THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 49 O. S. / 40 N. S. } JUNE, 1901. No. 6.

TWO QUESTIONS IN SPECIFIC PERFORMANCE.*

The Court of Common Pleas of Philadelphia County have just had before them a contract suggesting two interesting questions in specific performance. The case bringing the contract before the court arose as the result of the formation this winter of the American League Baseball Club, commonly known as the American League, as a rival to the National League, an organization which has heretofore included the principal clubs interested in professional baseball. All the local clubs in the different cities, members of the National League, make with their players contracts, the form of which is determined at a meeting of the Association. One of these forms of contract is known as "Players' Contract Form B. Six Months." Players signing this contract agree to play for one season for the club, and during the period of their engagement not to play for any other club. The club has two options, one an option to renew the contract for two successive seasons, and the other, an option to discharge the player at any time giving him ten days' notice.

*The second series of articles by Mr. Lewis on the specific performance of contracts, and the defence of lack of mutuality, will appear in the July number. The first article, one on mutuality, in the eighteenth century, appeared in the May number.—Ed.

A player named Lajoie signed such a contract with the Philadelphia Baseball Club, and played with the club last season. This season, though the club gave notice that they exercised their option to re-employ him, he signed a contract with another club in the rival American League. The Philadelphia Baseball Club filed its bill for an injunction to restrain Lajoie from playing baseball with the new club; the new club and also the American League being made parties defendant.

The court have decided the case against the plaintiff. The opinion has not yet been published. The case, however, suggests two questions, one nearly half a century old, the other practically new. The first is: Was the case of *Lumley* v. *Wagner*[1] properly decided? The second: Should a clause in a contract giving the plaintiff an option to terminate the contract prevent the plaintiff from obtaining an order from a court of equity directing the defendant to perform his promises?

The contract in *Lumley* v. *Wagner* was that the defendant should sing at the plaintiff's theatre for a period of three months, and not use during the engagement her talents at any other theatre, concert, etc. She was restrained from breaking the negative promise. The legal doctrine which the case stands for is: that where one of the parties to a contract has made two promises, one affirmative and the other negative, the one being the correlative of the other, the court can enforce the negative by injunction, though, as in the case of a promise to sing, they may be unable to enforce the performance of the affirmative promise.

The early cases in the United States, like the early cases in England, denied the right to the plaintiff to secure an injunc-

[1] Lumley *v.* Wagner, 1 DeGex, M. & G. 604, 1852, was decided by Lord St. Leonards, then Lord Chancellor. He reversed the earlier English case before Vice-Chancellor Shadwell, of Kembel *v.* Kean, 6 Sim. 333, 1829. See also Kimberly *v.* Jennings, 6 Sim. 340, 1836. The principle on which the Vice-Chancellor proceeded was that the object of the injunction being really to force the defendant to act at the plaintiff's theatre, the court would not prevent the defendant from acting for any one else. The opinion of Lord Eldon on the question is left in doubt by the reports we have of the two cases of Morris *v.* Coleman, 18 Ves. 437, 1812, and Clarke *v.* Price, 2 Wilson, 157, 1819.

tion to restrain the breach on the part of the defendant of a negative promise, which negative promise was the correlative of an affirmative promise that the court could not enforce.[2]

Nearly all the cases mentioned in the note expressly follow the English cases before Vice-Chancellor Shadwell, of *Kemble* v. *Kean* and *Kemberly* v. *Jennings*. Perhaps the principal case is that of *Hamblin* v. *Dinneford,* where the plaintiff sought to restrain the defendant, who had contracted to play for the plaintiff for three years and for no one else during the period of the engagement, from playing for a rival theatrical manager.

Prior to *Lumley* v. *Wagner,* there is no case in this country known to the writer which adopts the principle of the English case. The first two cases reported subsequently to the appearance of *Lumley* v. *Wagner* apparently approve of the principle there stated, but in each case the injunction is refused for other reasons.[3] Curiously enough the first case in this country actually to follow *Lumley* v. *Wagner, Hayes* v. *Willio,*[4] makes no mention of *Lumley* v. *Wagner,* but from an examination of the early English cases of *Morris* v. *Coleman* and *Clarke* v. *Price* the court comes to the conclusion, that where there is a plain and distinct nega-

[2] Hamblin *v.* Dinneford, 2 Ed. Ch. (N. Y.) 528, 1835; Barnum *v.* Randall, 2 W. L. J. (Ohio) 96, 1844; Burton *v.* Marshall, 4 Gill. (Md.) 487, 1846 (injunction refused on this and other grounds); Delevan *v.* Macarte, 4 W. L. J. (Ohio) 555, 1847, s. c. 1 Ohio, Dec. 226; Sanquirico *v.* Beneditti, 1 Barb (N. Y. Sup.), 315, 1847.

