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NOTES.

THE "BALANCE OF INJURY" AS A REASON FOR REFUSING AN INJUNCTION TO RESTRAIN A NUISANCE.

In the recent case of *McCarthy* v. *Bunker Hill and Sullivan Mining Company*,[1] the complainant, a riparian owner, brought a bill to perpetually restrain the mining company from so operating their mills and concentrators as to pollute the stream which ran through the complainant's land. The damage alleged was that the water was rendered unfit for domestic purposes, and that a poisonous sediment was deposited on complainant's land, which rendered the soil unfit for agriculture. The de-

[1] 164 Fed. 927 (C. C. A., 9th Circ.).

fendant denied the allegations and stated that he was operating his mines and concentrators in a careful and reasonable manner; that if the injunction was granted it would necessitate the closing of the mines, which employed over 10,000 persons and in which a large amount of capital was invested, and that it would as a result of throwing a large number of persons out of employment, practically destroy the business of important towns and the markets for the products of many farms.

The Court refused the injunction on two grounds. First, because there was a substantial conflict in the proofs. Second, because the comparative injury resulting from granting the injunction would be greater than the injury resulting from refusing it.

There is some conflict in the cases as to whether the second ground of the decision is sound or not.

It is generally recognized to be applicable where the bill is for a preliminary injunction.[2]

The cases in which the doctrine of the balance of injury is involved are often divided into two classes. First, where the injunction if granted would cause the defendant greater injury than would result to the plaintiff if not granted. Second, where the public would suffer if the injunction were granted. In most of the cases, however, as in the principal case, both these results concur.

The jurisdiction of equity to restrain nuisances is in aid of the legal right, when the legal right is inadequate, and to prevent a multiplicity of suits.[3]

The Court, then, must in every case be satisfied that the act of the defendant amounts to a tort. This in cases of the pollution of streams and making the air impure is often a troublesome question, depending on what is a reasonable use, for each particular locality.[4]

But once it is admitted that the legal tort exists and is continuing, the question arises; should the injunction follow as of course, or must the complainant show actual damage, or does it depend on the comparative injuries?

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[2] *Evans* v. *Fertilizing Co.*, 160 Pa. 209, 224; *Sellers* v. *Parvis*, 30 Fed. 164; *Milling Co.* v. *Tenn. Coal Co.*, 123 Fed. 811.

[3] Kerr on Inj.,* 166; I High on Inj., sec. 739.

[4] *Gilbert* v. *Showerman*, 23 Mich. 448.

For an extreme case denying the right of an action at law for the pollution of a stream on the ground that the rights of an individual must give way to the interests of the community, see *Sanderson* v. *Coal Co.*, 113 Pa. 126.

It has been held that no actual damage need exist.[5] Even though the public will be injured by granting the injunction.[6]

There are also cases in accord with the principal case which say the injunction will be refused if it will do more harm to grant it than to refuse it.[7]

The Courts in these cases intimate that the remedy at law is adequate.[8] But it is submitted that the amount of damage which will result to the defendant or the public by the granting of the injunction is no test of the adequacy of the remedy at law. The weight of authority seems to be that the injury to the defendant or the public cannot be considered.[9]

It is noticeable that in the majority of the cases where an injunction was refused there was some other element present besides the mere balance of injury, such as laches, or the fact that the complainant's right was not clearly proved, as in the principal case.[10]

Then, again, the cases where the injunction was refused were usually cases of the pollution of water or of rendering the air impure. That is an infringement of purely incorporeal property. While on the other hand, in cases where the water of a stream has been deviated from the complainant's land, the injunction has been granted even if there was shown no actual damage.[11]

Where the damage resulting from the injunction is only to the defendant, he should not be allowed to say that the complainant should be deprived of his remedy because it would injure the defendant.[12] And if the public interests are concerned, is would seem to be a case for legislation.

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[5] *Webb* v. *Portland Manuf. Co.*, 3 Summ. 189.

[6] *Smith* v. *Rochester*, 45 N. Y. 612.

[7] *Clifton Iron Co.* v. *Dye*, 87 Ala. 468; *Doughty* v. *Warren*, 85 N. C. 138; *Mountain Copper Co.*, v. *U. S.*, 142 Fed. 625.

[8] Richard's Appeal, 57 Pa. 105; *Simpson* v. *Justice*, 8 Ired. Eq. 120.

[9] Pomeroy, Eq. Jur., vol. 5, par. 530, 531.

