DePaul Law Review

Volume 1
Issue 2 *Spring-Summer 1952*

Article 7

Comparative Intelligence Doctrine in Equity

DePaul College of Law

seem to require that damages, if awarded, be either purely nominal, or the full amount of the legacy or devise. The possibility of awarding nominal damages would answer those who decry awarding any damages at all, the basis of their opinion being the impracticability of ascertaining what the testator would have done but for the fraud.

With the increasing realization that the true function of the law is to do justice, and the tendency to discard pat and arbitrary formulas, particularly in realizing that expectancies in many areas should be afforded the protection of the law, it is to be expected that the right to a remedy at law, in the problem herein discussed, will come to be firmly established. Its dangers must not be overlooked; the fraud must clearly be shown to be the ultimate cause of plaintiff's disappointment. To use the more familiar language of torts, the fraud must be shown to be the proximate cause of plaintiff's loss. But, when these conditions are met, the remedy in tort should be invaluable when equity affords no protection.

COMPARATIVE INTELLIGENCE DOCTRINE IN EQUITY

Equity's extraordinary jurisdiction in granting relief is well-known and settled. However, within this vast, broad body of equitable principles there exists a rather obscure doctrine which may be termed "the doctrine of comparative intelligence." This doctrine stems from the fact that it is a principle of law and equity as well as of natural justice that a greater degree of consideration and care is due persons who are unable to care for themselves than to persons who are able. Interwoven with other discretionary defenses, the doctrine has been used primarily to defeat actions for the specific performance of contracts. Courts generally do not acknowledge the existence of the "doctrine of comparative intelligence" by name; nevertheless, from a study of cases, it is apparent that the principles underlying the doctrine are being and have been applied in certain instances. Before discussing "comparative intelligence," it is necessary to discuss briefly some of the discretionary defenses to affirmative equitable relief.

In general, a court of equity will not interfere to relieve either party to a contract, fairly entered into, from its binding effects because of the wisdom or folly of the contract or because of bad business judgment; a bargain is a bargain.[1]

But, specific performance is not a right;[2] it is granted in the discretion of the court according to general rules and principles.[3] For instance, the complainant must show the contract is not unjust or oppressive to the defendant.[4] Specific relief may be denied on the ground that the defendant

[1] Knott v. Cutler, 224 N.C. 427, 31 S.E. 2d 359 (1944).

[2] Beard v. Morgan, 143 Neb. 503, 10 N.W. 2d 253 (1943).

[3] London v. Doering, 325 Ill. 589, 156 N.E. 793 (1927).

[4] Stone v. Pratt, 25 Ill. 16 (1860).

did not intend to make the contract sued on or because of unilateral mistake or where a party has been overreached and has contracted under circumstances of surprise, undue solicitation, sharp practice, trickery, or any other unconscionable circumstances.[5]

To be specifically enforced, a contract must be for an adequate consideration;[6] however, adequacy of price does not mean equality of price.[7] Equity will disregard a small difference in value,[8] but if the consideration is so grossly inadequate that it shocks the informed conscience of the court and indicates unfairness or overreaching, specific performance will be denied.[9]

Courts of conscience will not decree specific enforcement when the contract is obtained by fraudulent representations of the complainant or his agent.[10] Generally, this is so regardless of whether the misrepresentations were in fact innocent or whether they were made with an actual intent to deceive so long as they were material and relied on by the other party to his detriment.[11]

Closely related to fraud is concealment. Unless there is some exceptional circumstance generating a duty to speak, it is the right of every man to keep his business prospects to himself.[12] But where a party by word or act tends affirmatively to suppress material facts within his knowledge, which facts are unknown to the other party, or to distract the attention of the other party from such facts, the concealment warrants a denial of specific relief.[13]

Equitable relief will be withheld if, under the circumstances, the result would be harsh, inequitable, oppressive, or would result in a hardship to the defendant.[14] Hardship embraces a very broad category, and the hardship sufficient to defeat an action for specific relief must be a grave one which shocks the judicial conscience of the court. Mere fluctuations in price and disappointment are not hardships if the contract was fair when made.[15] The contract is judged as of the time it is entered into and the fact that a hard bargain results because of subsequent circumstances and changing events will not justify a withholding of relief.[16]

