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SPECIFIC PERFORMANCE OF CONTRACTS—DE-
FENCE OF LACK OF MUTUALITY.

Second Paper.

ENGLISH CASES INVOLVING CONTRACTS CONTAINING AN
OPTION.

In the first paper¹ I tried to show that in the eighteenth century a contract would not be enforced in equity if there was a lack of mutuality in the obligations of the parties. This lack of mutuality might exist though the contract was good at law. Thus contracts in which one party held an option were not generally enforceable at the instance of the party holding the option. Agreements by a lessor to renew a lease at the option of the lessee were, however, always enforced. In this paper I shall take up the cases in England involving contracts containing an option, and try to show how the rule granting specific performance to the lessee of the lessor's covenant to renew the lease was extended to all cases in which the plaintiff held an option.

¹ May, 1901, AMERICAN LAW REGISTER.

In view of the want of clearness which we frequently find in discussions of what we may call "optional cases," it will be well to fix in our minds at the outset what is meant by a contract containing an option. If A. for a consideration moving from B. agrees to let B. have the right to purchase his, A.'s, land for a sum certain, we have a contract between the parties in which A. is bound to sell if B. chooses to exercise his option. B. is not bound to buy. This is an example of a contract in which B. has an option. It is a unilateral contract. A. has agreed to sell on certain conditions. If B. performs the conditions, that is signifies his intention to complete the purchase, A. must perform his promise or break his contract. A., having given the option in a contract, based by supposition on a consideration, an attempt by A. to withdraw the option before B. elects to take has no effect on the contractual relation between the parties.

In spite of the simplicity of the elements of a contract containing an option, there is a tendency to confuse such contracts on the one hand with a continuing offer, and on the other with a contract to enter into a contract. An offer is not a contract. An offer is one of the steps leading to a contract. It is from its very nature subject to withdrawal at any time before acceptance by the offeree. Thus if A. says to B.: "I will give you until four o'clock to-morrow to accept or reject my offer," B. does not have an option. A. has merely designated the time when his offer without further notification to B. shall be withdrawn. A.'s thus designating a particular time when the offer shall at all events be withdrawn, does not prevent him from withdrawing the offer before that time.

Examples of contracts to enter into a contract are rare. It is of course possible for one man to agree with another for a consideration to accept an offer made by that other should the offer be made within a given time. In such a case the non-acceptance of an offer when made would be a breach of the first contract. The fact that the offer was not accepted shows that there is not in existence a second contract. There has been no meeting of minds by which meeting only the second contract can come into existence. There can be no such thing as specific performance of the second contract, for there is no second contract.

Besides a contract containing an option, a continuing offer, and a contract to enter into a contract, we may have an agreement without consideration to give an option. For example, A. and B. may both sign a written agreement that A. shall have until a particular time to elect to purchase a specific article from B. at a designated price, but A. may have given no consideration for B.'s promise. There is a strong tendency on the part of the courts to treat an agreement without consideration containing an option, as a continuing offer on the part of the party giving the option, which, if not withdrawn before election on the part of the holder of the option, makes a binding contract as of the date of the election. At present I shall postpone a consideration of this question and confine myself to those cases illustrating the specific performance of contracts based on a consideration and containing an option.

I have stated that the right of a lessee to compel specific performance by the lessor of his covenant to renew the lease at the lessee's option was an exception to the general rule of the eighteenth century which denied specific performance in all cases where only one party was bound. In this country leases with options to renew on the part of the lessee are rare. In England and Ireland they are common, and occur both in leases for years and in leases for lives. Thus one may let his land for a term of years giving the lessee a right to demand a new lease for another term. In this case it is usual to provide that the lessee shall notify the lessor of his desire to have a new lease within a time certain, such as six months, before the termination of the old lease. In the lease for lives it is customary to provide that three months or other certain time after the death of any one of the lives for which the lease extends, the lessee shall, if he so elects, nominate a new life and pay a fine to the lessor, and then the lessor shall grant a new lease inserting the person nominated, in place of the life that has dropped. All the leases discussed in the reports of the cases which we shall mention are for three lives. In either leases for years or lives if the original lease provides that the new lease which the landlord is to give at the demand of the tenant, shall contain a clause giving the tenant an option to again renew, then the

right of the tenant in the land may continue forever and the original and each subsequent lease is said to contain a clause for perpetual renewal.

