#45 5/11/65

Memorandum 65-23

Subject: Study No. 45 - Mutuality of Remedy in Suits for Specific Performance

Attached to this memorandum is a preliminary survey of the topic that was prepared when the Commission decided to undertake this study. At the last meeting, the staff indicated that the Supreme Court may have solved the problems. Our suggestion was based on the recent case of Ellis v. Mihelis, 60 Cal.2d 206 (1963). That case was an action for specific performance of a contract to sell real property where the plaintiff buyer had not given his agent written authority to enter into the contract. The defendant raised the mutuality defense because the contract was unenforceable against the plaintiff. The Supreme Court said:

> The claim of a lack of mutuality is likewise untenable. The old doctrine that mutuality of remedy must exist from the time a contract was entered into has been so qualified as to be of little, if any, value, and many authorities have recognized that the only important consideration is whether a court of equity which is asked to specifically enforce a contract against the defendant is able to assure that he will receive the agreed performance from the plaintiff. (See, e.g., 5 Corbin on Contracts (1951) §§ 1180, 1181, 1183, 1185, 1190, 1192; Rest., Contracts, com. a on § 372 (1); Stone, The "Mutuality" Rule in New York (1916) 16 Colum. L.Rev. 443, 444-445, 464.) As was said by Justice Cardozo, "If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule to-day. [Citations.] What equity exacts to-day as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant. [Citations.] Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end." (Epstein v. Gluckin, 233 N.Y. 490 [135 N.E. 861, 862].)
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> Our statutes are largely in accord with the modern view regarding mutuality of remedy. Section 3386 of the Civil Code, which provides, "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, . . ." is

followed by section 3388, which provides: "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance." It has been held from an early date in this state that, where a party commences an action to compel the specific enforcement of an agreement for the sale of real property, the requirement of mutuality is satisfied, the theory being that by bringing the action the plaintiff has submitted himself to the jurisdiction of equity and thereby enables the court to assure performance by him. (Vassault v. Edwards, 43 Cal. 458, 464-465; see Harper v. Goldschmidt, 156 Cal. 245, 251 [104 P. 451, 134 Am.St. Rep. 124, 28 L.R.A. N.S. 689]; cf. Gosnell v. Lloyd, 215 Cal. 244, 253 [10 P.2d 45].)

There are also cases holding that, where there is an agreement for the sale of real property which has been signed by the seller but not by the buyer, a deposit by the buyer which is subject to forfeiture prevents the seller from withdrawing from the agreement before the time specified for performance by the buyer. (Copple v. Aigeltinger, 167 Cal. 706, 709-710 [140 P. 1073] (deposit paid directly to seller); Wood Bldg. Corp. v. Griffitts, 164 Cal. App.2d 559, 565 [330 P.2d 847] (deposit made by a check placed in escrow and cashed).]

Some cases contain language indicating that where the buyer has not signed an agreement for the sale of real property, the seller who has signed has a right to withdraw from the agreement at any time before the offer for full performance by the buyer. (See Nason v. Lingle, 143 Cal. 363, 367 [77 P. 71]; San Francisco Hotel Co. v. Baior, 189 Cal. App.2d 206, 211 [11 Cal. Rptr. 32]; Seymour v. Shaeffer, 82 Cal. App.2d 823, 825 [187 P.2d 95]; Jonas v. Leland, 77 Cal. App.2d 770, 777 [176 P.2d 764].) This language, which was either dictum or was used in factual situations distinguishable from the one before us, is disapproved insofar as it may be understood to mean that there is such a right of withdrawal without regard to the equities involved.

We conclude that plaintiff was entitled to rely on the agreement whether or not he authorized or ratified Ratto's action in writing before defendants refused to perform.

