SPECIFIC PERFORMANCE OF CONTRACTS—PERFECTING TITLE AFTER SUIT HAS BEGUN.[1]

As a general rule it is correct to say that if, in a suit for the performance of a contract of sale, the plaintiff vendor can make a good title at the time of the decree, it is not necessary that he should show that his title was good when he entered into the contract of sale, or even when he brought his bill. It has been argued that this practice is contrary to the idea that the remedy of specific performance must be mutual. If the vendor's title is imperfect or does not exist at the time he brought his bill, and there was no way in which he could have been forced to perfect it, the vendee could not have succeeded in obtaining a decree against the vendor. The courts in reply to this argument have contented themselves with the statement that the rule, requiring the remedy of specific performance to be mutual, merely means, that the remedy must be mutual at the time of the decree. The fact is that for over a hundred years before the rule requiring mutuality in the remedy was distinctly announced, the practice of allowing a plaintiff vendor to perfect his title after bill brought was of constant occurrence. The doctrine of the necessity for mutuality in the remedy may have been said to have been born with the exception, or rather necessary limitation, that the remedy need only be mutual at the time of the decree. It is the object of this paper to trace the origin and present limits of the practice of permitting the plaintiff in a suit to enforce a purchase to perfect his title after filing his bill.

The earliest reported English case is *Langford* v. *Pitt*.[2] There B. contracted to purchase land from A., the title to be conveyed on or before Lady-day. No conveyance was

[1] Previous papers on the specific performance of contracts and the defence of want of mutuality, with which this paper is connected, will be found in 49 A. L. R., pp. 270, 382, 445, 507, 509, and Vol. 50, pp. 65, 251, 329.

[2] 2 P. Wms., 629, 1731.

made on Lady-day. B. died. A. brought specific performance against his executors and heirs. The defendant argued that by the plaintiff's own showing it appeared that he had not at the time of entering into the articles a good title. To this the court replied: "It is sufficient if the party entering into articles to sell has a good title at the time of the decree, the direction of the court being in all these cases to inquire whether the seller *can,* not whether he *could* make a title at the time of executing the agreement.[3] . . . It would be attended with great inconveniences, were decrees to direct an inquiry, whether the contractor to sell had at the time of entering into such contract a title; for thus all incumbrances and defects must be raked into."[4] The real origin of the rule is here indicated. The complicated state of English land titles made it impossible for anyone to know if he had a perfect title. Therefore, to have refused to enforce a contract merely because there had existed defects in the title, even if those defects were known to the vendor, would have been, not only unjust, but would have practically prohibited contracts for the sale of land. Had it not been for this fact we would probably have had in *Langford* v. *Pitt* a discussion of the propriety of allowing a man to contract for the sale of that which he did not own,[5] followed by an examination of the apparent delay of the plaintiff in not making a good conveyance on Lady-day. As to this delay, the state of English land titles which made it necessary to allow a plaintiff to perfect his title after bill brought, made it inequitable for the court to insist that the vendor should offer a good

[3] P. 630. The court refers to an earlier case, *Stourton* v. *Meers,* in which a plaintiff vendor, apparently not having a good title at the time the suit was brought, was given time to obtain an Act of Parliament to perfect his title.

[4] *Ib,* 631.

[5] Indeed the next year we have the court reported as saying, in *Tendring* v. *London,* 3 Eq. Cas. Abr. 680, pl. 9, 1732: "If A. contracts for the purchase of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so, though the owner offers to make a good title, yet equity will not force the buyer to take it, for every seller that will have such a bargain executed must be *bona fide* a contractor." For a possible reconciliation of this language with the actual practice of the court as indicated by *Langford* v. *Pitt,* see *infra,* note 24.

title on the exact day mentioned in the contract. At the time *Langford* v. *Pitt* was decided, in sales of real property, the court practically refused to listen to a defendant vendee who resisted performance on the ground of the laches of the plaintiff.[6]

