law and in most jurisdictions, it is submitted that the first reason cannot be so regarded. The judge virtually denies the recognized rule that where the breach can be adequately compensated for in damages, specific performance will not be enforced. He evidently believes that the only thing necessary to obtain specific performance is a sufficiently expressed contractural intention. Thus in this case, the peculiarity of New York law on this point is quite apparent, the rule obtaining unquestioned elsewhere, is regarded in New York with disfavor, and, were this dictum law, would be altogether abolished.

The second reason would, of course, be sufficient if it rendered money damages an inadequate compensation.

The next case, upon its facts, resembles, in many respects, the case under consideration, it is *Belmont* v. *Erie Railway Company,* 52 Barb. 637, especially 673. In this case a number of stockholders sought to have a receiver appointed to manage the affairs of the Erie Railway Company. The plaintiff's bill was dismissed, (1) Because the suit was maintained by parties other than the plaintiff's. (2) Because under the circumstances of the case, mere stockholders had no standing in the court to make application for a receiver. The above points were all that were necessary to the decision of the case, possibly the first was sufficient. During the argument, however, the question was raised as to the right of the Erie directors under the N. Y. Statute (Sess. Laws, 1850, Ch. 140), to issue "convertible bonds," which when an exchange was demanded by their holders might necessitate an increase in the corporate stock unauthorized by the stockholders. In deciding this question the court used language applicable to the point under consideration: Cardozo, J., said, "The power, therefore, to issue bonds in a proper case, with the right to authorize their conversion into stock, is beyond doubt. And, that being so, the right of the directors to issue stock in conversion of those bonds, is clear not only upon a fair and reasonable reading of the section, but upon the rule that when a power is granted, everything that is necessary to fully effectuate it, and the acts it authorizes, is implied, if not expressed; and also because it is but doing voluntarily what by a suit the company might be compelled to do. The holders of

such bonds would be entitled *either* to have the contract to convert them into stock specifically performed, or else to receive compensation in damages; and whether the one or the other, the pecuniary effect on the company would be the same."

It is clear from the above that the learned judge felt the influence of *Phillips* v. *Berger* (see *infra*) and *White* v. *Schuyler* (see *infra*). As in the latter case, the language quoted is simply dicta, but it is advanced as the ground for decision of a point argued in the cause, and for that reason becomes of considerable importance. It certainly shows that in a case, the facts of which were similar to ours, the highest New York court was of opinion that the specific performance of a contract to convert bonds into stock might be enforced *or* damages be recovered, *at the option of the bondholders.*

In *Cushman* v. *Thayer Mfg. Jewelry Co.,* 76 N. Y. 365 (1879), the court apparently swings back to the common law rule, though in reality the decision is at variance with it. The case was, that A. transferred stock in the X. company to B., his wife, by means of a legal assignment, but no transfer was made on the books of X. Subsequently, A. transferred the same stock to C. on the books of the company, said company being fully aware of the previous assignment to B. The stock was only transferable upon presentation of the certificates. B. presented the certificates but X. refused to transfer. Specific performance was decreed, on the ground that the money value of the stock would be inadequate compensation, because the probability of the future increase in the market price might have been an important factor in determining the value of the stock to B., and such a factor could not by reason of its fluctuating character, be covered by money damages. Such reasoning, however, applies to all sales of stock, and hence while the New York court claimed to decide this case under the exception (inadequacy of money damages) to the general rule, it is submitted that in other jurisdictions the plaintiff would have been sent to law to recover the value of the stock, a value, in this case, easily ascertainable.

Generally speaking, it is a rare thing for the courts of any other jurisdiction to decree the specific performance of a contract to transfer stock, unless the value of such stock is in doubt.

In *Johnson* v. *Brooks,* 93 N. Y. 337 (1883), the plaintiff sought to secure the specific performance of an agreement to transfer stock and bonds. In its opinion the court said: "It is in the second place, objected, that even under these findings of the court the plaintiff is not entitled to specific performance. But while it may be conceded that in general a court of equity will not take upon itself to make such decree where chattel property alone is concerned, its jurisdiction to do so is no longer to be doubted, and it is believed that no good reason exists against its

exercise in any case where compensation in damages would not furnish a complete and satisfactory remedy. (Several authorities are here cited including 1 Story's Eq. Jur., pp. 716 to 731, the court continued.) Indeed this learned author (*id.*, p. 717 *a.*) says: It is against conscience that a party should have a right of election whether he would perform his covenant or only pay damages for the breach of it. But on the other hand," he adds, "there is no reasonable objection to allowing the other party, who is injured by the breach, to have an election either to take damages at law, or to have a specific performance in equity." These views have not been fully adopted by the courts, but their equitable jurisdiction has been greatly extended in cases either of express or constructive trusts in relation to chattels, and the present case is within the principle upon which many others stand, and cannot be excluded from the rule governing cases relating to land, upon the mere difference between real and personal estate."