[5] Eisenbeis v. Shillington, 349 Mo. 108, 159 S.W. 2d 641 (1941).
[6] Edwards v. Brown, 308 Ill. 350, 139 N.E. 618 (1923).
[7] Schader v. White, 173 Cal. 441, 160 Pac. 557 (1916).
[8] Dunlop v. Wever, 209 Iowa 590, 228 N.W. 562 (1930).
[9] Garsick v. Dehner, 145 Neb. 73, 15 N.W. 2d 235 (1944).
[10] Asher v. Asher, 278 Ky. 802, 129 S.W. 2d 552 (1939).
[11] Note 5 supra.
[12] Neill v. Shamberg, 158 Pa. 263, 27 Atl. 992 (1893).
[13] Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 23 S.E. 2d 372 (1942).
[14] Todd v. Hyzer, 154 Fla. 702, 18 So. 2d 888 (1944).
[15] Coral Gables v. Payne, 94 F. 2d 593 (C.A. 4th, 1938).
[16] Smith v. Farmers' State Bank of Alto Pass, 390 Ill. 374, 61 N.E. 2d 557 (1945).

The "doctrine of comparative intelligence" is closely related to and integrated with the foregoing defenses to specific performance. It exists without a formal name and where it is applied, courts call it hardship or inadequacy or overreaching. When a court determines the fairness of a contract by looking to the surrounding circumstances such as the incapacity or inequality of the parties or their respective experience or inexperience in business matters, "comparative intelligence" is being called forth from its shelf in the vast storeroom of equity jurisprudence.

In *Falcke v. Gray*,[17] a leading English case, the complainant and the defendant contracted for the sale of two China jars, owned by the defendant, at a price of forty pounds. Falcke, an eminent dealer in his trade for over twenty-five years, knew the value of these objects of art to be much more. Subsequently, the defendant sold the jars to a dealer and she received two hundred pounds. Falcke then sought specific performance. After deciding that specific performance would be decreed for a chattel where the remedy at law was inadequate, the court felt it more equitable to withhold relief under the circumstances. The parties were not on equal footing as the plaintiff knew the true worth of the jars while the defendant was ignorant of their value. It was pointed out that in this case mere inadequacy of consideration would not be enough to resist specific relief.

Friend v. Lamb[18] was a case in which the plaintiff agreed to sell his realty to Mrs. Lamb by means of a contract containing terms so oppressive that the Pennsylvania court felt that if a man encumbered himself with such an agreement it would be a rash, improvident, and extremely hazardous undertaking. Only a sagacious and experienced operator in speculative transactions would be justified in entering a bargain, such as the one herein involved, in the ordinary judgment of men. However, for a woman, unless possessed with a special skill and with ample capital, such a contract would be almost entirely destructive, improvident, and oppressive. In this case, the defendant did not possess any of the essential qualifications to conduct the enterprise to a successful conclusion. The court refused specific performance, although making it clear that the plaintiff still had an action at law for damages.

In determining whether specific performance should be decreed, this court thought it proper to consider the fact that defendant was a married woman and inexperienced in business; it stated that specific performance would be denied in the case of married women as well as other persons who were less protected and, comparatively speaking, in a more helpless condition.[19]

[17] 29 L.J. Ch. 28 (1859).

[18] 152 Pa. 529, 25 Atl. 577 (1893).

[19] For other instances where the "doctrine of comparative intelligence" has been invoked in favor of women with little business experience, see the following cases:

Equity will not lend its aid to the sharp, experienced businessman who deals unjustly with an uneducated and inexperienced person. *Gaskins v. Byrd*[20] held that contracts for the sale of real estate would not be specifically enforced where the particular facts and circumstances clearly showed inequality of the contracting parties due to the inexperience and lack of information of one party with respect to the subject-matter as compared with the superior business qualities and information of the other party.

