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SPECIFIC PERFORMANCE: DECLINING FORCE OF THE RULE REQUIRING MUTUALITY OF REMEDY

The recent decision of the Supreme Court of Illinois in *Gould v. Stelter*¹ has placed that state among the growing number of jurisdictions that have either expressly or impliedly abandoned the mutuality of remedy requirement in an action for specific performance of a contract. In a suit to compel conveyance under a contract for sale of realty, the contract in question had been signed by the vendee's agent without the necessary written authorization so that under the Statute of Frauds, the vendee was not bound by the contract from its inception. However, between the time the agreement was made and the time of suit, the contract had become enforceable against the vendee because of his adoption and ratification. Defendant vendors moved to dismiss the complaint, arguing that because the vendee was not bound by the contract when made, there was an absence of mutuality of remedy and hence the agreement was not specifically enforceable against them. The lower court's dismissal on this ground was reversed by the supreme court, which held that "want of mutuality of remedy at the inception of the contract is not a bar to specific performance."²

The above case involves one of the typical factual situations³ in

1. 14 Ill. 2d 376, 152 N.E.2d 869 (1958).

It should be noted that there has been some confusion among the courts in differentiating between mutuality of remedy and mutuality of obligation. The latter relates to a prerequisite to the formation of a binding agreement and is merely a way of saying there must be valid consideration. See 1 Williston, Contracts § 105A (3d ed. 1957). Assuming that there is such a legally binding agreement, for the breach of which the law gives a remedy, then the doctrine of mutuality of remedy becomes applicable in determining whether and how a court of equity will act. It is this concept of mutuality of remedy as affecting equity enforcement which is the subject of this note.

For a general discussion of the distinction between mutuality of obligation and mutuality of remedy, see Stone, *The Mutuality Rule in New York*, 16 Colum. L. Rev. 443 (1916).

2. *Gould v. Stelter*, 14 Ill. 2d 376, 382, 152 N.E.2d 869, 872 (1958).

3. Situations in which the mutuality of remedy problem arises because the contract could not have been specifically enforced had defendant brought an action against the plaintiff include: contracts dependent upon some election or other act by plaintiff, such as an option; contracts for personal services to be performed by plaintiff; contracts to sell property owned by another; other contracts unenforceable against plaintiff when made because of lack of capacity, the Statute of Frauds, or because he is an assignee.

For a complete analysis of these various situations, see Lewis, *Specific Performance of Contracts—Defense of Lack of Mutuality*, 40 Am. L. Reg. (n.s.) 270, 383, 447, 507, 559 (1901); 41 id. 251, 329 (1902); Annot. 22 A.L.R.2d 508 (1952).

which the doctrine requiring mutuality of remedy is invoked. In the light of its holding rejecting the doctrine, this note will reexamine the requirement of mutuality of remedy, trace its development, and analyze the expressions of dissatisfaction with it as they have influenced the more recent decisions. Finally, the position of the Missouri courts with respect to the doctrine will be discussed.

There are two aspects to the doctrine of mutuality of remedy, one affirmative and one negative. Under the affirmative aspect, the plaintiff is entitled to specific performance, irrespective of the adequacy of his remedy at law, if the defendant could have maintained an action for specific performance in a hypothetical converse case.⁴ The effect of this phase of the rule is to grant an additional remedy to the plaintiff. In most cases, this would seem to cause no hardship or injustice to the defendant who merely must perform his promise instead of being allowed to breach it, subject to liability for damages. Of course, a procedural result of allowing plaintiff to bring the equitable action is that defendant will not be entitled to a jury trial, but even in the alternative suit for damages for breach of contract the right to a jury trial is not ordinarily of great importance.⁵ However, the granting of this additional remedy to the plaintiff, though producing no hardship, does result in an inconsistency. The normal remedy for non-performance of an agreement is an action for damages for the breach, not specific performance. The remedy of specific performance traditionally has been given as a substitute for the legal remedy of compensation only after a finding that judgment for money damages is inadequate or impracticable.⁶ Since the plaintiff might have an adequate remedy at law, the affirmative aspect of the doctrine of mutuality grants the remedy, not out of need to do more perfect and complete justice, but merely to "even up the sides." If a court of law could render a fair and adequate result, there seems to be no cogent reason why an equity court should grant relief, even though the equitable remedy might be necessary to secure defendant's performance of his promise.⁷

The negative, or defensive, aspect of the rule requiring mutuality works a hardship on the plaintiff by denying him a remedy to which

4. See, e.g., *Woodruff v. Germansky*, 233 N.Y. 365, 135 N.E. 601 (1922); *Prudential Ins. Co. v. Berry*, 153 S.C. 496, 151 S.E. 63 (1930).

