

## SPECIFIC PERFORMANCE OF CONTRACTS—DEFENCE OF LACK OF MUTUALITY.

### *First Paper.*

#### MUTUALITY AS UNDERSTOOD IN THE EIGHTEENTH CENTURY.

Mutuality is a legal term used in several different senses. When a court declares that a contract lacks mutuality, without further examination, we cannot be sure of the idea intended to be conveyed. A contract is an agreement for the breach of which there is a legal sanction. If for any reason there is perhaps an agreement or an apparent agreement but no contract, we frequently find the court declaring that the "contract lacks mutuality." In cases of this character the expression "lack of mutuality" really means that there is no contract. The defence of "no contract," whether explained on the ground of lack of mutuality or not, is as fatal to a bill for specific performance as it is to an action for damages for a breach of the alleged but not existing contract.

The expression "lack of mutuality," however, is also used to cover a special defence to a bill for specific performance, which defence would not be available to the defendant if the plaintiff sued him on the contract at law. An illustration will perhaps convey clearest this use of the expression. B. promises to convey land to A. and A. promises to pay B. in personal services. B. refuses to convey the land as promised. A. brings a bill in equity for specific performance. The defendant B. admits the existence of a binding contract, and also admits the breach on his part, but says that there is a "lack of mutuality," and therefore the plaintiff's bill should be dismissed. By this the defendant means that there is a lack of mutuality in the remedy; that is, that if the defendant sought to enforce the plaintiff's unexecuted promise, the court could not order the present plaintiff, who would then be defendant, to fulfill his unexecuted promise to perform personal services. We have, therefore, at least two uses of the expression "lack of mutuality;"

one denoting a defect in the agreement which prevents it from being a contract either in law or equity, the other denoting merely a lack of mutuality in the remedy in equity.

Lack of mutuality of remedy is a good defence in equity in a certain class of cases. The first successful use of this defence in England was in 1828, in the case of *Flight v. Bolland*.<sup>1</sup> In this case A., an infant, entered into a contract with B. B. refused to perform. A. brought his bill against B. for specific performance of the contract. The plaintiff being an infant was not amenable to an order of a court of chancery. Had therefore the defendant been the plaintiff he could not have had specific performance of A.'s promises. The court dismissed the plaintiff's bill, saying, "It is not doubtful that it is a general principle of courts of equity to interpose only where the remedy is mutual." The case is not contra to *Clayton v. Ashdown*, M. S. S. Rep. Trin. 13 Ann in Chanc. 9 Vin. Ab. 393, a case cited by counsel for the plaintiff as a case where specific performance was granted on a contract made by an infant. In the earlier case the court held, that the fact of the assignor being an infant at the time of making the contract, did not prevent the plaintiff having specific performance. The assignor was not an infant at the time of its assignment.

The application of the rule requiring mutuality in the remedy so as to prevent an infant from having specific performance has recently been questioned in Colorado.<sup>2</sup> As late as 1895, however, *Flight v. Bolland* was expressly followed in England.<sup>3</sup> The view of the Colorado court was that this application of the rule would be "permitting the adult party to directly reap the advantage and benefit from the infancy of the contracting party."

In England and the United States the doctrine that the remedy must be mutual has been applied to cases where the plaintiff's unexecuted promises are promises which the courts refuse to make a defendant in a suit for the specific

<sup>1</sup> 4 Russell 298. See for earlier application of idea in action of defendant, "That the course of justice shall run equally." Blackstone's Com., B. III, p. 345.

<sup>2</sup> *Seaton v. Tohill*, 53 Pac. 170, Col., 1898.

<sup>3</sup> *Lumley v. Ravenscroft*, 1 Q. B. 683, 1895.

performance of a contract perform, either because of the mechanical difficulty of executing a decree or because such a decree would interfere to too great an extent with personal liberty. Thus courts of equity refuse to decree the performance of personal services. And where the promises of the defendant involve a long series of acts, as the building or management of a railroad, the court of equity will refuse to interfere because of the mechanical difficulty of executing a decree should one be made. So where the unexecuted promises of the plaintiff are to perform personal services for the defendant the court refuses to interfere at the instance of the plaintiff on the ground of lack of mutuality in the remedy.<sup>4</sup>

The same principle has been applied to cases in which the plaintiff has an unexecuted promise to build<sup>5</sup> or manage a railway<sup>6</sup> or conduct a grain elevator.<sup>7</sup>