Despite the Supreme Court's opinion, however, it appears to us after a preliminary survey that problems still remain in this area. Illustrative is Adams v. Williams Resorts, Inc., 210 Cal. App.2d 456 (1962). The defendant in that case had leased a large area of land surrounding Bass Lake from P. G. & E. The defendant then sub-leased lots in the area. An agreement was entered into with the plaintiffs, who were real estate brokers, granting the plaintiffs the exclusive right to negotiate the sub-leasing of lots in the

area on a 10% commission basis. The defendant was given the right to terminate the agreement if the plaintiffs failed to negotiate and complete at least ten sub-leases per year. The agreement sub-leased one parcel of the property to the plaintiffs for use as a realty office. The agreement had a five-year term. A dispute arose between the parties as to the plaintiffs' right to a renewal for another five years. In the litigation that ensued, the court held that the plaintiffs did have and exercised an option for a five-year renewal. Accordingly, the trial court enjoined the defendant from permitting the operation of a competing real estate office and from violating plaintiffs' exclusive right to negotiate sub-leases in accordance with the agreement. The appellate court reversed in reliance upon the doctrine of mutuality. Since the contract was for personal services of the plaintiffs, the contract could not be enforced specifically against them. Therefore, specific performance was not available against the defendant under the doctrine of mutuality. Civil Code Section 3423(5) provides that an injunction cannot be granted to prevent the breach of a contract which would not be specifically enforced. Hence, the injunction issued was in error.

Other statutory clogs on the development of the law in this area are pointed out in the exhibit. We conclude, therefore, that despite the Supreme Court's language in Ellis v. Mihelis, there is vitality in the doctrine of mutuality yet; and a study of the subject would be warranted.

We discussed this matter with Professor Carter of Stanford (who taught contract remedies last year) and Gary Borchard, a third year student who is now working on a law review note concerning the subject. Mr. Borchard indicates that despite the broad language in Ellis v. Mihelis, the doctrine has considerable vitality, particularly at the trial court level. The problem frequently arises in the pleading stages of property litigation where the

parties do not have the time, even when they have the money, to process an appeal through to the Supreme Court. The Supreme Court's language indicates that it will attempt to alleviate the problems when they reach that level; but a legislative solution such as that recommended by the Commission in regard to rescission would be better. The statutes are the big obstacle to judicial reform in this area; and they have inhibited the courts from developing conditional remedies to alleviate the problems arising from lack of mutuality.

We suggest, therefore, that we proceed to obtain a consultant.

Respectfully submitted,

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Assistant Executive Secretary

SUGGESTION 177

(Originated by Stanford Staff)

PREFATORY NOTE

Mr. Harrick got interested in this subject and prepared the lengthy report on it which follows. His point is that the doctrine of mutuality of remedy in suits for specific performance in the law of this State deserves study with a view to determining whether the doctrine should be either abolished or modified. While his report is considerably longer than most which we send to you, it is so well done that we decided not to try to tailor it to the usual format.

J. R. M.

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The Commission may wish to consider the desirability of amending and consolidating those sections of the Civil Code (principally Sections 3386, 3388, 3392, 3394 and 3423(5)) concerning the requirement of mutuality of remedy in suits for specific performance. Speaking generally, this requirement prevents the plaintiff from obtaining a specific performance decree where that remedy would not be available to the defendant if he were suing.

INTRODUCTION

The general statute is Civil Code Section 3386 which provides:

> Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former

> is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

This provision is a modification of Fry's rule of mutuality of remedy. The rule is so-called because it made its first textbook appearance in Sir Edward Fry's Specific Performance (1848) and its formulation has generally been attributed to Fry.

Fry's rule, called by its author the most well-settled rule in equity, was stated as follows:

> A contract to be specifically enforced by the court must be mutual, --that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity to contract, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty, attending its execution in the former. (FRY, SPECIFIC PERFORMANCE 198 (2d. ed. 1861).)

Although as thus stated the rule seems to concern primarily the requirement of mutuality of obligation, it has been understood to refer to the mutual availability of the remedy of specific performance.

Even at the time of its formulation, the rule was subject to many exceptions. Several of these were eliminated by a restatement of the rule by Pomeroy, distinguishing between mutuality of remedy at the time of contracting and mutuality at the time of the suit for specific performance. As restated by Pomeroy the rule required mutuality of remedy only at the time of the suit. This modification permitted suits for specific performance by a plaintiff who was not bound originally by the contract but became so through a change in circumstances or through additional conduct on his part.

