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NOTES

MUTUALITY OF REMEDY IN PENNSYLVANIA

The facts of the case of *Heights Land Co. v. Swengel's Estate et al.*, 179 *Atl.* 431, (*Pa.*, 1935) appear to be that the plaintiff entered into a contract to convey lands to the defendants' testatrix for an agreed price to be paid in installments. The defendants' testatrix made no payment other than the part payment made at the time of signing. About a year after her death, and almost eight years after her first default in payment, the plaintiff brought an action of assumpsit for the recovery of the balance of the purchase price. The court, in the course of its opinion, said:

" . . . . . A contract to be enforced specifically must be mutual both as to remedy and as to obligation; . . . . . where a contract is incapable of being specifically enforced against one party to it, that party is incapable of enforcing it against the other".

Thus, once again, the Supreme Court of Pennsylvania pronounces the time-worn, discredited, and generally discarded[1] doctrine of mutuality of remedy as applied in cases of specific performance. The doctrine is one based on nothing but "notions of expediency".[2] Mr. Justice Cardozo has said: "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".[3]

There have been four principal statements of the doctrine in the development of the law of mutuality of remedy. The first of these was declared in 1848 by Fry who stated the doctrine to be that in order for the plaintiff to obtain specific performance, the contract must be mutual, that is, such that it might, "at the time it was entered into", have been enforced by either party against the other.[4] The rule as laid down by Fry has been qualified by so many exceptions, that it can be said to have been virtually abandoned as a principle to be followed.[5] Dr. Pomeroy's view of the true doctrine was that, if, when the bill is filed, the contract is still

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[1]The phrase, mutuality of remedy, seems to have come into the law of specific performance as a phrase to explain an apparent extension of equity jurisdiction, and later appears to have gotten twisted and inverted into a phrase to limit and restrain equity jurisdiction. Schofield, Essays on Constitutional Law and Equity, 807. Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979; Clason v. Bailey, 14 Johns. (N. Y.) 484; Topeka Water Supply Co. v. Root, 56 Kan. 187, 42 Pac. 715; Bacon v. Kentucky Cent. Ry. Co., 95 Ky. 373, 382, 25 S. W. 747; Eckstein v. Downing, 64 N.H. 248, 9 Atl. 626; Lamprey v. St. Paul & C. Ry. Co. et al., 89 Minn. 187, 94 N. W. 555; Austin v. Wacks, 30 Minn. 335, 15 N.W. 409; "Many courts, however, have recognized the injustice of denying specific performance if the situation of the parties be such that reciprocity exists at the time the remedy is invoked, and exceptions have been made until the exceptional doctrine has largely superseded the rule." Zelleken et al. v. Lynch et al., 80 Kan. 746, 104 Pac. 563.

[2]Lamprey v. St. Paul & C. Ry. Co., et al., 89 Minn. 187, 94 N. W. 555.

[3]Epstein v. Glucken, 233 N. Y. 490, 135 N. E. 861.

[4]Fry, Specific Performance, 5th ed. 231; 6th ed. 219.

[5]Montgomery Traction Co. v. Montgomery Light, etc., Co., 229 Fed. 672 (Where performance on both sides is concurrent, specific performance decreed); Clayton v. Ashdown, 9 Vin. Abr. 393 (G. 4) pl. 2 (Infant, after reaching majority, may have specific performance even though he could plead infancy in an action against him); Record v. Littlefield, 218 Mass. 483, 106 N. E. 142; Smith v. Wilson, 160 Mo. 657, 61 S. W. 597; Krah v. Wassmer, 75 N. J. Eq. 109, 71 Atl. 404 (Plaintiff is entitled to specific performance of a contract in writing signed by defendant under the statute of frauds even though the defendant could not have specific performance by reason of plaintiff's not having signed it). For other exceptions see Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73; Topeka Water Supply Co. v. Root, 56 Kan. 187, 42 Pac. 715; Bacon & Co. v. Moody. 117 Ga. 207, 43 S. E. 482.

executory, and the defendant, free from fraud or other personal bar, could not obtain specific enforcement, he will not be ordered to perform.[6] Professor Ames expresses the rule as being to the effect that if, after the defendant performs, his only remedy, in case of the plaintiff's non-performance, would be the common law remedy of damages, specific performance will be denied.[7] Finally, Cardozo, J., lays down the following broad principle: "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".[8] Referring to the doctrine, he says: "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 today".

