[HIGH COURT OF AUSTRALIA.]

DOUGAN . . . . . APPELLANT;
DEFENDANT,

AND

LEY AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1946.

SYDNEY, *March* 28; *April* 8.

Rich, Starke, Dixon, McTiernan and Williams JJ.

Specific Performance—Taxi-cab—Agreement for sale and purchase—Refusal of vendor to carry out agreement—Readiness and willingness of purchasers—Remedy—Specific performance or damages—Want of mutuality—Statutory requirements—Registration—Licence—Transport Act 1930-1945 (*N.S.W.*) (*No.* 18 *of* 1930—*No.* 22 *of* 1945), *s.* 171A (2), (3)—*State Transport* (*Co-ordination*) *Act* 1931-1945 (N.S.W.) (*No.* 32 *of* 1931—*No.* 22 *of* 1945), *s.* 17A (2).

In New South Wales, as a result of the relevant legislation and the manner in which the law with respect to the obtaining of registrations and the licensing of taxi-cabs is administered, the number of taxi-cabs which are so registered and licensed is strictly limited, and, in addition, the number of taxi-cabs which are transferable, together with their respective registrations and licences, is constantly diminishing. The average price paid for the licences of registered taxi-cabs is £1,318.

Held that a contract for the sale and purchase of a registered and licensed taxi-cab is within the scope of the remedy of specific performance.

Under s. 171A (2) (*d*) of the *Transport Act* 1930-1945 (N.S.W.) for each taxi-cab registration the Commissioner of Road Transport and Tramways shall grant one application for its transfer from the person holding it at a fixed date to an applicant who satisfies the Commissioner that he is a fit and proper person to be the holder of a registration certificate of a taxi-cab and that he will, if the application is granted, have the use, control and management of the vehicle to which the application relates. Section 17A (2) (*d*) of the *State Transport* (*Co-ordination*) *Act* 1931-1945 (N.S.W.) contains substantially the same provisions with respect to the licence to operate the taxi-cab.

Held that as these sections only require the buyers to submit materials to satisfy the Commissioner, there is, therefore, no lack of mutuality, nor is the Court, if it decrees specific performance, required to undertake a continued supervision of the acts of the parties.

Per Williams J.: A contract is capable of being specifically performed if, notwithstanding that it was not mutually enforceable at the date it was made, it has become mutually enforceable at the date the suit was instituted.

Decision of the Supreme Court of New South Wales (*Roper* J.) *Ley* v. *Dougan* (1945) 63 W.N. (N.S.W.) 224, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit by way of statement of claim was brought in the equitable jurisdiction of the Supreme Court of New South Wales by Victor Neville Ley and Harold John Nash against John Harold Dougan for a declaration that an agreement made between the parties for the sale by the defendant to the plaintiffs of taxi-cab, registered No. 1155, and the benefit of the registration thereof under the *Transport Act* 1930-1945 (N.S.W.) for the sum of £1,850, should be specifically performed, and that in addition to or in lieu of specific performance of the agreement the defendant should be ordered to pay to the plaintiffs the damages which the plaintiffs had sustained by reason of the defendant's refusal and neglect to perform the agreement.

In the statement of claim it was alleged that on 2nd November 1945 it was agreed orally between the defendant and the plaintiffs that the defendant would sell and the plaintiffs would purchase the said taxi-cab and the benefit of the said registration for the sum of £1,850, and thereupon the plaintiffs paid the defendant by way of deposit the sum of £10. The plaintiffs further alleged: (i) that they had been at all times ready and willing to complete the sale in accordance with the agreement but that the defendant on his part refused to do so; (ii) that they were fit and proper persons to be the holders of a registration certificate of a taxi-cab under the *Transport Act* 1930, as amended, and would upon the benefit of the registration being transferred to them have the use, control and management of the taxi-cab; (iii) that it was their intention to conduct with the taxi-cab the business of taxi-cab proprietors and to earn their living thereby; and (iv) that owing to the extreme difficulty of purchasing the benefit of a taxi-cab registration they did not anticipate being able to acquire another taxi-cab and registration and they could not be adequately compensated by damages in any action at law brought in respect of the defendant's breach of the agreement.