For example, a vendor who did not have title at the time of a contract to sell land could get specific performance if within a reasonable time he had obtained such title. Or an infant could get specific performance after attaining his majority. But even with some of the many exceptions to Fry's rule eliminated, Pomeroy said of the mutuality of remedy requirement:

> To the doctrine of mutuality, as stated and discussed in the foregoing paragraphs, there are limitations and exceptions of great importance, which very much narrow its application. (POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS 431 (3rd. ed. 1926).)

A rule subject to numerous exceptions soon loses its character as a rule. In 1903 Dean Ames listed eight major exceptions to the mutuality of remedy requirement and then concluded:

> It is evident, from a consideration of the eight classes of cases just discussed, that the rule of mutuality, as commonly expressed, is inaccurate and misleading. The reciprocity of remedy required is not the right of each party to maintain a bill for specific performance against the other, but simply the right of one party to refuse to perform, unless performance by the other is given or assured. (Ames, Mutuality in Specific Performance, 3 Col. L. Rev. 1, 8 (1903).)

Ames did not advocate discarding the principle of mutuality of remedy but instead suggested a different formulation of the principle in order to reveal its true import. He believed the principle of mutuality demands only an assurance to the defendant that the plaintiff's performance would also be forthcoming. This assurance would not be restricted to the defendant's ability to obtain a decree for specific performance but could take other forms. It would not be present, however, so it seemed to Ames, when the only remedy left to the defendant after he was compelled to perform would be a common law remedy for damages if the plaintiff should later breach the contract. So Ames

rephrased the rule of mutuality in these terms:

> It is hoped, too, that the preceding discussion of the cases will have proved the need of revising the common form of stating the principle of mutuality, and the propriety of adopting the form here suggested: Equity will not compel specific performance by a defendant, if after performance the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract. (Id. at 12.)

Legal writers have generally taken the same position as Ames but have veried in their efforts to rephrase the rule. It is almost universally conceded that the real reason for the mutuality of remedy requirement is the realization that it would be unfair to the defendant to compel him to perform without assurance that after he had done so the plaintiff would also perform. Yet the legal experts are in general agreement that this assurance is not necessarily provided only by the possibility of obtaining, if need be, a reciprocal decree for specific performance. When the defendant is assured that the plaintiff will also perform, because, for example, it is clearly in the plaintiff's financial interest to do so, then the plaintiff should not be denied his remedy merely because the defendant could not also obtain a decree for specific performance.

This is the view taken by the Restatement of Contracts which in Section 372 (1) provides that:

> The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party.

The Restatement restates the rule of reciprocity of remedy as follows in Section 373:

> Specific enforcement may properly be refused if a substantial part of the agreed exchange for the performance to be compelled is as yet unperformed and its concurrent or future performance is not well secured to the satisfaction of the court.

Regarding this rule adopted by the Restatement Williston wrote:

> This rule is flexible enough to allow wide discretion in granting or refusing specific performance, thus obviating the difficulties inherent in stating a general rule to cover all the situations. For example, when the party seeking specific performance has fully performed, or is now tendering complete performance, clearly specific performance should be granted. Where the contract is executory on both sides, the court may still give specific performance if it is satisfied that the person seeking relief will continue to perform. This may be shown by past conduct; or the person seeking specific performance may have such a strong economic interest in the carrying out of the contract by reason of extensive investment of his funds and labor that default on his part is highly improbable. The court may further secure the defendant by means of a conditional decree, or by requiring the person seeking performance to give security for his own performance. (WILLISTON, CONTRACTS 4022-24 (Rev. ed. 1937).)

Corbin writes concerning Fry's rule:

> This rule has been subject to constant attack from the beginning, in both legal articles and court opinions. Dean Ames pointed out the fact that it was subject to at least eight exceptions. Court decisions in which the rule has been either expressly or substantially repudiated are now so numerous that it is no longer permissible, if it ever was, to accept it as stating the prevailing law of the land. The exceptions have become the rule. (CORBIN, CONTRACTS 793-94 (1951).)

And in rejecting the "supposed" rule of mutuality of remedy as stated by Fry and Pomeroy, Corbin submits that rule of the Restatement has replaced it. (Id. at 800.)