5. See *McClintock*, *Equity* § 68, at 185 (2d ed. 1948).

6. 5 *Corbin*, *Contracts* § 1136, at 610, § 1139 (1951); 4 *Pomeroy*, *Equity Jurisprudence* § 1401 (5th ed. 1941).

7. Little more will be said of the affirmative aspect of the rule. It should be noted that this aspect has been rejected in some states, but adopted as one of a number of factors for court consideration by the Restatement of Contracts § 372 (2) (1932).

he would otherwise have been entitled. Relief is refused even though the plaintiff's remedy at law is clearly inadequate and the defendant's obligation could otherwise be enforced in equity, simply because the same type of relief could not have been given the defendant had he brought suit. This limitation upon equitable jurisdiction is said to have found basis upon two concepts: (1) a court of equity is a court which must be fair to all parties, and equality is fairness, and (2) equitable relief is wholly discretionary because the plaintiff always has an action for damages if his bill for specific performance is denied.⁸ Thus, since early courts of equity believed the element of fairness (i.e., equality) would be lacking where defendant could not have been given specific performance had he brought the action, it was felt that plaintiff should be denied the discretionary relief and left to his action for damages.⁹ It is submitted, however, that this refusal to grant relief was improperly based on an over-emphasis of the principle that equality is fairness. Clearly, there is nothing fair or equitable in denying relief to one who suffers from a breach of contract and has no adequate remedy at law, merely because the wrongdoer can argue that if he had brought the action he could not have obtained specific performance.¹⁰ Only when circumstances are substantially the same on both sides should equity require equal treatment of the parties. "As between an injured plaintiff and a wrongdoing defendant, equality is not equity."¹¹

The rule that specific performance must be mutually available had its beginnings in English cases of the early 19th century,¹² although it has generally been called the "Fry doctrine" because Lord Justice Fry gave it recognition and crystallization in his work on Specific Performance.¹³ Fry's expression of the doctrine was stated in such manner as to apply to cases in which there was want of mutuality at the *inception* of the contract,¹⁴ and he seems to have formulated it as a broad generalization based on the decision in *Flight v. Bolland*¹⁵ where

8. Lewis, *The Present Status of the Defence of Want of Mutuality in Specific Performance*, 42 Am. L. Reg. (n.s.) 591, 592 (1903).

9. *Ibid.*

10. See, Durfee, *Mutuality in Specific Performance*, 20 Mich. L. Rev. 289, 291 (1922).

11. 5 Corbin, *Contracts* § 1182, at 800 (1951).

12. See, e.g., *Lawrenson v. Butler*, 1 Sch. & Lef. 13 (Ch. 1802); *Flight v. Bolland*, 4 Russ. 298, 38 Eng. Rep. 817 (Ch. 1828); Lewis, *Specific Performance of Contracts—Defense of Lack of Mutuality*, 40 Am. L. Reg. (n.s.) 270 (1901).

13. Fry, *Specific Performance of Contracts* § 286 (2d ed. 1861).

14. "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." *Id.* at 198.

15. 4 Russ. 298, 38 Eng. Rep. 817 (Ch. 1828).

the contract was not specifically enforced on behalf of an infant because it could not have been enforced against him. But Fry's statement is a misdescription of the past decisions of the English courts of equity,¹⁶ primarily because he failed to distinguish cases where there was continuous lack of mutuality of remedy and those where mutuality was lacking at the inception but not at the time the bill was brought. In *Flight v. Bolland*, had the infant plaintiff withdrawn the action, the defendant could neither have prevented it nor have had specific performance. However, if the infant, on coming of age, had affirmed the contract, he could have gotten specific performance even though when the contract was entered into there was no mutuality of remedy.¹⁷ Although Fry stated of his doctrine that "no rule in equity is more thoroughly settled than this,"¹⁸ even he had to recognize certain exceptions to it,¹⁹ because in all probability he realized the fundamental weakness of its basis.

In spite of the weak basis for Fry's rule, it was literally followed by some courts,²⁰ often with obvious injustice,²¹ and for a while was not questioned by other writers. Pomeroy, in his treatise on Equity Jurisprudence, accepted the doctrine as one commonly stated by the courts but recognized limits in its application.²² Later editions of Pomeroy's works stated that the rule required mutuality of remedy only at the time suit was brought, and not at the time of making of the contract.²³ To overcome further the obvious harshness of the nega-

16. Cook, The Present Status of the "Lack of Mutuality" Rule, 36 Yale L.J. 897, 900 (1927); Lewis, The Present Status of the Defence of Want of Mutuality in Specific Performance, 42 Am. L. Reg. (n.s.) 591, 593 (1903) ("mutuality of remedy at the inception of the contract has never been required . . .").

