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## Specific Performance—Mutuality Doctrine in West Virginia

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the shareholder, when the sale is on the open market, because the parties deal solely with reference to the market value and as mere strangers without any knowledge of or regard for the relation of director and stockholder. A stronger ground for such an exception would be the impracticability of notice in such case.<sup>7</sup> Likewise, in the case of corporate disability to act, the impracticability of giving notice, or the need for immediate or secret action to make the business undertaking a success might cause an exception to the rule, but in the ordinary case give the shareholders the privilege of carrying out the undertaking in some other form, if they are under a disability to act as a corporation.

—JOHN HAMPTON HOGE.

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SPECIFIC PERFORMANCE — MUTUALITY DOCTRINE IN WEST VIRGINIA. — “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.”<sup>8</sup>

Attempts to apply the doctrine of mutuality as thus laid down by Fry have led to much confusion. Often while one court was quoting it to prove that a certain type of contract could not be enforced specifically, another would be citing it as grounds for

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<sup>7</sup> Walker, *The Duty of Disclosure by a Director Purchasing Stock from His Stockholders* (1923) 32 YALE L. J. 637; BALLANTINE, *PRIVATE CORPORATIONS* (1927) 398.

<sup>8</sup> FRY, *SPECIFIC PERFORMANCE OF CONTRACTS* (3d ed 1884) § 440. Compare POMEROY, *SPECIFIC PERFORMANCE OF CONTRACTS* (1897) § 165, “If the remedy of specific performance of a contract exists at all, it must be mutual; the remedy must be attainable alike by both parties to the agreement.” See the same author eight years later in 6 POMEROY’S *EQUITY JURISPRUDENCE* (3d ed. 1905) § 769, where he says, “It is a mutuality of remedy in equity at the time of filing the bill that is required.” Then see the fourth edition of the same work, vol. 5, § 769, where Mr. Pomeroy says, “The court will not grant specific performance to the plaintiff and at the same time leave defendant to the legal remedy for possible future breaches on plaintiff’s side.” For language to the same effect, see Ames, *Mutuality in Specific Performance* (1903) 3 COL. L. REV. 1, 2. Professor Ames, however, continues, “The reciprocity of remedy required is not the right of each party to the contract 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.” For an excellent article on the present status of the mutuality doctrine, see Cook, *The Present Status of the “Lack of Mutuality” Rule* (1927) in 36 YALE L. J. 897. Mr. Cook concludes that about all that seems to be required is that the other party will probably continue to perform and that no serious injustice will be done.

enforcing a similar contract under practically analogous facts and circumstances. In *Bumgardner v. Leavitt*,<sup>2</sup> the West Virginia Court of Appeals went so far as to hold that because of the doctrine of mutuality of remedy, *A* could have specific performance in a suit against *B* for no other reason than that if *B* had been bringing the suit, he could have maintained specific performance against *A*. Then in *Warren Co. v. Black Coal Co.*,<sup>3</sup> Judge Williams endorsed the opposite or so called negative phase of the mutuality doctrine when he said, by way of dictum, that *A* could not have specific performance of the contract, because, if *B* had been bringing the suit against *A*, *B*'s remedy at law would have been adequate. Such argument is not very convincing. Suppose the situation had been reversed in either case, say in *Bumgardner v. Leavitt*, and *B* had been bringing the suit; then the court would have had to say, if it wished to be consistent, that *B* could not have specific performance, because, on the merits of the case, *A* was not entitled to it; or since it was available to *A* on account of its being a proper remedy for *B*, *B* could now have it because he himself could have it. This would amount to denying specific performance of the contract to the party actually entitled to it on the merits of the case, or else, to allowing him to have it only by a process of reasoning so artificial<sup>4</sup> that it could not withstand even a casual inspection. In *Bumgardner v. Leavitt*, the court really found two independent grounds on which to base equity jurisdiction; first, on the mutuality doctrine as has already been explained, second, on the finding that *A* had no adequate remedy at law. Thus while the case is a holding on the mutuality doctrine, it does not necessarily convince one that the court would have held the same way if it had been compelled to predicate its decision entirely upon that doctrine.

In *Eclipse Oil Co. v. South Penn Oil Co.*,<sup>5</sup> the court said, "If a contract is incapable of being specifically enforced against one party, that party is equally incapable of enforcing it against the other". That would appear to be a literal application of Fry's mutuality doctrine, but the facts of that case show that there was really no contract to be enforced. The plaintiff had paid no con-

<sup>2</sup> 35 W. Va. 194, 13 S. E. 67 (1891).

<sup>3</sup> 85 W. Va. 684, 688, 102 S. E. 672, 674 (1920). Specific performance was denied in this case because the subject matter was not such as would give equity jurisdiction. The remedy of either party at law was adequate.