There are, of course, a few voices in the wilderness who seem to say that the venerable rule of mutuality of the specific performance remedy is still a living principle in the law. For example, the annotator in 22 A.L.R. 2d 508, 572 (1952) after an extensive study of the cases appears to come to that conclusion. But almost all the expert writers agree that the principle expressed by Fry and Pomeroy was phrased in language too restrictive to be

widely applicable. No one doubts the wisdom of assuring in some way performance by the plaintiff. Fry's rule, however, proved unworkable because it was subject to many and confusing exceptions.

THE CALIFORNIA MUTUALITY OF REMEDY RULE

The leading case in California is Cooper v. Pena, 21 Cal. 403 (1863). Plaintiff had partially performed services which were the agreed exchange for a parcel of land belonging to defendant. Upon offering to complete his performance plaintiff was notified by defendant to discontinue it. When plaintiff sued for specific performance and won, the supreme court reversed and ordered a new trial. In its opinion the court adopted Fry's rule along with its exceptions. The court held that since the plaintiff's services were not completed and there would be no way for the defendant to compel such completion since personal service contracts are not specifically enforceable, there was no mutuality of remedy and the plaintiff could not, therefore, obtain specific performance of the contract. Since the plaintiff had not performed before bringing suit, the court found it unnecessary to decide whether the proper time for such determination was as of the time of contracting or as of the time of the suit.

In 1872 the Legislature enacted as a part of the Civil Code a codification of Fry's rule with modifications. At the same time it enacted a number of the exceptions as separate sections, which will be discussed below.

The general rule appears in Civil Code Section 3386:

> Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

In essence this Section says that the plaintiff cannot obtain a decree for specific performance unless the defendant could also have gotten one. To this rule there is one exception expressed in the section itself: when the plaintiff has already completely performed or nearly so. This exception has been interpreted to mean that substantial performance by the plaintiff will prevent the defendant from successfully raising the objection of lack of mutuality of remedy. Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063 (1897). This is another way of saying that the doctrine of mutuality is not applicable to contracts executed on one side. Jones v. Clark, 19 Cal. 2d 156, 119 P. 2d 731 (1942); Van Fossen v. Yager, 65 Cal. App. 2d 591, 151 P. 2d 14 (1944).

Not applying the doctrine of mutuality to cases in which the plaintiff has already performed is consistent with the view that the time for determining mutuality is when the suit for specific performance is brought and not the time of contracting. This interpretation seems to be definitely established as the law of California though the holdings to that effect could probably all be classified under settled exceptions to Fry's rule. See Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063 (1897); Comment, 28 Calif. L. Rev. 492, 499 (1940); Annot. 22 A.L.R. 2d 508, 577 (1952).

The general rule of mutuality stated in Section 3386 is subject to other exceptions besides its inapplicability to contracts executed on one side.

Some of these exceptions are court made but several of them appear in the related sections of the Civil Code. Thus, for example, Section 3388 provides:

> A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance. (Enacted 1872.)

Under the statute of frauds a vendor who is the only signer of the contract or memorandum could not obtain specific performance from the vendee who has not signed it. Theoretically, then, the vendee should not succeed in his suit for specific performance because of a lack of mutuality of remedy. Section 3388 removes this disability when the vendee has performed or offered to perform.

As a matter of fact the California courts managed to evade the lack of mutuality in this situation even before the enactment of Section 3388 by holding that by filing suit for specific performance the plaintiff submits himself to the power of the court to render a decree of specific enforcement against him, thus creating in effect mutuality of remedy. See Vassault v. Edwards, 43 Cal. 458 (1872). Section 3388 is apparently a codification of this recognized exception to the lack of mutuality rule but goes beyond it by providing that the necessary mutuality is established by offering to perform by tendering the purchase price. Bird v. Potter, 146 Cal. 286, 79 Pac. 970 (1905); Copple v. Aigeltinger, 167 Cal. 706, 140 Pac. 1073 (1914).

