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# SPECIFIC PERFORMANCE OF CONTRACTS AND THE DOCTRINE OF MUTUALITY

BY WILLIAM BOONE

## 1. LACK OF MUTUALITY AS A REASON FOR DENYING SPECIFIC PERFORMANCE

The formulation and general statement of the rule of mutuality is usually attributed to Fry on Specific Performance, although there were some earlier references to it in the cases.<sup>1</sup> The original statement of the rule by Fry in his first edition in 1848 was: "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." In later editions the words "as a general rule" were inserted after the word "must", apparently to take care of the numerous exceptions to the rule as originally stated.<sup>2</sup> Some other early text writers stated the rule with some modifications. Pomeroy, for example, adding the provisions that the time from which mutuality was to be determined was when the suit was begun, and that the contract must still be executory on both sides.<sup>3</sup>

The view stated by Fry attracted some support because of its plausibility and air of apparent fairness. The suit for specific performance being in equity, the court should not render any decree which would not be just to all the parties. The unreasonableness of the doctrine formulated by Fry, however, is easily demonstrated. Why should the outcome of the plaintiff's case be determined by the possible results of a hypothetical converse case? As one court put it: "The court has no occasion to anticipate culpable conduct on plaintiff's part and to speculate on how the defendant might protect himself should he sometime need protection."<sup>4</sup> Furthermore, it should be noted that the rule of so-called "negative mutuality" takes no account of whether the defendant will have an adequate remedy at law if, after his compelled performance, the plaintiff refuses to

1 - *Flight v. Bolland*, 4 Russ. 298, (English).

2 - Fry on Specific Performance, 5th Edition, Page 231; 6th Edition, Page 219.

3 - Pomeroy, Equity Jurisprudence, Vol. 6, Section 769.

4 - Burch, J., in *Zelleken v. Lynch*, 80 Kan. 746.

perform. If damages would be an adequate remedy to a defendant in such a case, no reason is seen for denying a plaintiff equitable relief simply because the defendant could not have it. Fairness to the defendant does not require that he be entitled to the identical remedy which is available to the other party, but only that defendant have an adequate remedy of some kind, or that he be protected in some way from the consequences of plaintiff's breach of the contract. The result of the rule is a manifest injustice to the plaintiff, where, assuming that all other conditions necessary to entitle him to equitable relief are present, he is deprived of his only adequate remedy for the sake of a syllogistic sort of consistency. Even if the defendant would have no adequate remedy at law in case of the plaintiff's breach, and could not get specific enforcement of the contract in equity because it would be impossible or impractical to compel the plaintiff's performance, it still does not necessarily follow that the plaintiff's bill should be dismissed out of fairness to the defendant. As will be pointed out later, there are several means by which an equity court can protect a defendant in such a case.

Apart from considerations of the fallacy and injustice of Fry's rule of mutuality, an examination of the decisions reveals very little judicial support for the doctrine. In Ames, Lectures on Legal History, 370, it is pointed out that there are at least eight or nine situations in which the rule is ignored and the courts give one party specific performance, although the other could not have that remedy.<sup>5</sup> These cases have sometimes been referred to as presenting "exceptions" to the general rule, but an examination of them will show that the so-called exceptions eat up the general rule, leaving it to apply only in a few instances, and in a few courts where the "exceptions" are not recognized.

As illustrative of the unsoundness of Fry's doctrine is the case where a contract is voidable because of the fraud of one party to it. That the defrauded party is entitled to specific enforcement of the contract, if it is otherwise appropriate for equitable relief, is well established, although the culpable party could not have enforced the contract either at law or in equity, and, hence, there was neither mutuality of obligation nor of remedy.

5 - See also Williston on Contracts, Revised Edition, Vol. 5, Sections 1434 through 1440, Walsh on Equity, Pages 345 through 347.