<sup>4</sup> Langdell, *Lecture Notes* (1888) 1 HARV. L. REV. 104, "The rule as to mutuality of remedy is obscure in principle and extent, artificial, and difficult to understand and remember."

<sup>5</sup> 47 W. Va. 84, 103, 34 S. E. 923, 931 (1899).

sideration. Judge English, in *Hissom v. Parrish*,<sup>6</sup> quoted Fry's mutuality doctrine, but it had no application, for the contract was without consideration and concerned subject matter as to which the remedy at law was adequate. (Both of the preceding suits were really on options for which no consideration had been paid.) The opinion in *Lathrop v. Collieries Co.*<sup>7</sup> intimates that the remedy of specific performance must be available to both parties; but the contract there was such that either party could clearly have enforced it specifically; so the point did not come up for adjudication in that suit.

A number of exceptions to this doctrine of mutuality have been pretty generally recognized. Fry himself listed about eight.<sup>8</sup> Apparently West Virginia has always held that a contract for the sale of land, signed only by one party, was enforceable against the party who signed, even though the other party was not bound at all under the statute of frauds.<sup>9</sup> In *Capehart, Ex'r. v. Hale*,<sup>10</sup> Judge Hoffman expressed the attitude very well when he said, "The doctrine as to the necessity of mutual liability under the statute of frauds, formerly maintained, has long since been abandoned." A somewhat analogous situation is that in which the vendee has entered and done acts of part performance under an oral contract for the sale of land. Providing the part performance has been sufficient, the West Virginia court finds no obstacle in the way of enforcing such contract;<sup>11</sup> but it is pretty clear that there is no mutuality of remedy, at least, not in the majority of cases.

In *Bowden v. Laing*,<sup>12</sup> an agent was allowed to enforce specifically a contract to sell land. The agent had signed in such a way that he was liable for damages only and his principal was

<sup>6</sup> 41 W. Va. 686, 690, 24 S. E. 600, 601 (1896).

<sup>7</sup> 70 W. Va. 58, 73 S. E. 299 (1911) "A contract for the sale of land which so binds both parties that either may compel the other to perform cannot be held void for want of mutuality."

<sup>8</sup> FRY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1884) §§ 444-452.

<sup>9</sup> *Buckman v. Hay*, 92 W. Va. 97, 114 S. E. 514 (1922); *Mountain Park Land Co. v. Snidow*, 77 W. Va. 54, 86 S. E. 915 (1915); *Armstrong v. Coal Co.*, 67 W. Va. 589, 69 S. E. 195 (1910); *Creigh's Admr. v. Boggs*, 19 W. Va. 240 (1881).

<sup>10</sup> 6 W. Va. 547 (1873).

<sup>11</sup> *Bryson v. McShane*, 48 W. Va. 126, 35 S. E. 848 (1900); *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907 (1899); *Development Co. v. Thornburg*, 46 W. Va. 99, 33 S. E. 108 (1899); *Campbell v. Fetterman*, 20 W. Va. 398 (1882); *Middleton v. Selby*, 19 W. Va. 167 (1881); *Lorentz v. Lorentz*, 14 W. Va. 761 (1879); *West Va. O. & O. Co. v. Vinal*, 14 W. Va. 637 (1879); *Baldenburg v. Warder*, 14 W. Va. 397 (1878); *Vickers v. Sisson's Admr.*, 10 W. Va. 12 (1877); *Lowry v. Buffington*, 6 W. Va. 249 (1873).

<sup>12</sup> 103 W. Va. 733, 138 S. E. 449 (1927). Accord: *Rollyson v. Bourn*, 85 W. Va. 15, 100 S. E. 682 (1919).

not bound at all. On bringing suit, he tendered a proper deed from his principal. The court said, "It is the mutuality at the time of filing the bill, or of the decree, that is required, and not the mutuality in terms of the contract." Likewise, in *Dodson v. Hays*,<sup>23</sup> the vendor on tendering a proper deed was granted specific performance, although at the time the contract was made, he had no title to the land. The court said that while the remedy must usually be mutual, yet that was not necessary when at the time of making the contract, the vendee knew that there was a defect in the vendor's title to such an extent that he could not be compelled to perform specifically. In *Hall v. Philadelphia Co.*,<sup>24</sup> a covenant in a lease by which free gas was to be furnished to the owner of the leased premises was specifically enforced. Apparently the lack of mutuality was not even noticed; at least no mention was made of it.

Contracts made by a party under disability are not usually enforced at the suit of either party while the disability exists; but the court's refusal to enforce is not predicated on a lack of mutuality alone. Mutuality really has very little to do with it, for the same contract will ordinarily be enforced in favor of the party originally under disability after the disability has been removed. Similarly, contracts which have been induced through fraud or misrepresentation by one of the parties are, where otherwise properly subject to specific performance, enforced at the suit of the defrauded party, yet there is no mutuality of remedy in such cases, for the fraud or material misrepresentation would be a good defense for the party against whom it operated.