In the somewhat related situation involving the equitable doctrine of part performance of an oral contract to convey real property, however, there is good indication that the lack of mutuality rule is applicable. See Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231 (1912); Magee v. Magee, 174 Cal. 276, 162 Pac. 1023 (1917). However, no case has been found where a

lack of mutuality actually deprived the vendee of specific enforcement of the oral agreement. In the Husheon case, above, the court found a present oral transfer of a life estate rather than a contract to transfer the estate and accordingly decided that the rule of mutuality of remedy was not applicable although the plaintiff's personal services, the agreed consideration, were not as yet substantially performed. In Magee v. Magee, above, personal services were also involved. The grantor objected to a decree compelling him to perform, claiming that since he could not specifically compel the plaintiff to complete his services there was no mutuality of remedy. But the court found that the services had been completed so the rule was again inapplicable. These cases seem to indicate, however, that in a proper situation the mutuality rule would be applied.

Additional exceptions to the mutuality rule embodied in Section 3386 will appear occasionally in the following discussion of California cases in which the rule has been involved. The cases are illustrative only, listed for the purpose of indicating the general status of the mutuality rule in the law of this State:

(1) Contracts where the plaintiff is only conditionally bound. In certain types of contracts, as for example those involving infants or incompetents, the agreement is voidable by one of the parties but binding on the other. Before reaching his majority an infant cannot obtain specific performance of his contract since under the rule of mutuality the other party could not have specifically enforced the obligation of the infant. The general rule is, however, that after attaining his majority, an infant may obtain specific enforcement because his suit amounts to a ratification

of his contract, and the lack of mutuality is cured (assuming, of course, that the contract is of a type which is specifically enforceable against an adult). See 43 A.L.R. 120 (1926). There do not seem to be many California holdings on this point, but there are frequent dicta to this effect. See, for example, Vassault v. Edwards, 43 Cal. 458, 466 (1872). It is not clear, however, whether performance by the infant plaintiff before suit during infancy would provide the mutuality necessary to enable him to obtain a specific performance decree prior to reaching majority.

(2) Contracts terminable at will or upon notice. Specific performance will not ordinarily be decreed against a person who has a power to terminate his obligation at will or upon notice since the exercise of this power will frustrate the decree. Dabney v. Key, 57 Cal. App. 762, 207 Pac. 921 (1922) (oil lease terminable at any time); Sturgis v. Galindo, 59 Cal. 28 (1881) (land contract under which vendee could terminate upon 30 day notice). Accordingly where the plaintiff can terminate at will, specific performance is refused him because of lack of mutuality of remedy. Sheehan v. Vedder, 108 Cal. App. 419, 292 Pac. 175 (1930); see annots. 8 A.L.R. 2d 1208 (1949), 22 A.L.R. 2d 508, 533 (1952). This refusal is unfair to the plaintiff if filing the suit for specific performance or the decree itself could operate to extinguish the power to terminate, or if the exercise of the power would discharge both parties without deprivation to the defendant. See CORBIN, CONTRACTS 845-47 (1951); Comment, 22 CALIF. L. REV. 492, 502-03 (1940).

In an option contract there is no mutuality of remedy under the original agrement. But once the option-holder exercises his option he is entitled to specific performance. Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149 (1890). Tender of performance by the option-holder is also said to

provide mutuality of remedy. Sayward v. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44 (1898). So although there was no mutuality at the inception of the transaction, there is at the time of the suit.

(3) Contracts for personal services. As a general rule equity refrains from specifically enforcing an obligation to perform personal services. The two basic reasons are (a) the realization that a human being cannot be forced into a good faith performance of special services and (b) the difficulty involved in supervision by a court of a long, continuous performance. Consequently, when a plaintiff seeking specific performance has an incompletely performed obligation of personal service to the defendant, the decree is denied on the ground of mutuality of remedy even when the plaintiff was prevented from completing his obligation of personal service to the defendant by the latter's refusal to accept further performance. Cooper v. Pena, 21 Cal. 403 (1863); King v. Gildersleeve, 79 Cal. 504, 21 Pac. 961 (1889). In situations where the plaintiff has changed his position and there is little danger of his discontinuing performance, it may be extremely harsh to deny him specific performance. This may occur in agreements for care and support, Tompkins v. Hoge, 114 Cal. App. 2d 257, 250 P. 2d 174 (1952). (Of course, the intimate nature of these arrangements frequently justifies leaving the plaintiff to his legal remedies apart from considerations of mutuality of remedy.) Unless there is substantial performance the court will deny specific performance of a contract to devise property in exchange for care of the defendant, Roy v. Pos, 183 Cal. 359, 191 Pac. 542 (1920), and the basis for the denial is lack of mutuality of remedy. When the contract is fully executed by the plaintiff, specific performance will ordinarily be

granted since the lack of mutuality rule does not then apply. Jones v. Clark, 19 Cal. 2d 156, 119 P. 2d 731 (1941).

