# 45 6/7/68

Memorandum 68-55

Subject: Study 45 - Mutuality of Remedy

One of the topics authorized in 1957 for Commission study is whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.

Attached (pink) is a letter from a law professor to the Chairman of the Assembly Judiciary Committee suggesting that there is a need for study of this topic. The letter was referred by the Chairman to the Commission for its attention since the Commission was already authorized to make this study.

Also, in response to our letter to the members of law faculties requesting suitable subjects for study by the Commission, we received the following response from Professor James L. Blawie, University of Santa Clara Law School:

> How about Mutuality of Remedy in Statutes? California follows an entirely antiquated pattern re negative mutuality of remedy. (CC 3386, date 1872).
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> New York chucked the rule via Cardozo's opinion in Epstein v. Gluchin, 233 N.Y. 490, 135 N.E. 861 (1922), and Illinois did the same 15 or 20 years ago in a Schaefer opinion. The rule was a mistake to begin with, has no support in the cases or the literature, and we have it only because the rule is entombed in the statutes.
>
> See McClintock's hornbook, Equity § 68; 16 Col. L. Rev. 443, 3 Williston, Contracts, §§ 1433, 1436, 1440.

Some time ago, I suggested to the Hastings Law Journal that this subject would merit law review consideration. The most recent issue of the Journal contains a note on the subject. I suggest that we use the note as our background study and reprint it in our pamphlet containing our recommendation. (The note was, in fact, written with this in mind.) A careful reading of the background study prior to the meeting is desirable.

There appears to be no reason why we could not submit a recommendation on this subject to the 1969 Legislature since the research study is now available. Accordingly, we have prepared the attached tentative recommendation and study which, after review and approval by the Commission at the June meeting, could be distributed for comment and approved for printing at the September meeting.

We attach two copies of the tentative recommendation. As you review the tentative recommendation prior to the meeting, please mark your suggested editorial changes on one copy and return it to the staff so that they can be taken into account when we revise the material prior to distribution for comment.

Also attached for your convenience is a copy of Sections 372 and 373 of the Restatement of Contracts. Quite apart from the research reflected in the study and the propositions set forth in the Restatement, the staff has examined the California decisions to determine whether any negative or undesirable results might flow from "reversing" the requirement of mutuality new stated in Section 3386. There appear to be no cases in which specific enforcement ought (as a matter of policy or common sense) to be denied, and the existing section is either indispensable or even helpful in reaching that result.

Respectfully submitted,

John H. DeMoully
Executive Secretary

UNIVERSITY OF CALIFORNIA, DAVIS

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SCHOOL OF LAW

DAVIS, CALIFORNIA 95616

June 30, 1967

The Hon. William T. Bagley
Chairman, Judiciary Committee
California State Assembly
State Capitol
Sacramento, California 95814

In the course of the meeting which you and Assemblyman Biddle had on May 12 with representatives of the Berkeley and Davis law faculties I had occasion to comment briefly on a provision of the California Civil Code which many members of the legal profession today regard as outdated and a barrier to sound adjudication. The provision in question is C.C. Sec. 3386, entitled "Mutuality of Remedy" and reading as follows:

> 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.

As is pointed out in a good note in 28 California Law Review 492, the doctrine of mutuality of remedy in specific performance of contracts, which is codified in this provision, is "logically unsound" and its application has "resulted in grotesque confusion in the American cases." The doctrine prescribes that a plaintiff in an action of specific performance, a though otherwise entitled to the remedy, will be denied specific performance if the defendant could not have obtained it. Experience has shown that in many cases lack of mutuality is not a good reason for denying the remedy to the plaintiff. For example, there is little merit in refusing specific performance to the honest party to a contract solely for the reason that the dishonest party to the contract cannot get it. Furthermore, the principle often leads to undesirable consequences in cases where land is transferred or leased in return for persona' services to be performed. Obligations to render personal services are incapable, as a general rule, to be specifica ly enforced. But it is hard to see why an obligation incurred by A to transfer land to B immediately in return for B's promise to take care of A during his old age cannot be enforced, unless a serious risk exists that the personal service will not be rendered as agreed. See, for example, Moklofsky v Moklofsky, 79 Cal.App. 2d 259(1947). Also, it should be possible in the majority of instances to enforce a promise to grant a mining lease to a party who agrees to carry out certain mining operations for a number of years,

