

## Memorandum 69-1

Subject: Study 45 - Mutuality of Remedies in Suits for Specific Performance

Both the Northern and Southern Sections of the State Bar Committee on the Administration of Justice have approved in principle the legislation recommended by the Commission relating to mutuality of remedies. The Southern Section suggests that the language of the proposed statute be revised, the reporting member of the Northern Section also felt that the wording could be improved, although the Northern Section did not attempt to pass upon specific language. See Exhibit I (pink) attached.

The proposed section as recommended by the Commission reads:

3386. Specific performance may be compelled, whether or not the agreed counterperformance is or would have been specifically enforceable, if:

(a) Specific performance would otherwise be an appropriate remedy; and

(b) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured or can be secured to the satisfaction of the court.

The position of the State Bar Committee is indicated in the Minutes of the Southern Section:

The principle is sound, i.e., to reflect modern concepts as to mutuality of remedy, and up date the code section. Form: 1) It is the sense of the Section that the Commission text goes beyond, or affords a basis for the contention that it goes beyond, revising the "mutuality of remedy" concept. The words "whether or not" seem to give rise to this possible loophole or unintended broadening of specific performance authority.

The Minutes of the Southern Section contain alternative revisions of proposed Section 3386. Both alternatives are designed to eliminate the phrase "whether or not." The substance of each alternative is set out below.

Revision No. 1.

Specific performance may be compelled, ~~whether or not~~ notwithstanding that the agreed counterperformance is not or would not have been specifically enforceable, if:

- (a) Specific performance would otherwise be an appropriate remedy; and
- (b) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured or can be secured to the satisfaction of the court.

Revision No. 2.

~~Notwithstanding that the agreed counterperformance is not or would not have been specifically enforceable, specific~~ Specific performance may be compelled, whether or not the agreed counterperformance is or would have been specifically enforceable, if:

- (a) Specific performance would otherwise be an appropriate remedy; and
- (b) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured or can be secured to the satisfaction of the court.

The Southern Section preferred the second alternative; the Northern Section did not attempt to pass upon the specific language. Does the Commission wish to adopt either of these alternatives or to otherwise modify the proposed section?

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

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November 12, 1968

John H. DeMouilly, Esq.  
 Executive Secretary  
 California Law Revision Commission  
 School of Law  
 Stanford, California

Re: Specific Performance - Mutuality  
 of Remedy

Dear Mr. DeMouilly:

In accord with the understanding that the CAJ is authorized to express its views directly to you (which views are only those of the Committee), we wish to advise that both Sections of the Committee have approved the measure (July 25, 1968, form) in principle.

However, the Southern Section felt that the precise wording could have unintended effect, and has requested that the Commission consider changes of detail as shown in the enclosed extract from the Southern Section Minutes of November 4, 1968.

The reporting member for the Northern Section also felt that the wording could be improved, although the North did not attempt to pass upon specific language.

Yours very truly,

*Garrett H. Elmore*  
 Garrett H. Elmore

WLL:jc  
 Enc.

cc: Mr. Zinke, Mr. Allen  
 Mr. Hayes, Mr. Ellingwood

(So. Sec. 11/4/68)

AGENDA NO. 68-29.1 - SPECIFIC PERFORMANCE - (VOL. II)

ACTION TAKEN: That the measure be approved in principle and that the Commission be requested to consider changes in wording as shown below.

DISCUSSION: Mr. Green reported orally, having filed a written report. The principle is sound, i.e., to reflect modern concepts as to mutuality of remedy, and up date the code section. Form: 1) It is the sense of the Section that the Commission text goes beyond, or affords a basis for the contention that it goes beyond, revising the "mutuality of remedy" concept. The words "whether or not" seem to give rise to this possible loophole or unintended broadening of specific performance authority.

