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SPECIFIC PERFORMANCE OF BUILDERS' CONTRACTS

HOWARD L. OLECK†

IN 1920, Roscoe Pound, writing on the subject of the progress of law and equity, touched on the problem of specific performance of contracts to build or repair.1 Concerning this problem he observed that "one of the stock objections in construction contracts is want of sufficient certainty."2 He explained the origin of this objection to the granting of specific performance as follows:

When the English Chancellors were struggling to establish the jurisdiction of Chancery (equity) as a court separate from the existing "law" courts, it was imperative that the dignity of the new courts be maintained. Any order issued by the Chancellor which he could not be certain of being able to enforce would jeopardize this dignity. Accordingly, he avoided decrees for affirmative performance of anything beyond a single act. If a decree did require performance of detailed acts, the execution of the details had to be supervised. From this attitude arose the notion that equity was obliged to supervise the performance of each detail of any action required by its decree. This idea had two consequences: because the court sought to avoid prolonged supervision which its ordinary means and instrumentalities might not be able to carry out, it became prejudiced against the idea of specific performance of construction contracts. In addition a prejudice developed against all affirmative decrees involving more than a single, simple act, and at the same time the court tended to prefer negative decrees wherever possible. Despite the eventual abandonment of this idea in England, it remained a fundamental principle of equity in this country. Moreover, because the courts here have felt that they ought not to remake contracts but only to enforce them, they have required that every detail of performance be fixed, so that the courts can supervise and exact each detail without

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2. Pound, supra note 1, at 433. But see STONE, PROVINCE AND FUNCTION OF LAW 546 (1950), in which it is suggested that the interests of personal freedom and the efficiency of judicial institutions are of equal importance. For historical background see Oleck, Historical Nature of Equity Jurisprudence, 20 FORD. L. REV. 23 (1951).
altering the contract. As a result the older cases were overly squeamish about certainty of details. *Jones v. Parker et al.*,³ decided in 1895 by the Supreme Judicial Court of Massachusetts, was a landmark case in that it represented a turning point of American legal opinion in this respect. It held that, if there existed an objective standard capable of determination and application by experts, the contract might be specifically enforced.⁴

In his conclusion, Pound commented that “... the exigencies of judicial administration of justice will sooner or later require resort to modern machinery despite all technical and historical objections.”

In this conclusion, as in so many others, Pound demonstrated the penetrating insight and vision which have made him famous. Although the law moved with ponderous slowness in the direction indicated by him, it did move. Now, some thirty-two years later, his prophecy has become a fact, albeit in a manner somewhat different from what he may have contemplated.

As Pound sensed, the courts were not averse to remedying the wrongs inherent in many denials of specific performance. The difficulty lay in the “how” of such cases, rather than in the “why.” How could a court render justice effectively when the very nature of the remedy required made its practical enforcement futile?

In the decades after *Jones v. Parker et al.*,⁶ the courts struggled manfully, but not very successfully, with this problem. It remained, and remains true that building contracts are not generally specifically enforced, because the courts will not attempt to enforce decrees which require extended supervision of numerous details.⁷ Yet, at the same

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⁴ See Pound, *supra* note 1, at 434.

⁵ Pound, *supra* note 1, at 436.

⁶ 163 Mass. 564, 40 N. E. 1044 (1895).

time, equity courts always have regarded money damages as inadequate relief for breach of a promise to transfer any interest in specific real property. But the need for a more satisfactory solution has been recognized even while the general rule has been followed, perforce. Accordingly, certain exceptions to the general rule have been developed. Such exceptions are available for building and construction contracts. Of such contracts Pomeroy states that "... it has been said that if an agreement for erecting a building is in its nature defined, there is no difficulty in entertaining a suit for its performance." The English courts, more advanced than ours in this respect, have recognized and enforced specific performance in several classes of cases, viz.: (1) where the construction contract is certain and defined; (2) where the defendant has agreed to build a well-defined structure on his own land and the plaintiff has a material interest therein which is not susceptible of adequate compensation in damages; (3) where the defendant has agreed to do such building on land acquired from the plaintiff for this purpose; and (4) where there is part performance and the defendant has received some benefits in specie. Some American courts have recognized these exceptions in situations in which relief at law would be inadequate, and in which the right to performance is shown. But until now, the English treatment of this problem has been distinctly in advance of our development.

is interesting to note that plaintiffs have won less than one-half of contested actions for specific performance, as compared with 82% of contract cases, 75% of automobile negligence cases, and 54% of other negligence cases, as revealed by the statistics given in HURST, GROWTH OF AMERICAN LAW 173 (1950), citing CLARK AND SIMMONS, STUDY OF LAW ADMINISTRATION IN CONNECTICUT 22-32, 43-9 (1937).