The defendant, in his statement of defence, denied the making of an agreement between the parties except as being subject to a time

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limit which, he alleged, was not complied with by the plaintiffs. He denied the plaintiffs' readiness and willingness at any material time to complete the agreement; that he improperly refused at any time to complete it; and that the plaintiffs could not be adequately compensated by damages in an action at law. He alleged that taxi-cabs were and had at all material times been available in Sydney for purchase by any person who was ready and willing to pay the ruling market price for such taxi-cabs.

At the hearing a decision upon a demurrer *ore tenus* to the statement of claim, on the ground that it disclosed no equity, was stood over by *Roper* J. until the facts were before the Court.

The taxi-cab in question was registered under the provisions of the *Transport Act* 1930 as a taxi-cab and it was licensed to operate as such under the provisions of the *State Transport (Co-ordination) Act* 1931. It was so registered and licensed prior to and at the date of the commencement of the *Transport (Amendment) Act* 1945. Under the provisions of the last-mentioned Act the registration or licence of a taxi-cab is not transferable except that, in certain cases, a transfer may be effected, the relevant one for the purposes of this report being that set forth in the amendment effected to the *Transport Act* 1930 by adding to it s. 171A (2) (*d*), and the amendment effected to the *State Transport (Co-ordination) Act* 1931 by adding to it s. 17A (2) (*d*). The effect of s. 171A (2) (*d*) and s. 17A (2) (*d*) is the same except that the former applies to registration and the latter to licences. They provide that the Commissioner for Road Transport and Tramways shall, subject to certain provisions and regulations, grant one application only for the transfer of the registration or licence, as the case may be, from the person who held it at the date of the commencement of the *Transport (Amendment) Act* 1945, to an applicant who satisfies the Commissioner that he is a fit and proper person to be the holder of a certificate of registration or a licence, as the case may be, of a taxi-cab, and that he will, if the application be granted, have the use, control and management of the vehicle to which the application relates. The result of the amendments and of the manner in which the law with regard to the obtaining of registrations and the licensing of taxi-cabs is administered, is that the number of taxi-cabs which are so registered or licensed is strictly limited, and, in addition, the number of taxi-cabs which are transferable, that is, by transfer to new buyers, together with their respective registrations and licences, is constantly diminishing because as each transfer takes place the transferable pool of vehicles diminishes.

An officer of the Department of Road Transport gave evidence that there were 950 unrestricted metropolitan taxi-cab licences in the

whole of the Sydney metropolitan area. Of that number 917 were operating in the city or in the suburbs. Departmental records showed that since 18th May 1945, the date of the commencement of the *Transport* (*Amendment*) *Act* 1945, there had been 37 sales of unrestricted taxi-cabs plying in the city or suburbs. That meant that there were 880 taxi-cabs which had not yet had their first sale. The average price for the 37 taxi-cabs alleged to have been paid for the licence of the vehicle was approximately £1,318. A trade witness called for the plaintiffs said that since the date of the commencement of the *Transport* (*Amendment*) *Act* 1945 it had been very difficult to purchase taxi-cabs. Another trade witness called for the defendant agreed with this statement and said that one of the reasons was that owners realized that owing to sales of other taxi-cabs their taxi-cabs were becoming more valuable. Since the date of the commencement of the *Transport* (*Amendment*) *Act* 1945 the latter witness had effected a few sales of taxi-cabs, the amounts paid therefor ranging from £1,800 to £2,000. He expressed the opinion that there were six persons desirous of purchasing a taxi-cab for every person who was desirous of selling a taxi-cab.

A few days prior to the hearing of the suit on 12th December 1945 the plaintiffs bought another taxi-cab for the sum of £1,900.