[10] Ibid, note 115 and 116.

[11] *Webb* v. *Portland Manuf. Co.*, 3 Summ. 189; *Smith* v. *Rochester*, 45 N. Y. 612.

[12] *Weston Co.* v. *Pope*, 155 Ind. 394.

Powers of Investigation by the Interstate Commerce Commission.

The recent case of *Harriman* v. *Interstate Commerce Commission*[1] is an example of the modern conflict between economical and political rights, as well as between State and national control. The decision represents the two schools of thought upon these matters. The majority of the Court adheres to the limitations in the law as established by the sovereign power of the people over the diversified sovereignty of the Government, while the minority considers rather the economic results of the particular question.

The decision presents two questions: Did Congress empower the commission to make general investigations, on its own motion, of all the acts and incidents of interstate commerce, or only of matters which might be the subject of complaint or order under the terms of the act; and, incidentally, what is perhaps more fundamental, could such power be constitutionally exercised or delegated by Congress where such investigation would not be the subject of complaint, order, or contemplated enactment of Congress.

The lower court[2] and the dissenting members of the Supreme Court affirmed both these questions, while the majority, speaking through Mr. Justice Holmes, came to the opposite conclusion on the first and declined to pass upon the second. The lower court decided that the commission had power to conduct original investigation; that the power of investigation is broader than the power of legislation; and that where Congress has the power to legislate, there its power of investigation is unlimited, and collateral and incidental questions may be pressed home.

After commenting upon the power thus conferred, in that the commission could summon witnesses before it at any designated place, from any part of the country, and require them to disclose any facts relating to interstate commerce, concerning which it desired to make a recommendation, the majority said, "No such unlimited command over the liberty of all the citizens ever was given, so far as we know, in constitutional times, to any commission or court." While it declined to rule upon the constitutionality of such power in either Congress or the Commission, the plain import of their language appears to be against such power.

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[1] 211 U. S. 407.

[2] *Interstate Commerce Com.* v. *Harriman*, 157 Fed. 432.

This decision is in line with the decisions of our State[3] and Federal[4] courts, as well as those of England,[5] not relating to Parliament. Congress is not, like Parliament, supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the Government, it can exercise only such powers as are delegated to it; and, when it steps beyond the boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. The fundamental maxim of a free government seems to require that the rights of personal liberty and private property should be sacred.[6]

While Congress has the power to make investigations and even to punish for contempt, this power is limited to cases expressly provided for by the Constitution, or to cases where such power is necessarily implied from those constitutional functions and duties to the proper performance of which it is essential.[7] Even where such investigation is upon a subject upon which Congress might act, yet, if no action is intended or could be intended,[8] but it is to be a fruitless investigation into the personal affairs of individuals, it has no more power or authority in the matter than any other equal number of gentlemen.[9]

That such investigations shall be limited to some intended act and to the matter covered by the resolution[10] is essential so that the courts may be enabled to pass upon the exercise of the power. Not even in the courts, though their proper function is investigation, or the grand juries[11] is the power of investigation unlimited. The jurisdiction there is limited in

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[3] *People* v. *Keeler*, 99 N. Y. 463 (1885); *Railway Com.* v. *Express Co.*, 81 Me. 87 (1900); *Kilburn* v. *Massing*, 7 Wis. 630 (1858); Emery's Case, 107 Mass. 172 (1871).

[4] *In re* Chapman, 166 U. S. 661 (1896); *Hale* v. *Henkel*, 201 U. S. 43; *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880).

[5] *Kielley* v. *Carson*, 4 Moo. P. C. 63 (1842).

[6] *Taylor* v. *Ford*, 4 Hill (N. Y.), 140 (1843).

[7] *Burnann* v. *Morrisey*, 80 Mass. 226 (1859); *Kilburn* v. *Thompson*, *supra*.

[8] *People* v. *Keeler*, 39 N. Y. 563 (1884).

[9] *Railway Com.* v. *Express Co.*, 81 Me. 87.

[10] *Interstate C. C.* v. *Railway Co.*, 167 U. S. 509 (1896); *Interstate C. C.* v. *Brunson*, 154 U. S. 477 (1893); *Interstate C. C.* v. *Baird*, 194 U. S. 25 (1903).