8. RESTATEMENT, CONTRACTS § 360 (1932); 4 POMEROY, EQUITY JURISPRUDENCE 1039 (5th ed. 1941).
9. POMEROY, SPECIFIC PERFORMANCE 61 (2d ed. 1926).
10. Id. at 63.
11. 4 POMEROY, EQUITY JURISPRUDENCE 1038 (5th ed. 1941).
12. 4 ibid. See also Joy v. St. Louis, 138 U. S. 1 (1890). In the latter case the Supreme Court of the United States, consisting of eight of the nine justices who decided Texas and Pac. Ry. v. Marshall, 136 U. S. 393 (1890), granted specific performance of a construction contract, as the remedy and damages at law would be entirely inadequate, "and nothing short of the interposition of a court of equity would provide for the exigencies of the situation." Id. at 49. See also Herzog et al. v. Atchison, T. & S. F. R. R., 153 Cal. 496, 95 Pac. 898 (1908); Taylor et al. v. Florida East Coast Ry., 54 Fla. 635, 45 So. 574, (1907); Jones v. Parker et al., 163 Mass. 564, 40 N. E. 1044 (1895); Beck et al. v. Allison, 56 N. Y. 366 (1874); Rector of St. David's Church v. Wood, 24 Ore. 396, 34 Pac. 18 (1893); 9 AM. JUR. 77 (1937).
13. Gilchester Properties, Ltd. v. Gomm, 1948, 92 SOL. J. 220; SPECIFIC PERFORMANCE WITH COMPENSATION, 93 SOL. J. 262; see also Judicature Act, 1873, 36 & 37 VICT. C. 66, §§ 24-5; and 46 & 47 VICT. C. 49 (1883), which revised Chancery Amendment Act, 1858, 21 & 22 VICT. C. 27, § 2 (Lord Cairn's Act).
Nevertheless, it is true that both state and federal American courts of equity generally have enforced contracts to build, and contracts calling for performance of numerous acts over an extended period of time, provided that the nature of the construction or the acts or work to be done have been sufficiently defined. In this respect the English and American cases have been in harmony. The American federal courts have been especially emphatic in support of this view, and in recognition of the necessity for the adaptation of judicial machinery to deal with increasingly complex problems of this type. In *Kearns-Gorsuch Bottle Co. v. Hartford-Fairmont Co.*, the federal view was stated comprehensively yet tersely, as follows:

"... defendant urges ... that specific performance cannot be ordered because by so doing the court would require from both parties and would be required to supervise, 'the exercise of skill, personal labor and experienced judgment in the continuous operation of a manufacturing business.' ... The law *does* move with the times and usually moves first in the lower courts; ... For me the statement (or perhaps dictum) of *Life Preserver, etc., Co. v. National, etc., Co.* still represents the present state of the law, viz., protracted supervision of a business should *not* be assumed, but it is not true that it *cannot* be assumed. Everything depends on how insistently the justice of the case demands the court's assumptions of difficult, unfamiliar, and contentious business problems. The tendency of the times is to 'take on' harder and longer jobs. As a Judge of first instance I would not nowadays hesitate to undertake any business enterprise for which, with the support of competent receivers, I thought a reasonably intelligent Judge reasonably fit."

Parenthetically, it should be added that the "rule" against "extended supervision" is a discretionary principle of decision and not a limitation on jurisdiction. In other words, if an appellate court should reverse an extreme "discretionary order" based on the exception to the rule against supervision, such reversal could only logically or lawfully rest on an

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17. 1 F. 2d 318 (S. D. N. Y. 1921).

18. 252 Fed. 139 (2d Cir. 1918).

19. At this point a number of illustrative cases were cited.

ascertained abuse of discretion; the error would be in degree, not in kind. Moreover, it should be clear that denial of equitable relief as a matter of discretion would entitle a plaintiff to alternative legal relief or money damages.

A summation of what has been stated hereinabove, at this point, would reveal no especially remarkable progress by the courts in dealing with the problem of specific performance of builders' contracts. The principal advance seems to have occurred immediately after the close of World War I. This would coincide with the relatively limited building boom which followed World War I. The speculative boom of the nineteen twenties and the depression of the nineteen thirties resulted in little building, and correspondingly little litigation of building contracts. The first half of the nineteen forties, the period of World War II, again, saw little construction work of a private nature being done, although there was considerable public building. But then came the post-World War II boom, and with it such an expansion of private building as this nation never before had seen. Throughout the country housing “developments” mushroomed. Each development required a number of individual building contracts; the aggregate, nationwide, totaling many thousands of contracts. Inevitably, disputes and litigation arose, and the courts were faced again with the problem of specific performance of builders' contracts.