Roper J. declared that the agreement alleged in the statement of claim should be specifically performed and ordered that the defendant do all things and execute all documents which were proper and necessary for him to do and execute in order to enable the plaintiffs to present a proper application to the Commissioner for Road Transport and Tramways for the granting of the transfer of the registration and licence of the subject taxi-cab. In the event of such an application being granted, his Honour ordered the plaintiffs to pay to the defendant the balance of the purchase money due from them and that the defendant deliver to them the said taxi-cab. In the event of such an application being made and refused, his Honour reserved liberty to apply in the suit. (1)

From that decision the defendant appealed to the High Court.

Louat, for the appellant. The evidence shows that damages would be a fully adequate remedy, therefore, on the principles laid down, the Court should not decree that the contract should be specifically performed (*Adderley* v. *Dixon* (2); *Flint* v. *Brandon* (3); *Halsbury's*

(1) (1945) 63 W.N. (N.S.W.) 224.
(2) (1824) 1 Sim. & St. 607, at p. 610 [57 E.R. 239, at pp. 240, 241; 24 R.R. 254, at pp. 254, 255].
(3) (1803) 8 Ves. Jun. 159, at p. 163 [32 E.R. 314, at p. 315].

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Laws of England, 2nd ed., vol. 31, pp. 338, 339). As the matter of the transfer of the taxi-cab is entirely within the discretion and under the control of the Commissioner for Road Transport and Tramways, who, under s. 171A of the *Transport Act* 1930-1945 and s. 17A of the *State Transport (Co-ordination) Act* 1931-1945, is obliged to be satisfied about various things, particularly under s. 171A (3) that a refusal to grant the transfer would cause " undue hardship " to the appellant, it follows that the actual completion of the contract is something which, in the circumstances, is beyond the power of the court (*Hills* v. *Croll* (1)). As regards the equitable remedy of specific performance the sale of one taxi-cab out of the many taxi-cabs available for sale is quite different from the sale of a particular business in a particular locality. There is a want of mutuality in the contract (*Fry* on *Specific Performance*, 6th ed. (1921), p. 219, par. 460). There was no subjective element in *Macaulay* v. *Greater Paramount Theatres Ltd.* (2) as in this case, therefore that case is distinguishable.

Snelling (with him *Ferrari*), for the respondents. The evidence establishes that owing to the restrictive legislation taxi-cabs are a type of property which is not readily obtainable. Thus it follows that in the event of a refusal by a vendor to complete a contract for the sale by him of a taxi-cab, as here, there cannot be adequate compensation by damages at law and that the proper remedy is specific performance (*Duncuft* v. *Albrecht* (3); *Adderley* v. *Dixon* (4)). The principle that specific performance will be granted in a case where a complete remedy is not obtainable at law is a flexible one (*McIntosh* v. *Dalwood* [*No.* 4] (5)). The fact that the respondents were able to purchase another taxi-cab does not disentitle them to specific performance of the contract. The defence of want of mutuality was not raised on the pleadings nor at the hearing and is without substance (*Bramley* v. *Parrott* (6)). Section 171A (2) (*b*) of the *Transport Act* 1930-1945 meets the case that at the date of the commencement of the *Transport (Amendment) Act* 1945 the licence might not be in the name of the owner of the taxi-cab.

Louat, in reply.

Cur. adv. vult.

(1) (*circa* 1843) 1 DeG. M. & G. 627 (n) [42 E.R. 696, at p. 699].
(2) (1921) 22 S.R. (N.S.W.) 66.
(3) (1841) 12 Sim. 189, at pp. 198, 199 [59 E.R. 1104, at pp. 1107, 1108; 56 R.R. 46, at pp. 47, 48].
(4) (1824) 1 Sim. & St., at pp. 611, 612 [57 E.R., at p. 241; 24 R.R. 254, at pp. 255, 256].
(5) (1930) 30 S.R. (N.S.W.) 415, at pp. 416, 417; 47 W.N. 128, at pp. 128, 129.
(6) (1881) 7 V.L.R. (E.) 172.