even though the reciprocal duty to mine the property cannot be specifically enforced because it calls for continuous supervision by the court. See, for example, Pimentel v. Hall-Baker Co., 32 Cal.App.2d 699(1939). Further examples of undesirable consequences of the mutuality rule are pointed out in 28 California Law Review 500-505.

Because of its inherent weaknesses, the rule of mutuality has practically disintegrated in those jurisdictions in which it has not become frozen by reason of a statutory enactment. The large majority of American jurisdictions today accept Sec. 372 (1) of the Restatement of Contracts, which declares: "The fact that the remedy of specific performance is not available to one party is not a sufficient reason for refusing it to the other party". This provision flatly contradicts Sec. 3386 of the California Civil Code.

In a fairly recent case, the California Supreme Court has expressed its dissatisfaction with the mutuality rule in its orthodox form. In Ellis v. Mihelis, 60 Cal.2d 206(1963), the following statement by Justice Gibson appears on p. 215: "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 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". In this particular case, the court was able to avoid application of Sec. 3386 because of a narrowly defined exception enunciated in Sec. 3388. In other cases, Sec. 3386 may operate as a straitjacket upon the court's ability to administer the remedy of specific performance without injustice or oppression either to the plaintiff or to the defendant.

I believe, therefore, that Sec. 3386 should be repealed. An argument might possibly be made in favor of replacing it by a provision identical with, or similar to, Sec. 373 of the Restatement of Contracts, which provides that "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". The Supreme Court of California has indicated in the Mihelis case, supra, that this principle is deemed by it the appropriate guideline in granting or denying specific performance in cases where mutuality of remedy is lacking. Because of the flexibility of the principle, its statutory recognition probably would not unduly tie the hands of the courts. Yet it might be preferable to refrain from new legislation in this field and to repeal Sec. 3386 outright.

Very sincerely yours,

Edgar Bodenheimer
Professor of Law

EB:jk

§ 372. MUTUALITY OF REMEDY.

**(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.**

**(2) The fact that the remedy of specific enforcement is available to one party to a contract is not in itself a sufficient reason for making the remedy available to the other; but it is of weight when it accompanies other reasons, and it may be decisive when the adequacy of damages is difficult to determine and there is no other reason for refusing specific enforcement.**

*Comment on Subsection* (1):

*a.* 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. Security in much more effective form may be required, as is indicated in Comment *a* on § 373.

*b.* The plaintiff may already have fully performed, in which case the defendant needs no remedy. If the plaintiff's return performance is already due or will become due in specified portions as the defendant proceeds with his performance, the decree in the plaintiff's favor will be made conditional on his rendering the return performance. Further, the defendant may be required to perform at once, even though the return performance by the plaintiff is to become due much later, if there is sufficient security that it will be ren-

dered when due (see Comment *b* on § 373). Such a decree sufficiently protects the defendant against having to give something for nothing; and it is not essential that the plaintiff's return performance should be one that will be specifically compelled.

*c.* A special application of the rule stated in the present Section is found in cases where a party to a contract assigns his rights to an assignee. The assignee can get a decree for specific performance on exactly the same terms as the assignor could; and the fact that the other party to the contract cannot get a decree against the assignee is not in itself a sufficient reason for refusing it when sought by the assignee. The act of assignment does not relieve the assignor from his contractual duty; and it may in no respect make it more probable that the agreed exchange will not be rendered. If the assignee also contracts that he will render it, the other party acquires an additional security for the performance due him (see §§ 136, 160). Even if the assignor repudiates his duty or becomes unable to perform it, the assignee may be able to get a decree by making a tender and keeping the tender good. In any case, it must appear (as required by the rule stated in § 373) that the exchange actually agreed upon has been or will be rendered, and not a substituted or different one. If the contract is one that requires personal performance by the assignor, the assignee can not get a decree by offering himself as a substitute.