Considering the various statements of the doctrine in connection with the facts of the instant case, it will be noted that, even though we accept the doctrine of mutuality as sound, it was wrongly applied by the court. The result cannot be justified even under Fry's rule, because, although the defendant could not have obtained specific performance at the time of the suit, as the defendant had committed a breach by default in payment, the contract, so far as the facts indicate, was such "at the time it was entered into" that either party could have then obtained specific performance.[9] The facts do not warrant the application of Pomeroy's rule, because, "at the time of filing the bill in equity",[10] the defendant had committed a breach of the contract and was guilty of laches and therefore was not free from personal bar—these being the only reasons why the defendant could not obtain specific enforcement in this case. The result of the case would be otherwise under Professor Ames' view. The defendant, after performance, would not be limited to the common

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[6]Pomeroy's Equity Jurisprudence, vol. 4 sec. 1405.

[7]Ames, Lectures on Legal Hist., 370.

[8]Epstein v. Glucken, 233 N. Y. 490, 135 N. E. 861.

[9]Fry, in sec. 440, states: "The mutuality of a contract, as we have seen is to be judged of at the time it is entered into; so that it is no objection to the plaintiff's right that the defendant may by delay, or other conduct on his part subsequent to the contract, have lost his right against the plaintiff . . . If such a defense were sustained, it would be to allow the defendants to take advantage of their own neglect." Ochs et al. v. Kramer et al., 107 S. W. 260, (Ky.).

[10]In Heights Land Co. v. Swengel's Estate et al., the action is assumpsit, but is treated as a bill in equity insofar as equitable principles are concerned, by reason of the fact that "under our (Pa.) blended system of law and equity" actions for the recovery of purchase price are properly brought in a court of law. Heights Land Co. v. Swengel's Estate et al., 171 Atl. 431, 432.

law remedy of damages, since delivery of the deed and payment would be concurrent acts, and the defendant could thus be assured of performance by the plaintiff. Applying Cardozo's rule no "injustice or oppression" would result to the defendant because the defendant is then receiving what was contracted for.

It is submitted that the court should rid itself of a rule such as this —a rule without foundation—and that where one seeks specific enforcement of a contract, "if there is no other good reason why it should not be enforced except the want of mutuality of remedy, it will be so enforced".[11]

John A. Cherry

THE TERMINATION OF SEPARATION AGREEMENTS

The Pennsylvania cases on this subject are comparatively few in number, and the rules set down, while not inaccurate, are stated loosely. This is accounted for by the fact that agreements of separation between husband and wife are seldom used in Pennsylvania due to the fact that the husband is compelled by statute to support his wife.

Before citing cases to illustrate the rules, it would be well to define a separation agreement and point out the differences between it and a postnuptial property settlement. It is this latter form of contract which has caused the courts much confusion in this regard. In general, the usual separation agreement provides that the husband shall pay a certain amount to the support of the wife during the separation, and the terms of such a contract are, in the main, executory. On the other hand, a postnuptial property settlement has to do with the dividing of property and property interests between husband and wife. There is no question of the validity of such an agreement of separation, both before and after the Act of June 8 1893,[1] if made in contemplation of an immediate or an inevitable separation.[2] Neither is there any question of the validity of a postnuptial proper-

[11] Lamprey v. St. Paul & C. Ry. Co. et al., 89 Minn. 187, 94 N. W. 555.

[1] Married Women's Property Act, P. L. 344.
[2] Fennell's Estate, 207 Pa. 309; Rodenbaugh v. Rodenbaugh, 17 Pa. Super. Ct. 619.