The following written judgments were delivered :—

RICH J. This is an appeal from the decree and order of *Roper* J. by which his Honour declared that an agreement for the sale of a taxi-cab in respect of which the defendant was the holder of its registration issued in accordance with the provisions of the *Transport Act* 1930 (N.S.W.), as amended, and also of a licence in respect of the taxi-cab under the provisions of the *State Transport (Co-ordination) Act* 1931 (N.S.W.), as amended, should be specifically performed. His Honour also ordered the defendant to do all things and execute all documents which are proper and necessary for him to do and execute to enable the plaintiffs to present a proper application to the Commissioner for the grant of registration under the *Transport Act* 1930-1943, and the issue of a licence under the *State Transport (Co-ordination) Act* 1931. Both these Acts were amended by the *Transport (Amendment) Act* 1945.

The agreement the subject of the suit was an oral agreement for the sale and purchase of a registered and licensed taxi-cab for the sum of £1,850, of which the plaintiffs paid a deposit of £10. Counsel for the defendant demurred *ore tenus* on the ground that the statement of claim disclosed no equity. His Honour deferred his decision until he had heard the facts of the case. Evidence was then admitted to the effect that the number of registered taxi-cabs was restricted and that the average price paid for the licences of such cabs was £1,318. It also appeared that the plaintiffs had bought another taxi-cab for the purpose of their business and not to replace the taxi-cab the subject of the agreement.

In support of the appeal Dr. *Louat* submitted three points. The first was that a chattel was not the proper subject matter for a decree of specific performance, and that damages were a sufficient remedy. The *Sale of Goods Act* (Imp.) (56 & 57 Vict. c. 71), s. 52, which might be an answer to this objection, is not in force in New South Wales. This defence is, however, subject to well-known exceptions. Among them is that of a chattel of exceptional or peculiar value to the purchaser, in which case he is entitled to its delivery *in specie*. And I consider that the registration and licence of a taxi-cab are of such a nature as to bring it within this exception. For the registration and licence transform the vehicle into a chattel of special value to the purchaser as a money-making machine whereby he is enabled to gain his livelihood.

The second and third objections—want of mutuality and control of the discretion of the Commissioner under the relevant statutes —appear to me to merge into one defence. The respondents are required to join with the appellant in the application to the

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Commissioner and to sign the usual and proper documents for obtaining the transfer of registration and the issue of the licence. The Court is not called upon to superintend a series of acts and the order in question does not purport to control the Commissioner's discretion. In the event of refusal the obligation is at an end.

In *Roach* v. *Bickle* (1), I held that when a lease was subject to the approval of the Commissioner the agreement to sublet was provisional. And if the approval was not obtained the contract did not become operative: And see *Egan* v. *Ross* (2). Similarly, in *Willis* v. *Milner* (3), *Chapman* J. made a decree for specific performance of a contract for the sale and purchase of a lease, one of the terms of which was that the lessee should not assign without the lessor's previous consent.

In connection with obtaining the necessary consent of the Commissioner Dr. *Louat* contended that s. 171A (3) of the *Transport Act* 1930-1945 provided a further obstacle, but I think that this subsection has no relation to sub-s. 171A (2) (*b*), under which the transfer is effected.

For these reasons I am of opinion that the appeal should be dismissed with costs.

STARKE J. In my opinion, this appeal should be dismissed.

I agree with the reasons given by *Roper* J. in the Supreme Court (4) and nothing, I think, of any use, can be added to them.

DIXON J. The appellant, the defendant in the suit, owns a taxi-cab and holds for it a registration issued in accordance with the *Transport Act* 1930-1945 (N.S.W.) and a licence under the provisions of the *State Transport (Co-ordination) Act* 1931-1945 (N.S.W.). He made an oral agreement with the respondents, who are the plaintiffs, for the sale by him to them of the taxi-cab, and of the benefit of the registration and licence, for the sum of £1,850. The respondents paid a deposit of £10 and were ready and willing to complete the agreement, but the appellant refused to do so.

