COMMENTS

EQUITY—HARDSHIP—DECLINE OF PURCHASING POWER OF THE DOLLAR.

In a suit in equity by a vendor of land against her broker, his real estate agency, and the purchaser and her guardian to set aside the deed, it was established that the broker had failed to inform the vendor that the purchaser was the broker's mother-in-law.[1] The Supreme Court of Missouri held that there had been such fraudulent non-disclosure of the relationship between the broker and purchaser as would ordinarily create a right to cancellation. However, the court took judicial notice of the steady and material decline of the purchasing power of the dollar[2] in the twenty-three month interval[3] between the transaction and the institution of the suit, during which time the purchaser had become incompetent. As a consequence of this decline the refunded purchase-money would have represented to the defendant purchaser's guardian "only a fraction of its value at the time of the sale."[4] Because of this hardship to the defendant purchaser, the court in its discretion denied cancellation, but allowed recovery of the broker's fee with interest. It should be noted that the decision does not rest wholly upon the ground of the decline in value of the dollar, but was also influenced by the fact that the purchaser had become incompetent. This discussion, however, will center upon the availability of inflation as a discretionary defense in equity.

Discretionary Defenses in General

The discretionary defenses, an outgrowth of the "extra-legal" powers of the chancellor in the original equity courts, seem somewhat unsuited to our modern jurisprudence, in which the dis-

1. Currotto v. Hammack, 241 S.W.2d 897 (Mo. 1951).

2. Judicial notice by an appellate court of changes in dollar value has been especially frequent in recent years, but the issue is usually that of determining whether damages have been excessive. Gluckstein v. Lipsett, 93 Cal.App.2d 391, 209 P.2d 98 (1949) ("one half of value prior to inflation"); Owens v. Green, 400 Ill. 380, 81 N.E.2d 149 (1948) (impressive increase in real estate values at time of principal case); Cruce v. Gulf, Mobile & Ohio R.R., 361 Mo. 1138, 239 S.W.2d 674 (1951) (one of numerous Missouri cases); MCCORMICK, DAMAGES §§ 48, 49 (1935).

3. 1945-1947.

4. Currotto v. Hammack, 241 S.W.2d 897, 900 (Mo. 1951).

tinction between law and equity has been nearly wiped out. As Pound asks, why should the same judge be more or less callous on one docket than on another?[5] The exercise of discretion is none the less a safety-valve, needed to alleviate the rigor and thoroughness of equitable remedies such as specific performance or cancellation.[6]

The dangers in the exercise of equitable discretion are that the rules governing its exercise may be so strict as to be worthless, or so loose as to impair the security of contracts. If the judge must follow set rules, he loses the very power of discretion which is needed. On the other hand, if there are no rules, then he may, in effect, change any contract on a whim. The deliberations of judges and writers indicate that they are concerned with these dangers, especially the latter. They state repeatedly, often in the language of Chancellor Kent in *Seymour v. Delancey*,[7] that although the circumstances of each case are to be taken into account, the discretion must be "judicial" and not "arbitrary and capricious."[8] Any attempt to formulate a set of judicial rules for the exercise of the courts' discretion, however, meets with limited success at best. Courts are prone to confine their remarks to generalities and to the facts involved, being unwilling and, usually, unable to cite cases or fix principles which would be a guide in determining what kind or degree of hardship might be successfully urged as a defense in a future case.

The Defense of Hardship

It has often been stated that the availability of the defense of hardship is usually conditioned upon some wrongdoing or error on the part of the plaintiff and that the defense cannot be raised successfully if the contract was fair and just in its inception. Some courts have also held it applicable when the contract was fair in its terms, but a factor outside of the action of the parties, though existing at the time of the execution of the

5. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 130-133 (1922).
6. *Ibid.*
7. 6 Johns. Ch. 222 (N.Y. 1822). Although the Chancellor's decision that inadequacy of consideration alone is a defense was reversed by a split decision of the Court for the Correction of Errors [Seymour v. Delancey, 3 Cow. 445 (N.Y. 1824)], the case is often cited in support of Kent's discussion of judicial discretion in equity.
8. See note 7 *supra*. See also several excerpts in CHAFFEE, CASES ON EQUITY 749-750 (1951).

contract, later appears to work a hardship on the defendant.[9] On the other hand, it has been stated that any factors arising after the execution of the contract are deemed to have been within the contemplation of the parties and do not, therefore, give rise to the defense.[10] Pomeroy suggests an extension which reconciles most of the better decisions: if the performance of the contract would work a hardship on the defendant because of some unfairness which arises either at or after the execution of the contract, the defense may successfully be raised, unless the subsequent hardship could reasonably have been foreseen by the contracting parties.[11] Changes in the value of the subject-matter of the contract or of the consideration usually fall within this latter category,[12] although some unusual circumstance may create an unforeseeable hardship situation.[13] Pomeroy's proposal supplies a set of rules, but these are open to so many different interpretations when the problem of applying them to various factual situations arises that they constitute a rather shaky foundation.