The earliest case in which the subject is discussed in the United States is probably De Rivafinoli *v.* Corsetti, 4 Paige (N. Y. Ch.), 264, 1833. In this case the plaintiff attempted to secure an injunction to restrain the defendant from "singing for any one else but the plaintiff contrary to his covenant," before the time had arrived when, under his contract with the plaintiff, he was obliged to sing for the plaintiff. The injunction was refused on the ground that there was yet no promise which the defendant had to perform. The court also on this ground refused a *ne exeat* to restrain the defendant from leaving the country. The court treats the whole application with levity, and it is impossible to determine whether they would have issued the injunction had the application been made at a time when the defendant was under an obligation to sing for the plaintiff.

[3] Fredericks *v.* Mayer, 13 How. Pr. (N. Y.) 566, 1857; Butler *v.* Galletti, 21 How. Pr. (N. Y.) 465, 1861.

[4] 11 Abb. Pr. (N. Y.) 167, 1871.

tive promise not to perform personal services for any one else, and the plaintiff merely asks for an injunction to enforce this negative, and not for an order to compel specific performance of the positive promise, the court will grant the relief prayed for.[5] As just stated in a note, the two English cases referred to are not clear as to the matter. The other two reported cases in this country decided between the time of *Lumley* v. *Wagner* and 1871, the date of the decision in *Hayes* v. *Willio,* refuse, though for different reasons, to follow the English case. In the first case, *Ford* v. *Jermon,*[6] Judge Hare expressly rejects the doctrine of *Lumley* v. *Wagner,* while in the New York case of *De Pol* v. *Sohlke,*[7] the court refuse to enjoin a dancer from performing at another house because the plaintiff did not allege or prove that he suffered any special damage, in addition to the loss of the defendant's services, from the fact that the defendant danced elsewhere. This position is directly contrary to that taken by Lord St. Leonards in *Lumley* v. *Wagner,* as in that case he regarded the fact that the injunction would tend to make the plaintiff perform her affirmative promise as a ground on which the court issued the injunction.[8]

In 1873, the principle of *Lumley* v. *Wagner* was adopted in the case of the *Singer Sewing Machine Co.* v. *Union Button Hole Co.*[9] The defendant in that case had agreed to manufacture and sell to the plaintiff as many machines as the plaintiff desired, and not to sell to any one other than the plaintiff except in France and the city of Boston. The consideration for the defendant's promise was the promise by the plaintiff to advertise and push the sale of the defendant's machines. The court admitted that they could not force the plaintiff to manufacture the patented machine, and

[5] Page 174, 5.

[6] 6 Phila. (Pa.) 6, 1865.

[7] 7 Robt. (N. Y.) 280, 1867.

[8] The position taken in the New York case is also taken by Judge Simonton in Harrisburg Baseball Club *v.* Athletic Association, 8 Pa. C. C. 337, 1890.

[9] 1 Holmes, 253, 1873.

expressly followed *Lumley* v. *Wagner* in enforcing the negative covenant not to sell to any one else but the plaintiff.[10]

This decision was followed a year later in *Daley* v. *Smith*,[11] where an actress was restrained from violating an express negative promise in her contract with the plaintiff not to act except under the plaintiff's management. This decision has been regarded as the leading case in New York if not in the country,[12] and since its appearance the trend of the cases has been, almost without exception, in favor of enforcing partial performance by issuing the injunction to restrain the negative promise, though the correlative positive promise of the defendant cannot be enforced by the court.[13]

[10] Page 257, 8: The importance of the decision is somewhat lessened by the fact that the court also rests the right to the injunction on the theory that the contract amounted to a grant of the patent, and that therefore the injunction would have been issued to protect the property in the patent even if there had not been any contract. See page 258.

[11] 49 How. Pr. (N. Y.) 150, 1874.