*d.* Illustrations 1–7 are cases in which it is clear that the plaintiff may be given a decree for specific performance, even though this remedy would not have been available to the defendant in case of breach by the plaintiff. Other Illustrations will be found un-

der § 373, the Section stating the rule requiring security that performance by the plaintiff will be rendered.

*Illustrations of Subsection* (1):

1. A promises to act as B's nurse for a year; and B promises in return to transfer specified land to A. A fully performs as agreed; but B refuses to convey. A can get a decree for specific performance, even though at no time would a similar decree have been available to B.

2. A contracts to sell land to B for a price payable on conveyance. Later, B becomes bankrupt. The trustee for B's creditors can get a decree for specific performance against A, conditional on full payment of the price; but A cannot get such a decree against the trustee if the latter elects not to perform the contract.

3. By fraudulent statements A induces B to make a bilateral contract for the purchase of A's land. B can get a decree for specific performance by A, even though the latter could not have enforced the contract by any remedy whatever had B chosen to avoid it. B's ratification has made the contract mutually enforceable.

4. A contracts to sell land to B, but is unable to give the agreed title because of a partial interest owned by C. B can get a decree for specific performance by A, so far as A's property interest extends, with compensation for the deficiency (see § 365), even though because of his own breach A could not have obtained such a decree against B (see § 375).

5. A contracts to sell land to B, by written contract signed by A but not by B. The latter can get a decree for specific performance against A.

even though there is a Statute of Frauds that would have prevented A from getting a like remedy against B. The decree will be conditional upon B's paying the price if the time for payment fixed by the contract has arrived, otherwise upon the giving of sufficient security (see § 373).

6. A contracts, in return for $100 paid by B, to convey land for $10,000 if paid within thirty days. B assigns to C his right under this option contract. C gives notice of acceptance and tenders $10,000 within the thirty days. C can get specific performance, conditional on payment of the price, even though, prior to the notice of acceptance, A could not have compelled performance by either B or C.

7. A contracts with B, for a price to be paid by B to transfer land to C. The beneficiary C can get a decree for specific performance by A, conditional on payment of the price (see § 138). It is immaterial that A can get no such decree against C.

*Comment on Subsection (2):*

*e.* Bilateral contracts for the sale of land or unique chattels for a price in money are specifically enforceable at the suit of the vendee, because of the special character of the subject matter that he seeks. This reason is not applicable in a suit brought by the vendor to compel payment of the price; but the remedy is nevertheless available to him prior to conveyance (see § 360). The rule stated in this Subsection is one of the reasons for reaching this result.

*f.* There are certain reasons, wholly apart from any concept of mutuality, by which the remedy of specific performance is made unavailable to one party

to a contract. Such, for example, are difficulty of enforcement, interests of the public, and hardship. But these reasons exist in varying degrees and must be given varying degrees of weight. One or more of them may be so strong as to be decisive against the plaintiff; in such case, the fact that specific performance would be enforced in favor of the defendant and the feeling that a remedy should be mutually available will not turn the scale in the plaintiff's favor. On the other hand, no such reason may exist in any compelling degree and the adequacy of damages may be uncertain; in such case, if it is clear that the remedy would have been available to the defendant had he been the injured party, this fact may turn the scale in favor of granting the remedy to the plaintiff. There is no doubt, however, that it is not correct to say that specific performance is available to one party in all cases in which it is available to the other.

*Illustrations of Subsection* (2):

(See the Illustrations 1–7 of Subsection (1) for cases in which the fact that one party can get a decree for specific performance does not make it available to the other.)