[11] Ivins and Mason's Control of Public Utilities (1908); Stimson's The American Constitution (1908).

the extent of territory as well as subject matter. Only the utmost necessity should permit a legislative body or a commission, be it a limited sovereign body or not, to exercise the powers claimed by the Interstate Commission and granted by lower court. It is the capability of abuse and not the probability of it which is to be regarded in judging of the reasons which lie at the foundation and guide in the interpretation of such constitutional restrictions.[12]

The founders[13] of our Constitution intended that, by the superintending care of the States, all the more domestic and personal interests of the people should be regulated and provided for. Though the regulation of commerce was then a new power opposed by few, from which no apprehensions were entertained, yet, through it, the Federal Government has been enabled greatly to encroach upon the jurisdictions of the States. The failure of the States to curb predatory wealth will result in a continuous strengthening and centralization of power in the nation.[14] It behooves the States to exercise their ample powers[15] over the creatures of their sovereignty, else the sentiments and sanction of the sovereign people will crystallize upon the Federal Government and the courts, under pressure of such public opinion, will interpret our fundamental laws accordingly.[16]

Implied Trusts and the Statute of Frauds.

The principle that where a conveyance is made to B and the purchase money is paid by C, a trust arises in favor of C was recently re-stated in *Turpin* v. *Miles*, 71 Atl. 440 (Md., 1908). This sort of a resulting trust was included in Lord Hardwicke's classification[1] and from that time such has been the general common law rule.[2] Since the reason for the resulting use, the fact that it was the custom of the time for the legal title to be in one person and the use to be in another,[3]

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[12] Emery's Case, 107 Mass. 172 (1871).

[13] The Federalist, XLV, XLVI.

[14] Ivins and Mason, Preface X, *supra.*

[15] *State* v. *Express Co.*, 81 Me. 87; *Hale* v. *Henkel*, 201 U. S. 43.

[16] The recent book of Ivins and Mason, on Control of Public Utilities, concisely and correctly defines the functions and powers of such commissions.

[1] *Lloyd* v. *Spillet*, 2 Atk. 148 (1740).

[2] *Contra, Nashville* v. *Lannom*, 36 S. W. 977 (Tenn. 1896).

[3] Introduction to the History of the Law of Real Property, by K. E. Digby, 4th Ed. 327, 1892.

passed away on the enactment of the Statute of Uses, there is no longer any reason for the presumption of the trust in favor of the one paying the money.[4] Accordingly, a number of States have supplanted the common law rule by statute. In Wisconsin,[5] Michigan[6] and Minnesota[7] resulting trusts are abolished in terms and no parol agreement for the grantee to hold the land in trust may be shown. In Kentucky C is allowed to recover from the grantee B the money he has paid, on the ground of a presumption arising that the grantee consented to the expenditure of the money for his use.[8] In Kansas [9] and Indiana,[10] while resulting trusts are abolished, a parol agreement that the grantee shall hold in trust for the one paying the money is allowed to be shown, and the same conclusion seems to have been arrived at without the aid of a statute in at least one jurisdiction.[11] Under the later New York cases,[12] the statute abolishing resulting trusts has been construed as the like statute in Indiana and Kansas. While the statute with the last stated interpretation provides the best rule, the old common-law doctrine as announced in the principal case, though perhaps without justification historically, as shown above, is a far better rule than the Michigan and Wisconsin view, especially since under the second the presumption may be rebutted by showing that the money was lent to the grantee,[13] or that no trust was intended to be raised.[14]

Another question suggested by the decision is whether, when there is a conveyance by A to B on a parol trust for A, a trust may arise for A's benefit by operation of law. The result of the English cases is that such a trust does arise for the reason that to hold otherwise would be to allow the Statute of Frauds to become a cover for fraud, which was not intended. The

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[4] See article "Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land," by J. B. Ames, 20 Harv. L. Rev. 549, 555 (1907).

[5] *Skinner* v. *James,* 69 Wisc. 605 (1887); *Whiting* v. *Gould,* 2 Wisc. 552 (1853).

[6] *Chapman* v. *Chapman,* 114 Mich. 144 (1897).

[7] *Ryan* v. *Williams,* 92 Minn. 506 (1904).

[8] *Martin* v. *Martin,* 5 Bush, 47, 56 (Ky. 1868).

[9] *Franklin* v. *Colley,* 10 Kans. 260, 265 (1872).

[10] *Glidewell* v. *Spaugh,* 26 Ind. 319, 322 (1866).

