

## MUTUALITY OF REMEDY IN CALIFORNIA UNDER CIVIL CODE SECTION 3386

California Civil Code section 3386 provides that:

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 under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

This statute codifies the doctrine of negative mutuality<sup>1</sup> developed by the English text writer, Lord Justice Fry, after his analysis of the English chancery cases.<sup>2</sup> Almost since its inception, Fry's doctrine has been severely criticized.<sup>3</sup> The purpose of this note is not to add one more voice criticizing Fry's doctrine of mutuality of remedy; rather, it is to discuss the situations where California Civil Code section 3386 has been in issue and to review critically the results achieved in each situation. It is anticipated that by doing so, a recommendation can be made on whether the law should be retained, modified or rejected.

### Acceptance and Criticism of Fry's Doctrine

According to one writer, there never was the slightest reason for the doctrine of mutuality of remedy.<sup>4</sup> Yet it had a plausible sound and therefore was readily adopted by the American courts.<sup>5</sup> Until 1900, the courts, almost without exception, applied the doctrine.<sup>6</sup>

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<sup>1</sup> The doctrine of mutuality of performance has both a positive and a negative aspect. In its positive aspect, mutuality requires that the plaintiff should be granted specific performance if the defendant would have been granted specific performance. In the negative aspect is embodied the principle that the plaintiff should be denied specific performance if the defendant could not have obtained it against the plaintiff. Civil Code section 3386 concerns the negative aspect of the mutuality rule. Therefore, all references made in this note to the doctrine of mutuality of remedy refer to negative mutuality, not to positive mutuality.

<sup>2</sup> Fry stated his doctrine as follows: "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. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty, attending its execution in the former." E. FRY, *SPECIFIC PERFORMANCE OF CONTRACTS* 133 (3d ed. 1858).

<sup>3</sup> Ames, *Mutuality In Specific Performance*, 3 COLUM. L. REV. 1 (1903); Durfee, *Mutuality In Specific Performance*, 20 MICH. L. REV. 289 (1921); Stone, *The "Mutuality" Rule In New York*, 16 COLUM. L. REV. 443 (1916).

<sup>4</sup> W. WALSH, *A TREATISE ON EQUITY* 343 (1930).

<sup>5</sup> *Id.*

<sup>6</sup> See generally Lewis, *Specific Performance of Contracts—Defense of Lack of Mutuality* (pts. 1-6), 49 AM. L. REG. 270, 383, 447, 507 (1901); 50 *id.* at 251, 329 (1902); Lewis, *Specific Performance of Contracts Perfecting Title After Suit Has Begun*, 50 AM. L. REG. 523 (1902); Lewis, *The Present Status*

Thus a party who sought specific enforcement of a contract and whose remedy at law was inadequate (thereby satisfying the preliminary requirement which brought him within equitable cognizance) was required to show that the situation for which he sought relief met the requirement of mutuality of remedy.<sup>7</sup> If he could not, he was left to his remedy at law, which by definition was inadequate.<sup>8</sup>

However, as fact situations arose where a strict application of the rule would precipitate harsh and inequitable decisions, the courts refused to follow the doctrine in certain cases. Many exceptions to the rule thus were developed.<sup>9</sup> The rule also became the subject of vigorous attacks by scholars.<sup>10</sup> Langdell referred to the doctrine as being "obscure in principle and extent."<sup>11</sup> Lewis made an elaborate review of the cases and concluded that in all of them the application of the doctrine had resulted in a manifest denial of justice.<sup>12</sup> Ames, who rejected the rule of mutuality of remedy as being inaccurate and misleading,<sup>13</sup> suggested a rule of mutuality of performance which he stated 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.<sup>14</sup>

Durfee joined the others and advocated that the courts should not be concerned with absolute mutuality, but should allow the doctrine to be one of the factors to be considered in balancing the equities between the parties.<sup>15</sup> This theory was also advanced by Walsh.<sup>16</sup>

Today the doctrine survives in varying degrees across the United States. The majority of jurisdictions hold that it is fundamental that before specific performance will be granted mutuality of remedy must exist.<sup>17</sup> However, numerous courts have preferred Durfee's

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*of the Defense of Want of Mutuality in Specific Performance*, 51 AM. L. REG. 591 (1903).

<sup>7</sup> H. McCLINTOCK, *HANDBOOK OF EQUITY* 185 (2d ed. 1948).

<sup>8</sup> J. POMEROY, *A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS*, § 8 (3d ed. 1926).