I have stated that *Flight v. Bolland* is the first case in England which recognizes the principle that there must be

<sup>4</sup> *Pickering v. The Bishop of Ely*, 2 Y. & Coll. C. C. 249, 1843; *Stocker v. Wedderburn*, 3 Kay & Johnson, 293, 1857; *Ogden v. Fossick*, 4 De G., F. & J., 426, 1862; *Brett v. East India London Shipping Co.*, 2 H. & M. 404, 1864; *Bourget v. Monroe*, 25 N. W. 514, 1885 (agreement to support the defendant); See also *Simon v. Wildt*, 84 Ky. 157, 1886; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 1887; *Pingle v. Connor*, 66 Mich. 187, 1887; *Ballou v. March*, 133 Pa. 64, 1890; *Grunner v. Carlton*, 93 Cal. 189, 1892; *Chadwick v. Chadwick*, 25 So. 631, Ala., 1899. The last case deals with the question whether the court could force the plaintiff to support the defendant. The question is answered in the negative and therefore specific performance denied to the plaintiff. See *contra* on the point that a court of equity cannot specifically enforce a promise to support another. *Hackhett v. Hackhett*, 40 Atl. 434, N. H., 1893. See also *Stamper v. Stamper*, 28 S. E. 20, N. C., 1897.

<sup>5</sup> *Waring v. The Manchester, Sheffield, Lincolnshire Ry. Co.*, 7 Hare, 482, 1849; *Johnson v. Shrewsbury & Birmingham Ry. Co.*, 19 E. L. & Eq. R. 584, 1853; *Peto v. B. & W. and Tw. Ry. Co.*, 1 Hemming & Miller, 468, 1863. *Ross v. Union Pac. Ry. Co.*, 1 Woolworth, 26, 1863. So also where the building of a ship was involved. *Merchants' Trading Co. v. Bauner*, L. R., 12 Eq. Cases, 18, 1871.

<sup>6</sup> *Blackett v. Bates*, L. R., 1 Ch. Ap. 117, 1865; *Lattin v. Hazard*, 91 Cal. 87, 1891; *Rev. 2 H. & M. 270*; *Pullman Car Co. v. Texas Pac. Ry. Co.*, 4 Wood C. C. 317, 1882.

<sup>7</sup> *Richmond v. Dubuque & Sioux City R. R.*, 33 Ia. 422, 1871. On the general principle *Mayger v. Cruse*, 5 Mont. 485, 1885.

mutuality in the remedy in a suit for the specific performance of a contract in equity. In view of the statement of the Master of the Rolls in that case, that "it is not disputed that it is a general principle of the courts of equity to interpose only where the remedy is mutual," my assertion requires an explanation and a defence. A perusal of the arguments of counsel in the case of *Flight v. Bolland* shows that to the general principle as there stated by the court there were at that time a number of exceptions. But even the counsel for the plaintiff does not deny the existence of such a principle, and there is no evidence that the decision created adverse comment or, indeed, comment of any kind. Furthermore modern judges and text-book writers often refer to cases decided long before 1828 as supporting the assertion that there must be mutuality in the remedy. It is my purpose here to examine all cases prior to 1828 which have since been used by courts or counsel to uphold the principle that the remedy must be mutual. And first I wish to examine two cases which come nearer to involving the defence of lack of mutuality in the remedy than do any of the others.

The first case is *Hamilton v. Grant*.<sup>8</sup> To understand this case we must refer for a moment to the earlier case of *Collins v. Plummer*.<sup>9</sup> In *Collins v. Plummer*, it was intimated that a covenant in a marriage settlement on the part of the father not to suffer a recovery was not enforceable against a devisee of the land who received the land from the father after he had suffered a recovery. The decision is based on the quaint reason that when one relies on a covenant, "equity ought not to vary or alter the security."<sup>10</sup> In *Hamilton v. Grant* the covenant on the part of the plaintiff's ancestor in title was "not to suffer a recovery." It was argued by counsel on the strength of *Collins v. Plummer*<sup>11</sup>

<sup>8</sup> 3 Dow. 33, 1815.

<sup>9</sup> P. ms. 104, 1707.

<sup>10</sup> This case refers to *Warrington v. Langham*, Pre. In. Ch. 89, where A., having covenanted to devise his daughter ten thousand pounds, the court of equity refused to make the covenantor give security for the performance of his covenant. *Collins v. Plummer* seems to be a curious misapplication of the principle correctly applied in the earlier case.