The plaintiff in *Wolford v. Steele*[21] sued for specific enforcement of an agreement for the sale to him of all the coal and other mineral rights underlying the defendant's land. He was an educated, bright, wide-awake real estate agent who was familiar with the value of property. In contrast, the defendant was seventy-four years old, of infirm health, and without any education whatever. He could neither read nor write and was an ignorant man who was "unused to the ways of the world." The consideration was less than the value of the land and the court held that it would not specifically enforce a hard and unconscionable bargain where the ability and knowledge of the contracting parties was so unequal as to result in one being overreached and his property sacrificed by the inadequacy of the consideration.[22]

Campbell Soup Company v. Wentz[23] saw the court refuse specific performance of a contract whereby the defendant agreed to sell certain types of carrots to the plaintiff. The court stated, "We think it (the contract) is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience."[24] By implication, the court here was using the "comparative intelligence" doctrine as it was protecting the comparatively ignorant farmer from an agreement which unfairly tied him up at the hands of a large corporation which, through its legal staff and officers, were superior to him.[25]

An early Illinois case, *Fish v. Leser*,[26] involved a suit to order per-

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Forman v. Gadouas, 247 Mass. 207, 142 N.E. 87 (1924); Shoop v. Burnside, 78 Kan. 871, 98 Pac. 202 (1908); Banaghan v. Malaney, 200 Mass. 46, 85 N.E. 839 (1908); Burkhalter v. Jones, 32 Kan. 5 (1884).

[20] 66 Fla. 432, 63 So. 824 (1913).

[21] 27 Ky. L.R. 88, 84 S.W. 327 (1905).

[22] Wollums v. Horsley, 93 Ky. 582, 20 S.W. 781 (1892). This case also involved the sale of mineral rights by an aged, uneducated, and inexperienced farmer to an experienced business man for an inadequate price.

[23] 172 F. 2d 80 (C.A. 3d, 1948).

[24] Ibid., at 83.

[25] Accord: Dunlop v. Wever, 209 Iowa 590, 228 N.W. 562 (1930); Bartley v. Lindabury, 89 N.J. Eq. 8, 104 Atl. 333 (Ch., 1918). In the Bartley case, supra, there was a bill for specific performance of a contract to sell stock in exchange for a farm, against a farmer unfamiliar with business methods.

[26] 69 Ill. 394 (1873).

formance of a contract for the sale of real estate valued at $30,000 and sold for $21,000. The home of the defendants was destroyed on the land in question by the Chicago fire of 1871. Unknown to the defendants who were "weak-minded and unacquainted with business," the property had gone up in price because of the prospective construction of new buildings. Defendants were still terror-stricken from the great fire when they entered into the bargain with the plaintiff, a shrewd real estate dealer. The court declined to decree specific performance against the defendants who were comparatively less intelligent and experienced than the complainant.[27]

In *Wrobel v. Wojtasiek*,[28] a bill was brought for the specific enforcement of an agreement for the exchange of land. Defendant was an ignorant and illiterate man, unable to read and write English and unfamiliar with business. The contract called for a trade of defendant's premises worth $19,000 for complainant's land, valued between $9,000 and $12,000. The court said that where unfair advantage has been taken of the ignorance, the confidence, the friendship, or the inexperience of one of the contracting parties, the contract, though it might not be rescinded, may not be specifically performed.

Aside from its role in the field of specific performance, the "doctrine of comparative intelligence" has also been applied in suits to rescind contracts. In *Hiltpold v. Stern*,[29] the court held that a purchaser, induced by false representations to buy property may rescind and sue for the consideration. Going further, the court stated that the inexperience and ignorance of one of the parties, when contrasted with the superior knowledge of the other party, may make a misrepresenation as to value actionable which would not be had the dealings been between more equally matched parties.[30]

"Comparative intelligence" is actually a comparison whereby equity will weigh the qualifications of both parties to an agreement against one another. In this manner the courts attempt to balance the equities between the parties. It must be remembered that in a commercial age, contracts are procured by those who possess information by which they expect to profit because they are better informed than those from whom the agreements are desired. This is generally fair legally and morally.