8. A makes a bilateral contract for the sale of Blackacre to B for $5000. On breach by B, prior to conveyance, A can get a decree for the payment of the full price, conditional on proper conveyance. A's remedy in damages would be a judgment for $5000 less the market value of the land, the conveyance of which B has prevented. Since this remedy is of doubtful adequacy, and since B could get a decree for specific performance, the court gives a like remedy to A.

§ 373. Requirement of Security That the Agreed Exchange Will Be Rendered.

**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.**

*Comment:*

*a.* The purpose of the rule stated in the Section is to make sure that the defendant is not compelled to render his promised performance substantially in full without also receiving substantially in full the performance constituting the agreed exchange. In actions for damages for a total breach, the defendant is required to pay money only; and the amount is always reduced by the saving effected to the plaintiff by his not having to proceed with his own performance. If the defendant is compelled to perform specifically, the plaintiff is expected to do the same; and there is no saving. It may, indeed, be said that where the contract provides for performance by the defendant before the return performance by the plaintiff, the defendant consciously assumes the risk of non-performance by the plaintiff that is involved in those facts. But after a controversy has arisen and litigation is begun, that risk may be considerably increased. There is no injustice to the plaintiff in requiring the reduction of that risk, as the price of getting so drastic a remedy. This is made all the more obvious by the fact that frequently security to the defendant can be afforded by the terms of the decree itself, without cost to the plaintiff beyond his agreed performance, and that in other cases the cost of giving other security is comparatively little.

*b.* If performance by the plaintiff is already due,

or will be due simultaneously with the defendant's performance, either as a single simultaneous exchange or as a series of continuing exchanges such that no great risk is involved, the decree may be made conditional on the rendition of the agreed performance by the plaintiff. If performance by the plaintiff is not to become due until after full performance by the defendant or until some time as yet undetermined, the plaintiff is often willing that the decree shall be conditional upon simultaneous performance; and even if he is not willing, it may be just to require him to choose between damages as a remedy and a decree that is conditional upon an early performance by himself, making a proper discount when feasible. In other cases, the decree may reasonably be made conditional upon the execution of a mortgage as security for future performance, or the giving of other collateral. In still other cases, the plaintiff may already have so far partly performed and so deeply invested his funds and labor, that his own economic interest constitutes an adequate security to the defendant; in these cases no further security need be required by the court. In every case the court will mold its decree in the exercise of sound judicial discretion.

*Illustrations:*

1. A contracts to sell land to B, part of the purchase price to be paid in instalments after the time set for the conveyance of the land. B may properly be given a decree for specific performance by A, conditional on B's executing a mortgage or giving other satisfactory security that the payments will be made. This is so even though the contract provided for no such security.

2. A contracts to transfer land to B immediately, in return for B's promise to render personal services to A for a period of years. There is a dispute between them causing unfriendly relations; and A refuses to convey. B cannot get a decree for conveyance of the land, because of the increased risk that the personal service will not be rendered as agreed, and because sufficient security that it will be so rendered is lacking. Damages are the more satisfactory remedy.

3. In return for a promise of personal service, A contracts to transfer land to B on completion of the service. After part performance by B, A repudiates the contract. B is able and willing to complete the service as agreed. It may be proper for the court to issue an injunction against conveyance of the land to any third party, and an affirmative order that A shall convey it to B upon completion of the service. If such a decree will tend to cause the continuance of undesirable personal relations, this fact will be considered in relation to the degree of inadequacy of other remedies available to B, including both damages for the breach and restitution of the value of the service rendered and improvements made.

4. A contracts to transfer an undivided interest in land and in a business conducted thereon to B, to advance money for the promotion of the business, and to make B the directing partner. In return, B contracts to serve as such directing partner and to employ his time, skill, and experience in the management of the business. B's promise is of such a character that it will not be specifically enforced (see § 379), nor can the court otherwise afford sufficient security to A that it

will be performed. This is sufficient reason for refusing to compel specific performance by A and for leaving B dependent on money compensation as a remedy for A's breach.