[12] In view of this and the previous decision it was scarcely in accordance with facts for the Supreme Court of Maryland to say in 1875 that up to that time no case in this country had followed Lumley *v.* Wagner. See Hahn *v.* Concordia Society, 42 Md. 460, page 465. The court in that case does not regard Lumley *v.* Wagner with favor, but the expressions of the court on this point, in view of the facts of the case before them, must be considered dicta.

[13] In the following cases the injunction was issued: McCaull *v.* Braham, 16 Fed. 37, 1883; Chicago & A. Ry. Co. *v.* N. Y., L. E. & W. Co., 24 Fed. 516, 1885; American Association Baseball Club *v.* Pickett, 8 Pa. C. C. 232, 1890.

In the following cases, while the principle of Lumley *v.* Wagner is expressly approved, the injunction was refused on other grounds. Cort *v.* Lassard, 18 Ore. 221, 1889; Phila. Ball Club *v.* Hallman, 8 Pa. C. C. 57, 1890; Rogers Mfg. Co. *v.* Rogers, 20 Atl. 467 (Conn.), 1890; Burney *v.* Ryle, 91 Ga. 701, 1893; Jaccard Jewelry Co. *v.* O'Brien, 70 Mo. App. 432, 1897; Arena Athletic Club *v.* McPartland, 41 N. Y. App. Div. 352, 1899; Roosen *v.* Carlson, 46 N. Y. App. Div. 233, 1899.

The following cases are in part expressly based on Lumley *v.* Wagner, but it may be doubted whether the facts of each would not have enabled an injunction to be issued on the theory that the court was protecting the property of the plaintiff. Xenia Real Estate Co. *v.* Macy, 47 N. E. 147 (Ind. Sup.), 1897; Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 1898; Off. 30 N. Y. App. Div. 564, 1898.

As far as the writer is aware there has been no recent reported decision denying in toto the principle on which Lumley *v.* Wagner is founded.

There is also a class of cases to which I have not yet referred, where the injunction to restrain the breach of the negative promise of the defendant is always issued irrespective of whether the remaining affirmative promise of the defendant can be enforced or not. This is a class in which the action of the court, in restraining the breach of the negative promise, not only enforces in part a contract, but protects property. For instance, A. leases land from B. and B. covenants to supply A. with water, gas or other commodity, and in spite of his covenant B. threatens to cut the water-pipes or gas-pipes or do other acts which will prevent him from fulfilling the covenants in the lease. The court at the instance of A. restrains B. The ground for these injunctions as expressed by the courts is not always easy to ascertain. There are, however, numbers of cases where the courts have deliberately applied the doctrine of *Lumley* v. *Wagner*, disregarding the fact that the injunction issued might be justified on the familiar ground of protection to the property of the plaintiff.[14]

Of course the injunction will not be issued where the plaintiff can be compensated by the payment of money damages for the loss of the services of the defendant, or the

though the opinion above mentioned of Judge Simonton, in Harrisburg Baseball Club *v.* The Athletic Club, decided in 1890, must be regarded as based on a theory contrary to the spirit which, by enforcing an express or implied negative, seeks to enforce an affirmative promise which cannot be enforced directly.

[14] Western Union Telegraph Co. *v.* Union Pacific Ry., 3 Fed. 423, 1880, page 442; Lacy *v.* Heuck, 12 W. L. B. 347 (Ohio), 1883. See also Xenia Real Estate Co. *v.* Macy, 47 N. E. 147 (Ind. Sup.), 1897; Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 1898. As previously stated, the case of Singer Sewing Machine Co. *v.* Union Button Hole Co., 1 Holmes, 253, 1873, proceeds on the double ground of protecting property and enforcing contracts.

As an illustration of the difficulty of ascertaining the ground on which the court proceeds, see Hendricks *v.* Hughes, 117 Ala. 591, 1897, where the injunction was issued "to prevent the destruction of all contractual obligations," page 598. Injunctions are also issued to prevent a company from so acting as to render it impossible for them to perform a duty to the public, though the court cannot specifically enforce that duty. See, as an example of this class of cases, Bieneville Water Supply Co. *v.* City of Mobile, 112 Ala. 260, 1895.

loss resulting from the defendant serving others in a similar capacity. This is but an application to this kind of partial specific performance of the general rule that specific performance of a contract will not be granted if money damages at law are a sufficient compensation for the breach. The question whether a contract to play baseball is one the breach of which inflicts peculiar damage on the employer is not a question of the dignity of the services, but of the unique character of the particular services which defendant is capable of giving.