Pacific etc. Ry. Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623 (1908) illustrates another situation of unfairness to the plaintiff when he has partially performed. In consideration for the plaintiff's promising to construct and operate an interurban railway from Los Angeles to Pasadena to run over some land of the defendant, the defendant promised to grant a right of way to the plaintiff. After the plaintiff had completed the line from both Los Angeles and Pasadena up to the defendant's property, situated between the two cities, the defendant refused to grant the right of way. Although three-fourths of the line had been completed and there was great economic incentive for the plaintiff to continue his performance, the court refused to order specific enforcement of the contract on the ground of lack of mutuality of remedy as required by Section 3386. Here is the major evil inherent in the mutuality rule, a blind following of a mechanical formula.

(4) Contracts whose performance is impossible. Obviously a person who cannot perform because of impossibility cannot be made to do so by a decree for specific performance, although he may be liable in damages if his inability is not excusable. Hansen v. Hevener, 69 Cal. App. 337, 231 Pac. 361 (1924). Under the rule of mutuality, therefore, a plaintiff whose performance is impossible should not receive a decree of specific enforcement of the defendant's undertaking. Moore v. Tuohy, 142 Cal. 342, 75 Pac. 896 (1904). This is a very proper result and the rule works fine in this area. However, this situation would also be covered by the generally applicable rule of the Restatement, that the defendant will not be required to specifically

perform if there is not satisfactory assurance of the reciprocal performance of the plaintiff.

(5) Contracts under which the defendant cannot compel specific enforcement because he is at fault. Under Civil Code Sections 3392 and 3394 a vendor who cannot convey a title free from defects cannot compel specific enforcement of a contract to sell the property. Under the rule of mutuality strictly interpreted, a vendee under such a contract could not obtain specific performance either. However, an exception was created early in the history of the mutuality rule to allow a plaintiff specific performance when the defect in the title was caused by the defendant's own fault. It was obviously unfair to allow the defendant to hide behind his own bad faith. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS 903-04 (3rd ed. 1926).

But when this case came up in California in Linehan v. Devincense, 170 Cal. 307, 149 Pac. 584 (1915), the court ignored this well-established exception to the lack of mutuality rule and left the plaintiff to his remedy for damages. The court interpreted Section 3386 literally, disregarding the great weight of authority which recognized that the rule continued to exist only because of its necessary exceptions. Here again a mechanical formula was followed without regard for the consequences.

This was the law of California until finally in 1942 in Miller v. Dyer, 20 Cal. 2d 526, 127 P. 2d 901 (1942), the court reversed itself, recognized the exception and specifically compelled a vendor to perform with abatement of the purchase price for the defect in his title. In so doing the court conceded that Section 3386 was merely intended to be a codification of the well established equity rules concerning mutuality, including the numerous

exceptions. This would seem to indicate that the court no longer considers Section 3386 the straitjacket it once was.

(6) Contracts with negative covenants. The last class of contracts to be considered comprises those containing promises not to do something. These negative promises may be the only obligation of the defendant or there may in addition be promises of affirmative action. In the former case an injunction restraining breach of the contract by the defendant is equivalent to a decree of specific performance, and this is indirectly true in the latter. In a mid-nineteenth century English case, Lumley v. Wagner, 1 De G. M. & G. 604 (1852) an opera singer who had agreed both to sing at the plaintiff's theatre and not sing for his competitors was enjoined from breaching the latter promise although the former was not specifically enforceable. Mutuality of remedy was not mentioned. A new means of evading the mutuality rule was thereby created, and it has generally been followed in American cases.