<sup>11</sup> Page 40.

that the agreement was not mutual, Lord Redesdale, as one of the judges, expressing his opinion on the case in the House of Lords, states this argument as follows: "As the consideration on the part of Dickson (the plaintiff's ancestor in title) was of a description not capable of specific performance, and the agreement not being in that respect mutual . . . the plaintiff ought not to have a specific performance." As a statement of his own opinion he added: "The agreement was then not mutual; on the one side specific performance could not be enforced; and when that is the case equity leaves the parties to law, generally speaking, unless there were circumstances that did not occur in this case."<sup>12</sup> The lack of mutuality in the remedy here spoken of is between the ancestors of the plaintiffs and defendants. It arises from the idea that a covenant cannot be specifically enforced. Lord Redesdale himself has many other objections to granting the relief sought by the plaintiffs, and Lord Eldon, whose opinion in the Lords is also reported, does not mention the defence of lack of mutuality, but places his decision mainly on the point of laches.<sup>13</sup> The decision is therefore not on the point of mutuality. It is, however, an authority for the opinion of a learned judge, which opinion was expressed in voting on the case in the House of Lords, that mutuality of remedy was then, in 1815, necessary in a suit for the specific performance of a contract.

The second case is that of *Bozon v. Farlow*.<sup>14</sup> There the defendant having contracted to buy from the plaintiff his business as an attorney, the plaintiff sought specific performance. The bill was dismissed because the promises of the vendor were so vague that the court would be unable to place the defendant in possession of the subject-matter of the contract. The indefiniteness of the agreement is sufficient to defeat specific performance. It is not a decision that had the promises of the plaintiff been definite, but not enforceable, the court would refuse to make the defendant perform his promises.

In this connection we may examine a case, *Smith v. Fro-*

<sup>12</sup> Page 42.

<sup>13</sup> Page 55.

<sup>14</sup> Merv. 459, 1816. See *Richmond v. Dubuque Sioux City R. R. Co.*, 33 Ia. 422, 1871.

*mont*,<sup>15</sup> which, while it has never been cited as far as I am aware, for the principle that in specific performance the remedy must be mutual, may be said almost to involve that principle, since it was decided on one of the grounds on which the rule is now supported. B. had a contract with A. by which A. was to furnish horses between two places for A's coaches. The distance between the two places was part of the ride from Bristol to London. A. did not furnish the horses, as they had been seized by the sheriff. B. procured other horses, and A. sought by injunction to restrain B. from using any but A.'s horses. Lord Eldon refused to interfere, saying that the plaintiff has not the means of fulfilling his contract and the court has no means of compelling him to do so, and therefore to restrain the defendant from using his own horses might render the defendant liable to an action by every one whom he had undertaken to carry from London to Bristol. The court says nothing of lack of mutuality in the remedy, and on the facts it is manifestly a different thing to refuse specific performance, because the plaintiff has given evidence that he will not live up to his unenforceable and unexecuted promises, and to refuse specific performance to a diligent plaintiff merely because he could not be made to perform his unexecuted promises should he suddenly develop a disposition to break his contract. Nevertheless the case does contain the idea that a court of equity should not place a defendant in a position from which it cannot afterwards extricate him should it become proper to do so, and this idea as stated is one on which the defence of lack of mutuality in the remedy is now upheld.

The other cases in England before 1828, which are cited in support of the principle that the remedy must be mutual, are cases in which "lack of mutuality" is made the basis for the decision. The only question in these cases therefore is whether the term lack of mutuality is used in these cases in the sense of lack of mutuality in the remedy.

One case often quoted, especially in this country, to show the necessity of mutuality in the remedy, is merely

<sup>15</sup> 2 Swanston, 330, 1818.

an example of the use of the defence as applicable to a case where there is no contract to enforce. This is *Armiger v. Clarke*.<sup>16</sup> In that case the plaintiff's father holding a life estate, agreed to sell as if he were owner of the fee. The son who did hold the fee, on the death of his father, brought a bill for specific performance against the purchaser. There was no contract between the plaintiff and the defendant. The father's covenant did not bind the fee owned by the plaintiff, therefore the court says: "Since the lien is not reciprocal it ought not to conclude in a court of equity." There are, however, other cases in the eighteenth and early part of the nineteenth century where the defence of "lack of mutuality" was used, not as indicating that there was no contract, but as a special defence applicable when a bill was brought in equity for the specific performance of the contract. It is therefore necessary, in order to prove that *Flight v. Bolland* was the earliest English case involving a lack of mutuality in the remedy, to show that the special defence in equity of lack of mutuality as employed in these earlier cases was not the defence of lack of mutuality in the remedy, but a different kind of "lack of mutuality" from any that we have as yet discussed.