The recent unprecedented number of private building contracts have been characterized by the fact that most of them were entered into by buyers of limited financial means. At the same time many builders have formed special building corporations to deal with their various specific home or “development” projects. These corporations, in many cases, survive the completion of construction and the closing of titles for only a short space of time. In almost all such construction contracts nowadays prudent builders seek to secure themselves against mounting material and labor costs. This usually is done by the method of inserting into the contract a clause denying any right to damages to the buyer, in case of delay or non-completion by the builder, if the default is the result of strikes or other causes “beyond the control of the builder.” Many of these contracts have been (and still are being) entered into by buyers who were (and are) driven by imperative need for decent living quarters, or by wifely insistence that the enjoyment of “the better life” no longer be postponed.

21. Id. at 320. See also Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408 (1898); Municipal Gas Co. v. Lone Star Gas Co., 259 S. W. 684, 690 (Tex. 1924).

22. These facts, especially as they recently applied to veterans of World War II, are too well-known to need documentation here.
There can be little doubt that a veteran of World War II, in the years immediately following the war's end, had relatively little interest in the remedy of damages when, for any reason, his builder failed to complete and deliver the house the veteran needed. He needed a home, not a lawsuit. Nevertheless, on first inspection the law seemed of little help on this score. Damages seemed to be the only remedy, in many cases. Despite a few exceptions, the rule against specific enforcement seemed to be undefeatable, as yet, despite the efforts of Pound and other progressive spirits. The exceptions, while helpful in a few situations, were too limited to be of much practical utility in the majority of cases.

Had this been all, a plaintiff-buyer would have been hard put to obtain redress in case of even a deliberate default by the defendant-builder-vendor. In fact, many cases of hardship without adequate remedy must have occurred, never to come to public notice. However, there has existed for many years another provision of law which has held the key to the solution of this dilemma, but which has long remained not applied to this situation. In many American jurisdictions the right of a plaintiff in a bill in equity to have damages assessed in lieu of, or concurrently with specific relief has long been recognized. This also has been true in England for almost a century past. The possibilities suggested by the application of this principle to problems of specific performance of construction contracts are many.

Unfortunately, the idea of damages in lieu of specific performance is quite readily translatable into the idea of abatement. For example, in the well-known case of World Exhibit Corp. v. City Bank Farmers


26. See note 25 supra; also Wellston, Contracts § 1423 (rev. ed. 1936).


specific performance with an abatement from the purchase price was granted, because the vendor could not deliver all of what he had contracted to deliver. The Restatement of Contracts states: "The fact that a part of the promised performance cannot be rendered, or is otherwise such that its specific performance would violate some of the rules stated in §§ 360-380, does not prevent the specific enforcement of the remainder, if in all other respects the requisites for specific performance of that remainder exist. Compensation for the partial breach that still remains may be awarded in the same proceeding, either as damages, restitution, or an abatement in price. An indemnity against threatened future harm may also be required." But this is not the same thing as the substitutional redress mentioned in the preceding paragraph hereinabove. In the American code states, as in England, today specific relief and substitutional redress may be had in the same proceeding, as a result of statutes enacted over the last one hundred years. Yet, this fusion of administration did not abolish "the essential and permanent difference between legal and equitable relief. For the distinction between a judgment that the plaintiff recover land, chattels or money, and a judgment that the defendant do or refrain from doing a certain thing is as vital and far-reaching as ever." The theory of substitutional redress, rather than the allied theory of abatement was the one which offered an astonishingly simple and direct solution to the administrative difficulties surrounding the specific performance of construction contracts.