According to a note by Ridgeway² leases for lives with clauses for perpetual renewal had their origin, at least in Ireland, as the result of the disturbed condition of the country between the years 1643 and 1660. This assertion is taken from a case in manuscript, *Burnell v. Inchiquin*, decided in 1794. In this case the bill recites that the Irish Catholic gentry during the Commonwealth surrendered their land to great lords, receiving them again as leaseholds for lives, the leases containing clauses for perpetual renewal. Whatever the cause of the invention of these leases we know that the original lease in a case reported in 1787, *Boyle v. Lysaght*,³ dates from 1660. It is certain, however, that they did come into general use in Ireland after the Revolution of 1688, as by the English statute of the eighth and ninth William III., the Earl of Ormond is expressly given the right to make such leases on his estates. The Earl seems to have used his privilege to encourage settlement on the large tracts of waste land owned by him. Similar leases have existed in England from the last half of the seventeenth century. Whether earlier or not I am unable to say.

The earliest case in the reports involving these leases, *Bridges v. Hitchcock*,⁴ was decided in 1715. The original lease in that case was for twenty years with a covenant to renew for a further term of twenty years. The plaintiff lessee had spent a considerable sum of money on the premises, and his counsel pointed out, that the covenant to grant a new lease, "was the only foundation and encouragement" he had for this expenditure. The court granted the prayer of the bill for the renewal of the lease with a clause providing for re-renewal at the option of the lessee. The point of want of mutuality was not, as far as the report shows, raised by either court or counsel.

What is the explanation for this omission to raise the point of lack of mutuality, which point, when raised a few

² 1 Ridgw., p. 178.

³ V. & S., 135.

⁴ 2 Brown, P. C., 256.

years previously in *Bromley v. Jefferies*, where the option was in a marriage settlement had proved fatal to the plaintiff?⁵ Is it that *Bromley v. Jefferies* was a careless decision founded on a misconception of the prevalent rules of law? The other cases in the eighteenth century discussed in the first paper, and which indicate a similar idea of the defence of lack of mutuality, cover too wide a field to admit of this explanation. It is, I believe, merely an instance of a conflict which so often exists between the general legal rule and an economic fact. There was at the beginning of the eighteenth century, if the conclusions reached in the previous paper are correct, a general idea that equity would not enforce a contract where one party only was bound. But at the time *Bridges v. Hitchcock* was decided, leases with options to renew had not only been in existence for some time, but a large amount of land was held under such leases. To have denied specific performance to the lessee would have unsettled a large number of titles. Had there been many cases involving mere options to purchase in simple contracts, without any previous lease and possession, it is probable that the court of equity would have soon recognized and discussed the conflict between the rule enforcing covenants to renew, and the rule denying specific performance in cases of options to buy in other contracts. But cases where the facts were like those in *Bromley v. Jefferies* were few. The cases arising under leases following *Bridges v. Hitchcock* are very numerous. An examination of the way the court dealt with these cases will show us the point of view from which such leases were regarded and make plain why the defence of lack of mutuality did not occur to either court or counsel. For *Bridges v. Hitchcock* is not peculiar in this respect. I have collected the other reported cases in the note, and in not one of them is the defence of lack of mutuality suggested.⁶

⁵ The case is reported in 2 Vern. 415, 1700. I have discussed it at length in the May number of this magazine. To understand the present discussion a careful reading of the case is necessary.

⁶ In the following cases specific performance of a covenant to renew at the option of the plaintiff was granted, the question of mutuality not being raised by court or counsel; *Bridges v. Hitchcock*, 1 Bro. P. C.

Some of these cases discuss the effect of the neglect of the tenant to give notice of his desire to renew the lease, and pay the fine on the dropping of one of the lives. Others discuss the question whether the new lease should contain a clause for re-renewal at the option of the tenant. The spirit in which both of these questions are considered is that of the interpretation of grants of land rather than that of the construction of contracts.⁷ This is especially noticeable in the

256, 1715; *Sweet v. Anderson*, 2 Bro. P. C. 430, 1722; *Hyde v. Skinner*, 2 P. Wms. 196, 1723; *Bathhurst v. Gill*, 2 Eq. Cas. Abr. 32, 1724; *Davis v. Taylor*, Harg. Jur. Argum, 427, 1726; *Charles v. Rowley*, 6 Bro. P. C. 430, 1765; *Russel v. Darwin*, 2 Bro. C. C. (Perkins ed.) 499, note, 1767; *Cooke v. Booth*, 2 Cowp. 819, 1778; *O'Neill v. Jones*, 1 Ridgw. 170, 1785; *Boyle v. Lysaght*, V. & S. 135, 1787; *Tritton v. Foote*, 2 Bro. C. C. 499, 1789; *Rawstorne v. Bentley*, 4 Bro. C. C. 415, 1793; *Iggulden v. May*, 9 Ves. 325, 1804.