*Bromley v. Jefferies*<sup>17</sup> is the earliest reported case in equity involving the express statement by the court that there is a lack of mutuality sufficient to defeat a bill for specific performance. In that case one Sir Roland Berkley, on the marriage of his daughter, covenanted with his son-in-law, Bromley, that if Bromley survived him and there was issue of the marriage, Bromley should have certain lands for fifteen hundred pounds less than any other person would give for them. Sir Roland died, Bromley survived, and there was issue of the marriage. The court refused Bromley's bill for specific performance of the agreement for two reasons: first, because of its uncertainty, it not "being practical to know what a purchaser would give for it"; second, that "the agreement was not mutual; the plaintiff was not bound to take it at any price." The words "the plaintiff was

<sup>16</sup> Bunb. 111, 1722.

<sup>17</sup> 2 Vernon, 415, 1700.

not bound to take it at any price" are instructive. They show that the defence to the plaintiff's bill in the mind of the court was in the lack of mutuality of the covenants in the marriage settlement, not in the lack of mutuality of the remedy. But this lack of mutuality in the covenants was not sufficient to render the covenant of the defendant void at law. Was there then a requirement in equity at this time that there must be in a contract before it would be enforced, a mutuality of obligation greater than that required at law to make a binding contract? If this is so, and if lack of mutuality as a special defence in a court of equity in the eighteenth and early part of the nineteenth century meant this special lack of mutuality in the obligation and not lack of mutuality in the remedy, then we may expect to find certain applications of the defence of lack of mutuality in this special sense. In the first place equity is going to refuse to enforce contracts in which one party has an option to purchase or other option. This result realized, *Bromley v. Jefferies* is again reached in *Bell v. Howard*.<sup>18</sup> There the covenant of the vendor was that upon the request of the purchaser he would convey an advowson to him, but the purchaser was only bound to buy if his solicitor passed the title. The court pointed out that the articles were not mutual, being obligatory on one party only, and that the vendor could not have had execution, because, admitting that the solicitor's approval was a formal one only, as the title was bad, the plaintiff under no circumstances was obliged to take.<sup>19</sup> Outside of cases involving the specific performance of covenants by a lessor to renew at the option of the lessee, of which more presently, the two cases just mentioned contain, I believe, the only reported discussions in the eighteenth century of performance by a court of equity of a contract in which the plaintiff held an option.

The last thought in *Bell v. Howard* suggests another result which we may expect to find from the idea that equity

<sup>18</sup> 9 Mod. 302, 1742. Bill for specific performance of articles of agreement for the sale of an advowson.

<sup>19</sup> The case is also decided against the plaintiff because of undue influence and laches, and the fact that the plaintiff had waived the contract.



requires a mutuality of obligation not required at law. Where B. cannot fulfil his contract with A., and A. therefore can terminate the contract, equity at the instance of A., will not compel B. to carry out his contract as far as he is able to carry it out. And this is exactly the conclusion worked out by Lord Redesdale in *Lawrenson v. Butler*.<sup>20</sup> The defendant had agreed to give a deed of land which he had no power to give unless the deed contained a proviso that it should be void against male issue. The plaintiff sought specific performance with the proviso. As in all the modern cases where the defendant cannot give what he has contracted to give, there was no obligation on the plaintiff's part to do anything. There are two ways in which the law can regard such a situation. The law can say the parties have made a mistake in the subject-matter of the contract. There was an agreement, but no contract which a court can enforce, because the subject does not exist. Or the court can say the failure of the defendant to fulfil the representations which led to the making of the contract places the plaintiff in a position of having given a consideration for the option to call on the defendant for the performance of as many of his promises as he is able to perform. Lord Redesdale first takes the second possible attitude towards the relative position of the parties, but denies the right of the plaintiff to specific performance on the ground that he will not put the defendant in a situation "that if the agreement was averse to him he would be able to the performance, and yet if advantageous to him he could not compel a performance."<sup>21</sup>

Although in a later part of his opinion in this case Lord Redesdale takes the first possible attitude towards the relations of the parties by pointing out that owing to a mistake there is no contract, he would never have written the first paragraph if there had not been in existence the idea that equity required a mutuality of obligation which would prevent the court dealing with a contract which could be regarded as existing or terminable at the pleasure of one party.