There are no other reported cases in the eighteenth century discussing the practice of allowing a plaintiff to perfect his title after bill brought, though it would appear to be unquestioned that the practice was of daily occurrence. In the latter part of the century there was a decided reaction against allowing a plaintiff, who had apparently contracted to give a good title on a particular day, having a specific performance irrespective of the time when he offered a good title.[7] There also existed the more or less indefinite idea that a contract to be enforced in equity must be reciprocal or mutual.[8] As a consequence we have in the defendant's counsel in *Wynn* v. *Morgan*,[9] a case occurring in 1802 objecting to the practice. The plaintiff had agreed to sell an estate in fee, conveyance to be made on January 1. The purchaser refused to take on the ground that the vendor had not a fee, but only a term for 1,000 years. The plaintiff brought his bill for specific performance, and after the bill was filed, procured an Act of Parliament vesting in him the fee simple. Sir Samuel Romilly and a Mr. Stanley, for the defendant, argued that "The court will not carry into execution an agreement that is not reciprocal. The defendant was ready with his money, but the plaintiff had not a title, when he contracted to sell;"[10] and further that the defendant could not be compelled now to accept the title, "consistently with the late authorities, holding the performance of contracts to greater strictness, and considering the time material." Sir

[6] *Vernon* v. *Stephens*, 2 P. Wm. 66, 1722; *Gibson* v. *Patterson*, 1 Atk. 12, 1737.

[7] Compare *Lloyd* v. *Collett*, 4 Bro. C. C. 469, 1793, with the earlier case of *Gregson* v. *Riddle*, 1783, given by Sir Samuel Romilly in his argument in *Seton* v. *Slade*, 7 Ves.,p. 268.

[8] *Bromley* v. *Jefferies*, 2 Vernon, 415, 1700, and cases cited in the first paper on want of mutuality as a defence to a bill for specific performance, 49 A. L. R., 270.

[9] 7 Ves. 202, 1802.

[10] P. 204.

William Grant, however, ignores the argument that the obligation of the parties was not reciprocal. As to time, he considers it "unnecessary to determine generally, whether a plaintiff can at any distance of time come to this court and say, he is now ready to make a title . . ." But he points out that it is in the experience of all "that it has [often] been absolutely necessary for the party insisting upon the contract to do something to enable himself to convey a completely good title,"[11] yet specific performance has always been given.

Lord Eldon, in *Coffin* v. *Cooper*,[12] refused relief to a purchaser who moved to be discharged from his obligation to take certain land, the vendee having procured an Act of Parliament perfecting his title after the master had reported that his title was bad.[13] That Lord Eldon had some doubts as to the wisdom of the practice may be inferred from his language in *Lechmere* v. *Brasier*,[14] where he said: "I will not extend the rule which the court has adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied."[15]

[11] P. 205.

[12] 14 Ves. 205, 1807. In an earlier case, *Jenkins* v. *Hiles*, 6 Ves. 646, 1802, 655, in admitting the existence of the practice, Lord Eldon said: "It is impossible to deny, that upon the old authorities a specific performance might be obtained, if the title could be made good before the report." See also page 154.

[13] The case of *Birch* v. *Haynes*, 2 Meriv. 444, decided by Lord Eldon in 1817, practically decides that a plaintiff who had no title at the time the bill is filed must pay costs.

[14] 2 J. & W. 287, 1821, 289. The case was an application on the part of a purchaser to be discharged from his contract. The vendor at the time of the contract and also at the time of Lord Eldon's opinion not being able to make a good title, the purchaser was discharged.

[15] The case of *Dalby* v. *Pullen*, 1 R. & M. 296 1830, before Lord Lyndhurst, may be considered an application of the language quoted. A. agreed to sell to B. B. made objections to the title. These were cleared, and the master reported the title good. The purchase money was paid into court, and B. took possession. Before conveyance B. learned, what had all along been known to A.'s agent, namely, that there was a serious objection to the title. B. obtained a rule to report the title back to the master, and on re-examination the master reported adversely on the title. A. took exceptions to this report, and before argument obtained a good title. The court refused to grant specific performance and ordered the purchase money returned to B.