17. Lewis, *supra* note 16, at 593-95. See Lewis, Specific Performance of Contracts—Defense of Lack of Mutuality, 40 Am. L. Reg. (n.s.) 270 (1901) (paper entitled "Mutuality as Understood in the Eighteenth Century").

18. Fry, *op. cit.* *supra* note 13, § 286, n.1.

19. *Id.* §§ 290-99.

20. See, e.g., *Luse v. Dietz*, 46 Iowa 205 (1877); *Ten Eyck v. Manning*, 52 N.J. Eq. 47; 27 Atl. 900 (1893).

21. For example, in *Luse v. Dietz*, 46 Iowa 205 (1877), plaintiff tendered to defendant the deed to the property in question. At the time of the formation of the contract the property was in his wife's name and the court denied plaintiff's bill for specific performance because he was not bound by the contract at its inception. The defendant therefore was allowed to take advantage of his breach. This seems inequitable when weighed against the hypothetical situation that plaintiff *may* have chosen not to perform.

22. 4 Pomeroy, Equity Jurisprudence § 1405 (3d ed. 1905).

23. 5 Pomeroy, Equity Jurisprudence § 2191 (4th ed. 1919). The exact time when the mutuality of remedy must exist is a matter on which there has not been agreement. As originally stated by Fry, the rule required mutuality at the inception of the contract. See note 14 *supra*. Realizing the harshness of this view, some courts have required mutuality of remedy only at the time the suit is filed.

tive application of the rule, courts and writers began stating numerous exceptions and limitations.²⁴

Since the turn of this century, the rule requiring mutuality of remedy has been under heavy attack, led principally by Professors Lewis²⁵ and Ames.²⁶ Lewis, after an extensive review of the English and American cases, concluded that application of the rule resulted in injustice. He urged that specific performance be granted to a plaintiff in *all* cases where the contract is fair and reasonable and the court is capable of enforcing the defendant's obligations, without regard to any exception on the ground of want of mutuality in the remedy.²⁷ Ames, in rejecting the rule of mutuality of remedy as "inaccurate and misleading,"²⁸ suggested instead a rule of mutuality of performance to express more clearly what he considered the simple and just underlying principle of the decisions denying plaintiff specific performance, viz., to protect the defendant from being left with only a common law action for damages against the plaintiff as security for his own performance.²⁹

Corbin, while commending Ames for his work in showing the weakness of the mutuality requirement, believes that Ames' suggested rule places too much emphasis on the remedy in damages as security, and as a better rule he would require "satisfactory security" without singling out any specific kind.³⁰ He urges the abandonment of the supposed requirement of mutuality of remedy³¹ and states the better reasoned rule to be this: "The court may properly refuse specific en-

See, e.g., *Standard Lumber Co. v. Florida Industrial Co.*, 106 Fla. 884, 141 So. 729 (1932). Others have declared that mutuality of remedy must exist at the time the decree is issued. See, e.g., *Pierce v. Watson*, 252 Ala. 15, 39 So. 2d 220 (1949).

24. Durfee, *supra* note 10 at 291. In addition to the exceptions recognized by Fry, see note 19 *supra*, Ames thought there were eight, Ames, *Mutuality in Specific Performance*, 3 Colum. L. Rev. 1 (1903); and Clark lists ten, Clark, *Equity* §§ 175-80 (1919).

25. Lewis, *Specific Performance of Contracts—Defense of Lack of Mutuality*, 40 Am. L. Reg. (n.s.) 270, 383, 447, 507, 559 (1901); 41 *id.* 251, 329 (1902); Lewis, *The Present Status of the Defence of Want of Mutuality in Specific Performance*, 42 Am. L. Reg. (n.s.) 591 (1903).

26. Ames, *Mutuality in Specific Performance*, 3 Colum. L. Rev. 1 (1903).

27. Lewis, *supra* note 25, 42 Am. L. Reg. (n.s.) 591, 629 (1903).

28. Ames, *supra* note 26, at 8.

29. "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. This restatement of the doctrine of mutuality was the one later accepted by Pomeroy, in place of his former statement. 5 Pomeroy, *Equity Jurisprudence* § 2191 (4th ed. 1919).