Text No. 1. The following is suggested to improve the wording in respect of this particular suggestion: "If specific performance would otherwise be an appropriate remedy, such performance may be compelled, [ ] notwithstanding that the agreed counter-performance [ ] would not have been specifically enforced, if the agreed counter-performance has been substantially performed or its concurrent or future performance is assured or can be assured to the satisfaction of the court." The foregoing change is considered an important one by the Section.

Text No. 2. The following re-structuring is suggested by the Southern Section to include the change above and in the belief the re-structuring will result in a clearer statement. "Notwithstanding that the agreed counter-performance would not have been specifically enforced, specific performance may be compelled, if specific performance would otherwise be an appropriate remedy and if the agreed counter-performance has been substantially performed or its concurrent or future performance is assured or can be secured to the satisfaction of the court."

The Section prefers the latter text.

(So. Sec. 11/4/68 - Agenda 68-29.1 -  
Specific Performance - Vol. II)

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Item: Recommendation Relating to Mutuality of Remedies in Suits for Specific Performance

Topic: Study 45 - Mutuality of Remedies

Action by Commissioners Prior to Meeting:

This is the Recommendation as it will appear in our printed report. The Recommendation will be considered in connection with Memorandum 69-1.

Commissioner Primarily Responsible: Stanton

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION AND A STUDY

*relating to*

**Mutuality of Remedies in Suits  
for Specific Performance**

September 1968

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California 94305

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## NOTE

This pamphlet begins on page 201. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 9 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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September 20, 1968

To HIS EXCELLENCY, RONALD REAGAN  
Governor of California and  
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.

The Commission herewith submits its recommendation and a study relating to this subject. The study was prepared at the suggestion of the Commission by Mr. James D. Cox, a student at the University of California, Hastings College of the Law. Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Since the recommendation of the Commission is largely based on Sections 372 and 373 of the *Restatement of Contracts*, the text of these sections, together with the comments and illustrations, is reprinted as an appendix to this report.

Respectfully submitted,  
SHO SATO  
Chairman

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RECOMMENDATION OF THE CALIFORNIA  
LAW REVISION COMMISSION

relating to

**Mutuality of Remedies in Suits for Specific Performance**

Sections 3384-3395 of the Civil Code set forth several general principles regarding the specific enforcement of contracts. Apparently, these original sections of the code seemed unsatisfactory from the beginning, and they were revised in 1874. They have not been materially changed since that time. Unfortunately, the sections remain one of the poorer products of the effort to codify common law and equity principles. In certain instances, the sections are merely inartful or inaccurate statements of established principles and have been treated as such by the courts.<sup>1</sup> In one instance, however, the rigid statement of a supposed rule—mutuality of remedies—has tended to impede the development of modern equity practice.

As enacted in 1872, Sections 3385 and 3386 undertook to state both the "positive" and "negative" applications of the mutuality of remedies rule. Under that rule, the availability of specific performance turned upon whether or not the other party to the contract would have been entitled to specific enforcement of the counterperformance. Section 3385, repealed in 1874, stated the "positive" application of the supposed rule: "When either of the parties to an obligation is entitled to a specific performance thereof, . . . the other party is also entitled to it . . . ." Section 3386 remains and states the "negative" application of the rule:

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.

For the most part, Section 3386 can be reduced to the simple and seemingly indisputable proposition that a party compelled to perform a contractual obligation is entitled to receive the counterperformance. This is the usual effect attributed to the section by the California courts. In a recent decision, for example, the Supreme Court rejected an asserted defense of lack of mutuality of remedies and, with respect to Section 3386, observed:<sup>2</sup>

The old doctrine that mutuality of remedy must exist from the time a contract was entered into has been so qualified as to be of little, if any, value, and many authorities have recognized that

<sup>1</sup> See, e.g., *Morrison v. Land*, 169 Cal. 580, 147 Pac. 259 (1915), holding that Section 3384 ("Except as otherwise provided in this Article, the specific performance of an obligation may be compelled.") does not change the well-established rule that specific performance is available only where an action for damages or other "legal" remedy does not afford adequate relief.