[11] *Nashville* v. *Lannom, supra.*

[12] *Jeremiah* v. *Pitcher,* 26 N. Y. Appel. Div. 402 (1898); aff. in 163 N. Y. 574 (1900); *Fagan* v. *McDonell,* 100 N. Y. Sup. 641.

[13] *Whaley* v. *Whaley,* 71 Ala. 162 (1881).

[14] *Rider* v. *Kidder,* 10 Vesey Jr. 360 (1805).

fraud alleged is "not in the deed, but in relying upon it to give effect to something which was not the real intention of the parties."[15] It will be seen that this is purely equitable fraud,[16] there being no tort connected with the transaction; but this should have no effect upon the raising of the trust or the enforcement of rights under it, though it seems to have been thought of some consequence in another class of cases.[17] The English view has been taken in a very clear and unequivocal dictum[18] in America, but to the writer's knowledge, in no decided case; on the other hand, the contrary has been generally held.[19] In Massachusetts, while equity refuses to raise a trust in favor of the grantor A,[20] he is allowed to recover the value of the land as at the time of the conveyance.[21]

On principle, the English position that as the Statute of Frauds was passed to prevent fraud, it should not be allowed to be an instrument of fraud is permitting the preamble of the statute to control, although the enacting part is clear and unambiguous, a doctrine contrary to the rules of statutory interpretation.[22] Another view regards the situation simply as one where the grantee has land belonging to the grantor and which he is unconscionably holding. The grantor might recover in quasi-contract the value of his property, but could not get the specific property because of the inability of the law to award anything but damages. Since, however, equity has the power to compel a restitution of the specific property, it would seem that this should be done here.[23] This it is urged is not enforcing the express trust, but a trust raised by operation of law.

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[15] *In re* Duke of Marlboro; *Davis* v. *Whitehead,* L. R. [1894], 2 Ch. 133.

[16] A Treatise on Equity Jurisprudence, by J. N. Pomeroy, sec. 873.

[17] Where A conveys or devises to B on the latter's fraudulent parol promise to hold in trust for C, C has been allowed to enforce tho the contrary is held where the parol promise is not fraudulent. *Larmon* v. *Knight,* 140 Ill. 232 (1892); *Goldsmith* v. *Goldsmith,* 145 N. Y. 313 (1895). In these cases the conclusion reached was correct because C was also A's heir, but the reasoning would allow C to enforce, were this otherwise.

[18] *Peacock* v. *Nelson,* 50 Mo. 256, 261 (1872).

[19] *Sturtevant* v. *Sturtevant,* 20 N. Y. 39 (1859); *Brock* v. *Brock,* 90 Ala. 86 (1889).

[20] *Titcomb* v. *Marrill,* 10 Allen, 15 (Mass. 1865).

[21] *Cromwell* v. *Norton,* 193 Mass. 291 (1906).

[22] Cardinal Rules of Legal Interpretation, by E. Beal. 2nd Ed. 253 (1908).

[23] Keener on Quasi Contracts, 286 (1893).

To those feeling the need of following strictly the spirit of the Statute of Frauds, as expressed by the preamble, the English doctrine appeals; to those demanding strict adherence to the statute and who think that more harm will be done by letting in the parol testimony than by refusing the trust, the Massachusetts rule appeals; but to allow the grantee to keep the land and pay nothing for it seems unsupportable.[24]

Is There Consideration in Successive Promises to Perform the Same Thing?

The oft discussed question of whether a promise to perform that which one is already bound to perform by a prior contract was raised in a recent case. The problem may come up in two forms: (1) Where the new promises pass between the same parties who are bound by the earlier contract[1]; (2) where the promises pass between one of the parties to the original contract and a third party.[2]

It is our purpose to confine our attention to the first class of cases.

In *Weed* v. *Spears*[3] five stockholders of a corporation in order to aid its credit, in 1894 mutually obligated themselves to pay the notes and obligations then existing, or which should thereafter come into existence, upon which the names of any two stockholders appeared. In 1897 two stockholders, A and B, entered into an oral agreement by which A promises to pay certain notes, subject to the provision of 1894, and B certain others. B did not fulfil his obligation and A was compelled to pay one of the notes B had promised to discharge. In an action by A to recover the money from B, judgment was given for B on the ground that a promise to do the same thing which one is already bound to perform by a prior contract is no consideration for a subsequent one. This is undoubtedly the Settled English view. Most of the early cases, however, were "ship" cases, where sailors were promised additional compensation to fulfil the shipping articles which they had signed when starting on their voyage.[4] Public policy was the con-

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[24] See article "Resulting Trusts and the Statute of Frauds," by Harlan F. Stone, 6 Col. L. Rev. 326 (1906).