<sup>9</sup> Ames, *supra* note 3 (listed eight exceptions); G. CLARK, *EQUITY* §§ 175-80 (3d ed. 1924) (described ten distinct exceptions); J. POMEROY, *supra* note 8, §§ 167-73 (listed three exceptions). However, Walsh maintains that the so-called exceptions to the rule of mutuality are in no sense exceptions, but demonstrate that the rule as laid down by Fry "is unsound in principle and contrary to actual law. Together these so called 'exceptions' cover the field." W. WALSH, *supra* note 4, at 345.

<sup>10</sup> Ames, *supra* note 3; Durfee, *supra* note 3.

<sup>11</sup> Langdell, *Equity, Specific Performance, Mutuality of Remedy*, 1 HARV. L. REV. 104 (1887).

<sup>12</sup> Articles by Lewis, *supra* note 6.

<sup>13</sup> Ames, *supra* note 3, at 8.

<sup>14</sup> *Id.* at 2-3.

<sup>15</sup> Durfee, *supra* note 3, at 312-14.

<sup>16</sup> W. WALSH, *supra* note 4, at 354.

<sup>17</sup> *Pierce v. Watson*, 252 Ala. 15, 39 So. 2d 220 (1949); *Graham County Elec. Cooperative v. Town of Safford*, 95 Ariz. 174, 388 P.2d 169 (1963); *Duclos v. Turner*, 204 Ark. 1000, 166 S.W.2d 251 (1942); *Howard Cole & Co. v. Williams*, 157 Fla. 851, 27 So. 2d 352 (1946); *Pierce v. Rush*, 210 Ga. 718, 82 S.E.2d 649 (1954); *Schultz v. Campbell*, 147 Mont. 417, 413 P.2d 879 (1966); *Electronic Dev. Co. v. Robson*, 148 Neb. 526, 28 N.W.2d 130 (1947); *Knox v. Allard*, 90 N.H. 157, 5 A.2d 716 (1939); *Sarokohan v. Fair Lawn Memorial*

theory that mutuality is merely a discretionary tool to be used in balancing the equities.<sup>18</sup> In an increasing number of jurisdictions the doctrine of mutuality has been expressly repudiated.<sup>19</sup> Where this is so, specific performance will be granted whenever the decree will operate to give both parties the benefits of the contract.

Although there is a split of authority, it can be said that a substantial number of jurisdictions concur with California in holding that mutuality of remedy is essential to the successful maintenance of a suit for specific performance.<sup>20</sup> However, it does not follow that a rule is sound merely because it is adhered to in a substantial number of jurisdictions. Such a determination depends upon an analysis of the results achieved when the rule is applied. If the rule does not operate unreasonably to deprive the plaintiff of his bargained-for performance, but does operate to guarantee that the defendant shall not later be harmed by granting specific performance against him, the rule should be retained. If this is not the result, it should be rejected or modified.

Two questions are relevant in an analysis of California's application of Civil Code section 3386: In what factual situations has Civil Code section 3386 been an issue? What have been the accompanying results?

#### Where the Plaintiff Has Substantially Performed

A major exception to the doctrine of mutuality of remedy that applies to all factual situations is provided in Civil Code section 3392. This statute provides as follows:

Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be

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Hosp., Inc., 83 N.J. Super. 127, 199 A.2d 52 (Super. Ct. 1964); Zundel v. Farmers Grain Co., 79 N.W.2d 48 (N.D. 1956); Thompson v. Giddings, 276 P.2d 229 (Okla. 1954); Erkess v. Eisenthal, 354 Pa. 161, 47 A.2d 154 (1946); Carr v. Ott, 38 Tenn. App. 585, 277 S.W.2d 419 (1954); Burr v. Greenland, 356 S.W.2d 370 (Tex. Civ. App. 1962); Genola Town v. Santagnin City, 96 Utah 88, 80 P.2d 930 (1938); Pair v. Rook, 195 Va. 196, 77 S.E.2d 395 (1953); McGinnis v. Enslow, 140 W. Va. 99, 82 S.E.2d 437 (1954); Beatty v. Chicago B. & O.R.R., 49 Wyo. 22, 52 P.2d 404 (1935).

<sup>18</sup> Zelliken v. Lynch, 80 Kan. 746, 104 P. 563 (1909); Peterson v. Johnson Nut Co., 204 Minn. 300, 283 N.W. 561 (1939); Epstein v. Gluckin, 233 N.Y. 490, 283 N.W. 861 (1922); Ward v. Bickerstaff, 79 Ohio App. 362, 73 N.E.2d 877 (1946).