5. A contracts to transfer land to B for $5000. In return, B pays $1000 in cash and contracts to pay the balance in four annual instalments secured by mortgage and, at once upon conveyance, to proceed to improve the land by erecting a brick dwelling house suitable to the neighborhood. The contract provides that, upon B's failure to erect the dwelling as agreed, his interest in the land shall be forfeited and title shall revert to A. B may properly be given a decree for specific performance of this contract, even though A might not be able to enforce specifically B's promise to build a dwelling. The provision for forfeiture could be specifically enforced, and it affords sufficient security to A. Even though the conveyance was not required by the contract to be conditional, the court might properly decree specific performance by A, the deed to be defeasible on condition subsequent.

6. A, a fruit growers' co-operative association, organized for mutual benefit under a statute designed to improve the economic conditions of industry, contracts with its members to market their product, each member promising in return to deal exclusively with the association. B, one of the members, threatens a breach of his promise, imperilling the success of the organization. There is nothing to indicate that A will fail to market B's product as agreed. The court may in its discretion enforce B's promise by an injunction, without requiring additional security from A.

#45 June 11, 1968

STATE OF CALIFORNIA

# C A L I F O R N I A  L A W

# R E V I S I O N  C O M M I S S I O N

## TENTATIVE RECOMMENDATION

relating to

## MUTUALITY OF REMEDIES IN SUITS FOR SPECIFIC PERFORMANCE

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

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

**NOTE**

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

LETTER OF TRANSMITTAL

The California Law Revision Commission was authorized 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 has prepared the attached tentative recommendation relating to this subject. The background study, which is also attached, was prepared by Mr. James D. Cox in response to a suggestion from the Commission that this subject merited law review consideration and is reprinted from 19 Hastings Law Journal 1430 (May 1968). Only the tentative recommendation (as distinguished from the background study) is expressive of Commission intent.

#45

TENTATIVE 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 precepts and practices of courts of equity respecting the specific enforcement of contracts. Apparently, these original sections of the code seemed unsatisfactory from the beginning and were revised in 1874, but they have not been materially changed since that time. Unhappily, 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.[1]

In one instance, however, the rigid statement of a supposed "rule" has tended to impede the development of modern equity practice and should be changed. As enacted in 1872, Sections 3385 and 3386 undertook to state both the "positive" and "negative" applications of a supposed "mutuality of remedies" rule. Under that rule, the availability of specific performance was made to turn upon the question whether or not

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1. 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.

the other party to the contract would have been entitled to specific enforcement of the counterperformance. Section 3385 stated the "positive" application of the supposed rule by providing that, "When either of the parties to an obligation is entitled to a specific performance thereof, . . . the other party is also entitled to it . . . ." That section was repealed in 1874.

Section 3386 remains and states the "negative" application of the rule as follows:

> 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 seemingly innocent statement of the mutuality requirement differs from the "classical" formulation of the rule[2] in three respects:

(1) It addresses its requirement of "mutuality" to the time that enforcement is sought rather than to the time that the contract was made;

(2) It expressly excepts the case in which the plaintiff has fully performed; and

(3) It makes allowance for the doctrine of "substantial performance" that is more fully set forth in Section 3392.[3]

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2. See, e.g., the statement of the rule in Fry, Specific Performance of Contracts 133 (3d ed. 1858) quoted in note 2 on page 1430 of the research study.

3. Section 3392 provides that:

> 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 compelled, upon full compensation being made for the default.

Thus, 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:[4]

> 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 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. [Citations omitted.] 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 of 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." [Citation omitted.]
>
> Our statutes are largely in accord with the modern view regarding mutuality of remedy.

Nevertheless, Section 3386 does require 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 or should not be the rule:[5]

4. Ellis v. Mihelis, 60 Cal.2d 206, 215, 32 Cal. Rptr. 415, 420; 384 P.2d 7, 12 (1963). The quotation of Cardozo is from Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861 (1922).