The vendor of land who has an incomplete title to that which he contracted to convey may be compelled to perform, although the defect is such that he could not have enforced the vendee's performance.<sup>6</sup> And, conversely, the seller may have specific performance even though, at the time of the execution of the contract, he had no title to the land he agreed to convey, so that it would have been impossible for the vendee to have specifically enforced the contract, provided that the vendee has not learned of the vendor's lack of title and already rescinded the agreement.<sup>7</sup>

The granting of specific performance to a party to a contract who has not satisfied the Statute of Frauds is another example of an "exception" to the mutuality rule. An agreement signed by the defendant may be enforced against him, in spite of the fact that the same contract could not be sued on by the defendant because the plaintiff did not sign it. It is said that the plaintiff, by filing his bill, submits himself to the jurisdiction of the court and enables it to give a decree compelling him as well as the defendant to perform.

An infant may have specific performance in his favor when he has reached majority<sup>8</sup> or has fully executed the contract on his part,<sup>9</sup> although up to that time both mutuality of remedy and of obligation were lacking. If the infant brings suit before one of these conditions occurs, his action will be dismissed, not because of the lack of mutuality of remedy, as was suggested by an early English decision<sup>10</sup> on which Fry's doctrine was partly based, but because the action and decree would not bind the minor. The court can not deprive the infant of his privilege to disaffirm the contract, and unless he is deprived of it, the adult is subjected to injustice if compelled to perform.

In the case of a unilateral contract, the promisee, after performing the act stipulated for, may compel performance by the promiser, where equitable relief is otherwise appropriate, notwithstanding the

6 - Moore v. Goregliette, 228 Ill. 143.

7 - Gibson v. Brown, 214 Ill. 330; Dresel v. Jordan, 104 Mass. 407. There are a few cases which blindly follow Fry's rule of mutuality, for example, Ten Eyck v. Manning, 52 N.J. Eq. 47.

8 - Clayton v. Ashdown, 9 Vin Abr. 393.

9 - Asberry v. Mitchell, 121 Va. 276.

10 - Flight v. Bolland, 4. Russ. 298.

fact that the promisee, having of course made no promise, can be forced to do nothing.

Similarly, a party who has fully executed his part of a bilateral contract, specific enforcement of which could not have been given because of the nature of the acts required by it, may nevertheless have a decree enforcing the other party's promise if the plaintiff has no adequate remedy at law, and equitable jurisdiction is otherwise appropriate.<sup>11</sup>

The assignee of a contract may have specific performance thereof against the other contracting party, even in a jurisdiction where the rule is that the assignee, by the mere fact of acceptance of the assignment, does not undertake the obligations of the contract, and hence, the agreement could not be enforced against such assignee, either at law or in equity.<sup>12</sup> It is said "the assignee, by the very act of invoking the aid of equity, assumes the duty of performance, and subjects himself to any conditions of the judgment appropriate thereto."<sup>13</sup>

The fact that a State enjoys an exemption from suits against it without its consent is held not to be a bar to the State's action for equitable relief against the other contracting party.

Without further multiplication of examples, it is believed that it sufficiently appears that the rule requiring mutuality of remedy as a condition to maintenance of an action for specific performance, as announced by Fry, is contrary to actual law. "If ever there was a rule that mutuality of remedy existing, not merely at the time of a 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 today. What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to the plaintiff or to the defendant." This statement by Cardozo, J., in *Epstein v. Gluckin*, 233 N.Y. 490, at

11 - *O'Reagan v. White*, 2 Ir. R. 339.

12 - *Epstein v. Gluckin*, 233 N.Y. 490. That the assignee would not be liable on the contract otherwise in New York, see *Langel v. Betz*, 250 N.Y. 159.

13 - *Epstein v. Gluckin*, supra, note 12, by Cardozo, J.