<sup>19</sup> Chrysler Motors Corp. v. Tom Livizos Real Estate, Inc., 210 A.2d 299 (Del. Ch. 1965); Gould v. Stelter, 14 Ill. 2d 376, 152 N.E.2d 869 (1958); Urbain v. Speak, 258 Iowa 584, 139 N.W.2d 311 (1966); Messina v. Moeller, 214 Md. 110, 133 A.2d 75 (1957); Morad v. Silva, 331 Mass. 94, 117 N.E.2d 290 (1954); Reinink v. Van Loozenoord, 370 Mich. 121, 121 N.W.2d 689 (1963); Cooley v. Stevens, 240 Miss. 581, 128 So. 2d 124 (1961); Beets v. Tyler, 290 S.W.2d 76 (Mo. 1956); Harman v. Tanner Motor Tours, Ltd., 79 Nev. 4, 377 P.2d 622 (1963); Vanzandt v. Heilman, 54 N.M. 97, 214 P.2d 864 (1950); Paullus v. Yarbrough, 219 Ore. 611, 347 P.2d 620 (1959); First Nat'l Bank v. Laperle, 117 Vt. 144, 86 A.2d 635 (1952).

<sup>20</sup> Cases cited note 17 *supra*.

compelled, upon full compensation being made for the default. Thus, where the plaintiff has substantially performed, the doctrine of mutuality will not be invoked to deny him specific performance.<sup>21</sup> It has been held that when the plaintiff agrees to pave a street<sup>22</sup> or to render professional services<sup>23</sup> in exchange for an interest in land, he may obtain a decree of specific performance under this statute, so long as he has substantially performed.

In many cases, the courts have reached the same result without relying upon Civil Code section 3392.<sup>24</sup> The courts have held that where the plaintiff has substantially performed personal services and the only impediment to full performance is impossibility due to the forces of nature<sup>25</sup> or due to the defendant's breach,<sup>26</sup> the doctrine of mutuality of remedy does not apply. The reasoning here is that, although the contract could not have been specifically enforced when it was executed, it could be so enforced if it were fully performed by the plaintiff. Since his performance was prevented by something beyond the plaintiff's control, "it must be considered to have been sufficiently performed, within the meaning of Civil Code section 3386 . . . ."<sup>27</sup> A close reading of Civil Code section 3386 justifies this result; the section does not require full performance in all instances, provided there is nearly full performance and "full compensation for want of entire performance . . . ."

Both the statutory exception and the court-made exception are reasonable. In such situations, the defendant has received substantially all the benefits of his bargain, and should the plaintiff later fail to perform the remainder of the contract, it is quite likely that damages could adequately compensate the defendant for the small measure of performance he did not receive. Even if the defendant's remedy were not entirely adequate, it is not nearly so inadequate as that of the plaintiff. Since the plaintiff has received none of the unique benefits of the contract, any damages he would receive in an action at law would be inadequate. The defendant has received substantially all the benefits for which he contracted, making his remedy at law only slightly inadequate. Also, the past conduct of the plaintiff indicates his good faith, since he has substantially performed his part of the bargain. Although his past good faith does not guarantee that he will continue to perform, it does appear extremely unlikely that he would breach the contract after the jurisdiction of the court is removed. For these reasons it seems apparent that the defendant will suffer no injustice by the court enforcing the contract against him, and specific performance is properly granted in such cases.

As was previously mentioned, substantial performance is a major exception to the doctrine of mutuality of remedy. Therefore, the

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<sup>21</sup> *Butterfield v. Gentles*, 9 Cal. 2d 275, 70 P.2d 613 (1937).

<sup>22</sup> *Id.*

<sup>23</sup> *Howard v. Throckmorton*, 48 Cal. 482 (1874).

<sup>24</sup> *Thurber v. Meves*, 119 Cal. 35, 50 P. 1063 (1897); *Nevada Bank v. Steinmitz*, 64 Cal. 301, 30 P. 970 (1882); *Stone v. Burke*, 110 Cal. App. 2d 748, 244 P.2d 51 (1952).

<sup>25</sup> *Furtinata v. Butterfield*, 14 Cal. App. 25, 110 P. 962 (1910).

<sup>26</sup> *Ambrose v. Alioto*, 65 Cal. App. 2d 362, 150 P.2d 502 (1944).

<sup>27</sup> *Id.* at 370, 150 P.2d at 505.

following discussion is predicated upon the assumption that there has not been substantial performance.