30. See Note, 21 St. John's L. Rev. 104 (1946). Where, in a contract to sell, the title proves defective to an inconsiderable part, the court will decree specific performance with a ratable reduction of the purchase money by way of compensation. Keepers v. Yocum et al., 84 Kan. 554, 114 Pac. 1063 (1911). See also 1 DART, VENDORS AND PURCHASERS 570 (8th ed. 1929); Note, 16 Calif. L. Rev. 541 (1928); Note, 81 A. L. R. 900 (1932); Note, 40 Harv. L. Rev. 476 (1927).
31. Sections 358-80 of the Restatement deal with the subject of specific performance.
34. Ames, Lectures on Legal History and Miscellaneous Legal Essays 311 (1913). See also Cox et al. v. City of New York et al., 265 N. Y. 411, 193 N. E. 251 (1934).
On November 17, 1950, there was reported in the *New York Law Journal* a decision which finally cut the Gordian Knot so unintentionally woven by the early cases. While this was not an appellate decision, and thus seems at first mention not to be declaratory of the law, its direct logic and eminent practicality is so consonant with public policy and the needs of our times that it defies refutation and reversal.\(^{35}\) It was the case of *Gordon v. Hewlett Harbor Construction, Inc.*\(^{36}\) tried in the New York Supreme Court, Tenth Judicial District, by Justice Charles S. Colden.

The *Gordon* case arose and was tried in Nassau County, Long Island, a suburb of New York City and an area in which many construction contracts have been made in recent years. These have been principally home building contracts. This case turned on the fact that the builder was inclined not to perform a contract when it turned out to be unprofitable to him. Rising prices of materials and labor, after the contract had been signed, made its performance onerous from his point of view. Besides the then-current state of mounting inflation, the outbreak of hostilities in Korea had sharply accelerated an already rising level of costs. He reasoned that such great increases in his costs were difficulties beyond his control, and that therefore he should not be bound to perform. Justice Colden pointed out that the matter of price in such a contract is peculiarly within the control of a builder, who should not be permitted to shirk a bargain when he finds that he has made a poor one. Then the problem became a practical matter of how to remedy the non-performance. Damages would not suffice. The buyer needed a home, and was entitled to receive the home which he desired and needed. Obviously the remedy of damages, even liberal damages, would be an inadequate remedy in the conditions prevalent at the time. Justice Colden decreed that specific performance should be effectuated by compelling the builder to deliver title to the land, and to so much of the house as was constructed. In addition the builder was ordered to pay to the plaintiff such sum of money as would be required to complete the house as called for in the contract. Moreover, a referee was to hear and report on any claims for special damages which the plaintiff could prove. Such a decree, which would have shocked legal formalists of the past, evokes profound approval from the practical-minded lawyers of this generation.

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35. Oleck, *Specific Performance of Builders' Contracts*, 125 N. Y. L. J. 22, col. 1 (Jan. 3, 1951), commented editorially on this case. The keen interest of practicing lawyers in this case was immediately demonstrated by the correspondence which the article elicited from the members of the New York bar.

Specific performance and damages in lieu of specific performance, as employed in the Gordon case, must be distinguished from its employment in other situations as abatement rather than as true specific performance. In the case of World Exhibit Corp. v. City Bank Farmers Trust Co., 37 mentioned above true inability to perform resulted in a decree of specific performance with an abatement from the purchase price. 38 In the presence of true inability to perform, such a decree is sound. But a similar solution in a case involving unwillingness to perform would be quite inequitable. It would, in effect, rewrite the contract to suit the convenience of the vendor, which even a court of equity may not do. 39 Similar reasoning applies to situations in which specific performance is impracticable. 40

It may be argued that the equity court in the Gordon case exceeded its proper powers; that its "jurisdiction" does not include the authority to make such a decree as was rendered there. Accordingly, it is appropriate at this point to examine briefly the jurisdiction of courts of equity.

Jurisdiction, in equity, does not mean the same thing as does the word jurisdiction, at law. At law the word connotes power and authority granted by constitutional, or constitutionally created authority, to a court or judge, to pronounce the provisions of the law, regarding certain sets of established or provable facts, for or against certain persons, according to a prescribed procedure. 41 In the absence of such constitutional power, a pronouncement by the court or judge is a nullity; in its presence any incorrect pronouncement is valid until reversed or overruled in proper procedural manner. 42

In equity, jurisdiction means the group or body of types of cases or controversies which comprise the proper subject matter for the operation of the powers of courts. 43 Often jurisdiction is denied by equity where the power exists but should not be exercised, because