Some dicta are found to the effect that an option contract is not specifically enforceable because of a lack of mutuality;<sup>25</sup> but generally where such an option is for valuable consideration, the court treats it as an irrevocable, continuing offer which ripens into a contract when properly accepted.<sup>26</sup> Whether or not the contract made by the acceptance is specifically enforceable depends upon its own facts. Actually, by treating the option contract as a continuing offer, the court is in effect specifically enforcing it. In the same manner, it is specifically enforced at law. The optionor is powerless to withdraw the offer. The option contract, therefore, is specifically enforced, if one must apply such terms

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<sup>23</sup> 29 W. Va. 577, 2 S. E. 415 (1887).

<sup>24</sup> 72 W. Va. 574, 78 S. E. 755 (1913).

<sup>25</sup> *Eclipse Oil Co. v. South Penn Oil Co.*, *supra* n. 5; *Hissom v. Parrish* *supra* n. 6.

<sup>26</sup> *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743 (1888).

to the situation, both in law and in equity notwithstanding its lack of mutuality.

It appears, therefore, that in order to render justice in a great variety of cases, equity is compelled to get away from the mutuality doctrine. In most of the situations hereinbefore alluded to, the plaintiff has either performed in full or tenders substantial performance on filing his bill. When such is the case, mutuality of remedy could not possibly be of much importance, for the defendant has either received or will get by the decree all that he has bargained for. It remains to be considered whether or not the mutuality doctrine serves any real need in connection with executory contracts where something remains to be done after the decree. The seeming danger of leaving a defendant without adequate protection in such cases is probably what called forth the idea that the remedy must be mutual.

Where performance on both sides is to continue over a period of time, Judge Meredith, in *Elk Refining Co. v. Falling Rock Cannel Coal Co.*,<sup>17</sup> quoting from a prior federal case,<sup>18</sup> said, "If specific performance be otherwise proper, equity is not prevented from granting its aid because of a mere lack of mutuality of remedy. It is sufficient that defendant's compulsory performance is conditioned upon the plaintiff's continued readiness to perform its obligations". In the New York Court of Appeals, Judge Cardozo used language of similar import in *Epstein v. Gluckin*<sup>19</sup> when he said, "What equity exacts today as a condition of relief is assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or defendant. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end." These statements illustrate what is believed to be the modern view and what is conceded to be a sound view of the mutuality doctrine. Judges are not now inclined to pay much attention to it when justice can be better effectuated by some other means.

If the defendant's performance is to consist of a single act, and the plaintiff is to perform over a period of time, it is not always easy to ascertain that the decree will operate without injustice or oppression. There does not seem to be any West Virginia case exactly in point. However, it does not appear that the mutuality doctrine would be of much assistance. Often such a

<sup>17</sup> 92 W. Va. 479, 115 S. E. 431 (1922).

<sup>18</sup> *Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co.*, 239 Fed. 603 (1917).

<sup>19</sup> 233 N. Y. 490, 135 N. E. 861 (1922).

contract could be enforced without danger of undue hardship to defendant. His remedy at law might be sufficient to assure continued performance by the plaintiff.<sup>20</sup> Then too, there might be strong economic or other reasons why the plaintiff would continue to perform.<sup>21</sup> But even if it were undesirable to enforce the contract, equity would not need to resort to the mutuality doctrine. Since specific performance is a matter of privilege or discretion rather than of right,<sup>22</sup> the chancellor can exercise his discretionary power and refuse to enforce the contract when it appears that to do so would operate with serious injustice toward one of the parties.

Much dicta can be found to the effect that the mutuality doctrine is law in West Virginia; but no decision, based on that doctrine alone, has been discovered. On the contrary, the doctrine has been repudiated in many situations where it would seem to apply and has been entirely disregarded in others. Consequently, it has become so used up with exceptions that there is not much left of it. The general trend, apparently, is toward discarding it entirely.

—GEORGE W. MCQUAIN.

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<sup>20</sup> *Zelleken v. Lynch*, 80 Kan. 746, 104 Pac. 563 (1909).

<sup>21</sup> *Tribune Assn. v. Simonds*, 104 Atl. 386 (N. J. Eq. 1918).

<sup>22</sup> *Wellman v. Virginia Ry. Co.*, 85 W. Va. 169, 101 S. E. 252 (1919); *Big Huff Coal Co. v. Thomas*, 76 W. Va. 161, 85 S. E. 171 (1915); *Heflin v. Heflin*, 63 W. Va. 29, 59 S. E. 745 (1907); *Ratliff v. Sommers*, 55 W. Va. 30, 46 S. E. 712 (1904); *Conaway v. Sweeney*, 24 W. Va. 643 (1884). And see *Callahan v. Simms*, 105 W. Va. 259, 262, 142 S. E. 443, 444 (1928).