At the time of the decision in *Wynn* v. *Morgan,* though as stated there had been a reaction against the refusal to regard time in contracts for the sale of real property as of any importance, it was still doubtful whether it was possible for the parties to a contract for a sale of land to stipulate that the contract would be at an end if a good title was not convey ed on a particular day.[16] Lord Eldon, however, subsequently firmly established the principle that the parties by express agreement could make the completion of the title by a particular day essential to the plaintiff's right to specific performance.[17] This position has since been generally admitted. To use Lord Eldon's expression, "time may be of the essence of the contract." Where it is, and the plaintiff has not offered a good title on the day stipulated, he cannot of course perfect his title after bringing his bill; not because of any objection to that practice, but because he has failed to perform an antecedent condition to the defendant's obligation to take. Had Lord Eldon not only recognized the theoretic right of the parties in a contract for the sale of real property to make an exact time of conveyance an element of the contract, but had he also been inclined to interpret the contracts which came before him as containing such provisions, the practice of permitting plaintiffs to perfect titles after bill brought would have soon practically disappeared. But the confusion in titles to real property, which had been the origin of the practice, still persisted, and though as stated, Lord Eldon repeatedly proclaimed that the parties could make time essential, practically he never held in any case of the sale of a fee that time was essential. Indeed he went so far in one case as to hold, that a contract containing a provision that the land should be conveyanced on a particular day, did not contain a single word making the offer of a good conveyance on that day essential to the vendor's right to a specific performance.[18] Practically, therefore, while the position of Lord Eldon in recognizing

[16] See statement of Lord Eldon in *Boehm* v. *Wood,* 1 J. & W. 419, 1820, 420.

[17] *Levy* v. *Lindo,* 3 Meriv. 81, 1817, 84; *Boehm* v. *Wood,* 1 J. & W. 419, 1820, 420; *Withy* v. *Cottle,* T. & R. 78, 1823, 79.

[18] *Boehm* v. *Wood,* 1 J. & W. 419, 1820.

the right of the parties to contract for a conveyance on a particular day or not at all, contained the possibility of a decided curtailment of the practice of permitting the plaintiff to perfect his title after bill brought, the practice was probably as general during Lord Eldon's time as it had been in the eighteenth century.

The idea that the remedy of specific performance must be mutual was first definitely adopted by the English court in 1828.[19] In 1842 we have two reported cases, *Eyston* v. *Simonds*[20] and *Salisbury* v. *Hatcher*,[21] in which the plaintiff sought to enforce a contract to purchase land, though at the time of the contract he had not a good title. In both cases the defence of want of mutuality is raised. In the first case Vice-Chancellor Knight-Bruce does not notice the defence, and in the second he merely points to the fact that mutuality at the time the bill is filed has not heretofore been required.[22] As far as the writer is aware the arguments in these cases are the only attempts in England to introduce the present idea in respect to the necessity for mutuality in the remedy of specific performance, as a reason for requiring the seller to have a good title at the time of the contract.[23]

In none of the cases we have discussed do the facts reported warrant the assumption that the plaintiff when he contracted to sell had absolutely no title. None of them have the earmarks of a mere speculation on the plaintiff's part. The decisions reflect the feeling that he who sells an estate to which he believes he has a title, should have time to perfect that title. It is therefore pertinent to inquire, if the same relief would be given in a case where at the time of the contract the plaintiff has no shadow of a claim on the land he sells. The language in the case of *Tendring* v. *London*[24] indicates that the court in the first half of the eighteenth century would have tended to give

[19] See *supra*, note 6.
[20] 1 Y. & C. C. C. 608, 1842.
[21] 2 Y. & C. C. C. 54, 1842.
[22] P. 63.
[23] For a case in the United States; see *infra*, note 50.
[24] 3 Eq. Cas. Abr. 680, pl. 9, 1732, quoted in full *supra*, note 5.

a negative answer to this question. Lord Eldon, while he evidently thinks specific performance should not be given in such a case, is of the opinion that there is no doubt but that it was in his day too late for the court to take the position that a specific performance could be refused.[25] The next reported case is *Hoggart* v. *Scott*.[26] There certain persons, thinking themselves trustees of an estate, agreed to sell part

[25] Lord Eldon points out that: "There is a difference between an estate subject to encumbrances, and the case I put, where the vendor at the date of the contract has not a title." But he has immediately preceded this sentence by the observation that ". . . if a person carries an estate to market, not having any title at the time, it is much too late to discuss the question, whether it would have been wholesome originally to have held that he should not have a specific performance." *Mortlock* v. *Buller*, 10 ves. 1804, p. 315. Years afterwards in *Boehm* v. *Wood*, 1 J. & W. 419, 1820, 421, he confirms this opinion, saying "I admit, however, that if A. B. undertakes to sell another's estate, it does not signify whether A. B. has any interest, provided he can give the estate at the time the purchaser was to have it."