Roper J., who heard the suit, declared that the agreement should be specifically performed and decreed the appellant to do all things and execute all documents which are proper and necessary in order to enable the plaintiffs to present a proper application to the Commissioner for Road Transport and Tramways for the granting of a transfer of the registration and licence of the taxi-cab, and further

(1) (1915) 20 C.L.R. 663, at p. 672.
(2) (1928) 29 S.R. (N.S.W.) 382, at p. 388; 46 W.N. 90, at p. 93.
(3) (1909) 11 G.L.R. (N.Z.) 163; 28 N.Z.L.R. 62.
(4) (1945) 63 W.N. (N.S.W.) 224.

decreed that in the event of such an application being granted the respondents should pay to the appellant the balance of purchase money due from them and that the appellant should thereupon deliver the taxi-cab to them. (1)

The provisions of the legislation show what must be done under this decree. Section 171A (2) of the *Transport Act* 1930-1945 provides in par. (*a*) that, except as thereinafter provided, a taxi-cab registration shall not be transferable, and, in par. (*d*), that for each such registration the Commissioner shall grant one application only for its transfer from the person holding it at the commencement of Act No. 22 of 1945, a date fixed by proclamation, to an applicant who satisfies the Commissioner that he is a fit and proper person to be the holder of a registration certificate of a taxi-cab and that he will, if the application be granted, have the use, control and management of the vehicle to which the application relates. Section 171A (3) proceeds to make, by way of exception, a special provision for a further transfer in cases of undue hardship, but that provision has no application (an attempt on the part of the appellant to show that it applied was due to a misconception concerning what must have been an application and transfer made under s. 171A (2) (*b*)).

As to the licence under the *State Transport* (*Co-ordination*) *Act* 1931-1945 to operate the taxi-cab, s. 17A (2) (*a*) and (*d*) make provisions substantially the same as the foregoing.

It follows that the appellant is bound to take certain formal steps and the respondents, on their part, must satisfy the Commissioner of their fitness and that they will have the use, control and management of the vehicle. There is nothing in this, in respect of either side, calling for the continued supervision of the Court. The appeal is based primarily upon the contention that the contract is not one appropriate for the equitable remedy of specific performance.

The subject matter, it is said, is the sale of a chattel and, in general, a suit for the specific performance of an agreement to sell and deliver chattels will not be entertained. But, when the substance of the matter is considered, the agreement is not of this simple character. The legislation has resulted in a restriction upon the number of registered and licensed vehicles with which the calling of taxi-driving may be pursued. The contract is in fact for the transfer of a valuable privilege annexed to a chattel. Of the amount of the consideration, somewhat the greater part appears to represent the registration and licence and the lesser part the vehicle itself. The number of taxi-cabs licensed for the city and suburbs of Sydney which had not been already sold once since the commencement of Act No. 22 of 1945 was shown to be only 880. Thirty-seven taxis had, according to the

(1) (1945) 63 W.N. (N.S.W.) 224.

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evidence, been sold since that date and the prices paid for the licences of the vehicles were said to have averaged £1,318. The subject of the sale is thus shown to be a special right attached to a chattel, transferable only with it, and numerically restricted.

Though in earlier times the absence of an adequate theory of simple contract had led to the interposition of chancery on wider grounds, by the seventeenth century, if not before, it had come to be "taken for a good cause of dismission" of a bill "in most causes, to say that he" the plaintiff "hath remedy at the common law" (1). So it became the received doctrine that the foundation of decrees for specific performance was "that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed" (per Lord *Redesdale*, *Harnett* v. *Yeilding* (2)).

"The Court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice" (per Lord *Selborne*, *Wilson* v. *Northampton and Banbury Junction Railway Co.* (3)).

