

Specific Performance - Contract to Drill an Oil Well - Difficulty of Enforcement of Decree

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by newspapers are the same offenses.¹⁰ Therefore, the rules applicable to the press should not be modified when extended to radio broadcasting.

K. J. B.

SPECIFIC PERFORMANCE—CONTRACT TO DRILL AN OIL WELL—DIFFICULTY OF ENFORCEMENT OF DECREE—Defendant contracted to drill an oil well on a lease owned jointly by the plaintiff and defendant. After drilling a dry hole on a nearby plot, defendant refused to continue. In holding the defendant liable in damages,¹ the Louisiana Supreme Court stated that a contract to drill a well in search of oil or gas is one which, because of its nature, the courts have no means of compelling specific performance. *Fite v. Miller*, 192 La. 229, 187 So. 650 (1939).

The instant case follows another Louisiana decision which held that the specific enforcement of a contract to drill an oil well was subject to so many contingencies that specific performance was impracticable.² This is in accord with the universal rule of denial of injunctive relief in such cases.³ The common law has always been reluctant to decree specific performance of an act requiring continued supervision of the court and it has been decreed only in exceptional and unusual cases, where damages for the breach were clearly an inadequate remedy.⁴ The Louisiana rule is stated in Articles 1926 and 1927 of the Louisiana Civil Code,⁵ which provide that ordinarily damages are adequate com-

10. The statement of the court in the instant case [*Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 308 (Pa. 1939)] to the effect that the analogy between defamation by radio and defamation by the press is not well taken because newspapers have the opportunity to supervise and prevent publication of libelous matter seems unsound in that it fails to take into consideration the practical impossibility of newspapers detecting defamatory statements in those instances wherein the libel is not defamatory on its face.

1. For a discussion of the damage point, see Note (1939) 13 *Tulane L. Rev.* 639.

2. *Caddo Oil & Min. Co. v. Producers' Oil Co.*, 134 La. 701, 64 So. 684 (1914).

3. *Jeffers v. Rondeau*, 1 S.W. (2d) 380 (Tex. Civ. App. 1927); 3 *Summers*, *The Law of Oil and Gas* (1938) 226-234, §§ 533-534.

4. *Pomeroy*, *Specific Performance of Contracts* (1926) §§ 307, 312.

5. Art. 1926: "On the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued, according to the rules established in the following section."

Art. 1927: "In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he

pensation, but where they are insufficient and the party has the power to perform the contract, the court may grant specific relief. Following the spirit of these articles, it has been uniformly held that specific performance of contracts to do or not to do is not favored and cannot be demanded as a matter of right.⁶ Thus the Louisiana courts have refused to enforce specifically a contract for the building of a levee by a railroad company,⁷ the building of a polo field,⁸ the completion of a newspaper subscription contest,⁹ and a contract for the assignment of oil leases.¹⁰ In several instances in which specific performance was refused, the court stressed the impracticability of enforcing its decree. Thus specific performance has been denied where the contract provided for keeping streets in repair,¹¹ for the appointment of an arbitrator to settle a building contract,¹² the selection of an appraiser to evaluate grocery stock,¹³ and the lending of money on immovable property.¹⁴

In certain cases where little or no supervision is required on the part of the court and it was felt that damages were inadequate, specific performance of a contract to do or not to do has been granted. Specific performance has been ordered of a contract in which a person covenanted not to conduct a business,¹⁵ of an agreement to allow one partner free editorial control of a jointly owned newspaper,¹⁶ of an agreement to stay out of the butchering trade for five years,¹⁷ and of a lessor's agreement to permit the drilling for oil.¹⁸

may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts."

6. *New Orleans v. New Orleans & N. E. R. Co.*, 44 La. Ann. 64, 10 So. 401 (1892); *Solomon v. Diefenthal*, 46 La. Ann. 897, 15 So. 183 (1894); *Larousini v. Werlein*, 48 La. Ann. 13, 18 So. 704 (1896); *Mirandona v. Burg*, 49 La. Ann. 656, 21 So. 723 (1897); *Caperton v. Forrey*, 49 La. Ann. 872, 21 So. 600 (1897); *Pratt v. McCoy*, 128 La. 570, 54 So. 1012 (1911); *Tri-State Transit Co. v. Sunshine Bus Lines, Inc.*, 181 La. 779, 160 So. 411 (1935).