[1] *Stilk* v. *Myrick*, 2 Camp. 317 (1809).

[2] *Shadwell* v. *Shadwell*, 9 C. B., N. S. 159 (1860).

[3] N. Y. 86, No. E. 10 (1908).

[4] *Fraser* v. *Hatton*, 2 C. B., N. S. 512 (1857); *Silk* v. *Myrick*, *supra*.

trolling factor in these cases. In this country the question has frequently come up and there has resulted a decided split in the cases.[5] The decision of the principal case is sustained by the following coterie of eminent authorities: Pollock,[6] Harriman,[7] Williston,[8] Langdell [9] and Leake.[10]

Let us consider the reasons for the opposite conclusion, for there is an array of cases in America which holds the second contract binding.

A reason often assigned for not enforcing the contract is that the second contract contains neither a benefit to the one who is entitled to performance, nor a detriment to him who promises to perform. Is that requisite to a contract?

It is said a privilege is waived when one enters the second contract, viz., the alternative option of paying damages instead of performing the contract. Does the law sanction this grotesque conception of contracts? This is Mr. Justice Holmes' theory: that a contract is a mere risk and that the promisee undertakes to pay damages at his option. The law has always shunned this view of contracts, and equity stepped in at an early date, whenever damages seemed inadequate, in order "to prevent the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach."[11]

Again, it is said that the promisor may consider the payment of damages of less value to him than actual performance of the contract, and hence this new promise to perform is considered a benefit to the promisor sufficient to support a contract.[12] This is merely viewing the proposition just stated from another viewpoint, reiterating that when a contract is about to be broken, damages are all to which the promisor is entitled. This is so far from the truth that in many cases even though the contract provides in terms for a measure of damages, specific performance is given, if the contract is of such a nature as to afford this remedy.[13]

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[5] Ward's Pollock on Contracts (Williston, ed. 1906), 203.

[6] Contracts (6th Ed.), 176.

[7] Contracts, 65.

[8] 8 Har. Law. Rev. 27.

[9] Summary on Contracts, 54 (1880).

[10] Contracts, 2nd Ed., 119.

[11] *Union Pacific Rwy. Co.* v. *Chicago Rwy. Co.*, 163 U. S. at 600 (1895).

[12] *Stoudenmeier* v. *Williamson*, 29 Ala. 558 (1856); *Stewart* v. *Keteltos*, 36 N. Y. 388 (1866).

[13] Fry on Specific Performance, chapter III.

The rescission of the first contract and the substitution of a new is the most specious reason yet given for enforcing the second contract.[14] The difficulty is to find such a rescission in most cases. True, a rescission need not be made in express terms,[15] but it seems paradoxical to say there is a mutual rescission sufficient to support a contract, when in reality it is a pure case of blackmail, as where one party refuses to perform his part of the contract and is induced to go on by the promise of additional compensation. Yet cases have gone to that length.[16] In many cases the facts are such that the question of rescission may be submitted to a jury.[17] However, only so long as a contract is bilateral may it be rescinded by mutual agreement.[18] When once it becomes unilateral through performance by one party the mutual agreement to rescind without more is ineffectual and the first contract remains intact.[19]

Professor Ames, in an erudite treatise[20] concludes that the second contract is a binding contract on the principle that a promise for a promise is sufficient consideration.[21] He controverts the thought that one should look behind the promise at the nature of the obligation assumed, for to do so will result in endless hair splitting. He admits, however, that while on theory these contracts are binding, cogent reasons often exist, on the ground of public policy, for denying their enforcement.

As a matter of fact, this theory of Professor Ames has never been applied from the earliest date to contracts of this class. The courts have always looked behind the mutual promises at the actual moving consideration. Unless there is a rescission of the old contract which is still bilateral, or a new contract is entered into with substantial variations from the prior agreement on both sides,[22] one can hardly expect to convince a court of the validity of the second agreement. The

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[14] *Rollins* v. *March*, 128 Mass. 118 (1829).

[15] Ward's Pollock on Contracts (Williston's ed.), 816.

[16] *Goebel* v. *Linn*, 47 Mich. 489 (1882).