Sudgen, in his work on Vendors and Purchasers, follows the earlier case of *Tendring* v. *London*, 3 Eq. Cas. Abr. 680, pl. 9, 1732. He says: "Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take it, for every seller ought to be a *bona fide* contractor; and it would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate." Vol. 1, p. 207, ninth ed. He also brings in the idea of mutuality which would apply to any perfecting of title after contract, and not merely to the case where there was no title in the vendor at the time of the contract. He says: "Besides, the remedy is not mutual, which, perhaps, is, of itself, a sufficient objection in a case of this nature."

The courts of common law were also discussing a similar question. In 1826 Lord Chief Justice Abbott, in *Bryan* v. *Lewis*, Ry. & Moo. 386, held that a contract to sell that which the vendor must go into the market to buy amounted to a wager on the price of the commodity. This position was soon repudiated: See *Hibblewhite* v. *M'Morine*, 5 M. & W. 462, 1839, where Baron Parke said that he could not see "what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving." In *Mortimer* v. *M'Callan*, 6 M. & W. 58, 1840, 76, Baron Alderson places the refusal to follow *Bryan* v. *Lewis* on the ground that "it would put an end to half the commercial contracts in London."

[26] 1 R. & M. 293, 1830.

to the defendant. On discovering their error the vendors notified the defendant, telling him that they would at once take steps to acquire a title. The only action taken by the defendant was to urge the vendors to complete their title. Subsequently the defendant repudiated the contract because of the delay. Sir John Leach, in the course of his opinion, points out that: "The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title."[27] The inference from this is, that if the vendor has no title at the time of the contract, the vendee, discovering the fact, can terminate the contract, in which event the vendor would be denied relief because there was no longer any contract between the parties. A few years later Vice-Chancellor Shadwell, speaking on the same general subject, introduces the thought that the knowledge of the vendor at the time of the contract that he has no title is an element to be taken into consideration. "I admit," he said, "if the case is that A., with reference to an estate which he knows to belong to B., contracts to sell to C., that it is a very wholesome rule that this court ought not to aid such a contract."[28] In the case of *Forrer* v. *Nash*,[29] Sir John Romilly refused to give specific performance, where the plaintiff agreed to sell a lease which he knew he had no power to assign. The defendant on learning the fact had refused to proceed. At the time the bill was filed the plaintiff had obtained the right to make the assignment. Mr. Justice Kekewich, in *Wylson* v. *Dunn*,[30] expresses the opinion that, "If a man contracts to sell an agreement for a lease, and it turns out that he has not got an agreement for a lease, the purchaser, when he finds that to be so, may say, 'I will not enter into it; I am not repudiating the contract, for I never entered into it; I am entitled to be off and I am off.'" This is the last expression of the English courts that the writer has been able to find. It would appear

[27] Specific performance was given.

[28] *Chamberlain* v. *Lee*, 10 Sim. 444, 1840, 450.

[29] 35 Beav. 167, 1865.

[30] L. R. 34 Ch. D. 569, 1887, 577. The question was not involved in the decision.

that in England at the present time a court of equity will discharge a purchaser who, believing that he is buying from a person having a good title, finds that his vendor has been selling that which he had no claim upon.

