

and receivable in payment of taxes, if properly tendered, the county court \* \* \* could waive any such irregularity in the time and mode of presenting their own obligations, and credit the collector with them in the account."

There seems to be little need of pursuing the subject further. The only acts complained of that could possibly be regarded as entitling the relators to any of the relief sought in this proceeding, are those last considered, and it seems that they are mere irregularities, which the county court has the power to waive, and has already waived by approving the treasurer's settlement.

It also stands admitted by the motion to quash that the action of the county court in waiving such irregularities was not due to any fraudulent combination to injure the relators, but was done in the exercise of a sound judicial discretion reposed in that body. From any point of view, therefore, the return made by the respondents is sufficient, and the motions to quash must be overruled. It is so ordered.

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NORRIS v. FOX *et al.*

(Circuit Court, N. D. Missouri, E. D. March 3, 1891.)

**SPECIFIC PERFORMANCE—MUTUALITY OF CONTRACT.**

A contract whereby plaintiff agreed to procure a deed to be made to defendant of certain land owned by a third person, in consideration whereof defendant agreed to convey to plaintiff certain other land, is not mutual so far as the remedy for its enforcement is concerned, and cannot be specifically enforced, since plaintiff's agreement to convey land of another cannot be compelled, but only subjects plaintiff to an action for breach thereof.

**In Equity.**

This is a bill for specific performance of a contract for the exchange of lands. Norris, the complainant, by an agreement in writing dated September 12, 1889, bound himself "to procure a warranty deed conveying \* \* \* to defendant Fox," subject to a certain incumbrance, certain land situated in Butler county, Kan., and "to furnish an abstract showing good title," except as to the incumbrance, in consideration whereof Fox on his part agreed and bound himself "to convey by general warranty deed to W. H. Norris, or any one named by him," certain land situated in Monroe county, Mo. At the time the contract was executed the title to the Kansas land was vested in one J. E. Robbins. Norris subsequently obtained a deed from Robbins and wife to Fox, but the latter refused to accept the same, or comply with the contract, for various reasons unnecessary to be mentioned, whereupon the present bill was filed.

*W. O. L. Jewett*, for complainant.

*Harrison & Mahan and R. P. Giles*, for defendants.

THAYER, J., (after stating the facts as above.) Specific performance cannot be enforced in this instance for want of mutuality in the contract, so

far as the remedy for its enforcement is concerned. The rule is fundamental that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties at the time it is executed have the right to resort to equity for its specific enforcement. *Marble Co. v. Ripley*, 10 Wall. 340; *Bodine v. Glading*, 21 Pa. St. 50; *Duwall v. Myers*, 2 Md. Ch. 401; *German v. Machin*, 6 Paige, 288; *Boucher v. Vanbuskirk*, 2 A. K. Marsh. 345; *Duff v. Hopkins*, 33 Fed. Rep. 599-608. And where a contract when executed is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific enforcement against the other party. *Hope v. Hope*, 8 De Gex, M. & G. 731-736; *Fry, Spec. Perf.* (3d Ed., Amer. Notes,) § 443. In the case at bar the agreement of Norris to procure a warranty deed of land at the time belonging to another, was of that nature that only an action at law would lie for a breach of the agreement. As Fox could not compel specific performance of the contract when made, and only had his remedy at law by a suit for damages, the complainant must resort to the same remedy.

The bill is dismissed, without prejudice to the complainant's right to sue at law.

## SERENSEN v. NORTHERN PAC. R. CO.

(Circuit Court, D. Montana. January 15, 1891.)

### 1. DEATH BY WRONGFUL ACT—PARTIES—PLEADING.

Under Rev. St. Mont. 1870, p. 508, § 2, providing that an action for negligently causing death shall be brought by the personal representative for the exclusive benefit of the widow and next of kin, it is essential to the action that there be a widow or next of kin, and that fact must be alleged in the complaint.

### 2. SAME—WAIVER OF DEFECTS.

Where the complaint failed to allege the existence of next of kin, and evidence of the fact was admitted over defendant's objection, and his exception to the ruling is saved, the defect is not cured by verdict, and plaintiff will not be held to have waived his objection by his failure to demur.

### 3. SAME—PLEADING—ALLEGATION OF DAMAGES.

As the widow and next of kin are entitled to the benefit of the action irrespective of any legal claim on the deceased, if he had survived, for support, the complaint is not insufficient because it fails to set out specifically the damage which they sustained by his death.

### 4. SAME—DAMAGES.

In estimating the damages the jury must take into consideration the age of deceased, the probability of the extent of his life, his wages, personal habits, disposition, and capacity to labor and make and save money, and the probability that if he had lived he would have been of some pecuniary benefit to them; and, where it appears that deceased had a sister and two brothers living in Denmark; that he was a bridge carpenter, and received \$2 a day; that he had been at work three or four months, and had sent some money to his sister, (how much did not appear); and there was no evidence as to his age or his capacity for earning and saving money, or as to the expectation of pecuniary benefit to be derived by the next of kin from his estate if he had lived longer,—a verdict of \$1,750 will be set aside as excessive.