37. See note 29 supra.
38. Ibid. See also Note, 21 St. John's L. Rev. 104 (1946). This case turned on a clause in the contract concerning risk of loss, which now is governed, in New York, by N. Y. Real Prop. Law § 240 a. See editorial, 116 N. Y. L. J. 338 (Aug. 27, 1946).
39. 58 C. J. 1221 (1932); see also 49 Am. Jur. 123 (1943).
42. In re Sawyer et al., 124 U. S. 200 (1888); Tonnele v. Wetmore et al., 195 N. Y. 436, 88 N. E. 1068 (1909).
43. People ex rel. Gaynor v. McKane et al., 78 Hun 154, 28 N. Y. Supp. 981 (Sup. Ct. 1894); Black, Law Dictionary 1038 (3d ed. 1933).
of lack of equitable basis for action.\textsuperscript{44} In the absence of power, a decree of equity, like a judgment at law, is a nullity and open to collateral attack; the absence of equity "jurisdiction" merely means only that it will be error to use the power, and the decree may be reversed on appeal.\textsuperscript{45} In other words, a decree of equity which is defective for lack of equity jurisdiction may be attacked only directly, as by appeal, and stands until reversed or upset.\textsuperscript{46} Moreover, in general, the defendant must object to the lack of equity jurisdiction at the beginning of the proceedings, or be deemed to have waived the defect.\textsuperscript{47} But the court itself also may raise the objection at any stage of the proceedings.\textsuperscript{48} In states which follow the Field Code, such as New York and Minnesota, where law and equity are combined in one court, the court properly cannot raise such an objection, which would apply only to the defendant’s right to a jury trial and the form of relief.\textsuperscript{49} The defendant may waive jury trial by failing seasonably to raise objection to the equity jurisdiction, and the form of relief may be changed easily enough in the code states.\textsuperscript{50} In the early days of English chancery, especially prior to the seventeenth century, much less reliance was placed on precedent than is the case today.\textsuperscript{51} It was said, therefore, that equity consisted in large part of the exercise of judicial discretion. Today the discretion of equity courts is rather a customary term than a literal one. Some judicial discretion (more particularly in the sense of "discreetness") there must be, but this is not an arbitrary thing, and bears little relation to the celebrated "Chancellor's Foot" discretion derided by John Selden in his "Table Talk."\textsuperscript{52} Discretion is necessary principally in "balancing

\begin{enumerate}
\item \textit{Sacks v. Stecker}, 62 F. 2d 65 (2d Cir. 1932); \textit{Miller et al. v. Rowan et al.}, 251 Ill. 344, 96 N. E. 285 (1911).
\item \textit{Sexton v. Pike}, 13 Ark. 193 (1852); \textit{Roe v. Mayor et al.}, 80 N. J. Eq. 35, 86 Atl. 815 (1911).
\item \textit{Twist et al. v. Prairie Oil & Gas Co.}, 274 U. S. 684 (1927); \textit{Hanna et ux. v. Reeves et al.}, 22 Wash. 6, 60 Pac. 62 (1900).
\item \textit{Jackson v. Strong}, 222 N. Y. 149, 118 N. E. 512 (1917).
\item \textit{Hoff v. Olson}, 101 Wis. 118, 76 N. W. 1121 (1898). See Note, 27 Col. L. Rev. 65 (1927); also \textit{McClintock, Equity § 41} (2d ed. 1948).
\item \textit{Barbour, The History of Contract in Early English Equity in Oxford Studies in Social & Legal History} 166 (1914).
\item \textit{Selden, Table Talk} 43 (Pollock ed. 1927). See also \textit{Mentlikowski et al. v. Wisiolowski et al.}, 173 Mich. 642, 139 N. W. 874 (1913); \textit{Groesbeck v. Morgan}, 205 N. Y. 385, 99 N. E. 1046 (1912).
\end{enumerate}
the equities,” as in cases involving hardship or public policy.53

Much of the nature of specific performance stems from the essentially "in personam" character of such decrees in equity.54 This characteristic of equity is a result of its ecclesiastical background. The ecclesiastical courts, having no jurisdiction over property, could act only by adjudicating the duties of the parties and by compelling the losing party to obey its decrees.55 Of course, to some extent the common law also enforces its orders “in personam” by contempt, as in cases involving prohibition or mandamus.56 But equity courts act principally on the basis of contempt punishment for disobedience.57 The jurisdiction of equity is grounded, in most cases, on the circumstance of the person


Lawrence, in his treatise on Equity Jurisprudence suggests the following general limitations on the jurisdiction, or employment of the powers of equity:

(1) Only irreparable injuries are the concern of equity. Hermann v. Mexican Petroleum Corp., 85 N. J. Eq. 367, 96 Atl. 492 (1915). If the legal remedies are adequate there is no need for equitable assistance. Roe v. Mayor et al., 80 N. J. Eq. 35, 86 Atl. 815 (1911); Pankey v. Ortiz et al., 26 N. M. 575, 195 Pac. 906 (1921). (2) Only substantial (and not theoretical) claims are the concern of equity. Dubovy v. Woolf et al., 127 Me. 269, 143 Atl. 58 (1928); Goodrich v. Moore, 2 Minn. 61 (1858). But see Borchard, Declaratory Judgments (2d ed. 1941). (3) Only matters subject to practical control are the concern of equity. Dixie Grain Co. et al. v. Quinn, 181 Ala. 208, 61 So. 886 (1913). (4) Matters of primarily political character are not the concern of equity (though equity does protect public as well as private rights). Duggan v. Emporia, 84 Kan. 429, 114 Pac. 235 (1911); Colegrove et al. v. Green et al., 328 U. S. 549 (1946). But see dissent of Justice Black, id. at 566. See Georgia Trust Co. et al. v. State, 109 Ga. 736, 35 S. E. 323 (1900); and 33 A. L. R. 1370 (1924). (5) Equity should not accept jurisdiction when the remedy sought will cause disproportionately great harm to the defendant (unless he is guilty of wilful conduct); it must consider the “balance of convenience” Walters v. McElroy, 151 Pa. 549, 25 Atl. 125 (1892); Bochterle v. Saunders, 36 R. I. 39, 88 Atl. 803 (1913). (6) Equity must limit its jurisdiction so as to conform with public policy. Reed et al. v. Johnson et al., 27 Wash. 42, 67 Pac. 381 (1901). (7) Equity jurisdiction should be available, where harsh remedial measures are sought (such as injunction, cancellation or receivership), only when clear and convincing proof (superior to that required at law) is available. Ralston v. Phila. Rapid Transit Co., 267 Pa. 257, 110 Atl. 329 (1920); Blicking v. Florey's Brick Works, 53 Pa. Super. 325 (1913). (8) Equity relief should suit the situation existing at the time of the issuance of the decree, although any basis for equitable relief is sufficient to permit the plaintiff to commence the proceeding. Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298 (1894). 1 LAWRENCE, Equity Jurisprudence § 41 (1929).

54. Union Trust Co. v. Olmstead, 102 N. Y. 729, 7 N. E. 822 (1886).

55. Langdell, Equity Pleading § 40 (2d ed. 1883), cited in Hutson, The Enforcement of Decrees in Equity 75 (1915).


57. Cook, supra note 56.
of the party to whom its orders are directed being within the power of the court. 58

58. Lord Portarlington v. Soulby, 3 My. & K. 104, 40 Eng. Rep. 40 (1834). In like manner it can command him to do some act relating to property outside its jurisdiction. Penn v. Lord Baltimore, 1 Ves. Sr. 444, 27 Eng. Rep. 1132 (1950). Or it can restrain him from doing an act abroad, Dundas v. Biddle, 2 Pa. 160 (1846), whether the thing forbidden be a conveyance or other act in pais, or the instituting or prosecution of an action in a foreign court. Chapman et al. v. American Surety Co., 261 Ill. 594, 104 N. E. 247 (1914). Nor does the full faith and credit provision of the Constitution forbid the court of one county or state thus to prohibit action in another county or state. Cole v. Cunningham, 133 U. S. 107 (1890); Muller v. Dows, 97 U. S. 444 (1876); Newton v. Bronson, 13 N. Y. 587 (1856); see Note, 35 Harv. L. Rev. 610 (1922). Disobedience of an order of an equity court is treated as contempt of court. If a defendant wilfully ignores the authority of the court, all that need be shown is that he knew of the existence of its order at the time he violated it. Having v. Kauffman, 13 N. J. Eq. 397 (1861). If a defendant is in court when an injunction is granted, he has sufficient notice of it to make it his duty to respect it. Hull v. Thomas, 3 Edw. Ch. 236 (N. Y. 1838). If he is not in court at that time, but is informed that such an order has been made, by a person who was in court at the time, he has sufficient notice to be liable for punishment for disobedience, even though the order should not have been granted. Weidner et al. v. Friedman et al., 126 Tenn. 677, 151 S. W. 56 (1912); Koehler v. Dobberpuhl et al., 56 Wis. 497, 14 N. W. 631 (1883). It should be understood that, although equity acts in personam, actual action of the person commanded often is necessary in order for the court's decree to be effective. Atlantic Seaboard Natural Gas Co. v. Whitten, 315 Pa. 529, 173 Atl. 305 (1934); Anonymous, Jenk. Cent. Cas. 108 (C. P. 1459). A chancery decree itself was not effective, for example, to convey a title, when the plaintiff had equitable title and the defendant had legal title. A recalcitrant defendant might prefer prison to obedience. But today statutes do enable the decrees of an equity court to take effect, of themselves. Grimmett v. Barnwell, 184 Ga. 461, 192 S. E. 191 (1937). Or they provide that officials may act in the stead of the defendant. Such statutes are to be strictly construed, as are any statutes giving to equity courts powers in rem, or their equivalents. Grimmett v. Barnwell, supra. See also 6 C. J. 93 (1916); 15 C. J. 1391 (1918); and 20 R. C. L. 565 (1929). And if the statutory remedies are full and adequate, there is no basis for equity jurisdiction. Hope v. Glass, 182 Ga. 514, 185 S. E. 803 (1936); Burress v. Montgomery, 148 Ga. 548, 97 S. E. 535 (1918). Yet, even statutes may be rendered inapplicable, by equity, if for example, a party seeks to employ a statutory provision as a cloak for fraud. Baart v. Martin, 99 Minn. 197, 108 N. W. 945 (1906). In such situations equity is said to operate on the conscience of the party, in that it will issue such an order to him as will prevent him from using the statute for a fraudulent purpose. Wirtz v. Guthrie, 81 N. J. Eq. 271, 87 Atl. 134 (1913). See 2 Pomeroy, Equity Jurisprudence §§ 430-1 (5th ed. 1941). The fact that equity acts in personam, joined with the fact of inadequacy of the remedy at law also provide the bases on which equity founds jurisdiction to deal with many-sided cases. While common law courts, partly because of the
An action for specific performance of a contract to convey real estate is in personam. Originally, specific performance was an action in personam, as were all proceedings in equity. Suits to foreclose mortgages, to partition lands, to quiet titles, and to remove clouds on titles, all were in personam proceedings, originally. In the course of time, partly by the gradual extension of their jurisdiction by the courts, and partly by the enactment of statutes, these proceedings have come to have a dual aspect, partly in personam and partly in rem. Today, the courts have power to act directly upon property within their jurisdictions, and by their judgments or decrees to divest one party of legal title and vest it in another, if that be necessary or proper to a final determination of the ultimate rights of the parties.