In order that the right of the vendee to terminate the contract may not be doubtful two things must concur: at the time of the contract the vendor must have had no title, and this fact though known to him, he must have concealed from the vendee. Thus, Vice-Chancellor Shadwell himself in *Chamberlain* v. *Lee* did not dismiss the plaintiff's bill, though there was a total failure of title to a small portion of the estate sold. The vendor was ignorant of the defect, and he was given an opportunity to make by purchase a title to it. Shadwell's successor, Knight-Bruce, admitted that it was doubtful whether the purchaser of an estate, finding that a material fact relating to the title had been concealed from him, could not declare the contract at an end.[31] Eighteen years later the same judge in *Murrell* v. *Goodyear*,[32] again refuses to give a positive opinion as to the right of the vendee, on learning of defects in the vendor's title, to terminate the contract. Thus it is doubtful whether in England the vendee may terminate the contract, where the vendee finds there is a very serious defect in the vendor's title, though not a total absence of title, even though this defect was known to the vendor at the time of the contract. As stated, when the vendee can terminate the contract, it is of course impossible for the vendor to perfect his title after he has brought his bill.

In all cases so far discussed the defects in the vendor's title were not known to the vendee at the time of the sale. Where the defect in the vendor's title is known to the vendee at the time of the contract, and the vendor promises to convey a good title, it would appear necessary to allow him a reasonable time to do so. It would also appear to follow that the title could be perfected after bill brought. In England this was assumed in *Murrell* v. *Goodyear*,[33] where in a

[31] *Eyston* v. *Simonds*, 1 Y. & C. C. C .608, 1842, 613 (in this case the parties continued the negotiation concerning the title); *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54, 1842, 65 (here again the discussion concerning the title continued after notice of the defect). Specific performance was granted in both cases.

[32] 1 De G. F. & J. 432, 1860, 446.

[33] See note 32 supra.

contract for the sale of real property there was a clause, which provided that if the purchaser had any objections to the title he should make the same within a specified time after the delivery of the abstract of title.[34] The court held that such clause presupposed a possibility of defects in title, and such defects appearing the vendee could not terminate the contract, but must allow the vendor a reasonable time to perfect his title.[35] When the vendee knows of the defect and the vendor only promises to convey such title as he has, any question involved in perfecting the title cannot arise. Where the vendor merely promises to convey a good title provided he can secure one, it would appear that the vendee has a right to terminate the contract at any time before the vendor secures a good title.[36] In this case the vendor would apparently have to complete his title before bringing the bill, else during the pendency of the suit the defendant would have the right to terminate the contract. The real difficulty in those cases where the vendee knows of the defect in his vendor's title at the time of the contract, is to determine the exact meaning of the contract between the parties, that is whether the sale is of such title as the vendor has, or of a good title, or whether it is merely an agreement to sell provided a good title can be obtained. The question of the proper interpretation of such contracts I have discussed at length in a note to a previous paper.[37]

In the United States as early as 1809, Chief Justice Marshall assumed that a court of equity would grant specific performance to a vendor if he could perfect his title before de-

[34] In England it is usual to insert such a clause.

[35] The question what is a reasonable time to perfect title in these cases the writer hopes to discuss in a subsequent article. Of course, if an exact day for the completion of the conveyance has been made an element of importance by express words, the fact that the defect may be cured in a short time does not enable the vendor, who has not conveyed on the day, to obtain relief. This question will also be discussed in a subsequent paper.

[36] *Wylson* v. *Dunn*, L. R. 34 Ch. D. 569, 1887, 578. The court, per Kekewick, here says: "If in the meantime the vendor had incurred expense, it may be that he would have a right of action against the purchaser for his expenditure."

[37] See June number, *supra*, 50 A. L. R. 336, note 19.

cree.[38] The same assumption has been repeatedly made since.[39] Even encumbrances existing at the time of the decree do not prevent specific performance, provided they can be satisfied out of the purchase money.[40] In the United States, however, the idea that the real question to be decided in a case where the vendor has not a good title at the time of the contract, is the effect of the delay, if any, on the rights and obligations of the parties, is stated much more clearly than in England. In New York as early as 1835, the court said: "A specific performance may be decreed, if it appears by the report of a master that a perfect title can be made to the purchaser at the time of making such report, *unless the* purchaser has been materially injured by the delay."[41] So also in *More* v. *Smedburg*,[42] the vendor had not a good title at the time of the contract, the vendee tried to repudiate, and the court assumed that the only question to be decided, the vendor being then able to make a good title, was whether an exact day of conveyance was provided by the contract, and, if not, what was a reasonable time for the vendor to complete his contract.[43] The same idea has been advanced in other states.[44]

[38] *Hepburn* v. *Auld*, 5 Cr. 262, 277, 1809. The case went against the plaintiff because of imperfection in his title still existing. In a subsequent litigation arising out of the same transaction, it was held that a vendor, whose bill for specific performance had been dismissed because of the condition of his title, could not perfect his title and then force the vendee to take. See *Helpurn* v. *Dunlap*, 1 Wh. 179, 1816, 185, 195, per Washington, J.

