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Equity--Specific Performance--Mutuality of Remedy

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EQUITY—SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—As a result of preliminary negotiations a form of lease was drawn up, it being agreed that the new lease was to cancel an existing lease between the same parties. The name of the lessee was left blank in the new lease and it was not executed by either party. Because of undue delay on the part of the plaintiff, the defendant, the lessor, refused to sign the new agreement and sued the plaintiff for royalties due under the old lease. This suit was to enjoin the action at law. Upon the question whether or not the lessor was bound by its agreement to execute the new lease the court *held,* that there was no binding contract. *Virginian Export Coal Co.* v. *Rowland Land Co.,* 131 S. E. 253, (W. Va. 1926).

The holding of the court, that there was no contract, is clearly correct, but in giving as one of its reasons for its decision that there was lack of mutuality of remedy the court has laid itself open to criticism. It is clear that the question of lack of mutuality of remedy can not arise until there is a binding obligation. The confusion of thought and expression on the subject is without doubt traceable to the different senses in which the word mutuality is used, namely, (1) mutuality of obligation; and (2) mutuality of remedy. The distinction between the two expressions is drawn by Mr. H. C. McClintock in an article in 49 American Law Register (N. S.) 16, as follows: " 'Want of mutuality of obligation' is ordinarily used to denote an absence of *quid pro quo,* that there is an agreement, but no binding contract. 'Want of mutuality of remedy' properly means that there is a binding contract, but, from the nature of the consideration moving from plaintiff to defendant, the defendant can not compel specific performance of his part of the contract." Mr. Harlan F. Stone, in an exhaustive article in 16 Columbia Law Review 443 says: "It is established by abundant authority in nearly every jurisdiction that the rule that in equity the remedies on a contract must be mutual has nothing to do with mutuality of obligation." Practically every text writer recognizes this distinction. Pomeroy in his work on Specific Performance, Second Edition, says: "There is a clear distinction in principle between the mutuality of right and obligation—that is, the binding efficacy of the agreement upon both the parties. and the

mutuality simply of the equitable remedy—that is, the right of both parties to obtain a specific performance." To the same effect are the statements and arguments of William Draper Lewis in a series of articles entitled "DEFENSE OF LACK OF MUTUALITY," which appeared in Volume 40, American Law Register (N. S.) At page 270 he says: "If for any reason there is perhaps an agreement or an apparent agreement but no contract, we frequently find the court declaring that the contract lacks mutuality. In cases of this character the expression 'lack of mutuality' really means that there is no contract." FRY, SPECIFIC PERFORMANCE (5th Ed.) §460 lays down the rule as to mutuality as follows: "A contract to be specifically enforced by the court must, as a general rule, 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." Commenting on this statement of the rule Mr. Williston, the well known authority on Contracts, says that the rule as thus stated requires *both* mutuality of obligation and remedy. 25 R. C. L. 232 notes that the language adopted by numerous courts is to the effect that equity will grant a decree of specific performance only in cases where there is mutuality of obligation *and* mutuality of remedy. "Mutuality of remedy, *as well as* mutuality of obligation, is often, though not always, essential", according to ELLIOT ON CONTRACTS, Volume 3, §2283. Mr. Ames, in 3 Columbia Law Review 2 (1903) states the principle of mutuality of remedy as follows: "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." The rule as thus stated contemplates that there is a contract for the breach of which there could be an action for damages. A careful study of the manner in which the text writers have expressed themselves, and a proper understanding of the distinction drawn by them between the doctrine of mutuality of obligation and mutuality of remedy, clearly indicates that the question of mutuality of remedy can not arise unless there is mutuality of obligation, that is, a binding contract between the parties. Mr. Page has apparently noted that many courts, no doubt carelessly, have fallen into the error committed by the court in the principal case in that

they have failed to distinguish between mutuality of obligation and mutuality of remedy. In his LAW OF CONTRACTS Volume 6, §3318, he says: "It has been said that lack of mutuality of remedy, no matter from what cause, will defeat specific performance. In many of the cases in which this view is expressed, the difficulty in granting specific performance is deeper than a mere want of mutual remedy, since the reason that the defendant could not have had a remedy against the plaintiff was because the contract was either voidable at the election of the plaintiff, or because there was no valid contract to enforce. In cases of this sort, the real lack of mutuality is in the obligation, and the lack of mutuality of remedy is due to the absence of a valid contract." It will be noted that, with possibly one exception, in all of the cases cited by the court in the principal case in support of its statement that there must be mutuality of remedy there was a valid binding contract. If the court means that there was no contract in the principal case because there was lack of mutuality of obligation, it is right; but it is clearly not a case in which to talk about the doctrine of mutuality of remedy, if in fact there is such a doctrine today. Judge Cardozo, in the much discussed case of *Epstein* v. *Gluckin,* 233 N. Y. 490, probably made an apt remark when he said: "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 exception that, viewed as a precept of general validity, it has ceased to be a rule today."

—E. H. Y.