The jurisdiction in rem, of course, presupposes the existence within the territorial jurisdiction of the court of a thing or res upon which the authority is to act. Broadly speaking, decrees which require some
personal action or omission by the defendant must remain in personam. 63

In view of the rules and principles sketched in the above summary or the range and scope of equity jurisdiction, it hardly is to be doubted that the court was within its authority in its decree in the Gordon case. It is quite likely that the decree could have been made even more stringent without straining the authority vested in the court. As a matter of fact, the same progressive thinking had been evinced several years earlier 64 in another, parallel case in New York, which involved commercial property. 65 The New York courts have taken the lead in overcoming the traditional reluctance to supervise the execution of building contracts.

As has been remarked hereinabove, it now is standard practice for builders to insert protective clauses in their contracts, to provide against difficulties which may arise as a result of strikes, material shortages, expressly provided for by statute in the particular situation. Garfilda v. McInnis, 248 N. Y. 261, 162 N. E. 73 (1928); Prudential Insurance Co. v. Berry, 153 S. C. 496, 151 S. E. 63 (1930); Tennant’s Heirs v. Frettis, 67 W. Va. 569, 68 S. E. 387 (1910).

63. On the other hand, for practically all other types of cases, statutes in most states now provide that equity’s decrees, once made of record, are effective in themselves as the bases of title or property rights, or provide for administrative officials to effectuate such decrees by executing necessary instruments or documents. For a list of the statutes of the various states see 4 Pomeroy, EQUITY JURISPRUDENCE § 1317 n. and § 1434 n. (5th ed. 1941). Typical cases illustrating the vesting of a legal estate by the equity decree itself, without any administrative action of any officer, are the following: Title and Document Restor. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1905); Price v. Sisson, 13 N. J. Eq. 163 (1880); Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350 (1890). But these statutes do not abrogate the power of equity courts to operate in personam, except in a very few specific cases, nor do they have effect outside the territorial jurisdictions of the respective states. 4 Pomeroy, ibid. See also Corbett v. Nutt, 10 Wall. 464 (U. S. 1870). However, there have been some few cases in which state officers have been permitted to execute conveyances affecting real property outside the state. Promis v. Duke, 208 Cal. 420, 281 Pac. 613 (1929). The tendency of the courts is to extend equity’s powers and jurisdiction in rem. Dodd, Equity Receiverships as Proceedings in Rem, 23 ILL. L. REV. 105 (1928).