[39] *Watts* v. *Waddle*, 31 U. S. 389, 1832, 399; *Brown* v. *Haff*, 5 Paige, 235, N. Y. 1835, 241, *dicta; Baldwin* v. *Salter*, 8 Paige, 473, 1840, 474, *dicta; Luckett* v. *Williamson*, 37 Mo. 395, 1866, 395; *Jenkins* v. *Fahey*, 73 N. Y. 355, 1878, 359; *Logan* v. *Bull*, 78 Ky. 607, 1880, 617; *Oakey* v. *Cook*, 41 N. J. Eq. 350, 1886, 364.

[40] *Guild* v. *Railroad*, 57 Kan. 70, 1896, 76, 77, and cases there cited.

[41] Per Chancellor Walworth in *The Reformed Dutch Church* v. *Mott*, 7 Paige, 77, 85, 1838.

[42] 8 Paige, 600, N. Y. 1841.

[43] Specific performance was granted.

[44] In Maryland, in *Buchanan* v. *Lorman*, 3 Gill. 51, 1845, 77, Chief Justice Archer said: "The ability of the vendor (to make a good title) should exist, when his duty by the contract arises to convey, or at the time of a decree for a conveyance, where time is not of the essence of the contract." Cited with approval and at length in *Dorsey* v. *Hobbs*,

In Massachusetts the question was for a time open to doubt. In *Richmond* v. *Gray*,[45] there was a contract for the sale of land dated the twenty-fifth of June, 1859. No exact day was mentioned for the conveyance. The vendee took possession, but in September relinquished possession, and gave notice of the termination of the contract, because of defects in the vendor's title. In the following April the vendor perfected his title, and on June 12 brought a bill for specific performance. The court held that time was material, that the plaintiff had not perfected his title within a proper time, and therefore the rule permitting a plaintiff to perfect his title after bill brought did not apply.[46] The rule, that where time is not material the title can be perfected after bill brought, is acknowledged; but Judge Chapman, who wrote the opinion, treats it as an anomaly, saying that, "It amounts to this: that a party who commences a suit with no existing cause of action may acquire a claim to a decree by the delay of the cause in court. And there is danger that it may amount to making a contract for the parties into which they never entered."[47] A few years later the same court in assuming that specific performance would in no case be given if the vendor was not the owner at the time of the sale,[48] copied the language of *Tendring* v. *London*.[49] These apparent doubts in regard to the whole practice of granting specific performance, where the vendor had to perfect

10 Md. 412, 1857, 417, 418, and also in *Foley* v. *Crow*, 37 Md. 51, 1872, 59, 60. See also *Maryland Construction Co.* v. *Kuper*, 45 A. 197, Md. 1900.

In *Westall* v. *Austin*, 5 Ir. Eq. 1 N. C. 1847, 3, 4, there is a *dictum* by Judge Nash to the effect that it is the privilege of the vendor to complete his title, and this he may do at any time before decree, provided there has been no unnecessary delay.

[45] 85 Mass. 25, 1861.

[46] See especially page 29.

[47] Page 29. He further assumes that since *Harrington* v. *Wheeler*, a case decided in England in 1799 (see 4 Vesey, 686), time in contracts for the sale of real property is usually regarded as material. That this was an error I have indicated *supra*, note 16, and hope to show at length in a subsequent paper.

[48] *Dicta* per Foster, J., in *Hurley* v. *Brown*, 98 Mass. 545, 1868, 547.