5. Comment on subsection (1) to 372, Restatement of Contracts.

> 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 or should be denied for reasons other than any lack of mutuality.[6]

The California courts have been inventive in creating "exceptions" to the rule seemingly stated by Section 3386 and would now grant specific enforcement in most, but not all, of the situations mentioned in the Restatement.[7] On occasion, however, injustice or unduly awkward results are obtained simply because of the existence of Section 3386. In a

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6. See the illustrations to §§ 372 and 373.

7. See, e.g., Miller v. Dyer, 20 Cal.2d 526, 127 P.2d 901 (1942); Magee v. Magee, 174 Cal. 276, 162 Pac. 1023 (1917); 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 1433 (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).

leading California case,[8] for example, a poultrymen's cooperative corporation was formed for the mutual benefit of the producers in improving economic conditions in the industry. The cooperative entered into contracts with each of its members to market their product, 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. 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 apparently intended to "reverse" the result of this specific case and points out that specific enforcement might have been granted without requiring any "security" from the cooperative other than that which inhered in the circumstances of the case.[9]

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8. Poultry Producers etc., Inc. v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922).

9. See the sixth illustration to § 373. The result of the Barlow decision as to cooperative marketing contracts was promptly changed by amendment of Section 3423 in 1925 to provide that breach of such contracts may be enjoined. See Colma Vegetable Ass'n v. Bonetti, 91 Cal. App. 103, 267 Pac. 172 (1928).

In another leading California case,[10] 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 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."[11] 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 . . . ."[12]

Additional examples of the odd or undesirable consequences of the mutuality rule are pointed out in the research study, infra, at 1437-1440 and in the Comment in 28 California Law Review 492, 500-505 (1940).

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10. Pacific Electric Railway Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623 (1908).

11. Id. at 116, 94 Pac. at 627.

12. Id. at 112, 94 Pac. at 626.

In contrast to the unfortunate results reached under Section 3386, there appear to be no cases in which specific enforcement should be denied and in which denial must be placed upon the lack 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 estate or some interest therein. If he has completed, or substantially completed, performance of the services, he is granted specific performance.[13] 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.[14] However, the decision as to whether specific performance should be granted in such a case should be made on the basis of the reasons, wholly apart from any concept of mutuality, by which the remedy of specific performance is made available or unavailable to one party to a contract. Such reasons include the difficulty of enforcement and the unsatisfactory character of personal services rendered to an unwilling defendant. Although these reasons will most often be decisive against the plaintiff, cases may arise where specific performance would be appropriate under general equitable principles.[15]

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13. 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).

14. See, e.g., Wakeham v. Barber, 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 (1960).

15. Compare Illustrations 2 and 3 to Section 373, Restatement of Contracts

The mutuality of remedies rule has been severely criticized by all modern writers on equity practice.[16] 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.[17] 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 requirement accomplishes the only reasonable object of the mutuality of remedy rule; it assures the defendant against being forced to perform without receiving the agreed counterperformance from the plaintiff.

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16. These criticisms are summarized and illustrated in Note, 19 Hastings L. J. 1430 (1968), reprinted with permission beginning on p. 1430 infra; Comment, 28 Cal. L. Rev. 492 (1940).

17. 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.
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> * * * * *
>
> 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.

On the whole, the results of the California decisions may not be far out of line with the modern view as to mutuality of remedies. But, often the proper result has been reached only with difficulty and has seemed inconsistent with a literal reading of Section 3386. 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 implement 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.[18]

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18. See Ellis v. Mihelis, supra, note 4.

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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.~~ If specific performance would otherwise be an appropriate remedy, such performance may be compelled whether or not the agreed counterperformance is or would have been specifically enforced. However, specific performance may be refused if the agreed counterperformance has not been substantially performed and its concurrent or future performance is not assured and cannot be secured to the satisfaction of the court.

Comment. Section 3386 is amended to eliminate the requirement that, in order to obtain specific enforcement of a contract, 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 first sentence of the section as amended is based on subdivision (1) of Section 372 of the Restatement of Contracts, and the second sentence is based on Section 373 of that Restatement. With respect to the second sentence, the assurance or security that the defendant will receive the 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.