The above quotation from Story, together with the comment thereon, shows how strongly the court leaned towards a liberal construction of the rules of specific performance, and this case, therefore, readily falls in line with the preceding authorities. It is to be noted that the court says of Story's theory, that, "it is not yet fully adopted," leaving it to be inferred that the cases are tending that way.

In The Matter of The Petition of The Argus Company *et al.*, 138, N. Y. 557 (1893), a comparatively recent case which briefly touches on this question, the plaintiffs argued that the defendant should be compelled to re-convey certain stock to them, which he had purchased for value and without notice of a prior agreement, between the stockholders to give one another the first chance to purchase each other's holdings. The court held that specific performance could certainly not be obtained in this case, because the plaintiffs had raised the question collaterally and had not filed a proper bill to that end. On the general subject, however, the court spoke as follows: "The jurisdiction of a court of equity to enforce specific performance of a contract relating to personal property though rarely exerted, cannot be denied, and may be exercised 'where compensation in damages would not furnish a complete and satisfactory remedy': *Johnson* v. *Brooks*, 93 N. Y. 337."

This statement of the law seems in no wise different from the common law doctrine and the rule which prevails generally in other jurisdictions; but in the light of the previous decisions it is thought, that it would receive so liberal a construction in New York, that few circumstances could arise where damages would be considered an adequate compensation, and specific performance refused. Furthermore, there seems to be a strong probability, that at any time, the Court of Appeals may revert

to the reasoning of *Phillips* v. *Berger,* and *White* v. *Schuyler,* and enunciate a definite rule that where there has been a clear agreement to transfer personal property, or to do an act, specific performance of the same will be enforced, whether or not the breach is susceptible of adequate pecuniary compensation. It is submitted that the whole line of New York decisions on this point has been gradually tending towards such a rule, and that its declaration would be merely the logical sequence of a connected chain of legal events. Under any circumstances such decisions as *Cushman* v. *Thayer Mfg. Jewelry Co.,* 76 N. Y. 365, show that the old rule while it *is* adhered to will be construed with increasing liberality.

See also, in this connection, *Middlebrook* v. *The Merchants' Bank,* 41 Barb. 481, *id.* 3 Abb. App. Dec. 395. *The Com. Bk. of Buffalo* v. *Kortright,* 22 Wend. 348; *Buckmaster* v. *The Consumers' Ice Co.,* 5 Daly 313; *Seymour* v. *Delancy,* 6 Johns Ch. 222; *Brown* v. *Britton,* 41 App. Div. 57 (1899).

After a careful review of the foregoing decisions it is thought that there can be no difficulty in applying the law to the facts at hand. It is submitted, that a bill in equity filed by the bondholders against the X. Railroad Company to compel it to specifically perform its contract to exchange its preferred stock for their convertible bonds, would have a good prospect of success in New York; but would almost certainly be dismissed in the courts of the United States, or in Pennsylvania.

The writer, however, is strongly of opinion that in this matter the minority view is the better. Two questions are raised by the condition of the New York law on this point: (1) Should the common law rule be revoked absolutely? (2) If it be retained, should the qualification thereto receive a liberal interpretation?

Let us consider briefly each of these questions.

It does seem that when two parties make a considerate and valid contract for the transfer of stock (*i. e.,* a chattel), that in the absence of any reasons negativing his ability to perform his part of the contract, the transferror should be compellable so to do. A rule of long standing is not to be lightly departed from, and it is undoubtedly true that many consider the power of equity to exact specific performance as an instrument of justice which should be used very sparingly lest use become abuse and instead of affording protection it shall inflict slavery. However, it is believed that there is much force in Judge Story's words on this subject, and that as time goes on it will not improbably be found that the exigencies of business life will warrant a departure from the old doctrine and the specific enforcement of stock transfers whenever there is no practical objection thereto.

But suppose the rule is retained? In this case there are cogent

reasons for interpreting liberally its accompanying qualification. In other words, there are few cases in which a man can be adequately compensated for the non-transfer of stock. This is so because stock differs from other chattels in that its value is uncertain and subject to constant and extreme fluctuations.

Thus in a case like that which forms the subject of this note, the redemption of the bonds might in no proper degree compensate the bondholders, because, while it would enable them to buy stock upon the market, it would not cover a possible, and obviously uncertain premium; on the other hand specific performance would insure *an exchange at par* which alone would satisfy the terms of the contract.

Numerous other reasons exist in favor of a liberal construction of said qualification, in addition to those which have been mentioned in reviewing the foregoing cases, but those just advanced seem conclusive, and may be all summed up in the assertion that nothing which is *uncertain* can be considered adequate.

T. J. G.