This method of ameliorating the rule was made unavailable in California, however, by Civil Code Section 3423 (5), which provides generally that an injunction cannot be granted to prevent breach of contract which could not be specifically enforced. However, there are exceptions in Section 3423 (5) for two kinds of contracts: (a) a written contract for the rendition of unique personal services at a compensation of at least $6,000 a year (sometimes called the movie star provision), and (b) a contract between a nonprofit cooperative and its members concerning the sale or delivery of the members' produce. The latter provision was added in 1925 to ameliorate the result of Poultry Producers etc. v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922), which

held that the association could not get specific enforcement of a production contract with the defendant because the association's own promised performance, involving personal services in the selling of poultry produced by the members, was not specifically enforceable. Here was a vivid illustration of the evils inherent in a rule stated too specifically. Because of a technical rule, technically interpreted, the continued existence of the cooperative marketing system was jeopardized although it was clear that the association would, out of self interest, continue to market its members' production. The legislature almost immediately enacted Section 3397 and an amendment to Section 3423(5) to preserve the cooperative system. The amendment is discussed in Colma Vegetable Ass'n v. Bonetti, 91 Cal. App. 103, 267 Pac. 172 (1928); see also 10 Calif. L. Rev. 518 (1922); 15 Id. 258 (1927). It should be noted that the two exceptions to Section 3423(5) appear to depart widely from the mutuality rule. Not only do they seem to authorize enforcement of an express or implied negative promise not to deal with others of the kind enforced in Lumley v. Wagner, supra, but they also appear to authorize the court to enjoin breach of the affirmative promises made in the contract, enforcing its order by contempt proceedings in appropriate cases. This is in effect, although not in form, specific performance.

SUMMARY AND CONCLUSION

California courts early adopted Fry's rule of mutuality of remedy. In 1872 this rule was codified in Civil Code Section 3386 with a modification which appeared to mean that the question of mutuality should be determined

as of the time of the suit for specific performance rather than at the time of contracting. Even at this late date, however, there is still some question concerning the time of measuring the mutuality, although it seems reasonably safe to say that the time of the suit is crucial. This is the view of the great majority of the American states which have not already completely discarded Fry's rule.

Along with Section 3386, enacting Fry's rule as modified, the Legislature enacted several of the exceptions to the rule. Others were added at later dates. Still others have been read into the statute by the courts in an effort to make the rule practicable. Yet occasionally the extreme technicality of the rule overcomes the court's ability to circumvent it, and consequently the very purpose of equity is thwarted.

As a result of this development, California law involving mutuality of the specific performance remedy is in considerable confusion. A general rule of little value has been perforated with exceptions until at present there is no reasonable way to ascertain the correct law.

Although thorough analysis would probably demonstrate that California decisions in terms of results are not far out of line with the more modern and enlightened view which has discarded Fry's rule, these decisions have only been reached with considerable difficulty. And all too often a bad decision has resulted.

Much of this difficulty could undoubtedly have been avoided through the utilization of a conditional decree of specific performance as permitted by the Restatement of Contracts, Section 359(2). By conditioning the decree for specific enforcement of the defendant's obligation upon the continuation

and completion of the plaintiff's performance the entire mutuality issue could have been avoided in many cases. But in Poultry Producers etc. v. Barlow, the cooperative marketing case already discussed, the court interpreted Sections 3386 and 3423(5) (as it then stood) to forbid the use of a conditional decree of specific performance to avoid a lack of mutuality. See also O'Brien v. O'Brien, 197 Cal. 577, 588, 241 Pac. 861, 865 (1925) (dictum). The statement in the Barlow case might be considered dictum but if not should be overruled. The conditional decree has proved effective in quiet title actions, Stein v. Simpson, 37 Cal. 2d 79, 230 P. 2d 816 (1951), and has been used to compel specific performance of an agreement to assign a patent, conditioned upon payment of the patentee's expenses, Hercules Glue Co. v. Littooy, 45 Cal. App. 2d 42, 113 P. 2d 490 (1941).

A study with a view to completely overhaul California law on mutuality of remedy would seem to be warranted. As Cardozo observed in Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861, 862 (1922), in a passage which is frequently quoted:

> If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule of to-day. (Citing authorities.) What equity exacts to-day as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant. (Citing authorities.) Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end. The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle.

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