In the case of goods or securities obtainable upon the market, damages at law place the disappointed buyer or seller in as good a position as delivery of the articles or receipt of the price because it enables him to go upon the market. But damages at law for the refusal of a vendor of land to go on with the contract might not be a complete remedy to the purchaser, to whom the land might have a special value (*Adderley* v. *Dixon* (4)), and the vendor's failure to complete through defect of title left the purchaser without any adequate remedy at law (*Flureau* v. *Thornhill* (5); *Bain* v. *Fothergill* (6)). But specific performance is also the right of a vendor of land against a defaulting purchaser. "It has been said, but has long since been overruled, that a seller may go to law, as he only wants the money, whereas the purchaser wants the estate; but a seller wants the exact sum agreed to be paid to him, and he wants to divest himself legally of the estate, which after the contract was no longer vested in him beneficially" (per Lord *St. Leonards*, *Eastern Counties Railway Co.* v. *Hawkes* (7)).

But apart from land, a contract for which has always been considered a proper subject of specific performance, the question raised for the Court of Chancery was to say in what circumstances equity

(1) (*circa* 1602) Cary 20 [21 E.R. 11].
(2) (1805) 2 Sch. & Lef. 549, at p. 553; 9 R.R. 98, at pp. 100, 101.
(3) (1874) L.R. 9 Ch. 279, at p. 284.
(4) (1824) 1 Sim. & St., at p. 610 [57 E.R., at pp. 610, 611; 24 R.R. 254, at p. 255].
(5) (1776) 2 Black. W. 1078 [96 E.R. 635].
(6) (1874) L.R. 7 H.L. 158, at pp. 201, 207-210.
(7) (1855) 5 H.L.C. 331, at p. 376 [10 E.R. 928, at p. 945; 101 R.R. 183, at p. 210].

considered the purchaser entitled to the specific thing contracted to be sold or the vendor to divest himself of it and receive the price, rather than in either case being bound to accept damages as the price of the loss of the contract.

It was not difficult to say that a purchaser of " articles of unusual beauty rarity and distinction " was entitled to obtain them *in specie* (*Falcke* v. *Gray* (1)). Though a less obvious case, it was settled that " a certain number of railway shares of a particular description, which railway shares are limited in number " and are not to be obtained by going on the share market, are a subject in respect of which a contract of sale will be enforced specifically (*Duncuft* v. *Albrecht* (2)). But though it is within the power of a court of equity to decree specific performance of a contract for the sale and purchase of shares, yet when shares are dealt in largely on the market and anyone can go and buy them, there is no reason why they should not be in the same position as government stock is, in a contract for its sale and purchase (per *Parker* J., *Stern* v. *Schwabacher* ; *Re Schwabacher* (3)). Where chattels are sold or otherwise disposed of by contract as part of the particular equipment of a business, there is ground for equity granting specific relief. There appears to be no direct case of specific performance, but compare *North* v. *Great Northern Railway Co.* (4) ; *Nutbrown* v. *Thornton* (5).

In the present case I think that we should have no difficulty in concluding that, because of the limited number of vehicles registered and licensed as taxi-cabs, because of the extent to which the price represents the value of the licence, and because of the essentiality to the purchasers' calling of the chattel and the licence annexed thereto, we should treat the contract as within the scope of the remedy of specific performance.

An answer was attempted on the part of the appellant to the effect that the respondents in fact succeeded in buying another taxi-cab. This, I think, is not material. It was not an election on their part to obtain a substitute at the expense, in damages, of the appellant. They were entitled to obtain an additional car, if they could, for their business without prejudicing their right to obtain *in specie* the taxi-cab registration and licence already contracted for.

An argument was advanced that there was a lack of mutuality because, as against the respondents as purchasers, the contract could

(1) (1859) 4 Drew 651, at p. 658 [62 E.R. 250, at p. 252 ; 113 R.R. 493, at p. 496].
(2) (1841) 12 Sim., at p. 199 [59 E.R. at p. 1108 ; 56 R.R. 46, at p. 48].
(3) (1907) 98 L.T. 127, at p. 128.
(4) (1860) 2 Giff. 64, at pp. 68, 69 [66 E.R. 28, at p. 30 ; 128 R.R. 20, at p. 23].
(5) (1804) 10 Ves. Jun. 160 [32 E.R. 805].