#### Where the Performance on the Part of the Plaintiff Is Impossible

A request for specific performance has been denied where the action of a third party has made the plaintiff's performance impossible.<sup>28</sup> In such a case, the equities are with the defendant, since to require him to perform would leave no hope that he would receive his bargained-for counter performance. Specific performance is likewise denied where the plaintiff's performance requires action by third persons.<sup>29</sup> Here too it is correct to deny this extraordinary relief, since the defendant would have but a bare hope that the counter performance would be received. Equity tries to avoid such situations and the application of Civil Code section 3386 achieves this just result, because it requires that the plaintiff's performance be specifically enforceable.

#### Where the Performance by the Plaintiff Was Impossible at the Time the Contract Was Executed but Is Possible at the Time of Suit

In California<sup>30</sup> and most other states<sup>31</sup> the appropriate time for determining whether a contract lacks mutuality of remedy is at the time its enforcement is sought and not the time of its execution. It follows that if the plaintiff can perform at the time he filed the action, the fact that his performance was impossible when the contract was made should not bar his action for specific performance. This has been the result in the cases that have dealt with the problem.<sup>32</sup>

In some of these cases, the defendant knew when the contract was executed that the plaintiff could not then perform.<sup>33</sup> The courts indicated that because of this knowledge on the part of the defendant they would make an exception to the doctrine of mutuality of remedy, apparently on the theory that it was a risk assumed by the defendant.<sup>34</sup> While the result is correct, this theory is unsound.

<sup>28</sup> *By-Products Fuel Mach. Co. v. Dawson*, 110 Cal. App. 214, 294 P. 19 (1930).

<sup>29</sup> *Boys Town U.S.A., Inc. v. The World Church*, 221 Cal. App. 2d 468, 34 Cal. Rptr. 498 (1963); *Sesma v. Ellis*, 38 Cal. App. 2d 139, 100 P.2d 816 (1940).

<sup>30</sup> *Jones v. Clark*, 19 Cal. 2d 156, 119 P.2d 731 (1941); *Thurber v. Meves*, 119 Cal. 35, 50 P. 1063 (1897); *Henderson v. Fisher*, 236 Cal. App. 2d 468, 46 Cal. Rptr. 173 (1965); *Stone v. Burke*, 110 Cal. App. 2d 748, 244 P.2d 51 (1952); *Van Fossen v. Yager*, 65 Cal. App. 2d 591, 151 P.2d 14 (1944).

<sup>31</sup> *E.g.*, *Pierce v. Watson*, 252 Ala. 15, 39 So. 2d 220 (1949); *Howard Cole & Co. v. Williams*, 157 Fla. 851, 27 So. 2d 352 (1946); *Gould v. Stelter*, 14 Ill. 2d 376, 152 N.E.2d 869 (1958); *Safeway Systems, Inc. v. Manuel Bros., Inc.*, 228 A.2d 851, (R.I. 1967); *First Nat'l Bank v. Laperle*, 117 Vt. 144, 86 A.2d 635 (1952).

<sup>32</sup> *Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 P. 817 (1912); *Wolff v. Cloyne*, 156 Cal. 746, 106 P. 104 (1909); *Wolleson v. Coburn*, 63 Cal. App. 315, 218 P. 479 (1923). See also G. CLARK, *supra* note 9, § 179.

<sup>33</sup> *Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 P. 817 (1912); *Wolleson v. Coburn*, 63 Cal. App. 315, 218 P. 479 (1923).

<sup>34</sup> *Wolleson v. Coburn*, 63 Cal. App. 315, 218 P. 479 (1923).

Civil Code section 3386 contains no exception for a defendant who had knowledge that the plaintiff's performance was impossible when the contract was formed. Instead, all the statute requires is that it be possible to assure the plaintiff's performance by a decree of specific performance. By judicial interpretation, the assurance must be at the time of suit.<sup>35</sup> Therefore, what occurred before the filing of the suit is of no consequence. The result is a desirable one, since each party is assured of receiving the performance for which he contracted.

#### **Where the Defendant Cannot Compel Specific Performance Because of His Own Fault**

It is well established that the doctrine of mutuality of remedy does not apply where specific performance is unavailable to the defendant due to his own fault.<sup>36</sup> This was the law in California,<sup>37</sup> until the much criticized<sup>38</sup> case of *Linehan v. Devincense*.<sup>39</sup> In that case, the court denied a vendee specific performance because his vendor could not have specifically enforced the contract, due to a defect in his title. The court allowed the defendant "to plead his own fault as a reason for refusing to enforce the contract as far as it may yet be performed."<sup>40</sup>

Fortunately, the case was overruled by *Miller v. Dyer*,<sup>41</sup> where a buyer sought specific performance and abatement of a contract to sell land against his seller who had an imperfect title. The seller contended that since he could not have forced the defective title upon an unwilling buyer, mutuality of remedy was lacking and specific performance must be denied. The court, in granting specific performance and abatement, held that what was said in *Linehan v. Devincense* "was not necessary to the decision of the case"<sup>42</sup> and was "without support of the authorities."<sup>43</sup> Thus, this well-established exception to the doctrine of mutuality was returned to California.