[49] 3 Eq. Cas. Abr. 680, 1732, *supra*, note 8.

his title after the contract, led Judge Wells in *Dresel* v. *Jordan*,[50] to make a rather careful examination of the whole subject. The plaintiffs, in the case before the court, had not a perfect title at the time of the contract, but their title was good before the defendant was ready to receive it. Specific performance was granted, and the language in *Hurley* v. *Brown* expressly repudiated.[51] Judge Wells expressed the point of view of the American cases when he said: "The equitable rule is established by numerous authorities, that where time is not the essence of the contract, and is not made material by the offer to fulfill by the other party, and request for a conveyance, the seller will be allowed reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. And in all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement, or by the equities of the particular case, he is required to make the conveyance, in order to entitle himself to the consideration."[52] He also brushes aside the argument that where the title is not good at the time of the contract there is a lack of mutuality.[53]

It will be noticed that the presumption from the language just quoted, is that the vendor need not have a shadow of a title at the time of the contract. I have been unable to find American cases discussing the question of the right of the vendee to terminate the contract if he finds his vendor has no title.[54] Where the vendee at the time of the contract knows of the imperfect state of vendor's title, and the vendor is assumed to agree to convey a good title, he has, as

[50] 104 Mass. 407, 1870.

[51] See page 414.

[52] Pages 415, 416.

[53] Page 414. This is the only case in which want of mutuality is raised as a defence. Even here, want of mutuality in the obligation, rather than in the remedy, is the argument to which Judge Wells seems to be replying. Of course there is no want of mutuality in the obligations of the parties in these cases. *Dresel* v. *Jordan* is perhaps the leading case in this country.

[54] See *supra*, note 29.

in England, a right to perfect his title at any time before decree.[55]

The case of *Miller* v. *Cameron*[56] suggests a possible exception to the practice we have been discussing. It would appear that in that case the plaintiff vendor had not signed the contract of sale. In his bill he did not allege that he had offered a good title. A demurrer was sustained on the ground that in a case "where the complainant is not originally bound—that is, is not bound at all by the contract, and cannot himself be brought into court, he should by all means be required to show that he had most faithfully performed every stipulation, on his part to be performed, so far as they appear upon the record."[57] Irrespective of the correctness of applying these ideas to cases where only the defendant has signed, which is a question of the proper interpretation of the Statute of Frauds, it would appeal to the writer that in the case of a contract containing an option to sell, the option is not properly taken up unless the holder offers a good title, and that therefore it would be, as indicated in the New Jersey case just cited, improper to permit a vendor under such a contract to complete his title after filing his bill.

In regard to the practice as a whole it may be regarded as proper, even though the confusion of titles to real property, which was the original cause of the practice, does not exist in this country to anything like the extent it did in England in the eighteenth century. Of course the contract should be free from objection, and the title, though not made out at the time the bill is filed, should be made out within the time contemplated by the parties. The first proviso is, as we have seen, expressly pointed out by the English courts, the second by the American. Both, however, may be assumed to be essential. Whether the first criterion is satisfied where the vendor at the time of the contract knew that he had no title is apparently open to doubt on this side of the Atlantic. In

[55] There are at least two cases in which the facts indicated appear: *Tison v. Smith,* 8 Tex. 147, 1852; *Reeves* v. *Dickey,* 10 Grat. 138. Va., 1853.

[56] 45 N. J. Eq. 95, 1889.

[57] Page 96.

England it would appear to be fatal to the plaintiff's bill. This is a question of the policy of the law's recognition of a certain class of contracts. It has nothing to do with the specific performance of contracts. So also whether a contract is completed within the time contemplated by the parties is a question of the interpretation of contracts, and has likewise nothing to do with specific performance. Though it has been necessary to point out the tendencies of the decisions on both these questions in order to show the present scope of the practice of permitting a plaintiff to perfect his title after bill filed, I have not discussed either. But assuming that the original contract is a proper one, and at the time the court is called upon to dispose of the case the plaintiff is able to fulfill his contract to the letter, there is certainly no injustice to the defendant in making him fulfill his promises. For the court to undertake to investigate the extent of the defects in the plaintiff's title at a prior time, or how far these defects, if they existed, were known to the plaintiff, would, under the circumstances, smack of an academic discussion rather than of an effort at the practical administration of justice.

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