There is an interesting dilemma in which courts find themselves. On

[27] Accord: Dunlop v. Wever, 209 Iowa 590, 228 N.W. 562 (1930); Wilson v. Bergmann, 112 Neb. 145, 198 N.W. 671 (1924).

[28] 341 Ill. 330, 173 N.E. 348 (1930). Accord: Miller v. Tjexhus, 20 S.D. 12, 104 N.W. 519 (1905).

[29] 82 A. 2d 123 (Mun. C.A., D.C., 1951).

[30] Accord: Sell v. Gup, 338 Pa. 134, 12 A. 2d 1 (1940); Gross v. Stone, 173 Md. 653, 197 Atl. 137 (1938). These two cases are similar in nature to the case under discussion and a recission was allowed in both because of the comparatively inexperienced and ignorant status of the parties aggrieved.

one hand, courts are reluctant to disturb the binding force of contracts purporting to express the will and purpose of the parties, by refusing specific enforcement or by granting recission. On the other hand, they are unwilling to permit this salutory and beneficent policy to be used as a shield to protect those who have obtained from the weak, the unwary, the helpless, or the ignorant, an unconscionable and inequitable advantage. To illustrate, in *Johnston Realty and Investment Company v. Grosvenor*[31] the Michigan court refused specific enforcement because the defendant's simplicity, credulity, and lack of experience was seized upon by overzealous plaintiffs. However, a divided court resulted and the dissenting opinion favored the proposition that as long as there was no fraud, a court of equity should not aid one to escape a bad bargain.

Between these two opposite poles, there exists a sphere wherein equity may apply the "doctrine of comparative intelligence." It is important to remember that courts are reluctant and hesitate to invoke the doctrine for fear that the door be let open wide and the sanctity of contracts undermined by easy escape from specific performance of such agreements. All that may be said is that in a justiciable case, where the equities between the parties warrant, a court of chancery may compare the differences between the contracting parties and withhold the relief sought.

THE ALLUREMENT ELEMENT AND ATTRACTIVE NUISANCE

The attractive nuisance doctrine is a controversial theory which imposes liability upon the occupier of land for injuries sustained by trespassing children as a result of dangerous conditions maintained by the occupier on his premises. The doctrine is not a new one, having had its origin in English common law in the case of *Lynch v. Nurdin*.[1]

A number of American jurisdictions, most of them in the eastern industrial states, have refused to accept or apply the attractive nuisance doctrine at all, leaving the rights and liabilities of the parties for solution in accordance with the ordinary principles of negligence.[2] However, in

[31] 241 Mich. 321, 217 N.W. 20 (1928).

[1] 1 Q.B. 29, 55 Rev. Rep. 191, 113 English Reports 1041 (1841).

[2] Wolfe v. Rehbein, 123 Conn. 110, 193 Atl. 608 (1937); State To Use Of Alston v. Baltimore Fidelity Warehouse Co., 176 Md. 341, 4 A. 2d 739 (1939); Falardeau v. Malden and Melrose Gas Light Co., 275 Mass. 196, 175 N.E. 471 (1931); Ryan v. Towar, 128 Mich. 463, 87 N.W. 644 (1901); Kaproli v. Central R. of New Jersey, 105 N.J. L. 225, 143 Atl. 343 (1928); Morse v. Buffalo Tank Corporation, 280 N.Y. 110, 19 N.E. 2d 981 (1939); Merriam v. Bonded Oil Co., 76 Ohio App. 435, 65 N.E. 2d 74 (1945); Trudo v. Lazarus, 116 Vt. 221, 73 A. 2d 306 (1950); Washabaugh v. Northern Va. Const. Co., 187 Va. 767, 48 S.E. 2d 276 (1948); Tiller v. Baisden, 128 W. Va. 126, 35 S.E. 2d 728 (1945).