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not be enforced without a continued supervision or superintendence, which the Court would not undertake : cf. *Peto* v. *Brightons Uckfield and Tunbridge Wells Railway Co.* (1) ; *Pickering* v. *Bishop of Ely* (2). But it is evident from the nature of the statutory provision that the argument is misconceived. All the respondents must do is to submit the materials for satisfying the Commissioner. If they fail to satisfy him the decree has no further operation.

The conditional form of decree made in the present case accords with settled practice in Australia, where a contract to be specifically performed involves obtaining the consent, approval or other sanction of a public authority.

In my opinion the appeal should be dismissed with costs.

McTIERNAN J. I agree that this appeal should be dismissed and with the reasons for judgment of my brother *Dixon*.

WILLIAMS J. This is an appeal by the defendant from a decree made by *Roper* J. exercising the equitable jurisdiction of the Supreme Court of New South Wales in equity whereby his Honour declared that on 2nd November 1945 a contract had been made for the sale by the appellant to the respondents of taxi-cab registered No. 1155 and the benefit of the registration for the sum of £1,850 and ordered that this contract should be specifically performed. The appellant does not challenge the finding that the contract was made but he does challenge the jurisdiction of the Court of Equity to order its specific performance on two grounds. They are (1) that on the evidence his Honour should have held that damages were an adequate remedy, and (2) that having regard to the provisions of the *Transport (Amendment) Act* 1945 which came into force on 18th May 1945 his Honour should have held that the appellant could not have sued the respondents for specific performance at the date of the contract so that it was wanting in mutuality.

The material facts and relevant legislation have been set out in previous judgments and I shall not repeat them. The appellant was at the date of the contract the holder of a current certificate of registration and licence for the taxi-cab under the *Motor Traffic Act* 1909-1945, the *Transport Act* 1930-1945, and the *State Transport (Co-ordination) Act* 1931-1945, which registered the vehicle as a taxi-cab in the Metropolitan Transport District and authorized its use as a taxi-cab in New South Wales subject to certain prescribed

(1) (1863) 1 H. & M. 468 [71 E.R. 205 ; 136 R.R. 203].

(2) (1843) 2 Y. & C.C.C. 249, at pp. 266-268 [63 E.R. 108, at pp. 117, 118 ; 60 R.R. 132, at pp. 140, 141].

conditions. The *Transport (Amendment) Act* 1945 inserted s. 171A into the *Transport Act* 1930, as amended, and s. 17A into the *State Transport (Co-ordination) Act* 1931, as amended, and these sections had the effect of restricting the right to transfer the registration and licence to one transfer by the appellant to an applicant who satisfied the Commissioner that he was a fit and proper person to be the holder of a registration certificate and of a licence for a taxi-cab and that he would, if the application was granted, have the use, control and management of the vehicle to which the application related.

It is clear that the Court of Equity will not decree specific performance of a contract where a money payment, or in other words damages, will afford an adequate remedy for the breach, and that this is the position in the case of most forms of personal property, such as goods which can be readily purchased in the market and Government stock and shares in listed companies which can be readily purchased on the Stock Exchange. But it is equally clear that the Court of Equity will decree specific performance of contracts for the sale of chattels which are unique or have for some other reason a special or peculiar value. The contract of 2nd November was not a mere contract for the purchase of a chattel. It was a contract for the purchase of a chattel adapted to carry on a particular business, and of the registration and licence without which that business could not be carried on. It was therefore a contract of a composite character. The evidence shows that if the purchase money had been apportioned, the greater sum would have been attributable to the purchase of the registration and licence. This registration and licence were both capable of being renewed annually and of being transferred to another vehicle which replaced the existing taxi-cab.