The services must be peculiar and therefore not capable of being performed by any one reasonably skilled in the work to be done. In *Frederick* v. *Mayer,*[15] the court says: "Services which involve the exercise of powers of the mind, which in many cases, as of writers or performers, are purely or largely intellectual, may form a class in which the court will interfere; such services are generally individual and peculiar." Perhaps a more satisfactory expression of the rule is given by the Supreme Court of Oregon when, in *Cort* v. *Lassard,*[16] they say, that the services must be so unique that in case of default "the same or like services could not be easily performed."[17] In that case the services of the defendants, who were acrobats, were not sufficiently unique under the above rule, not because they did not involve powers of the mind, but because there was not evidence before the court that the services agreed to be rendered could not be performed by any one skilled in gymnastics. An injunction has been refused in a case where the defendant contracted to act as manager of the plaintiff's factory.[18] In *Burney* v. *Ryle*[19] the court regarded the services of an insurance agent as not sufficiently peculiar or unique to warrant an injunction to restrain the defendant in that case from engaging with another company, and the same conclusion was reached in a case where the defendant had contracted to serve the plaintiff as a salesman in the plaintiff's

[15] 13 How. Pr. (N. Y.) 566, 1857.
[16] 18 Ore. 221, 1889.
[17] Page 227.
[18] Rogers *v.* Rogers, 20 Atl. 467 (Conn.), 1891.
[19] 91 Ga. 701, 1893.

jewelry store.[20] On the other hand the services of actors,[21] singers,[22] professional baseball players[23] and prize fighters,[24] have all been considered sufficiently extraordinary in the particular cases cited to warrant the assumption that the loss of services could not be compensated in damages.[25]

Whatever opinion may be held as to the wisdom of issuing these injunctions, which tend to effect the performance of contracts for personal services of a unique character, a question which I shall not now enter upon, no one can doubt, in view of the cases referred to, that the courts of this country have shown as a whole a strong tendency to

[20] Jaccard Jewelry Co. *v.* O'Brien, 70 Mo. App. 432, 1897.

[21] 5 Hayes *v.* Willio, 11 Abb. Pr. (N. Y.) 167, 1871.

[22] McCaull *v.* Braham, 16 Fed. 37, 1883.

[23] American Association Baseball Club *v.* Pickett, 8 Pa. C. C. 232, 1890.

[24] Arena Athletic Club *v.* McPartland, 41 N. Y. App. Div. 352, 1899 (*dicta*).

[25] Sometimes the unique character of the services to be performed by the defendant arise from the fact that the defendant controls certain property necessary to the services. See for example Chicago & Alton Ry. Co. *v.* N. Y., L. E. and W. Co., 24 Fed. 576, 1895. This is true also of all the cases cited (*supra*), note 16.

In England an express negative is now necessary in order that the injunction may be issued. That is an agreement by A. to work for a certain period for B. does not give B. the right to restrain A. from working for any one else unless there is an express promise by B. not to work for any one but the plaintiff during the period of the contract. See Whitewood Chemical *v.* Hardman, L. R., 2 Ch. (1891) 416. In Butler *v.* Galetti, 21 How. Pr. (N. Y.) 465, 1861, the court points out what they consider the radical difference between Lumley *v.* Wagner and the case before them because of the absence of an express negative clause. In the later New York case of Daly *v.* Smith, however, though in that case the contract contained an express negative, it is evident that the court did not regard the existence of the express negative as necessary. See 49 How. Pr. (N. Y.), page 56. In Cort *v.* Lessard, *supra* and in Burney *v.* Ryle, *supra,* especially in the former case, there are strong opinions showing that an express negative should not be considered essential. In both of these cases, however, the injunction was refused on other grounds. The only direct decision in favor of the position that an express negative promise is not necessary, that the writer has been able to find, is one by Judge Arnold in the Court of Common Pleas of Philadelphia County. This is the case of the American Association Baseball Club *v.* Pickett, *supra.* In that case the absence of express negative clause is the only point discussed. The court issued the injunction prayed for.

grant partial specific performance of these contracts and thus apply the principle which Lord St. Leonards first worked out in the much-controverted case of *Lumley* v. *Wagner*.