[17] *Rogers* v. *Rogers*, 139 Mass. 440 (1885); *Lattimore* v. *Harsen*, 14 Johns (N. Y.), 257 (1817); *Endriss* v. *Belle Isle Co.*, 49 Mich. 289 (1882).

[18] *Peters and Reed Pottery Co.* v. *Folochener* (Mo.), 110 S. W. 598 (1908).

[19] Ward's Pollock on Contracts (3rd ed. 1906), 816.

[20] 13 Harvard Law Review, 29 (1899).

[21] *Goring* v. *Goring*, 1 Yelv. 11 (1602).

[22] *Dreifus* v. *Columbian Co.*, 194 Pa. 475 (1900).

principal case, therefore, seems to be in line with the authorities on this question.

It becomes an interesting question, however, as to whether there was not a consideration for the new contract when we apply to the analysis of the case one of the rules of suretyship. It is an elementary principle that one surety cannot speculate off his co-surety, but must give him the benefit of any advantageous compromise he has succeeded in effecting with the creditors. While it is true that approximately one hundred thousand dollars of the liabilities was so apportioned that more than one-half of it was to be paid by the defendant, and if the agreement had gone no further than this, and had included no counter stipulation which could be viewed as a consideration for this unequal assumption, such a contract would clearly have been unenforceable, do not the facts of this case take it out of such a situation? Out side of the liability of one hundred thousand dollars, there was a debt of $87,160.80, with respect to which, in the absence of agreement to the contrary, each surety was bound to contribute one-third,[23] and if any one effected a compromise as to his part, he was bound to share the benefit with the others. By the second clause of the agreement, each agreed to abandon the right of contribution with respect to this debt, and each contracted with the others (in exchange for a reciprocal promise to himself) that each might deal independently with the creditors and buy his own peace upon such terms as his skill or persuasiveness would enable him to, without accountability to the others.

By acting in pursuance of that agreement, the defendant escaped by paying only $6000, whereas, if the total debt had been collected, defendant's liability would have been about $29,000. Even under the facts as presented, if the agreement does not stand, the defendant is indebted on this part of the liability to the plaintiffs,—who were compelled to pay $19,000 in order to escape,—in the sum of $2334, and plaintiffs should be permitted to collect this, at least, if not the entire amount of the extra note paid by them.[24]

This, then, is the hard question. Was not the mutual abandonment of the right to demand an accounting between the co-sureties with respect to the indebtedness of $87,160.80 a sufficient relinquishment of a legal right to constitute a consideration for the new contract, resting upon valid, mutual and substantial promises? On the face of the state of facts, as pre-

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[23] *Weed* v. *Calkins*, 24 Hun. (N. Y.), 582 (1881).

[24] 24 Eng. & Am. Ency. 811; *Morgan* v. *Smith*, 70 N. Y. 537 (1877).

sented, the Court's accounting was undoubtedly right, but regarding the contract as entire, which human nature would lead us to believe the parties intended it to be, there is much to be said for its validity. At least it is hard to comprehend the state of mind of the sureties, when they designed this agreement, under any other interpretation of its intention.

Time the Essence of a Contract.

In *Zempel* v. *Hughes, et al.*, 85 Northeastern Reporter, 641, decided in the Supreme Court of Illinois, June 18, 1908, the facts showed a written agreement whereby B agreed to convey to A a farm for the price of $18,000, $500 being paid at the time the agreement was entered into, December 12, 1904, $7500 to be paid "on or before February 28, 1905," and the remaining $10,000 to be satisfied by a conveyance by A to B of two properties therein mentioned. The agreement further read: "but should A fail to perform his contract on his part promptly at the time and in the manner specified, then the above $500 shall be forfeited as liquidated damages and the above contract shall become null and void." A, having on several days previous to February 28, 1905, unsuccessfully attempted to meet B, went on that day to the latter's home and told B's daughter that he was there to close the trade, at the same time showing his deeds for the properties which he was to convey, and the balance of the purchase price in cash, but B could not be found. A few days later—on March 1, 1905,—A made a tender to B, who refused to accept, telling A that he was too late. The Chancellor in the lower court dismissed A's bill for specific performance, but his decision was reversed on appeal.