#### **Where the Plaintiff Is Seeking To Exercise an Option Granted by the Defendant**

A universally recognized exception to the doctrine of mutuality is the conditional or option contract.<sup>44</sup> The California courts hold that if the party to whom the offer is made accepts within the allotted time, there is a mutual contract which he may then enforce, although he himself could not have been proceeded against for specific per-

<sup>35</sup> Cases cited note 30 *supra*.

<sup>36</sup> G. CLARK, *supra* note 9, § 179; J. POMEROY, *supra* note 8, § 434.

<sup>37</sup> *Smiddy v. Grafton*, 163 Cal. 16, 124 P. 433 (1912); *Farnum v. Clarke*, 148 Cal. 610, 84 P. 166 (1906); *Easton v. Montgomery*, 90 Cal. 307, 27 P. 280 (1891).

<sup>38</sup> *E.g.*, Comment, *Specific Performance of Contracts for the Sale of Land with Abatement of Purchase Price for Defects and Deficiencies in the Vendor's Title*, 16 CALIF. L. REV. 541, 543 (1928).

<sup>39</sup> 170 Cal. 307, 149 P. 584 (1915).

<sup>40</sup> Comment, *supra* note 38.

<sup>41</sup> 20 Cal. 2d 526, 127 P.2d 901 (1942).

<sup>42</sup> *Id.* at 530, 127 P.2d at 903.

<sup>43</sup> *Id.*

<sup>44</sup> G. CLARK, *supra* note 9, § 178; J. POMEROY, *supra* note 8, at 169.

formance prior to his acceptance.<sup>45</sup> Invariably it is a contract of sale of land or unique chattels. If the offeree's consideration is the payment of money and/or the giving of security, the performance of which can be enforced in equity, the court will grant the offeree specific performance.<sup>46</sup> However, the courts will refuse specific performance if the offeree's consideration is to render personal services.<sup>47</sup> In either situation, the fact that the contract grew out of an option agreement is of no importance, for it is the rights and duties of the parties under the resulting contract that determine whether either party may obtain its specific performance. Therefore, option contracts, although stated to be an exception to the doctrine of mutuality, appear to be an exception without legal significance.<sup>48</sup>

#### Where the Plaintiff Has Not Complied with the Statute of Frauds

Mutuality of remedy will be found where a contract within the Statute of Frauds is oral or is written but unsigned by the plaintiff, if the plaintiff has substantially performed,<sup>49</sup> has partially performed,<sup>50</sup> has offered to perform,<sup>51</sup> or has brought an action to compel performance.<sup>52</sup> In each of these situations the exception is justified, since the defendant is assured that the plaintiff will not resort to the defense of the Statute of Frauds, but will perform. It then seems probable that the plaintiff will fulfill his obligations under the contract because he has manifested his intention to perform by bringing suit and because he has partially performed, substantially performed, or offered to perform.<sup>53</sup> With the plaintiff's performance thus assured, the courts may reasonably take the position that mutuality exists. Obviously, none of the above exceptions to the doctrine of mutuality apply where the party signing the contract has withdrawn therefrom before the tender of performance or commencement of the suit by the party who did not comply with the Statute of Frauds, because there does not then exist the degree of performance required to give rise to the exceptions.<sup>54</sup>

<sup>45</sup> Schmidt v. Beckelman, 187 Cal. App. 2d 462, 9 Cal. Rptr. 736 (1960); Caras v. Parker, 149 Cal. App. 2d 621, 309 P.2d 104 (1957); Jonas v. Leland, 77 Cal. App. 2d 770, 176 P.2d 764 (1947).

<sup>46</sup> See Caras v. Parker, 149 Cal. App. 2d 621, 309 P.2d 104 (1957).

<sup>47</sup> See Archer v. Miller, 73 Cal. App. 678, 239 P. 92 (1925).

<sup>48</sup> See Note, 13 COLUM. L. REV. 737, 738 (1913).

<sup>49</sup> Jonas v. Clark, 19 Cal. 2d 156, 119 P.2d 731 (1941); Van Fossen v. Yager, 65 Cal. App. 2d 591, 151 P.2d 14 (1944).