Page 494, has been generally approved by legal writers on the subject,<sup>14</sup> and has been quoted by other courts.<sup>15</sup> The Restatement of Contracts adds its support to this view; in Section 372(1) the rule of mutuality is expressly disapproved, and in Section 373 the true rule is stated as follows: "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." This rule, although somewhat more specific than that pronounced by Cardozo, has the desired flexibility. When the party seeking specific performance has fully performed, or is tendering complete performance, clearly the relief should be granted. Where the contract is still executory on both sides, the court may still give specific performance, if, as in the ordinary case, performance is to be concurrent, such that the decree will not bind the defendant if the plaintiff fails to perform, or if the court is satisfied that the person seeking relief will continue to perform. This latter may be shown by past conduct, or the plaintiff may have such a strong economic interest in the carrying out of the contract by reason of extensive investment of funds and labor that his default is highly improbable.<sup>16</sup> Where there does not appear sufficient assurance that the plaintiff will perform his part of the contract, so that the decree might operate unfairly on the defendant, the court may further secure the latter by means of a conditional decree or require giving of security.<sup>17</sup>

Although the rule of mutuality of remedy has been said to be dead, its ghost still occasionally appears to haunt unfortunate plaintiffs, either as an application to a case where the doctrine, if true, should apply,<sup>18</sup> or as a misapplication of some other rule of law.<sup>19</sup> Sometimes the rule is given as a ground for a decision which is properly based on other reasons.<sup>20</sup>

14 -Williston on Contracts, Vol. 5, Revised Edition, Section 1440; Walsh on Equity, Page 354.

15 -See Daniels v. Brown Shoe Co., 77 F. 2d, 899.

16 -See, for example, Zelleken v. Lynch, supra, Note 4; City of La Follette v. La Follette Water Co., 252 F. 762

17 -Williston on Contracts, supra, Note 14.

18 -Wilson v. Nelson, 130 Neb. 1; Ten Eyck v. Manning, 52 N.J. Eq. 47.

19 -See Ulrey v. Keith, 237 Ill. 284, where the court misapplied the rule that, where the defendant can terminate the contract at will, specific performance will be denied, to a case where the plaintiff had such powers, giving as a ground for denying specific performance the lack of mutuality.

20 -See the early English case of Flight v. Bolland, 1828, supra, Note 1.

The requirement of mutuality of remedy as a condition of specific relief in equity is also embalmed in statutes in five states, to wit, in Alabama, California,<sup>21</sup> Montana, North Dakota, and South Dakota. The California doctrine of mutuality is so thoroughly discussed in an article in 28 Calif. L.R. 492 that further treatment here would appear useless.

## II. MUTUALITY AS A REASON FOR GRANTING SPECIFIC PERFORMANCE

For some obscure reason, either as a corollary to Fry's rule of "Negative Mutuality", or as a misinterpretation of certain classes of cases, a rule of "positive mutuality" came to be spawned on the courts. The usual statement of this rule was that, if, (in a hypothetical converse case), the defendant would be entitled to specific performance of plaintiff's part of the contract, apart from the mutuality doctrine, then the plaintiff should also be given that remedy against the defendant, on the principle of mutuality.

Here again nothing is said of the adequacy of the plaintiff's remedy at law. If the remedy of damages would be adequate compensation to the plaintiff for the defendant's breach of the contract, then there is no particular reason to give the plaintiff a recovery in specie. If the plaintiff's legal relief would not be adequate, that fact alone is generally a sufficient basis for equitable jurisdiction, unless practical consideration preclude the remedy of specific performance. In the latter situation, the doctrine of mutuality will not, any more than the inadequacy of the legal remedy, be of aid to a plaintiff. The mutuality rule, when applied as a reason for granting specific relief, at least works no great harm in a case where the plaintiff has what is generally held to be an adequate remedy at law, but nevertheless considers specific performance the better remedy under the circumstances, and where there are no other positive reasons for denying equitable relief.

