

8/6/68

Commissioner primarily responsible: Yale

## Memorandum 68-78

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

Attached are two copies of the tentative recommendation relating to Mutuality of Remedies in Suits for Specific Performance. We will send you the comments we receive on this tentative recommendation with the first supplement to this memorandum.

We will be sending our recommendation on this subject to the printer after the September meeting. Accordingly, please mark your editorial revisions on one copy and return it to the staff at the meeting.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

Revised July 5, 1968

STATE OF CALIFORNIA

CALIFORNIA LAW  
REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

MUTUALITY OF REMEDIES IN SUITS FOR SPECIFIC PERFORMANCE

CALIFORNIA LAW REVISION COMMISSION  
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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.

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.<sup>1</sup>

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<sup>2</sup> 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.<sup>3</sup>

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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:<sup>4</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 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 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 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:

4. Ellis v. Mihelis, 60 Cal.2d 206, 215, 32 Cal. Rptr. 415, 420; 384 P.2d 7, 12 (1963).

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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup> On occasion, however, injustice or unduly awkward results are obtained simply because of the existence of Section 3386. In a

5. Restatement of Contracts, § 372, comment a at 678.

6. Restatement of Contracts, §§ 372, 373, comment d at 679-681, comment b at 683-686.

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 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).



leading California case,<sup>8</sup> 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 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 have been granted without requiring any "security" from the cooperative other than that which inhered in the circumstances of the case.<sup>9</sup>

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

9. See Restatement of Contracts, § 373, comment b, illustration 6 at 686. 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,<sup>10</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 construction over their lands, nor the willingness of the plaintiff to do so have any bearing in the application of the equitable principle that where there is no mutuality of remedy there can be no decree for specific performance."<sup>11</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>12</sup>

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 Elec. Ry. 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.<sup>13</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>14</sup> 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.<sup>15</sup>

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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. 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).

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.<sup>16</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>17</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 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). See also, 4 Witkin, Summary of California Law Equity §§ 39-43, at 2818-2821 (7th ed. 1960).

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."<sup>18</sup>

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18. See *Ellis v. Mihelis*, 60 Cal.2d 206, 215, 32 Cal. Rptr. 415, 420, 384 P.2d 7, 12 (1963).

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, if 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, 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 portion of the section as amended is based on subdivision (1) of Section 372 of the Restatement of Contracts, and the second portion is based on Section 373 of that Restatement. With respect to the second portion, 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 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 counterperformance 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 Equity §§ 39-43, at 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.