64. In 1943.


66. See note 65 supra. See Doty v. Rensselaer, 194 App. Div. 841, 185 N. Y. Supp. 466 (3d Dep’t 1921), 21 Col. L. REV. 495; and St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967 (1903), which stated that “the time over which a contract extends is not necessarily controlling as to specific performance.” Id. at 160, 65 N. E. at 970. See also City of New York v. New York Central R.R., 275 N. Y. 287, 9 N. E. 2d 931 (1937); and Jones v. Seligman, 81 N. Y. 191 (1880), affirming, 16 Hun 230 (N. Y. 1878).
and the like. These clauses usually provide that the buyer is to recover only his deposit, and no damages, in case the builder fails to complete the work because of strikes, unobtainability of materials, "and other causes beyond the builder's control." The *Gordon* case pointed up the dangers inherent in the phrase "beyond the builder's control." But another problem is involved in the use of clauses exculpating the seller for failure to perform "for any reason." This latter phrase also has been used in a number of contracts, and promises to be even more widely employed as a result of the *Gordon* case.67

However, the difficulty suggested by the interchange of these phrases is more seeming than real. They create two seemingly similar, but actually different types of contracts. First, there are contracts which provide that the builder need only return the buyer's deposit if the builder cannot perform for any reason "beyond his control." Secondly, there are those contracts which provide that the builder need only return the deposit should he default "for any reason." The latter type of contract seems to be clearly beyond the reach of equity's remedy. A termination of this latter type of contract is not a breach, but an observance of the terms of the contract.68 If equity were to attempt to intervene it would be making a new contract, not enforcing the contract entered into by the parties.

The real difficulty lies in contracts which seek to employ subtle shadings of language rather than the clear and direct phrases mentioned here. Once it has been determined into which of the two categories a contract falls, the applicable legal principles are clear.69 If *Gordon v. Hewlett Harbor* accomplishes nothing else, it will compel the use of clearer and more easily understood exculpatory language in contracts. And that, in itself, is a consummation devoutly to be wished. But, much more likely, the *Gordon* case will break, once and for all, the grip of the dead hand of a tradition that has long outlived its purpose.70 Roscoe Pound's admonition regarding specific performance of construction contracts seems to have been heeded, at last.

*Gordon v. Hewlett Harbor Construction* was cited by Mr. Justice Keogh in a late 1951 decision71 as an example of equity's acceptance of jurisdiction of cases of "quality or quantity of performance," in which

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69. Ibid.
equity will "make adjustments." Nevertheless, he added that this might well be "generally by way of an abatement in price." This implies, in effect, utilization of abatement to grant what is specific performance in substance, as in the Gordon case.

Another case in the same court shortly after the Gordon decision, and very similar to it, was Cherot v. Nat. Constructors, Inc. decided by Mr. Justice Hooley. He granted summary judgment for the plaintiff-vendee, on the same basis as was done in the Gordon case, but without citing that decision.

The modern view of all specific performance of contracts is strikingly illustrated by the following example: In late 1951 the American Arbitration Journal published an article which suggested that desired specific relief could be obtained despite the traditional reluctance of courts to grant it, by the use of arbitration. Arbitrators are not as constrained by legal tradition, in this respect. And an arbitrator's award of specific performance, if otherwise in due form, is enforceable by court order. Thus the inclusion of an arbitration clause in a contract, or later agreement to arbitrate, could secure the desired remedy.

This note, though almost casual in form and brevity, was picked up and broadcast by the Law Review Digest. A short time thereafter, apparently by coincidence, the writer was asked to arbitrate a demand by a reputable publishing house for specific performance of a contract to write a very learned book, on a technical subject, by a world-famous scholar. Specific performance of a contract so subject to the "supervision" requirement probably would have been refused by practically every court, even today. By actual agreement of the parties, specific performance was ordered, with extension of time to perform, and a heavy penalty in case of default. The formal award was made to this effect, to the expressed satisfaction of both parties.

It is clear that, although they have made great progress recently, the courts still are far behind the public's desire for liberal granting of specific relief even when prolonged supervision may be necessary.

73. 125 N. Y. L. J. 1936, col. 2 (Sup. Ct. May 24, 1951).
75. Note, Court Orders Specific Compliance of Award, 2 Ann. News 2 (1952), regarding a State Mediation Board award, enforced by Justice Samuel H. Hofstadter of the N. Y. Supreme Court.
76. 2 Law Rev. Dig. 1 (1951).
77. February, 1952.
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