<sup>20</sup> 1 Sch. & Lef., page 13, 1802.

<sup>21</sup> Page 18.

We find in the eighteenth century one apparent exception to the principle that a court of equity will not place a defendant into the position of being bound or not at the option of the plaintiff. This apparent exception is found in *Stapleton v. Stapleton*.<sup>22</sup> In that case a man had two sons. There was a doubt regarding the legitimacy of the eldest. In order to prevent a dispute over this subject the father and the two sons agreed to do all that was necessary to settle the family estate on the father for life and on his death one-half to each son. The eldest son died in the lifetime of the father, leaving a son, the plaintiff in the case; then the father died. The plaintiff after failing to prove the legitimacy of his father sought to force his uncle to fulfill his covenant and do those acts necessary to give the plaintiff one-half the estate. The court, after dealing with the questions raised, pertaining to the law of real property, addresses itself to the question whether there was a valuable consideration for entering into the agreement, and decides that a compromise of a doubtful right is a sufficient foundation for an agreement. The question of consideration having been disposed of, the court then continues as follows: "Another objection has been made to this agreement that the benefit on Henry and Philip's side was not mutual and equal. During both their lives the benefit and obligation was equal, and Henry would have been equally compellable to suffer a recovery with Philip. But it is stated that an alteration as to their mutual benefit has happened by the death of Henry, and it is said that if Henry had been legitimate the plaintiff would not have been compellable to suffer a recovery because the issue in tail is not compellable to perform the covenants of his ancestor the tenant in tail. But here the clause was at first equal, and it is hard to say that an act of God should hinder the agreement from being carried into execution. . . . If Henry had been legitimate and Philip had died in Henry's life leaving children, I am of the opinion Philip's sons would have been able to come against Henry for execution of the agreement."<sup>23</sup> In short, if an agreement had

<sup>22</sup> 1 Atk. 2, 1739.

<sup>23</sup> Page 12.

mutuality in obligation at its initiation, an act beyond the control of the parties making it obligatory in a law on one party only would not prevent the party no longer bound from having specific performance in equity of the defendant's promises. This case is instructive, not only as illustrating an exception to the idea that in equity there must be mutuality of obligation, but as bringing out the thought that "lack of mutuality" in the eighteenth century was neither lack of mutuality in the remedy on the one hand, or, on the other merely the defence of "no contract" expressed in a roundabout way. In the passage just quoted it will be observed that the court first dealt with the question of lack of consideration, and then as a separate question with the alleged lack of mutuality in obligation.

Another intimation in the eighteenth century of the possibility of a further exception to the idea that there must be mutuality of obligation might be thought to be found in *Campbell v. Leach*.<sup>24</sup> The case decides that a tenant for life with power to lease for years could bind the remainderman. The question was raised in the argument whether the remainderman could enforce the lease against the lessee. Lord De Grey is reported to have said ". . . and I do not know that the remainderman could enforce the contract of such tenant for life."<sup>25</sup> But in *Shannon v. Bradstreet*, a case involving a point similar to that of *Campbell v. Leach*, Lord Redesdale doubts the correctness of the passage above quoted.<sup>26</sup> Whether Lord De Grey is misquoted or not, the passage cited is, I believe, the only evidence that it was at one time supposed that the lessee of a tenant for life, the lessor having power to lease beyond the duration of his life tenancy, was not bound to the remainderman. It would appear therefore that in equity both the lessee and the remainderman were bound in spite of Lord De Grey's reported *dicta* to the contrary, and that both could have had specific performance in equity.

<sup>24</sup> Amb. 740, 1774.

<sup>25</sup> Page 749; 1 Sch. Lef. 52, 1803, page 65.

<sup>26</sup> Sugden, in his work on Powers, page 365, note 1, agrees with Lord Redesdale in thinking that DeGrey is misquoted. Sugden can also be found in Blunt's ed. of Ambler's Reports, page 749, note 17.