In the following cases specific performance of covenants to renew at the option of the plaintiffs was denied, on the ground of the laches of the plaintiffs, and not because of any lack of mutuality: *Ripon v. Rowley*, M. S. S. 1723, cited 1 Ridgw. 194; *Allen v. Hilton*, M. S. S. 1738, cited *Fonblanque's Equity*, Bk. 1, Ch. 6, Sec. 12, note c.; *Pendreth v. Griffith*, 4 Bro. P. C. (1st ed.) 512, 1744; *Kane v. Hamilton*, 1 Ridgw. 180 (about 1778); *Bateman v. Murray*, 1 Ridgw. 187 (about 1779); *Magrath v. Muskerry*, V. & S. 166, 1787; *Bayly v. The Corporation of Leominster*, 1 Ves. 476, 1792; *Baynham v. Guy's Hospital*, 3 Ves. 295, 1796; *Chesterman v. Mann*, 9 Hare 206, 1851.

The following cases are cases involving the specific performance of covenants to renew leases arising in the eighteenth and first part of the nineteenth centuries in which the lessee was bound to renew, and therefore the question of the specific performance of optional contracts is not involved: *Lord Ross v. Worsop*, 4 Bro. P. C. 411, 1740; *Furnival v. Crew*, 3 Atk. 83, 1744; *Taylor v. Stibbert*, 2 Ves. 437, 1794; *Deane v. Marquis of Waterford*, 1 S. & L. 451, note, 1795; *Eaton v. Lyon*, 3 Ves. 690, 1798; *More v. Foley*, 6 Ves. 232, 1801. In foregoing cases specific performance was granted; in the following cases of the same class it was denied: *Jackson v. Saunders*, 1 S. & L. 443, 1802; *City of London v. Mitford*, 42 Ves. 41, 1807.

⁷ The only two cases cited above not discussing one or both of these questions are *Bathurst v. Gill*, 2 Eq. Cas. Abr. 32, 1724; *Taylor v. Stibbert*, 2 Ves. 437, 1794. In the last case the covenant was enforced against a purchaser who took with notice.

A clause for re-renewal was put in the new lease in the following cases: *Bridges v. Hitchcock*, 2 Brown P. C. 256, 1715; *Furnival v. Crew*, 3 Atk. 83, 1744; *Cooke v. Booth*, 2 Cowp. 819, 1778; *Boyle v. Lysaght*, V. & S. 135, 1787.

treatment of the question of laches. There is in this respect a difference in the Irish and English cases. In England the neglect of the plaintiff lessee, who held the option to renew, to notify his landlord and pay his fine within the specified time, was treated leniently, but the clause specifying the time of notice was not, as in Ireland, totally disregarded.⁸

In the following cases the court decreed a new lease omitting the clause for re-renewal: *Hyde v. Skinner*, 2 P. Wms. 196, 1723; *Davis v. Taylor*, cited Harj. Jud. Arg. 427, 1726; *Russel v. Darwin*, 2 Bro. C. C. 499, note, 1767; *Tritton v. Foote*, 2 Bro. C. C. 499, 1789; *Moore v. Foley*, 6 Ves. 232, 1801; *Igguiden v. May*, 9 Ves. 325, 1804.

A clause involving perpetual renewal is not against the policy of the law, but it will not be inferred without the language is unequivocal. It will not be inferred from a covenant "to renew with like covenants," though it would appear that Lord Hardwicke thought otherwise in *Furnival v. Crew*, 3 Atk. 83, 1744. In all the cases where perpetual renewal has been granted, either the language or the actions of the parties showed that that was the meaning which the parties intended to give to the original covenant to renew. The only case of doubt is that of *Furnival v. Crew* itself. There the covenant was not only to "execute one or more lease or leases under the same rents and covenants as are expressed," etc., but also, "and so continue the renewing of such lease or leases . . . from time to time, according to the true intent and meaning of said indenture" (p. 84). In the first case cited, *Bridges v. Hitchcock*, it had been intended that the lessee should put up a new mill and do other acts, which he would not be likely to do if he did not expect a perpetual lease. In *Cooke v. Booth and Boyle v. Lysaght* the parties themselves had construed their contract by renewing the original lease with a covenant for re-renewal.

⁸ In the following English cases the neglect of the plaintiff lessee did not defeat his right to a renewal: *Lord Ross v. Worsop*, 4 Bro. P. C. 411, 1740; *Rawstorne v. Bentley*, 4 Bro. C. C. 415, 1793.