The second sentence of the section as amended achieves the only reasonable object of the "mutuality of remedies" rule formerly stated by the section and developed in the case law: it assures the defendant that he will not be forced to perform without receiving the agreed equivalent from the 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 Study Relating to Mutuality of Remedy in Suits for Specific Performance, 9 Cal. L. Revision Comm'n Reports 000 (1969); 4 Witkin, Summary of California Law, 2818-2821 (7th ed. 1960).

Deletion from the section 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 require-

ment that the plaintiff have substantially performed all conditions precedent, the dispensation for insubstantial failure to perform, and the requirement of compensation for partial default are all more fully covered by Section 3392.

Note from 19 Hastings Law Journal 1430 (May 1968)

# 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[1] developed by the English text writer, Lord Justice Fry, after his analysis of the English chancery cases.[2] Almost since its inception, Fry's doctrine has been severely criticized.[3] 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.[4] Yet it had a plausible sound and therefore was readily adopted by the American courts.[5] Until 1900, the courts, almost without exception, applied the doctrine.[6]

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[1] 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.

[2] 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).

[3] 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).

[4] W. WALSH, A TREATISE ON EQUITY 343 (1930).

[5] *Id.*

[6] *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.[7] If he could not, he was left to his remedy at law, which by definition was inadequate.[8]

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.[9] The rule also became the subject of vigorous attacks by scholars.[10] Langdell referred to the doctrine as being "obscure in principle and extent."[11] 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.[12] Ames, who rejected the rule of mutuality of remedy as being inaccurate and misleading,[13] 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.[14]

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.[15] This theory was also advanced by Walsh.[16]

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.[17] 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).

[7] H. MCCLINTOCK, HANDBOOK OF EQUITY 185 (2d ed. 1948).

[8] J. POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS, § 8 (3d ed. 1926).

[9] 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.

[10] Ames, *supra* note 3; Durfee, *supra* note 3.

[11] Langdell, *Equity, Specific Performance, Mutuality of Remedy*, 1 HARV. L. REV. 104 (1887).

[12] Articles by Lewis, *supra* note 6.

[13] Ames, *supra* note 3, at 8.

[14] *Id.* at 2-3.

[15] Durfee, *supra* note 3, at 312-14.

[16] W. WALSH, *supra* note 4, at 354.

[17] 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.[18] In an increasing number of jurisdictions the doctrine of mutuality has been expressly repudiated.[19] 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.[20] 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

Hosp., Inc., 63 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).

[18] 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).

[19] Chrysler Motors Corp. v. Tom Livizos Real Estate, Inc., 216 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).

[20] 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.[21] It has been held that when the plaintiff agrees to pave a street[22] or to render professional services[23] 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.[24] 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[25] or due to the defendant's breach,[26] 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 . . . ."[27] 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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[21] Butterfield v. Gentles, 9 Cal. 2d 275, 70 P.2d 613 (1937).

[22] *Id.*

[23] Howard v. Throckmorton, 48 Cal. 482 (1874).

[24] 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).

[25] Furtinata v. Butterfield, 14 Cal. App. 25, 110 P. 962 (1910).

[26] Ambrose v. Alioto, 65 Cal. App. 2d 362, 150 P.2d 502 (1944).

[27] *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.[28] 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.[29] 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[30] and most other states[31] 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.[32]

In some of these cases, the defendant knew when the contract was executed that the plaintiff could not then perform.[33] 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.[34] While the result is correct, this theory is unsound.

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[28] By-Products Fuel Mach. Co. v. Dawson, 110 Cal. App. 214, 294 P. 19 (1930).

[29] 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).

[30] 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).

[31] *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).

[32] 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.

[33] Dore v. Southern Pac. Co., 163 Cal. 182, 124 P. 817 (1912); Wolleson v. Coburn, 63 Cal. App. 315, 218 P. 479 (1923).