<sup>50</sup> Copple v. Aigeltinger, 167 Cal. 706, 140 P. 1073 (1914); Boehle v. Benson, 150 Cal. App. 2d 696, 310 P.2d 650 (1957); Gibbs v. Mendoza, 103 Cal. App. 183, 284 P. 250 (1930).

<sup>51</sup> Bird v. Potter, 146 Cal. 286, 79 P. 970 (1905); Sayward v. Houghton, 119 Cal. 545, 51 P. 853 (1897); Vassault v. Edwards, 43 Cal. 458 (1872).

<sup>52</sup> Ellis v. Mihelis, 60 Cal. 2d 206, 32 Cal. Rptr. 415, 384 P.2d 7 (1963); King v. Stanley, 32 Cal. 2d 584, 197 P.2d 321 (1948); Copple v. Aigeltinger, 167 Cal. 706, 140 P. 1073 (1914); Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451 (1909).

<sup>53</sup> Austin, *Mutuality of Remedy in Ohio: A Journey From Abstraction to Particularism*, 28 OHIO ST. L.J. 629, 642 (1967).

<sup>54</sup> Nason v. Lingle, 143 Cal. 363, 77 P. 71 (1904); Hay v. Mason, 141 Cal. 722, 75 P. 300 (1904); Seymour v. Shaeffer, 82 Cal. App. 2d 823, 187 P.2d 95 (1947).

### Where the Plaintiff Has the Option To Terminate the Contract at Will or Upon Short Notice

Based on the equitable doctrine that equity will not do a vain thing, equity will not grant a decree of specific performance which could later be made nugatory by action of the parties.<sup>55</sup> Thus, if the defendant has the option to terminate the contract at will or with notice, a decree of specific performance will not be granted.<sup>56</sup> This is quite rational so far as it pertains to the defendant's right to terminate. But "[p]artly from confusion with this principle, partly for alleged lack of mutuality, specific performance has been refused in a number of cases because the plaintiff had a power given him under the contract to terminate it after a certain time . . ."<sup>57</sup> This result has been severely criticized.<sup>58</sup> Nevertheless, the California cases have uniformly held that a contract giving such a power to the plaintiff to terminate at will<sup>59</sup> or with notice<sup>60</sup> will not be specifically enforced. The result is an unreasonable one. The plaintiff sues for a decree of specific performance to obtain the benefits of the contract, not to bring the benefits to an end as soon as the decree is granted. Can it be said that such a decree is nugatory? Second, the doctrine of mutuality does not demand that each party benefit equally, but only that they have equal remedies.<sup>61</sup> Third, is it fair to allow the defendant to raise as a defense a clause that he assented to, thereby requiring the plaintiff to sue at law for damages which by definition are inadequate, when it is probable that the plaintiff has given additional consideration for the power to terminate? Since the result cannot be supported by reason and operates to deny the plaintiff the benefits for which he has contracted, the doctrine should be sparingly applied in such cases. Only in those rare situations where it might create a hardship on the defendant's part should the doctrine be applied.<sup>62</sup> In all other cases, reason should rule and the doctrine should not.

### Where the Contract Requires Performance on the Part of the Plaintiff That Has Traditionally Been Beyond Equity's Jurisdiction

The cases within this category most vividly portray the inequitable results that follow from a strict application of the doctrine of negative mutuality.<sup>63</sup> Within this category we find contracts requiring the plaintiff to perform construction work or to perform personal

<sup>55</sup> *Carver v. Brien*, 315 Ill. App. 643, 43 N.E.2d 597 (1942).

<sup>56</sup> *S. WILLISTON, CONTRACTS* § 1442 (1924).

<sup>57</sup> *Id.*

<sup>58</sup> *W. WALSH, supra* note 4, at 354; *S. WILLISTON, supra* note 56.

<sup>59</sup> *George v. Weston*, 26 Cal. App. 2d 256, 79 P.2d 110 (1938); *Scheel v. Harr*, 27 Cal. App. 2d 345, 80 P.2d 1035 (1938); *Moore v. Heron*, 108 Cal. App. 705, 292 P. 136 (1930); *Dabney v. Key*, 57 Cal. App. 762, 207 P. 921 (1922).

<sup>60</sup> *Sturgis v. Galindo*, 59 Cal. 28 (1881); *Sheehan v. Vedder*, 108 Cal. App. 419, 292 P. 175 (1930).

<sup>61</sup> *Cf. G. CLARK, supra* note 9, § 174.

<sup>62</sup> *S. WILLISTON, supra* note 56, § 1442.