30. 5 Corbin, *Contracts* § 1186 (1951).

31. 5 *id.* § 1181.

forcement if some substantial part of the agreed exchange for the defendant's performance has not yet been rendered and its performance is not sufficiently assured to the satisfaction of the court."³² The chief merit of such a rule is that it leaves much to the discretion of the court, and recognizes that there is no such thing as mechanical justice.³³ And yet the rule gives the court a workable test—sufficient assurance of plaintiff's performance—on which to grant specific performance. The court may direct its attention to various factors in making this determination, such as the inadequacy of money damages as a remedy and what constitutes satisfactory security that plaintiff's future performance will be rendered.³⁴

The criticism leveled at the Fry doctrine by these commentators has had its effect on the decisions of the courts. Some courts have rejected the rule entirely;³⁵ while others, not expressly rejecting it, have found ways to make it inapplicable.³⁶ It is submitted that rejection of the rule is correct and that the flexible principle stated above can stand much better in its stead. The reasons advanced for the rule (equality is equity, and equity's relief is discretionary³⁷) are insufficient³⁸ to deny relief to a plaintiff who is being deprived of his just remedy on the sole ground that the same remedy would not have been available to the defendant in a hypothetical converse situation. Under the rule, the courts have not dealt with the equities of the parties as they actually existed but have denied the relief sought by the plaintiff because, under a hypothetical state of facts, the defendant would not have been entitled to similar relief.³⁹ No such mechanical rule can be

32. 5 *id.* § 1183.

33. In accord with Corbin's suggestion of leaving the matter of granting specific performance to the discretion of the court: 5 Williston, *Contracts* § 1440 (rev. ed. 1937); Restatement, *Contracts* §§ 372(1), 373 (1932); Durfee, *supra* note 10, at 312.

34. 5 Corbin, *Contracts* § 1183 (1951).

35. *Gould v. Stelter*, 14 Ill. 2d 376, 152 N.E.2d 869 (1958); *Peterson v. Johnson Nut Co.*, 204 Min. 300, 283 N. W. 561 (1939); *Epstein v. Gluckin*, 233 N.Y. 490, 135 N.E. 861 (1922).

36. See, e.g., *Zelleken v. Lynch*, 80 Kan. 746, 104 Pac. 563 (1909); *State Highway Comm'n v. Golden*, 112 N.J. Eq. 156, 163 Atl. 551 (1933). In five states a rule requiring mutuality of remedy at the time of suit has been legislatively enacted: Ala. Code Ann. tit. 9, § 51 (1940); Cal. Civ. Code § 3386 (*Deering* 1949); Mont. Rev. Code § 17-803 (1947); N.D. Rev. Code § 32-0408 (1943); S.D. Code § 37.4604 (1939).

37. See text supported by note 8 *supra*.

38. See Corbin's criticism of the statement that equality is equity at 5 Corbin, *Contracts* § 1182 (1951).

39. Lewis points out that this argument rests on two incorrect assumptions: (a) the probability that the plaintiff will not live up to his part of the contract after obtaining a decree; (b) the decree would become unfair if the plaintiff failed

framed which will observe the equities of the situation.⁴⁰ Whenever a plaintiff, through no fault of his own, has been unjustly and wrongfully deprived of a promised performance for which deprivation a remedy at law would be inadequate, and a court of equity can remedy this wrong without leaving the defendant in an overly vulnerable position, then, without recourse to the doctrine of mutuality, specific performance should be granted.⁴¹

The attitude of the Missouri courts towards the requirement of mutuality has gone through the same confused development experienced in many other states. There are two cases dealing with the affirmative aspect. In *Paris v. Haley*⁴² the court said as dictum that it was "well established that a vendor may maintain a suit for specific performance in all cases where the vendee can sue for a specific performance."⁴³ The Kansas City Court of Appeals followed this dictum in *Rice v. Griffith*,⁴⁴ holding that defendants were entitled to specific performance on their counterclaim since plaintiff could have obtained specific performance against defendants. The court flatly stated that in Missouri "the doctrine has been based upon the theory of mutuality."⁴⁵ But this holding was reversed by the Missouri Supreme Court,⁴⁶ which pointed out that it was not correct to say that specific performance may be obtained by one party whenever it is available to his opponent.⁴⁷ Thus, as the law relating to the affirmative aspect now stands, the Missouri Supreme Court will not grant specific

to perform, although it is fair when made. Lewis, *supra* note 25, 42 Am. L. Reg. (n.s.) 591, 626 (1903).

