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Sales—Specific Performance of Personalty—Effect of Uniform Sales Act

Joseph C. Tisdall

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include invasion of incorporeal interests. *Jay Bee Apparel Stores, Inc. v. 563-564 Main Street Realty Co.* 130 Misc. 23, 223 N. Y. S. 537 (Sup. Ct.), *aff'd.* 226 App. Div. 721, 233 N. Y. S. 792 (4th Dept. 1927), and more specifically to include tortious invasions of contract rights, *Buyers v. Buffalo Paint & Specialties Co.* — Misc. —, 99 N. Y. S. 2nd 713 (Sup. Ct. 1950).

In the instant case, the court interpreted the term "personal property" so as not to include intangible or incorporeal interests. The reason advanced was the absence of a precedent. However, it might well be that the true determinant was public policy: the fear of making malicious invasions of such intangible personal property as business reputation, good-will, contract rights, etc., a criminal offense; but this fear is unfounded because the intent element of the tort action (malice in law) differs from the intent element of the crime (malice in fact). Another factor might be the fear of making the award of damages, already a matter of speculation when injury to intangibles is involved, a mechanism of oppression and abuse when trebled.

Robert C. Schaus

SALES—SPECIFIC PERFORMANCE OF PERSONALTY—EFFECT OF UNIFORM SALES ACT

Louis O'Disho, a peach grower, contracted to sell all peaches to be grown by him for a period of five years to Hunt Foods, Inc. The purchase price was to be the average price paid by the canner to other growers in that county in the current season of delivery. When O'Disho refused to deliver after the first year the canner brought suit for specific performance under section 1788 of the Civil Code of California, (Uniform Sales Act, sec. 68.) *Held:* the contract was specifically enforceable; that, "By its enactment of this section the legislature unquestionably had in mind the liberalization of the law regarding specific performance of contracts for the sale of chattels." *Hunt Foods, Inc. v. O'Disho et al.*, 98 F. Supp. 267 (N. D. Cal. 1951).

Specific performance was established as a remedy for breach of contract in the early history of Anglo-American jurisprudence. It was meant to supplement the legal remedy of damages and was decreed only where the money damages would not be adequate compensation. It was not decreed as a matter of right but only in the exercise of sound judicial discretion, subject to fixed rules and legal principles. *Rogers v. Challis*, 27 Beav. 175, 57 Eng. Rep. 68 (1859); Restatement, Contracts, sections 358, 359 (1932); 4 Pomeroy, *Equity Jurisprudence*, sec. 1401 (5th Ed. 1941); 31 Halsbury's Laws of England, 329, *et. seq.* (2nd Ed. 1938). Where specific performance has been made a statutory remedy these principal features have been preserved. Section 68 of the Uniform Sales Act, es-

entially a copy of the English Sale of Goods Act of 1893, 56 & 57 Vict., c. 71, sec. 52, provides, . . . "Where a seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, . . . direct that the contract shall be performed specifically . . ." 1A Uniform Laws Annotated, sec. 68.

Before the statutes, the courts generally refused to extend equitable jurisdiction to a contract for the sale of personal property. They held the view that damages at law, calculated on the market price, were as complete a remedy, in the case of chattels, as specific delivery. With the money damages awarded a purchaser could go into the market and buy a like thing in like quantity. *Adderly v. Dixon*, 1 Sim. & St. 607, 57 Eng.Rep. 239 (1824); *Corbin v. Tracy*, 34 Conn. 325 (1867); *Pomeroy, supra*, sec. 1402. This attitude is still manifest in some jurisdictions in interpreting the statute. In New York a buyer was denied specific performance of a contract for the sale of scarce tobacco. In sending him back to the trial court for a determination of the adequacy of money damages the Appellate Division held the statute to be a codification of the Common Law. In exercising its discretion, the court said, due regard must be given the spirit of the decided cases, and where money damages will substantially compensate specific performance should be denied. *Glick v. Beer*, 263 App. Div. 599, 33 N. Y. S. 2d 833 (1st Dept. 1942). (For a similar view of the English statute see, *In re wait*, [1927] 1 Ch. 606, where the contract involved a shipment of grain.)

The principal case is an illustration of the extent to which the traditional view has been modified in this country. There is a definite tendency in some jurisdictions to increase the number of cases in which the remedy is available by liberalizing its requirements. Restatement, Contracts, sec. 358 (1932); Williston, *Contracts*, sec. 1419, (Rev. Ed. 1937). Williston also points out that this modern trend brings our law more in harmony with the Civil Law where the remedy is freely granted when deemed the most effective relief. Williston, *supra*, sec. 1418. Typical of the modern view is *Bomberger v. McKelvey*, 35 Cal. 2d 607, 220 P. 2d 729 (1950); cited by the court in the instant case, where it was held that a contract involving scarce building materials was specifically enforceable. The court determined that the intent of the legislature in adopting the Sales Act was to liberalize the requirements for specific performance of contracts for the sale or transfer of chattels.

It might be said that the liberal view has developed in spite of the requirement that the goods be specific or ascertained. This prerequisite probably came from the early notion that specific performance was to be granted only where the buyer had suffered a hardship in respect of certain goods; the unique goods idea. Why the statute demands that the goods be ascertained is not so easily

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understood. See in re *Wait, supra*, 630. In New York the latter stipulation has actually operated as a bar to equitable jurisdiction without consideration of the basic issue of adequacy of the legal remedy. Where buyers sought specific performance of contracts made to insure delivery of a new car in the tight market which followed World War II it was held to be fatal that the contracts did not specify a certain car at the time they were drawn. The bills were dismissed on that ground alone. *Cohen v. Rosenstock Motors, Inc.*, 188 Misc. 426, 65 N. Y. S. 2d 481 (Sup. Ct. 1946); *Goodman v. Henry Caplan, Inc.*, 188 Misc. 242, 65 N. Y. S. 2d 581 (Sup. Ct. 1946); *Gellis v. Fulson Buick Co.*, 191 Misc. 566 (Sup. Ct. 1947).

There are indications however, that where the liberal attitude prevails the specific or ascertained clause is being relegated to a position of minor importance. In *Pittenger Equipment Co. v. Tiber Structures, Inc.*, 217 P. 2d 770 (Ore. 1950), a shipment of lumber was held to be specific or ascertained goods within the meaning of the statute since it was to serve a specified purpose, *i. e.* settlement of an insolvent debtor's account. Further evidence of the de-emphasis of this requirement is found in the rephrasing of section 68 in the new Uniform Commercial Code, sec. 2-716, (Proposed Final Draft, Spring, 1950). The clause has been completely omitted in the new section which was formulated with the express purpose of promoting the liberal view.

In proclaiming the modern view the court in the instant case is still far from Story's position which allowed that no reasonable objection could be raised to giving the buyer his election. 2 Story, *Equity Jurisprudence*, sec. 717a, (13th Ed. 1886). On the other hand it does mark fulfillment of Williston's hope that the statutes would dispose the courts to grant the remedy more often, and thus increase the number of cases in which the ends of justice may be served. Williston, *Sales*, sec. 601, (Rev. Ed. 1948). As the Commissioners of the Commercial Code point out, the demands of the commercial world today make it necessary that the courts eschew the traditional attitude toward specific performance. That this can be accomplished without departing from the long established rules is exemplified by the instant case. It affirms the ability of equity to expand to meet new and changing situations without sacrificing its basic principles.

Joseph C. Tisdall