<sup>63</sup> *See Pacific Elec. Ry. v. Campbell-Johnston*, 153 Cal. 106, 94 P. 623 (1908); *Moklofsky v. Moklofsky*, 79 Cal. App. 2d 259, 179 P.2d 628 (1947).



services for an indefinite period of time. Since Civil Code section 3386 requires that the plaintiff be "compellable specifically to perform, everything" and since performance of this nature has traditionally been considered by equity to be beyond its power to compel, it necessarily follows that the court will deny specific performance to the plaintiff in these cases.<sup>64</sup> The problem, as will be seen, is not the inability of the court to guarantee that the plaintiff will perform, but the inability to guarantee such performance by a decree of specific performance. In most cases the result is a harsh one.

*Pacific Electric Railway Co. v. Campbell-Johnston*<sup>65</sup> is a classic example of the injustice that results from such a strict application of the doctrine. In that case the defendant agreed to convey to the plaintiff a right of way over land that separated Los Angeles and Pasadena. In return, the plaintiff promised to construct, maintain, and operate a railroad between Los Angeles and Pasadena. After the plaintiff had performed the major part of its obligation by constructing and operating its line from said cities to the boundaries on either side of the land in question, the defendant refused to permit any construction over the lands. In denying a decree of specific performance, the court said, "neither the refusal of the defendants to permit construction over their lands, nor the willingness of the plaintiff to do so have any bearing in the application of the equitable principle that where there is no mutuality of remedy there can be no decree for specific performance."<sup>66</sup> The court then went on to discuss the application of Civil Code section 3386, holding that the test is "if it appears that the right to this remedy is not reciprocal, it is not available to either party . . ."<sup>67</sup> This is the spirit and literal meaning of Civil Code section 3386 and consequently it is not unnatural that the court reached such an unjust decision.

The decision was unjust, not only because the result was harsh, but also because it is not supported by reason. What harm might come to the defendant by specifically enforcing the contract against him? The plaintiff has demonstrated his willingness to perform by bringing suit and also by completing a major part of the continuous line and operating it up to the boundaries of the defendant's land. Certainly the plaintiff has a strong economic interest in carrying out the contract, due to his extensive investment of funds and labor and to the fact that it would have been wasteful to reroute the railway. With such an economic interest, his default appears extremely unlikely.<sup>68</sup> Therefore, the defendant was assured of receiving the performance for which he had contracted. Even if the court still doubted that the plaintiff's performance would be forthcoming, it could have issued a conditional decree providing that the deed would be delivered upon the completion of the line across the defendant's land.

Unfortunately, such decisions are not rare under California Civil Code section 3386. In other cases the courts, relying upon this code section, have denied specific performance where the plaintiff per-

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<sup>64</sup> *Id.*

<sup>65</sup> 153 Cal. 106, 94 P. 623 (1908).

<sup>66</sup> *Id.* at 116, 94 P. at 627.

<sup>67</sup> *Id.* at 112, 94 P. at 626.

<sup>68</sup> See Austin, *supra* note 53, at 642.

formed extensive construction work and all that remained to be done was the making of a doorway<sup>69</sup> or the construction of a stairway,<sup>70</sup> neither requiring very much time nor effort. These cases did not come within the substantial performance exception.<sup>71</sup> Since the plaintiff has demonstrated his good faith by partly performing, it is highly improbable that he will breach the contract once the jurisdiction of the court is lifted.<sup>72</sup> Even if the plaintiff did refuse to perform, the defendant's remedy at law would be adequate, for he could have the stairway or doorway completed by another and sue the plaintiff for the appropriate damages. However, the plain meaning of Civil Code section 3386 demands that specific performance be denied, since the plaintiff's performance may not be assured by a decree of specific performance. With this clear and unambiguous rule of law glaring at the courts, it is not difficult to understand how they are forced to render such inequitable decisions. The courts have been so influenced by the literal meaning of Civil Code section 3386 that they have even refused to grant a conditional decree,<sup>73</sup> which appears to be a practicable method to guarantee the plaintiff's performance. Yet these results may be expected, so long as California has a statute demanding such decisions.