<sup>2</sup> *Ellis v. Mihelis*, 60 Cal.2d 206, 215, 32 Cal. Rptr. 415, 420, 384 P.2d 7, 12 (1963) (citations omitted).

the 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. . . . As was said by Justice Cardozo, "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 to-day. [Citations.] What equity exacts to-day 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. [Citations.] Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end." (*Epstein v. Gluckin*, 233 N.Y. 490 [135 N.E. 861, 862].)

Our statutes are largely in accord with the modern view regarding mutuality of remedy.

Nevertheless, Section 3386 does state that the party seeking specific performance must be "compellable specifically to perform" everything to which the opposing party is entitled under the contract. As the *Restatement of Contracts* points out, this is not and should not be the rule:<sup>3</sup>

The law does not provide or require that the two parties to a contract shall have identical remedies in case of breach. A plaintiff will not be refused specific performance merely because the contract is such that the defendant could not have obtained such a decree, had the plaintiff refused to perform prior to the present suit. It is enough that he has not refused and that the court is satisfied that the defendant is not going to be wrongfully denied the agreed exchange for his performance. The substantial purpose of all attempted rules requiring mutuality of remedy is to make sure that the defendant will not be compelled to perform specifically without good security that he will receive specifically the agreed equivalent in exchange. Sufficient security often exists where there is no mutuality of remedy; and there are cases in which mutuality of remedy would not in itself be adequate.

The *Restatement* gives numerous examples in which mutuality of the remedy of specific performance does not exist but in which that remedy should be granted.<sup>4</sup>

The California courts have been inventive in creating "exceptions" to the rule stated by Section 3386<sup>5</sup> and would now grant specific en-

<sup>3</sup>RESTATEMENT OF CONTRACTS, § 372, comment a at 678.

<sup>4</sup>See RESTATEMENT OF CONTRACTS, § 372, comment d at 679-681, *id.* § 373, comment b at 683-686.

<sup>5</sup>See, e.g., *Miller v. Dyer*, 20 Cal.2d 526, 127 P.2d 901 (1942); *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149 (1890); *Vassault v. Edwards*, 43 Cal. 458 (1872). Various exceptions to the rule in California are noted in the research study, *infra* at 1432 (where plaintiff has substantially performed), 1434 (where performance by plaintiff was impossible at time contract was executed but is possible at time of suit), 1435 (where defendant cannot compel specific performance because of his own fault), 1435 (where plaintiff is seeking to exercise an option granted by defendant), 1436 (where plaintiff has not complied with the statute of frauds but has substantially performed, has partly performed, has offered to perform, or has brought action to compel performance).

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forcement in most, but not all, of the situations mentioned in the *Restatement*. On occasion, however, injustice or unduly awkward results are obtained simply because of the existence of Section 3386. In a leading California case,<sup>6</sup> for example, a poultrymen's cooperative corporation was formed to improve economic conditions in the industry for the mutual benefit of the producers. The cooperative entered into contracts with its members to market their products, each member promising in return to deal exclusively with the cooperative. The defendant breached the agreement, thereby imperiling the success of the cooperative, even though there was nothing to indicate that the cooperative had failed or been unsuccessful in marketing the defendant's product. The appellate court reversed a judgment enjoining the defendant from selling his product to other persons and specifically enforcing the contract to sell and deliver to plaintiff. Under the court's view, the performance of the cooperative (to market the defendant's product) could not be specifically enforced and therefore the mutuality required by Section 3386 could not be attained. The *Restatement of Contracts* includes an illustration based on these facts (but with the opposite result) and points out that specific enforcement might be granted without requiring any "security" from the cooperative other than that which inheres in the circumstances of the case.<sup>7</sup>

In another leading California case,<sup>8</sup> the defendant agreed to grant a right of way over his land. In return, the plaintiff promised to construct and operate an electric railroad between Los Angeles and Pasadena. After the plaintiff had built and was operating its line from those cities to both boundaries of the land in question, the defendant refused to permit any construction over the land. In upholding the denial of a decree of specific performance, the Supreme Court said, "neither the refusal of the defendants to permit the construction over their lands, nor the willingness of 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>9</sup> In reference to Section 3386, the court expressed its view that, "if it appears that the right to this remedy is not reciprocal, it is not available to either party . . . ."<sup>10</sup>

Additional examples of cases where mutuality of the remedy of specific performance does not exist but where that remedy should be granted are pointed out in the research study, *infra* at 1437-1440, and in the Comment in 28 *California Law Review* 492, 500-505 (1940).