Willard v. Tayloe

A leading case in the hardship field, *Willard v. Tayloe*,[14] bears not a little resemblance to the principal case. An optionee who proffered legal tender notes in payment was denied specific performance of a land contract, since these notes had only about one-half the purchasing power of the only tender current at the time the option was given. The United States Supreme Court held that, although the parties must usually assume the risk of fluctuations in value, nevertheless in this case the optionee might have specific performance only upon tender of gold, because of an unusual circumstance, the passage of the Legal Tender Acts and the subsequent inflation of the notes. The Court discussed the nature of the defense of hardship generally, and concluded by quoting the maxim, "Whilst he seeks equity he must do equity."[15]

9. As, for example, an underground stream of water which, unknown to the vendee, flowed under the property. Kleinberg v. Rattett, 252 N.Y. 236, 169 N.E. 289 (1929).

10. See Marble Co. v. Ripley, 10 Wall. 339 (U.S. 1870); Southern Ry. v. Franklin & Pittsylvania R.R., 96 Va. 693, 32 S.E. 485 (1899).

11. POMEROY, SPECIFIC PERFORMANCE §§ 177, 178, 178(a) (3rd ed. 1926).

12. Franklin Tel. Co. v. Harrison, 145 U.S. 459 (1892) (great rise in value due to natural growth of cities).

13. Willard v. Tayloe, 8 Wall. 557 (U.S. 1869).

14. *Ibid.*

15. *Id.* at 574.

It should be noted that this case constitutes an exception to the general rule that changes in value of subject matter or consideration are to be treated as reasonably foreseeable by the parties. The decision was handed down in the same term as that in *Hepburn v. Griswold,*[16] which held the Legal Tender Acts unconstitutional when applied to pre-existing debts. Shortly thereafter, the Court, the personnel having changed, overruled the latter stand in the *Legal Tender Cases.*[17] It also pronounced the oft-quoted dictum of *Marble Co. v. Ripley,*[18] that if a contract be fair at its inception, the defense of hardship will not be allowed because of changed conditions. In making this pronouncement, the Court made no reference to *Willard v. Tayloe.*

The Principal Case

It is evident that the decision reached in the principal case operates as a "safety-valve" which protects a defendant purchaser from hardship. The result seems consistent with equitable principles, since it was not claimed that the defendant participated in the fraudulent act but only in its benefit. In addition, although the application of discretionary defenses to a suit for cancellation of a deed involves the same principles as those dealt with in a suit for specific performance,[19] the former type of action is usually viewed as a more serious matter—a remedy to be given more cautiously—than the latter.[20]

On the other hand, the defense was here judicially recognized by a court of last resort although not urged by counsel in their briefs,[21] and was used as a major factor in the decision in a rather casual manner, without citation of authorities. It further appears to have been a broad extension of the doctrine of equitable discretion; the contract was fair at its inception (so far as the plaintiff's conduct was concerned), and the hardship resulted from a subsequent change in the value of the consideration. Even if *Willard v. Tayloe* be relied upon, one must remember that over three-quarters of a century of economic and fiscal change

16. 8 Wall. 603 (U.S. 1869).
17. 12 Wall. 457 (U.S. 1870).
18. 10 Wall. 339 (U.S. 1870).
19. Lariviere v. Larocque, 105 Vt. 460, 168 Atl. 559 (1933); Note, 91 A.L.R. 1521 (1934).
20. See note 19 *supra;* Wagner v. Hickey, 232 S.W.2d 531 (Mo. 1950).
21. Briefs for Appellant and Respondents (No. 41,893), Currotto v. Hammack, 241 S.W.2d 897 (Mo. 1951).

separate that case from the principal one. The use of paper money has long ceased to be a legal issue, and does not affect the principal case as it did the former one. In addition, cyclic inflation and deflation make the change in monetary value quite foreseeable, thereby further distinguishing the two cases.

Conclusion

While the decision in the principal case may be supported as being equitable in view of the facts involved, it does not suggest the general availability of hardship caused by the decline of the purchasing power of the dollar as a discretionary defense in equity. First, it is not the sole ground on which the decision in the case rests. Second, although the court was liberal in its extension of equitable discretion in this case,[22] such liberality as here displayed is open to charges of being arbitrary and capricious, and of going beyond accepted practice, as described above. Finally, if the defense were developed into a consistently applied legal theory it would go a long way toward tying the courts to the administrative agencies which determine price indices.

JOHN M. DRESCHER, JR.

DOMESTIC RELATIONS—RIGHT OF CHILD TO SUE PARENTS FOR AN INTENTIONAL TORT.

Plaintiff, an unemancipated minor child, sued her deceased father's estate for damages (for mental pain and suffering) resulting from the father's killing plaintiff's mother in plaintiff's presence and then a week later committing suicide, also in plaintiff's presence. The child was the illegitimate offspring of the deceased persons.[1] A Maryland appellate court reversing the lower court's sustaining of defendant's demurrer declared:

> . . . where the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity from suit by the child, on the ground that disci-

22. Another interesting example of Missouri liberality in the field of hardships is Rockhill Tennis Club v. Volker, 331 Mo. 947, 156 S.W.2d 9 (1932), noted in 47 HARV. L. REV. 441 (1933) as the "first case where a court of equity has declared civic beauty of sufficient importance to warrant a denial of specific performance," and one wherein the court had to determine what constituted beauty under the facts of the case.

1. The court gives no consideration to the fact that the child was illegitimate; rather it treats the father as the legitimate parent.