One of the points argued by B, the vendor, was that time was made of the essence of the contract by its terms, and that as A, the vendee, had not performed on the day named in the agreement, he could not maintain his bill for specific performance. The Court, in answering this, said: "In equity, time is not necessarily deemed of the essence of the contract; but, if it is made so by the terms of the agreement, it will be treated in equity, as in law, as of the essence. But, even where the contract so provides, equity, under peculiar circumstances, may not enforce a forfeiture." The Court further said, that conceding that time was made of the essence of the contract by its terms, it was manifest from the circumstances as shown by the evidence, that B, the vendor, was entirely responsible for the failure of A, the vendee, to make the tender within the

time provided in the contract, as B had obviously tried to avoid meeting A for the purpose of closing the contract for several days previous, and A was clearly excused.

The final decision in the case seems to be in accord with principles which are very well established. In all ordinary cases of contract, equity does not regard time as of the essence of the agreement. This principle has been established by a long line of cases. In one of the earliest cases,[1] Lord Eldon remarked: "To say time is regarded in this court, as at law, is quite impossible." In a Pennsylvania case,[2] decided early in the nineteenth century, Mr. Justice Gibson enunciated the same doctrine as Lord Eldon had previously expressed in England. The contract was for the sale of certain land, the agreement providing for the payment of the purchase money in installments. The last installment became due on April 1, 1816. On April 3, $600 was accepted by the vendor, there being evidence to show that there was at the time of acceptance an agreement made whereby the vendor agreed to take the money only on condition that if the vendee should not pay the balance on the 6th of April, the contract should be void. The money was not tendered until the 15th of August following; and, the vendor refusing to convey, a bill for specific performance was brought by the vendee. Specific performance was decreed, the Court saying that, "Where time admits of compensation, as it perhaps always does where lapse of it arises from money not having been paid at a particular day, it is never an essential part of the agreement." The Court also held that the subsequent agreement, that if the whole sum should not be paid at a certain day, the payment then made should be forfeited, and the original bargain be at an end, gave the vendor no additional right to rescind.

In a case decided in Illinois in 1845,[3] counsel for the vendee, against whom specific performance was asked, contended that unless a party were held to strict performance, except where he showed an excuse for non-performance, fidelity in the execution of contracts would be destroyed, and that if a delay of a week would not cut off a party from relief in Chancery, neither should a delay of a year operate to have that effect. The Court, however, refused to be influenced by this view, saying that in the case at bar the parties evidently did not mean that the contract should be void, if not performed on the day

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[1] *Seton* v. *Slade*, 7 Ves. 265.

[2] *Decamp* v. *Feay*, 5 S. & R. 323.

[3] *Andrews* v. *Sullivan*, 2 Gilman, 327.

named. But, continued the Court, by way of dictum, "even if the vendor were bound to tender a deed on the day named, his delay was satisfactorily accounted for by his absence and unexpected detention from home." The vendor had been called away on business, previous to the day named for performance, and had not returned by that time. It would seem that this dictum goes to an extreme not warranted by the authorities. Ordinarily, where the parties have made time of the essence of the contract, the agreement will be enforced;[4] and it is difficult to see why the vendor's attention to business elsewhere on the day of performance should be considered sufficient excuse to prevent the forfeiture of his right to enforce, subsequently, a contract, of which, by its terms, time was to be of the essence. A more equitable rule was laid down by the Supreme Court of Maine: in a bond conditioned to convey land upon the payment of a note, it was provided that "in case the obligee should neglect or refuse to pay the note according to its tenor, the bond should be void. The delay was excused by proof that the obligee was prevented by illness from attending to the matter at the day specified, and on recovery of his health, sought permission of the obligor to pay it. Upon refusal, he asked equity to aid him. The Court, in allowing him relief, said: "The party seeking relief from a forfeiture must show, that circumstances, which exclude the idea of willful neglect or of gross carelessness, have prevented a strict compliance, or that it has been occasioned by the default of the other party, or that a strict compliance has been waived."[5]

In *Zempel* v. *Hughes, supra,* the Court having decided that time was not of the essence of the contract, its further expressions on the subject must be regarded as *dicta,* but nevertheless, as sound. Although it may be argued with considerable force that where time is of the essence of a contract, a party in default through illness should not be allowed to compel performance, it is impossible to comprehend a court of equity refusing to allow performance of a contract where the default of the party asking relief has been caused by the other party. To so refuse would be to allow one party to take advantage of his own wrong, and the opinion of the Court is a clear enunciation that, this equity will not do, although by refusing performance, the Court would be enforcing the contract according to the strictness of its terms.

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[4] *Smith* v. *Brown,* 5 Gilman (Ill.), 309.

[5] *Jones* v. *Robbins,* 29 Me. 351.