Let us now turn to our second question, whether the presence in a contract of an option to terminate deprives the plaintiff of all right of specific performance?

Ordinarily where an option is based on a sufficient consideration, the party who has given the consideration for the option, electing to exercise it, can have specific performance of the contract to the same extent as if the contract had never contained an option. When a contract contains an option to purchase, for instance, the election is nothing more than the performance on the part of the plaintiff of the conditions of the defendant's promise.[26]

[26] Laning *v.* Cole, 4 N. J. Eq. 229, 1842; Western Ry. Co. *v.* Babcock, 6 Met. (Mass.) 346, 1843; Van Doren *v.* Robinson, 16 N. J. Eq. 256, 1863; Corson *v.* Mulvany, 49 Pa. 88, 1865; Smith and Fleck's App., 69 Pa. 474, 1871; Estes *v.* Furlong, 59 Ill. 298, 1871; Reynolds *v.* O'Neil, 26 N. J. Eq. 223, 1875; Brown *v.* Slee, 103 U. S. 828, 1880; Waterman *v.* Waterman, 27 Fed. 827, 1886, page 829; Bradford *v.* Foster, 87 Tenn. 4, 1888, page 8; Calanchini *v.* Branstetter, 84 Cal. 249, 1890; Ross *v.* Parks, 93 Ala. 153, 1890; Watts *v.* Kellar, 56 Fed. 1, 1893; Sayward *v.* Houghton, 119 Cal. 545, 1898; Stanton *v.* Singleton, 54 Pac. 587 (Cal.), 1898; Boyd *v.* Brown, 34, S. E. 907 (W. Va.) 1899. There are numerous dicta *contra* to the above decisions in many of the earlier cases in this country. The case of Rider *v.* Gray, 10 Md. 282, 1856, is perhaps the only one where the decision is directly *contra*. See Geiger *v.* Green, 4 Gill. (Md.) 472, 1846; Tyson *v.* Watts, 1 Md. Ch. 13, 1847; Duvall *v.* Myers, 2 Md. Ch. 401, 1850; Bodine *v.* Glading, 21 Pa. 50, 1853; Snell *v.* Mitchell, 65 Me. 48, 1876; Mayard *v.* Brown, 41 Mich. 298, 1879.

In the following cases contracts to purchase in leases at the option of the plaintiffs' lessees were enforced, the lessee determining to exercise his option and purchase: *In re* Hunter I. Edw. Ch. (N. Y.) I, 1831; Stansbury *v.* Fringer, 11 Gil. & John. (Md.) 149, 1840; Kerr *v.* Day, 14 Pa. 112, 1850; Laffan *v.* Naglee, 9 Cal. 662, 1858; D'Arras *v.* Keyser, 26 Pa. 249, 1859; DeRutte *v.* Muldrow, 16 Cal. 505, 1860; Hawalty *v.* Warren, 18 N. J. Eq. 124, 1866; Souffrain *v.* McDonald, 26 Ind. 269, 1866; Kerr *v.* Purdy, 50 Barb. (N. Y. S. C.) 24, 1866; Willard *v.* Tayloe, 8 Wal. (U. S.) 57, 1869; Hall *v.* Center, 40 Cal. 63, 1870, Napier *v.* Darlington, 70 Pa. 64, 1871; Maughlin *v.* Perry, 35 Md. 352, 1871; Clark *v.* Clark, 49 Cal. 586, 1875; Schroeder *v.* Gemeinder, 10 Nev. 355, 1875; Newell's App., 100 Pa. 513, 1882; Herrman *v.* Babcock, 103 Ind. 461, 1885; Page *v.* Martin, 46 N. J. Eq. 585, 1890; House *v.* Jackson,

But all the cases just cited are options of what we may call an affirmative character. In all the plaintiff has given consideration for an election to be bound or not, but having made his election, both parties are equally bound. In none has the plaintiff an option to terminate the contract. Perhaps the earliest case involving an option to terminate is that of *Marble Co.* v. *Ripply.*[27] In that case B., in consideration of the conveyance to him of certain land by A. covenanted to quarry for A. annually certain amounts of stone on the land granted. A. had a right "to abandon the contract at any time, giving one year's notice." B. had to furnish the marble as long as A. and his heirs might elect to take it. The court refused A.'s bill for specific performance because of the conduct of the plaintiff, the continuous nature and personal character of the defendant's covenant, because of a clause providing for re-entry by the plaintiff in case of a breach on the part of the defendant, and finally because of lack of mutuality. On this last point the court says, "Such performance by Ripply (the plaintiff in the cross bill for specific performance) could not be decreed or enforced at the suit of the Marble Company (the defendant in the cross bill), for the contract expressly stipulates that he may relinquish the business or abandon the contract at any time on giving one year's notice; and it is a general principle that when from personal incapacity the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other."[28]