[34] 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.[35] 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.[36] This was the law in California,[37] until the much criticized[38] case of *Linehan v. Devincense*.[39] 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."[40]

Fortunately, the case was overruled by *Miller v. Dyer*,[41] 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"[42] and was "without support of the authorities."[43] 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.[44] 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-

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[35] Cases cited note 30 *supra*.

[36] G. CLARK, *supra* note 9, § 179; J. POMEROY, *supra* note 8, § 434.

[37] 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).

[38] *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).

[39] 170 Cal. 307, 149 P. 584 (1915).

[40] Comment, *supra* note 38.

[41] 20 Cal. 2d 526, 127 P.2d 901 (1942).

[42] *Id.* at 530, 127 P.2d at 903.

[43] *Id.*

[44] G. CLARK, *supra* note 9, § 178; J. POMEROY, *supra* note 8, at 169.

formance prior to his acceptance.[45] 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.[46] However, the courts will refuse specific performance if the offeree's consideration is to render personal services.[47] 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.[48]

**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,[49] has partially performed,[50] has offered to perform,[51] or has brought an action to compel performance.[52] 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.[53] 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.[54]

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[45] 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).

[46] *See* Caras v. Parker, 149 Cal. App. 2d 621, 309 P.2d 104 (1957).

[47] *See* Archer v. Miller, 73 Cal. App. 678, 239 P. 92 (1925).

[48] *See* Note, 13 COLUM. L. REV. 737, 738 (1913).

[49] 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).

[50] 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. 750 (1930).

[51] Bird v. Potter, 146 Cal. 236, 79 P. 970 (1905); Sayward v. Houghton, 119 Cal. 545, 51 P. 853 (1897); Vassault v. Edwards, 43 Cal. 458 (1872).

[52] 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).

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

[54] 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.[55] 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.[56] 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 . . . ."[57] This result has been severely criticized.[58] Nevertheless, the California cases have uniformly held that a contract giving such a power to the plaintiff to terminate at will[59] or with notice[60] 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.[61] 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.[62] 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.[63] Within this category we find contracts requiring the plaintiff to perform construction work or to perform personal

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[55] Carver v. Brien, 315 Ill. App. 643, 43 N.E.2d 597 (1942).

[56] S. WILLISTON, CONTRACTS § 1442 (1924).

[57] *Id.*

[58] W. WALSH, *supra* note 4, at 354; S. WILLISTON, *supra* note 56.

[59] 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).

[60] Sturgis v. Galindo, 59 Cal. 28 (1881); Sheehan v. Vedder, 108 Cal. App. 419, 292 P. 175 (1930).

[61] *Cf.* G. CLARK, *supra* note 9, § 174.

[62] S. WILLISTON, *supra* note 56, § 1442.

[63] *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.[64] 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*[65] 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."[66] 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 . . . ."[67] 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.[68] 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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[64] *Id.*
[65] 153 Cal. 106, 94 P. 623 (1908).
[66] *Id.* at 116, 94 P. at 627.
[67] *Id.* at 112, 94 P. at 626.
[68] *See* Austin, *supra* note 53, at 642.

formed extensive construction work and all that remained to be done was the making of a doorway[69] or the construction of a stairway,[70] neither requiring very much time nor effort. These cases did not come within the substantial performance exception.[71] 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.[72] 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,[73] 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.[74] 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.[75] 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.[76] 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.[77] 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

[69] Johnson v. Wunner, 40 Cal. App. 484, 181 P. 103 (1919).

[70] Moklofsky v. Moklofsky, 79 Cal. App. 2d 259, 179 P.2d 628 (1947).

[71] 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.

[72] Austin, *supra* note 53, at 636.

[73] Moklofsky v. Moklofsky, 79 Cal. App. 2d 259, 179 P.2d 628 (1947).

[74] 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).

[75] 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 764 (1947).

[76] 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).

[77] 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.[78]

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.

*James D. Cox**

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[78] 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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