40. See Cook, The Present Status of the "Lack of Mutuality" Rule, 36 Yale L.J. 897, 912 (1927).

41. The most famous case advocating this test for granting specific performance is *Epstein v. Gluckin*, 233 N.Y. 490, 135 N.E. 861 (1922), wherein Justice Cardozo said: "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 plaintiff or to defendant. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end." *Id.* at 494, 135 N.E. at 862. Other recent cases which seem to follow this modern view that specific performance be granted where "injustice or oppression" will not result to either party are: *Morad v. Silva*, 331 Mass. 94, 117 N.E.2d 290 (1954); *Fleischer v. James Drug Stores*, 1 N.J. 138, 62 A.2d 383 (1948); *Vanzandt v. Heilman*, 54 N.M. 97, 214 P. 2d 864 (1950). *Temple Enterprises v. Combs*, 164 Ore. 133, 100 P.2d 613 (1940); *Jones v. English*, 268 S.W.2d 686 (Tex. Civ. App. 1954).

42. 61 Mo. 453 (1875).

43. *Id.* at 457.

44. 144 S.W.2d 837 (Mo. App. 1940).

45. *Id.* at 842. This case is noted in 26 Wash. U.L.Q. 431 (1941).

46. *Rice v. Griffith*, 349 Mo. 373, 161 S.W.2d 220 (1942).

47. *Id.* at 383, 161 S.W.2d at 225.

performance in all cases where the defendant would have been so entitled.⁴⁸

As to the negative aspect of the rule, in an early Missouri case⁴⁹ mutuality of remedy at the inception of the contract was required. This view was followed in *McCall v. Atchley*⁵⁰ where the plaintiff, even though he had performed the personal services which were a condition to the defendant's performance, was denied specific performance.⁵¹ But this decision was criticized and overruled nineteen years later in *Jones v. Jones*⁵² where the Missouri Supreme Court held that the doctrine of mutuality was limited to cases where the contract was still executory or partly executory, but had no application where the plaintiff seeking specific performance had fully performed.⁵³ The requirement of mutuality was thus held to be satisfied if the mutuality existed at the time of suit, and where the party seeking specific performance had already fully performed, mutuality ceased to be material and was no defense to the other party.⁵⁴

The trend of Missouri decisions, therefore, has been toward the abandonment of Fry's doctrine that there be mutuality of remedy at the inception of the contract. But the Missouri Supreme Court has not gone far enough. The court, though rejecting Fry's limited and inflexible rule, has not broken away from it entirely. While the court has rephrased the rule's application, it continues to retain the form of a general rule. Any such general rule of a court of equity tends to result in unjust decisions because of a natural inclination to follow the rule without a close examination of the equities of the particular case. Therefore it is submitted that the Missouri Court should take the last step necessary to free itself from all the influences of Fry's rule by

48. See Restatement, Contracts § 372 (2) (1932). It would appear the Missouri court is now following this view.

49. *Glass v. Rowe*, 103 Mo. 513, 15 S.W. 334 (1890).

50. 256 Mo. 39, 164 S.W. 593 (1914).

51. In explaining mutuality the court said: "The contract must be mutual with respect to the right of the respective parties to the equitable remedy. This means that, in so far as the consideration, upon which the right to specific performance rests, consists of an executory agreement, that agreement should be of such a nature that it entitles the party to whom it runs to have it specifically enforced according to its very terms." *Id.* at 54, 164 S.W. at 598. See also *Falder v. Dreckshage*, 227 S.W. 929 (Mo. App. 1921).

52. 333 Mo. 478, 63 S.W.2d 146 (1933).

53. *Id.* at 491, 63 S.W.2d at 153.

54. *Ibid.* See *Kludt v. Connett*, 350 Mo. 793, 168 S.W.2d 1068 (1943). This case contains a good analysis of the Missouri cases dealing with the negative aspect of mutuality of remedy. The court believes that, while the Missouri cases are not entirely in harmony, Missouri's position is close to that of § 372(1) of the Restatement of Contracts. *Id.* at 804-05, 168 S.W.2d at 1072-1073.

expressly rejecting it, as did the Illinois court, and thereby prevent any future confusion and injustice that the rule may continue to cause. A court of equity should grant relief when it is sure that its decree "will operate without injustice or oppression either to plaintiff or to defendant. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end."⁵⁵ After examining each factual situation equity should grant specific performance whenever it can properly exercise reasonable control over the dispute, both as to the parties and as to present and future actions.

55. *Epstein v. Gluckin*, 233 N.Y. 490, 494, 135 N.E. 861, 862 (1922).