In the early years of the nineteenth century the peculiar idea of lack of mutuality of obligation as a special defence in equity appears in two cases. The first is *Howel v. George*.<sup>27</sup> There the defendant had agreed to convey to the plaintiff certain premises of which he was possessed under a settlement. When the agreement was made the defendant thought he had the power to convey a fee. Afterwards he found that the only way he could bar the settlement under which he held the land was to purchase other lands of equal value and settle the lands so purchased to the same uses. The plaintiff asked the court to require the defendant to make such a purchase. Vice-Chancellor Plumber says, in refusing the application, "The want of mutuality in a contract is sufficient ground for refusing specific performance. Was there mutuality in this contract? Could the defendant have insisted on the plaintiff waiting until he could procure the estate by means of his power under the proviso? Certainly not."<sup>28</sup> The case is similar to *Lawrenson v. Butler*.

The second case is one before Lord Eldon, *Clarke v. Price*.<sup>29</sup> Price had agreed with Clarke to write reports in the exchequer. There is some doubt whether Price was obliged to give all the reports he wrote to Clarke, but no doubt from the wording of the agreement that Clarke had a right to terminate the contract at any time. Lord Eldon, after deciding the case on other grounds, in the closing sentence of his opinion adopts the argument of Price's counsel, saying, "It is also quite clear that there is no mutuality in this agreement." The contract was a good contract. The only want of mutuality is in the sense in which that term was used in *Bromley v. Jefferies*; the same lack of mutuality which is in every contract containing an option to purchase or in every contract terminable at the option of one party. If *Flight v. Bolland* is the first case in which the defence of

<sup>27</sup> 1 Maddock, 13, 1815.

<sup>28</sup> Page 19. The citation in support of this opinion by Plumber, used by the reporter, is *Armiger v. Clarke*, Bunb. 111, *supra*, p. 276. The case would probably be followed to-day, as the facts show that there existed great uncertainty in regard to the defendant's ability to procure other land in accordance with his power in the settlement.

<sup>29</sup> 2 Wilson Ch. 157, 1819.

lack of mutuality in the remedy is used with effect, *Clarke v. Price*, as far as the writer is aware, is the last mention made in England of the idea that equity requires a mutuality of obligation not required at law. In America the cases of *Bromley v. Jefferies* and *Lawrenson v. Butler*, and the conception of the defence of lack of mutuality embodied in them, have had a much more persistent influence. The history of that influence and its present effect on our law in this country are subjects which I hope to take up in a subsequent article.

Before leaving our present subject, however, there are a few questions I should like to anticipate. Admitting that an examination of the cases in England prior to *Flight v. Bolland* does not show any case in which lack of mutuality in the remedy is the moving cause for the decision, and admitting also the prevalence of the idea that there was a special defence of lack of mutuality in the obligation applicable to the defendant in equity which might not be applicable to the same defendant when sued at law, why the idea of the judge who decided *Flight v. Bolland* that he was applying a well-known and universally admitted principle, and why the general acquiescence of the profession both at the time and since? Such a question is easily answered. It is true that the defence of lack of mutuality, meaning lack of mutuality of obligation, is radically different from a defence which admits the mutually binding force of the respective promises of the plaintiff and the defendant and sets up a lack of mutuality in the remedy in equity. At the same time there is a lack of mutuality of the remedy, in one sense, if only the defendant is bound, and the common law lawyers, as distinguished from the equity lawyers, were not the only persons who had a tendency to look at substantive legal relations through the medium of procedure. While *Flight v. Bolland* is the first decision founded on the idea that the remedy must be mutual, no prior case had raised and repudiated that conception of the lack of mutuality as a defence. And indeed it may hardly be questioned but that, if a case involving lack of mutuality in the remedy, not due to the effect of the Statute of Frauds, had arisen at any time within fifty years before *Flight v. Bolland*, the decision

would have been the same as in that case. In other words, there was a general notion, probably more or less vague, just as it is vague to-day, that mutuality is an important thing in equity, and so we have the easy and unnoticed transition from one idea of lack of mutuality to another and really radically different idea.

Another question which may be asked is: If there existed in the eighteenth and early part of the nineteenth century the idea that to specifically enforce a contract in equity there must be mutuality in obligation in the peculiar sense which would render a contract containing an option given on a good consideration not enforceable in equity, how can we explain the fact that there are large numbers of cases, some even antedating *Bromley v. Jefferies*, in which the lessee is allowed to bring a bill to force the lessor to renew his lease, the lessee having an option to renew in the original lease? Again, how can we explain the total disappearance in England, and not in America, of the idea that mutuality of obligation in equity is something more than the mere requirement, common to law as well as to equity, that a contract must have two parties in order to be a contract? These two questions I shall take up together in subsequent articles on the specific performance of contracts containing an option.

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