Almost all the cases stating the positive mutuality

21 - Civil Code Section 3386 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, either completely, or nearly so, together with full compensation for any want of entire performance." See also Civil Code Section 3423(5).

rule, or discussing it, involve executory contracts for the sale of land where the vendor is suing for the purchase price, that is, for specific performance of the contract. The formulation of the rule apparently arose from a misunderstanding of the reason for allowing the vendor to recover in such cases. The true basis for the decisions in this class of cases, as emphasized by most modern cases dealing with the subject,<sup>22</sup> is that the vendor of land, where the contract remains largely executory on both sides, does not have an adequate remedy at law. The seller's damages are measured by the difference between the value of the land and its purchase price under the contract. Since land usually has no established market value, in most cases it would be difficult, if not impossible, for the vendor to prove his loss accurately. Furthermore, he would be required to carry the land contracted to be sold, paying taxes on it and maintaining it until he could find another buyer. That this is the real reason for allowing the vendor to specifically enforce the agreement is further illustrated by decisions like that in *Porter v Frenchman's Bay Co.*, 84 Mo. 195, wherein a demurrer to the complaint was sustained because the inadequacy of the available legal remedy of the seller was not alleged. If mutuality of remedy is the reason for giving specific performance to the vendor, then there should be no necessity for such an allegation. Another example showing the ground for equitable jurisdiction in such cases is afforded by the situation where the contract for the sale of land is no longer executory. If the seller has fully performed, and nothing further remains to be done under the contract other than the vendee's payment of the purchase price, then the vendor is entitled to that amount in an action at law and is not limited to his damages for breach of contract. In such a case, it is held that, since the seller may recover the same amount at law as in equity, his remedy at law is adequate and equity jurisdiction should be denied.<sup>23</sup>

For the same reason-inadequacy of the legal remedy - the seller of a unique chattel, like the buyer thereof, may have specific enforcement of the contract of sale.<sup>24</sup> By hypothesis, such personalty has no market

22 - *Hodges v Kowing*, 58 Conn. 12; *Eckstein v. Downing*, 64 N.H. 248; *Baker Machine Co. v. U.S. Fire Apparatus Co.*, 11 Del. Ch. 386. For further reference, see *Walsh on Equity*, Page 341; *Williston on Contracts*, Vol. 5, Revised Edition, Section 1443; *Restatement of Contracts*, Section 372(2).

23 - *Jones v. Newhall*, 155 Mass. 244.

24 - See *Walsh on Equity*, Page 342.

value, and the vendor would have no means of establishing his damages. But it must be clearly shown that the legal relief is inadequate, in order to obtain equitable intervention, for mutuality of remedy is generally held to afford no reason for granting specific performance of the contract for sale of personal property at the suit of the seller, any more than it does for decreeing specific enforcement of an agreement to sell realty.<sup>25</sup> The Uniform Sales Act, Section 63(3), modifies the ordinary rule by allowing the seller to recover the purchase price, in what would correspond to an action at law, in cases where the goods are not readily resaleable. If this section is applied, then the vendor has an adequate legal remedy, and equity jurisdiction should probably be denied, unless the doctrine is accepted that equity, once having established jurisdiction over a certain class of cases, never relinquishes it.

In summary, it is generally held that the fact that the defendant could have had the contract specifically enforced against the plaintiff, if the plaintiff had refused to perform, is not of itself a sufficient reason to grant specific performance to the plaintiff. Although a few courts have used the mutuality doctrine as a supplementary reason for giving specific relief,<sup>26</sup> No cases have been found where that was the sole reason for the decision. In the field of specific performance, as well as in other fields of equity jurisprudence, the fundamental requirement of equitable intervention is the lack of an adequate remedy at law on the part of the plaintiff, and the purpose of equity is to provide such a remedy.

25 - *Eckstein v. Downing*, supra, Note 22.

26 - *Eastern Counties Ry. Co. v. Hawkes*, 5 H.L.C. 331, (1885).