

rights conferred by it, either in a legal or an equitable suit, unless he strictly fulfills all the conditions to which the undertaking of the grantor was expressly made subject by the provisions of the contract.

In practice it has happened that, for reasons which are sufficiently obvious in view of the usual subject-matter of these contracts and the nature of their provisions, this principle has ordinarily been applied in suits for specific performance, (see XI, post) which is refused, unless it is apparent that the condition which was not fulfilled was not intended to be of the essence of the contract (*b*), or unless, owing to no default on the part of the grantee of the option, it was impossible to fulfill those conditions (*c*).

Where "the covenantor cannot enforce a sale, but it is entirely in the option of the covenantee whether he will purchase or not, and where he is at liberty to exercise his option only upon the performance of certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for the sale and purchase of land, and a party entitled to purchase or not at his option must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option" (*d*).

38. Conditions considered without reference to the time fixed for performance.—Subjoined are some decisions in which the general principle stated alone has been applied without any special reference to the requirement that the act specified shall be done within a certain period.

(*a*) *Payment of purchase price.* (See also sec. 42, *infra*)

If the proviso is that the grantee of an annuity will accept a specified sum for it within a specified period after the grantor, his heirs, etc., shall give notice of his desire to re-purchase it, the annuity is not extinguished unless a regular notice is given and payment actually made according to the notice (*e*).

(*b*) *Payment of rent by tenant with option to purchase or renew.*

As a general rule a tenant's stipulation to pay rent must be literally performed in order to entitle him to the specific performance of any

(*b*) *Joy v. Birch* (1836) 4 Cl. & F. 57 (p. 89); *Berwind v. Williams* (1895) 172 Pa. 1.

(*c*) *Ball v. Canada Co.* (1876) 24 Grant (U.C.) 281. See X, post.

(*d*) *Forbes v. Connolly* (1857) 5 Grant (U.C.) 657, per Spragge V.C.

(*e*) *Joy v. Birch* (1836) 4 Ch. V.F. 57, p. 89.