Where the plaintiff is not required to build, but to perform personal services for an indefinite time, the courts have consistently denied specific performance.<sup>74</sup> An example is a contract requiring the plaintiff to care for an aged defendant until the defendant's death, in return for the defendant's promise to devise his property to the plaintiff.<sup>75</sup> Another example is contracts requiring the plaintiff to organize and promote a corporation for the development of natural resources and to receive land or stocks in return.<sup>76</sup> A possible answer in these situations would be to require the defendant to place the deed in escrow with instructions that it not be delivered until the plaintiff has performed. However, the courts have not adopted this approach, but instead they have denied equitable relief, thereby forcing the plaintiff to accept an inadequate remedy at law.<sup>77</sup> Such a result is required under the clear meaning of Civil Code section 3386, there being no authority in the statute for the court to guarantee the plaintiff's performance in any manner *other than by a decree of specific performance*. This strait-jacket statute obviously deters the

<sup>69</sup> Johnson v. Wunner, 40 Cal. App. 484, 181 P. 103 (1919).

<sup>70</sup> Moklofsky v. Moklofsky, 79 Cal. App. 2d 259, 179 P.2d 628 (1947).

<sup>71</sup> Discussed in the text following footnote 21 *supra*. It is possible that some of the reasoning that supported the substantial performance exception is equally applicable to the factual situations discussed above.

<sup>72</sup> Austin, *supra* note 53, at 636.

<sup>73</sup> Moklofsky v. Moklofsky, 79 Cal. App. 2d 259, 179 P.2d 628 (1947).

<sup>74</sup> Roy v. Pos, 183 Cal. 359, 191 P. 542 (1920); Los Angeles & Bakersfield Oil & Dev. Co. v. Occidental Oil Co., 144 Cal. 528, 78 P. 25 (1904); O'Brien v. Perry, 130 Cal. 526, 62 P. 927 (1900).

<sup>75</sup> Roy v. Pos, 183 Cal. 359, 191 P. 542 (1920); O'Brien v. Perry, 130 Cal. 526, 62 P. 927 (1900); Tompkins v. Hoge, 114 Cal. App. 2d 257, 250 P.2d 174 (1952); Van Core v. Bodner, 77 Cal. App. 2d 842, 176 P.2d 784 (1947).

<sup>76</sup> Los Angeles & Bakersfield Oil & Dev. Co. v. Occidental Oil Co., 144 Cal. 528, 78 P. 25 (1904); Rautenberg v. Westland, 227 Cal. App. 2d 566, 38 Cal. Rptr. 797 (1964); Hupp v. Lawler, 106 Cal. App. 121, 288 P. 801 (1930).

<sup>77</sup> Cases cited notes 74 & 75 *supra*.

courts from protecting the defendant in any other manner, such as by a conditional decree or the posting of a security bond.

### Conclusion

In all of the above situations, the exceptions to Civil Code section 3386 have been justified, because the defendant is assured of the plaintiff's performance; therefore, no injustice is done to the defendant by specifically enforcing the contract against him. But as was discussed, the courts, by enforcing Civil Code section 3386 to the letter, have in numerous other cases failed to realize that no injustice would come to the defendant by specifically enforcing the contract against him, since he was or could be substantially assured that the plaintiff would perform. Logic demands that whenever the plaintiff's performance is assured, specific performance should be granted whether the case comes within one of the exceptions to the doctrine of mutuality or not.

It is submitted that more equitable results can be achieved only by the repeal of Civil Code section 3386. But the mere repeal of this statute will not assure the judicial death of Fry's doctrine, since the doctrine is so well established in California. Therefore, in its place should be substituted a law that embodies the advantages of the old law and none of the unjust consequences that have been described in this note. The following would accomplish this result:

Specific performance may properly be refused if a significant 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 or can not be secured to the satisfaction of the court.<sup>78</sup>

If such a provision were in the California Civil Code, specific performance could be granted, although the plaintiff had not completed the railway, stairway, or doorway. This result would be reached because the factual situation clearly indicates that the plaintiff has such an economic interest in the completion of the work that it would be prodigal for him not to complete his performance. In other situations, the past conduct of the plaintiff would provide the necessary assurance. If this were not sufficient, the court could require the plaintiff to post a security bond or could issue a conditional decree. Perhaps the only complaint with such a statute is that it could not act retroactively to cure the harsh results that have followed from the application of Civil Code section 3386.

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<sup>78</sup> This recommendation was derived from the RESTATEMENT OF CONTRACTS § 373 (1932), with modifications being made to accomplish the desired results discussed in the text. The California Supreme Court indicated this is the appropriate guideline when Justice Gibson said: "[T]he only important consideration is whether a court of equity which is asked to specifically enforce a contract against the defendant is able to assure that he will receive the agreed performance from the plaintiff." *Ellis v. Milhelis*, 60 Cal. 2d 206, 215, 32 Cal. Rptr. 415, 420, 384 P.2d 7, 12 (1963). However, this was dictum, since the case fell within one of the exceptions to the doctrine of negative mutuality.

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