The agreement in this case gave Ripply a limited option to terminate; that is, he could not terminate the contract at any time, but he could say, "In a year from this day this contract is at an end." The assertion by the court that specific performance could not be had against the plaintiff because he

32 Pac. (Or.) 1027, 1893; Bacon *v.* Ky. Cent. Ry. Co., 25 S. W. (Ky.) 747, 1894; Waters *v.* Bew, 29 Atl. (N. J. Eq.) 590, 1894; Hayes *v.* O'Brien, 149 Ill. 403, 1894; McCormick *v.* Stephany, 41 Atl. 840 (N. J. Eq.), 1848; Madison Ath. Assoc. *v.* Brittin, 46 Atl. 652 (N. J. Eq.), 1900.

[27] 10 Wal. (U. S.) 339, 1870.

[28] Page 359.

had within his power the right to terminate the contract at any time is not therefore strictly correct. Even after giving notice of a termination of the contract, the plaintiff was bound for another year, though under the peculiar circumstances of the case the only unexecuted covenants which Ripply was bound to perform after such notice were the sale of the marble already demanded, and an account to the defendant of a portion of the proceeds. In view of this last fact and in view of the fact that there were many other sufficient reasons for the refusal of the court to grant specific performance, the case is not a strong one, though in view of the tribunal which decided it and the number of times it is cited in the reports, it is, even on the point under discussion, an important case. As far as it goes it does stand for the proposition that a contract in which the plaintiff has an option to terminate in a year cannot be enforced in equity on account of lack of mutuality.[29]

The question raised in *Marble Co.* v. *Ripply* received some attention in the case of the *Singer Sewing Machine Co.* v. *The Union Button Hole Co.*[30]

In that case, as stated when I referred to the case in another connection, the Union Button Hole Company had made a contract by which the Singer Company was to have the exclusive agency, except in France and the City of

[29] It may be questioned whether the Supreme Court of the United States did not unconsciously reverse Marble Co. *v.* Rippley on the point under discussion in the case of the Franklin Telegraph Co. *v.* Harrison, 145 U. S. 459, 1892. The contract in that case as interpreted by Judge Butler, Judge of the District Court, seems to have been that the plaintiff had the right to terminate the contract for the telegraphic services of the defendant at the end of any year, while the defendant's obligations continued as long as the plaintiff chose to pay the yearly price for the services of the telegraph company, and for the prior use of a particular wire between Philadelphia and New York. (See page 446.) Judge Butler's decree granting the plantiff's prayer was affirmed by the Supreme Court. It is doubtful, however, whether the Supreme Court did not regard the plaintiff as also bound to pay the stipulated price per year for an indefinite time. (See the language of Harlan, J., on page 471.) At all events the point of lack of mutuality because of any power to terminate the contract on the part of the plaintiff was not raised either by counsel or by the court.

[30] 4 Holmes 253 (U. S. C. C.), 1873.

Boston, for the sale of a certain patented invention embodied in a machine for making buttonholes. The Singer Company agreed to push the sales and the Union Company to furnish the machines at a stipulated price as called for. The contract contained the following clause: " . . . . In case the Singer Manufacturing Company fail to carry out their agreement as herein expressed, forfeiture of such agency shall be considered the only penalty for such failure." The Singer Company alleged in its bill that it had expended a considerable sum of money in pushing the sale of the machines, and had sold upwards of one thousand, and that the Union Company was about to transfer the agency to another company. One of the prayers of the bill, to which the defendant demurred, was for an injunction to prevent this transfer. The defendant contended that the clause quoted from the contract gave the plaintiff the option of terminating the contract and raised the defence of lack of mutuality. The court doubts the correctness of this interpretation of the contract, but referring to the *Marble Co.* v. *Ripply,* Judge Lowell says, "I cannot think that the court (the Supreme Court of the United States) intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year."[31] The learned judge cites as supporting an opposite opinion the English cases of *Hills* v. *Croll*[32] and *Rolfe* v. *Rolfe.*[33] Yet neither of these cases directly involve the point. In the former the court refuses to grant specific performance, besides expressly stating that both parties were bound; that is, one of them could not legally, under the terms of the agreement, put an end to the obligation to perform his covenant. In the second case cited the court regarded the contract as divisible and expressly refused to consider as before them the part in which the plaintiff seems to have had an option to terminate his obligation. Judge Lowell also states "that in many of the cases I have cited the plaintiff had it in his power to end the contract."[34] Here