The Court of Equity can intervene to protect the rights of persons who have interests in licences which are necessary to enable them to carry on business (*Leney & Sons Ltd.* v. *Callingham and Thompson* (1)). It can also intervene where chattels are of special value to a person in order to carry on his business (*North* v. *Great Northern Railway Co.* (2)). The present composite contract incorporates both these features. The fact that there were a number of other taxi-cabs whose registrations and licences were still capable of being transferred at the date of the suit and that the respondents might have purchased one of these cabs in lieu of the appellant's vehicle is immaterial. It is equally immaterial that the respondents, after suit brought, managed to purchase another taxi-cab. If personal

(1) (1908) 1 K.B. 79, at p. 85.

(2) (1860) 2 Giff., at p. 68 [66 E.R., at p. 30].

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Williams J.

property is of such a nature that it can be the subject matter of a suit for specific performance, the subsequent purchase of similar property could no more affect the rights of the purchaser to specific performance than the subsequent purchase of another block of entirely comparable land in a subdivision adjoining the block already purchased could affect the right of the purchaser to have the previous contract specifically performed. I agree with his Honour's statement that " this particular chattel, with the rights which come from registration and the licence as a taxi-cab, is of such a nature that this Court can properly entertain a suit for specific performance in regard to this sale."

I also agree with him that the second ground fails. There was nothing in the relevant legislation which prohibited the making of the contract. On the contrary it expressly authorized the appellant to sell and transfer the taxi-cab and licence to an applicant who satisfied the Commissioner that he was a fit and proper person and would have the use, control and management of the vehicle. The position of the parties under the contract is, as his Honour said, analagous to that which exists in the case of contracts for the sale of Crown land which can only be transferred subject to the Minister's consent. In *Egan* v. *Ross* (1), *Harvey* C.J. in Eq. said that a condition must be implied in such contracts that their completion is subject to the obtaining of the necessary consent, and that neither the vendor nor the purchaser will do anything to jeopardize the obtaining of such consent: Cf. *McFarlane* v. *Wilkinson* (2); *Maynard* v. *Goode* (3); *Norton* v. *Angus* (4) and *Public Trustee* (*N.S.W.*) v. *Gavel* (5).

Where the steps which are required to obtain the consent are defined and capable of supervision it is well within the competence of the Court of Equity to compel the parties to take such steps. In the present case it is the respondents who must attempt to satisfy the Commissioner in the two respects already mentioned. They must place before him such evidence as he may reasonably require for this purpose. An order that the respondents should do so would be analagous to the order set out in *Egan* v. *Ross* (6). The contract was not, therefore, wanting in mutuality at the date that it was made. But even if it had been, the better opinion would appear to be that a contract is capable of being specifically performed if, notwithstanding that it was not mutually enforceable at that date, it has become mutually enforceable at the date the suit is

(1) (1928) 29 S.R. (N.S.W.), at p. 387; 46 W.N., at p. 92.
(2) (1927) V.L.R. 359.
(3) (1926) 37 C.L.R. 529.
(4) (1926) 38 C.L.R. 523.
(5) (1927) 40 C.L.R. 169.
(6) (1928) 29 S.R. (N.S.W.), at p. 388; 46 W.N., p. 93.

instituted. Even if the respondents could not have been ordered to take such steps in a suit instituted by the vendor, they have offered by their statement of claim to do everything that is necessary to complete the contract. There was, therefore, no want of mutuality from the date the suit was brought (*Queensland Insurance Co. Ltd.* v. *Australian Mutual Fire Insurance Society Ltd.* (1); *Hume* v. *Munro* [*No.* 2] (2)).

For these reasons I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *A. N. Harding & Breden.*
Solicitors for the respondents, *Harold J. Price & Co.*

J. B.

(1) (1941) 41 S.R. (N.S.W.) 195, at p. 202; 58 W.N. 182, at p. 186.

(2) (1943) 67 C.L.R. 461, at pp. 483, 484.