7. *New Orleans v. New Orleans & N. E. R. Co.*, 44 La. Ann. 64, 10 So. 401 (1892).

8. *New Orleans Polo Club v. New Orleans Jockey Club*, 128 La. 1044, 55 So. 668 (1911).

9. *Youngblood v. Daily and Weekly Signal Tribune*, 15 La. App. 379, 131 So. 604 (1930).

10. *Snyder v. Wilder*, 146 La. 811, 84 So. 104 (1920).

11. *State v. The New Orleans and Carrollton R. Co.*, 37 La. Ann. 589 (1885).

12. *Gauche v. Metropolitan Bldg. Co.*, 125 La. 530, 51 So. 578 (1910).

13. *Mirandona v. Burg*, 49 La. Ann. 656, 21 So. 723 (1897).

14. *Kenner v. Slidell Savings & Homestead Ass'n*, 170 La. 547, 128 So. 475 (1930).

15. *Levine v. Michel*, 35 La. Ann. 1121 (1883).

16. *Puckette v. Hicks*, 39 La. Ann. 901, 2 So. 801 (1887).

17. *Solomon v. Diefenthal*, 46 La. Ann. 897, 15 So. 183 (1894).

18. *Gulf Refining Co. v. Hayne*, 148 La. 340, 86 So. 891 (1920).

The present case is in accord with prior Louisiana jurisprudence in laying down the rule that damages is the remedy for the breach of a contract to do or not to do, with specific performance being allowed only in unusual circumstances.¹⁹

J. B. D.

TORTS—LIABILITY OF ESCAPED CONVICT FOR EXPENSES OF RECAPTURE—Defendant, an escaped convict, was recaptured and returned to the penitentiary at cost to the state in excess of one thousand dollars. The state thereupon sued the defendant in tort to recover the amount thus expended. *Held*, recovery denied. *State Highway and Public Works Commission v. Cobb*, 215 N.C. 556, 2 S.E. (2d) 565 (1939).

Apparently this is a case of novel impression; at least the court so considered it. The basic problem involves the inherent difference between a tort and a crime. Modern opinion agrees that a wrongful act may be both criminal and tortious, and may subject the wrongdoer to punishment by the state and to civil suit by the individual immediately harmed.¹

19. Art. 1142, French Civil Code, provides: "Every obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor." (Translation supplied.) Nevertheless, it may be proper to say with the majority of the French commentators that, as a consequence of the wide discretion assumed by the courts in specifically enforcing obligations to do or not to do with the aid of the method of *astreintes* [7 Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1931) 84, n° 787], specific performance is the rule rather than the exception even as to such obligations. However, a judicial reluctance to compel the performance of a personal act—*fait personnel*—is still general. 1 Baudry-Lacantinerie et Barde, *Traité Théorique et Pratique de Droit Civil, Des Obligations* (3 ed. 1906) 469, n° 431; 24 Demolombe, *Traité Des Contracts ou Des Obligations Conventionnelles en Général* (1877) 486, n° 488; 7 Huc, *Commentaire Théorique et Pratique du Code Civil* (1894) 192, n° 135; 4 Marcadé, *Explication Théorique et Pratique du Code Civil* (7 ed. 1873) 437-439, nos 511-513; 2 Planiol et Ripert, *Traité Élémentaire de Droit Civil* (11 ed. 1937) 66-69, nos 173-175. See also Art. 1144, French Civil Code (on substituted performance). 197-199. "*Ainsi l'exécution directe de l'obligation est la règle pour toute espèce d'obligations. La règle ne reçoit d'exception que s'il y a impossibilité de poursuivre l'exécution directe.*" (At 258, n° 198).

Translation: "Thus specific performance of the obligation is the rule, for every kind of obligation. The rule is subject to exceptions only if it is impossible to decree specific performance."

1. Miller, *Handbook of Criminal Law* (1934) 21, § 4(b); Clark, *Handbook of Criminal Law* (3 ed. 1915) 8, § 2; Clark and Marshall, *A Treatise on the Law of Crimes* (3 ed. 1927) 4-5, § 2.

It is generally held in America that criminal and civil proceedings are not mutually exclusive. *State v. Loyacano*, 135 La. 945, 66 So. 307 (1914); *State v. Vogt*, 141 La. 764, 75 So. 674 (1917); *State v. Walsen*, 17 Colo. 170, 28