[31] Page 259.
[32] 2 Phillips, 60, 1845.
[33] Sim. 88, 1846.
[34] Page 260.

the learned Judge must refer to the power of the plaintiff to end the contract in the sense that the plaintiff could not be compelled to complete his contract by a court of equity if he chooses to break it.

The force of the opinion in this case is considerably modified, not only by the fact that the court doubted whether the contract gave, as a consequence of the clause quoted, an option to the plaintiff to terminate it, but also by the fact that the case before the court was more than a bill for the specific performance of a contract. It was also an effort to secure protection to a species of property; that is, a grant of an exclusive right to a patent. That the court would protect this property, contract or no contract, seems to be beyond dispute. This at least is the view taken by Judge Lowell.[35]

Though the case of the *Singer Sewing Machine Co.* v. *The Union Button Hole Co.* can scarcely be said to involve the question of the specific performance of contracts containing an option on the part of the plaintiff to terminate the contract, it does contain a well-considered expression of opinion to the effect that the possession of such an option by the plaintiff will not necessarily defeat the plaintiff's right to specific performance if he would be otherwise entitled thereto.

The decision in *Marble Co.* v. *Ripply* is expressly followed in *Sturgis* v. *Galindo.*[36] Here the contract sought to be enforced was or had been terminable at the option of the plaintiff on his giving thirty days' notice. It is proper to state, however, that the bill was also dismissed on other grounds. A more important case is one decided by Judge Cooley, *Rust* v. *Conard.*[37] In that case A. agreed to prospect land belonging to B., and B. to lease to A. on a certain royalty; A. to mine the land in a certain way and have the right to terminate the lease on thirty days' notice. Judge Cooley refused specific performance at the instance of A. on two

[35] Page 258. It may also be noted that the bill was considered by the court as in effect an application for a temporary injunction until the facts and law could be fully ascertained.

[36] 59 Cal. 28, 1881.

[37] 47 Mich. 449, 1882.

grounds: first, because the contract was an inequitable bargain, and second, because of the lack of mutuality which arose from the power of A. to terminate the contract. The reason for this last position is somewhat differently stated than in the earlier United States case. "The court will also refuse to interfere in any case," says Judge Cooley, "where, if it were to do so, one of the parties might nullify its action through the exercise of the discretion which the contract or law invests him with." It will be noted that this is a reason which does not apply to cases where the contract contains an option on the part of the plaintiff to terminate so limited, that even after notice to terminate given by the plaintiff, the defendant would still have the possibility of a bill to make the plaintiff perform his promises up to the time the contract comes to an end, as a result of the plaintiff's notice.

The principle of *Rust* v. *Conard* was applied in *Iron Age Publishing Co.* v. *Western Union Telegraph Co.*,[38] where the plaintiff had the option to terminate the contract at any time, and also in *Harrison Baseball Club* v. *Athletic Association*,[39] a case in the county courts of Pennsylvania. In both of these cases, while the court says that the option to terminate the contract on the part of the plaintiff creates a lack of mutuality sufficient to deprive the plaintiff of the right to have specific performance of the obligations of the defendant, there are other grounds for the refusal of the court to grant the relief sought. In the Alabama case the plaintiff had unexecuted personal services to perform, while in the Pennsylvania case the court also placed its decision on the ground that they would not enforce a negative promise of the defendant where they could not enforce the affirmative promise of the defendant, in a case where the breach of the negative promise caused in itself no special damage to the plaintiff.[40]

[38] 83 Ala. 498, 1887, page 509.

[39] 8 Pa. C. C. 337.