On the other hand, there appear to be no cases in which specific enforcement should be denied and in which denial must be placed upon the narrow doctrine of mutuality of remedies. For example, in the most common type of case in which Section 3386 is invoked, the plaintiff has agreed to render personal services in return for real es-

<sup>6</sup> *Poultry Producers Inc. v. Barlow*, 189 Cal. 278, 208 Pac. 93 (1922).  
<sup>7</sup> See RESTATEMENT OF CONTRACTS, § 373, comment b, illustration 6 at 696. The result of the *Barlow* decision as to cooperative marketing contracts was changed by amendment of Section 3423 in 1925 to provide that breach of such contracts may be enjoined and that specific performance of them may be compelled. See

Cal. Stats. 1923, Ch. 103, § 1, adding CIVIL CODE § 653 pp (repealed by Cal. Stats. 1933, Ch. 25, § 1301). See CIVIL CODE § 3423(5). See also

*Colma Vegetable Ass'n v. Bonetti*, 91 Cal. App. 103, 267 Pac. 172 (1928).

<sup>8</sup> *Pacific Elec. Ry. v. Campbell-Johnston*, 153 Cal. 106, Pac. 623 (1908).

<sup>9</sup> *Id.* at 116, 94 Pac. at 627.

<sup>10</sup> *Id.* at 112, 94 Pac. at 626.

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promptly.  
 cooperative  
 marketing

tate or some interest therein. If he has completed, or substantially completed, performance of the services, he is granted specific performance.<sup>11</sup> If he has not, specific performance is denied even though he is willing to complete performance of the services and has been prevented from doing so by the defendant.<sup>12</sup> Generally, this result is proper. The difficulty of enforcing personal service contracts and the unsatisfactory character of personal services rendered to an unwilling defendant usually preclude any assurance that the defendant will receive the substance of the performance for which he contracted. Nevertheless, cases may arise where specific performance would be appropriate under general equitable principles,<sup>13</sup> and the decision whether specific performance should be granted in such a case should be made on the basis of these principles, without regard to the narrow concept of mutuality embraced by Section 3386.

The mutuality of remedies rule has been severely criticized by all modern writers on equity practice.<sup>14</sup> Moreover, the rule has been rejected or substantially modified in most American jurisdictions.

Sections 372 and 373 of the *Restatement of Contracts* repudiate the mutuality of remedies rule and substitute the rule that specific performance may be refused if there is insufficient "security" that the defendant will receive the performance promised to him.<sup>15</sup> This security may be provided by the plaintiff's past conduct, by his economic interest in performing, or by granting a conditional decree or requiring the plaintiff to give security for his performance. The *Restatement's* assurance of performance requirement accomplishes the only reasonable objective of the mutuality of remedies rule: It assures that the defendant will not be forced to perform without receiving the agreed counter-performance from the plaintiff.

On the whole, the results of the California decisions are not far out of line with the modern view as to mutuality of remedies. The proper result, however, has often been reached only with difficulty and has seemed inconsistent with a literal reading of Section 3386.<sup>16</sup> The Commission therefore recommends that the substance of the *Restatement* rules be substituted for the mutuality of remedies doctrine presently codified in Section 3386. In addition to eliminating an anachronism from the Civil Code, the substitution would coincide with and imple-

<sup>11</sup> See, e.g., *Henderson v. Fisher*, 236 Cal. App.2d 468, 46 Cal. Rptr. 173 (1965); *Mutz v. Wallace*, 214 Cal. App.2d 100, 29 Cal. Rptr. 170 (1963).

<sup>12</sup> See, e.g., *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131 (1889). See also *Moklofsky v. Moklofsky*, 79 Cal. App.2d 259, 179 P.2d 628 (1947) (where the trial court had decreed a conveyance if the promised services were performed), criticized in 4 WITKIN, SUMMARY OF CALIFORNIA LAW Equity § 36 at 2816 (7th ed. 1960).

<sup>13</sup> Compare Illustrations 2 and 3 to Section 373, *Restatement of Contracts*.

<sup>14</sup> These criticisms are summarized and illustrated in Note, 19 HASTINGS L. J. 1430 (1968), reprinted with permission beginning on page 1450 *infra*; Comment, 28 CAL. L. REV. 492 (1940). See also, 4 WITKIN, SUMMARY OF CALIFORNIA LAW Equity §§ 39-43 at 2818-2821 (7th ed. 1960).

<sup>15</sup> Sections 372 and 373 state:

372. (1) The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party.

373. Specific enforcement may properly be refused if a substantial 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 to the satisfaction of the court.

<sup>16</sup> E.g., *Magee v. Magee*, 174 Cal. 276, 162 Pac. 1023 (1917).

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ment the California Supreme Court's view that "the 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."<sup>17</sup>

The Commission's recommendation would be effectuated by the enactment of the following measure:

*An act to amend Section 3386 of the Civil Code, relating to the specific performance of contracts.*

*The people of the State of California do enact as follows:*

SECTION 1. Section 3386 of the Civil Code is amended to read:

3386. 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. Specific performance may be compelled, whether or not the agreed counterperformance is or would have been specifically enforceable, if:

(a) Specific performance would otherwise be an appropriate remedy; and

(b) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured or can be secured to the satisfaction of the court.

*Comment.* Section 3386 is amended to eliminate the requirement that, to obtain specific performance, the plaintiff be "compellable specifically to perform, everything to which the [defendant] is entitled under the same obligation." The amendment substitutes the rules of the *Restatement of Contracts* that (1) specific enforcement should not be denied in an appropriate case solely because of a lack of "mutuality of remedies" and (2) that such enforcement may be denied if the defendant's receipt of the counterperformance is not assured and cannot be secured to the satisfaction of the court. The introductory portion of the section as amended is based on subdivision (1) of Section 372 of the *Restatement of Contracts*, and subdivision (b) is based on Section 373 of that *Restatement*. With respect to subdivision (b), the assurance or security that the defendant will receive the agreed counterperformance may be provided by the plaintiff's past conduct, by his economic interest in performing, or by granting a conditional decree or requiring the plaintiff to give security for his performance. For further pertinent discussion, see the comments and illustrations to Sections 372 and 373 of the *Restatement of Contracts*.

The section as amended achieves the only reasonable objective of the mutuality of remedies rule formerly stated by the section and developed in the case law: It assures that the defendant will not be forced to perform without receiving the agreed counterperformance from the

<sup>17</sup> See *Ellis v. Mibelis*, 60 Cal.2d 206, 215, 32 Cal. Rptr. 415, 420, 384 P.2d 7, 12 (1963).

plaintiff. See *Ellis v. Mihelis*, 60 Cal.2d 206, 215, 32 Cal. Rptr. 415, 420, 384 P.2d 7, 12 (1963) ("[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."). See also *Recommendation and A Study Relating to Mutuality of Remedies in Suits for Specific Performance*, 9 CAL. L. REVISION COMM'N REPORTS 201 (1969); 4 WITKIN, SUMMARY OF CALIFORNIA LAW *Equity* §§ 39-43 at 2818-2821 (7th ed. 1960).

Deletion of the former language concerning partial performance "together with full compensation for any want of entire performance" makes no substantive change in existing law. The requirement of substantial performance of all conditions precedent, the dispensation for an insubstantial failure to perform, and the requirement of compensation for partial default are all more fully covered by Section 3392.