[40] The case of the Philadelphia Ball Club *v.* Hallman, 8 Pa. C. C. 57, 1890, also a case in one of the Common Pleas Courts of Pennsylvania, deserves mention in this connection, though it does not directly involve the question of the effect of the plaintiff's option to terminate the con-

The conflicting views of the question presented in the cases we have been discussing and the meagreness of authority render it difficult to make any general statement as to the law. In the few cases where the plaintiff has had an unlimited option to terminate, or an option only limited by the requirement of a short notice of termination, as ten or thirty days, the courts in the reported cases have refused to grant the plaintiff's prayer on the alleged ground of lack of mutuality. Whether, however, the idea of *Rust* v. *Conard* will be persisted in, can fairly be considered doubtful. There is

tract on his right to specific performance. In that case B. agreed to play baseball for one year for A. A. had a right to terminate the contract on ten days' notice. A. had also the right to reserve "B. for another year." B. notified A. of his intention to exercise his option and requested B. to sign for another year another contract "similar in tenor, form and terms." B. refused, and was about to play for another party when A. attempted to restrain him by injunction. Judge Thayer, who decided the case, was of the opinion that the mere fact that B. could not be made to play for A. would not prevent an order restraining him playing for any one else, but he refused to issue the injunction for several reasons. First, he did not believe that there was a contract for a year with an option to renew, but merely a contract with an option to employ the defendant for another year on terms to be settled upon at the time of re-employment. Of course such a contract is too indefinite to enforce. Second, even if the contract is considered as one giving an option to the plaintiff to renew with a clause for renewal, the plaintiff must be considered as having an option to employ the defendant for life or discharge him on ten days' notice. The learned Judge was of the opinion that ". . . it is perfectly apparent that such a contract is so wanting in mutuality that no court of equity would lend its aid to compel a compliance with it." (Page 63.) Here, however, the court is using the term "want of mutuality" in the sense of inequitableness, and this inequality arises as much from the perpetual nature of the defendant's obligations as from the clause giving the plaintiff the right to terminate the contract.

Judge Thayer expressly refuses to deal with the contract as a contract to renew without a clause for renewal because the plaintiff had asked the defendant to sign a new contract "of similar tenor, form and terms." This the court regarded as a demand to sign a contract with a clause of renewal. "He," the defendant, "Is in no default therefore for refusing to comply with the demand contained in that notice, and it is too late now for them to give a fresh notice." (Page 63.) What the opinion of the court on the effect of an option to terminate the contract where the obligations of a contract were limited to a reasonable time it was not necessary for the court to state.

unquestionably a strong analogy between the defence of lack of mutuality in the remedy and the defence that the court cannot grant specific performance to the defendant and therefore ought not to grant it to the plaintiff, because on the defendant's bringing his bill against the plaintiff the plaintiff could end the whole proceeding by electing to terminate the contract. On the other hand it must be admitted that the cases are not identical. Where the defence is lack of mutuality in the remedy, the court refuses to act at the instance of the plaintiff because, should they make the defendant perform his promise, they could not then turn round and make the plaintiff perform his promise, not because the plaintiff would not have any unexecuted promises to perform, but because of the nature of the acts he has promised to do. Thus B. promises to convey land to A. and A. promises that on the conveyance he will perform for a year certain personal services for B. A. cannot have specific performance of B.'s promise to convey, because of the lack of mutuality in the remedy. For if the court should compel B. to convey the land according to his promise to A., and thereafter A. should refuse to serve B. as agreed, the court could not make A. perform these services at the suit of B. Where, however, the plaintiff has a power to terminate the contract on a short notice or on no notice at all, then the court would refuse to give specific performance at the instance of the defendant because the parties themselves have agreed that on notice of the plaintiff no contract should exist between them. There is in this case no contract for the court to enforce. In one case the court refuses to act because of its own inability to make both parties live up to their agreement, but in the case where the plaintiff has the option to terminate the contract the court refuses to make the defendant perform his promises because of what we may call an infirmity in the contract. In England at present the only idea now ever mentioned by the courts in reference to the defence of lack of mutuality is the lack of mutuality in the remedy. It is therefore probable that the defence of lack of mutuality would never even be raised there in a case where the plaintiff in a bill for specific performance had an option to terminate the contract. In this

country, however, we have the oft-stated principle that a contract, in order to be enforced by a court of equity, must be "mutual in remedy and obligation." This idea is responsible for the decision in *Rust* v. *Conard*. The origin of the idea and its usefulness as a rule of law, the writer hopes to discuss at another time.

William Draper Lewis.