In the following English cases the laches of the plaintiff defeated his right to renewal: *Ripon v. Rowley*, M. S. S., 1723, cited in 1 Ridgw. 194. In this case the request for renewal was to be made within one year from the dropping of a life, and it was not made for ten years. *Allen v. Hilton*, Fonb. Eq. Book 1 Ch. 6 Sec. 12, note c., M. S. S. 1738: This was a lease of a colliery. The lessee was to notify the lessor within three months of the expiration of the old lease. He did not notify until one month before the expiration of the old lease. *Bayly v. The Corporation of Leomminster*, 1 Ves. 476, 1792: There was here a covenant to renew on the part of the lessor, when one of three lives should drop. The lessee requested a renewal after two of the lives had dropped. *Baynham v. Guy's Hospital*, 3 Ves. 295, 1896, was a similar case, except that there all three lives seem to have dropped. *Eaton v. Lyon*,

The earliest reported case arising in Ireland under these leases is *Sweet v. Anderson*.⁹ This was a lease for three lives, each life being renewable. One of the lives left the kingdom in 1697, another died in 1714. Nothing is said as to existence of the third life. In 1715 the lessee offered to pay the fine on all three lives and asked for a new lease for three lives. The lessor resisted, but the court on appeal confirmed the decree of specific performance made in 1717 by the Irish courts. The grounds of the decision on appeal are not stated. Subsequently to this decision it seems to have been the custom for the Irish courts not to regard the dropping of even all the lives as working a forfeiture of the tenant's right to renew, provided he offered to pay the three fines for renewal.¹⁰

For a long time after 1717 no case coming from Ireland on appeal to the English House of Lords, involved an extreme application of the Irish practice of totally disregarding the laches of the tenant in not giving notice of his desire for a renewal.¹¹ About 1778 the case of *Kane v. Hamilton*¹²

3 Ves. 690, 1798: This is a case similar to *Bayly v. The Corporation of Leomminter* (*supra*). See also *City of London v. Milford*, 14 Ves. 42, 1807, remarks of Lord Eldon, page 58, and *Chesterman v. Mann*, 9 Hare 206, 1851, where there was wilful refusal to pay the fine for renewal.

⁹ 2 Bro. P. C. 430, 1722.

¹⁰ In calculating the fines it was estimated that a life was worth seven years.

The Irish cases are all in manuscript. They are given in a note to the report of the argument before the Irish courts in *Bateman v. Murray*, 1 Ridgw. 187 (about 1778), p. 193. The cases are *Carpenter v. Stewart*, 1733; *O'Hara v. Bourke*, 1756, where all three lives had dropped; *Harrison v. Prendergast*, 1754, *Ibid.*; *Shore v. Darnley*, 1766, where two lives had dropped, and *Kirkwood v. Tyrone*, where the landlord had already succeeded in an action of ejectment.

¹¹ The first reported case after *Sweet v. Anderson* is *Ross v. Worsop*; 4 Bro. P. C. 411, 1744. Here the lessor was away when the life dropped, and the lessee offered to pay the fine to his agent, but the agent wanted the lessee to accept a bill drawn on the lessee by lessor in favor of a third person. The lessee said he would, but no bill was ever presented to him. As the failure to renew was not the lessee's neglect, the court ordered a renewal. In the case of *Pendred v. Griffith*, 4 Bro. P. C. 512, 1744, the bill was dismissed, apparently because

¹² 1 Ridgw. P. C. 180.

was decided by the English House of Lords. A. had mortgaged land to the defendant's ancestor, but the mortgagor remained in possession and agreed to execute a lease for three lives renewable forever. The tenant under the agreement attorned to the mortgagee, and on the dropping of a life in 1842 applied to the mortgagee for a renewal. The mortgagee refused and the matter was dropped. The lessee died in 1757. In 1763 his heir heard of the agreement and brought his bill for renewal. A decree in favor of the plaintiff by the Irish courts was reversed. In view of the facts of the case the decision would not have created much comment in Ireland had not Lord Mansfield in his opinion said that the English courts in Irish cases had not adopted the Irish practice allowing renewals after the time designated in the original lease for the lessee to make a request had passed. He further pointed out the fact that the Irish cases confirmed in England, and which I have just mentioned in the note, contained peculiar circumstances excusing the tenant for his non-performance of the conditions of renewal. This decision was immediately followed by that of *Bateman v. Murray*.¹³ The case is analogous to *Pentred v. Griffith*. There was a lease for lives renewable on the death of any life, if demand was made and fine paid. The husband of the plaintiff had been tenant of the leasehold. He was also steward of the estate of the landlord. Though two lives dropped he made no request for a renewal, and no fine was paid. At the time the bill was filed on behalf of the heir of the tenant by his widow all three lives had dropped. The Irish courts granted a renewal,

of a quasi fraud of the tenant, he having sublet the land on the same lives that were in his lease, and on their dropping took fines for renewal of the underleases, but failed to inform his landlord of the fact. The facts of the next reported case taken on appeal to England, *Charles v. Rowley*, 6 Bro. P. C. (1st ed.) 73, 1765, seems to bear out Lord Ridesdale's opinion in *Lennon v. Napper*, 2 S. & L. 682, 1802, p. 686, that all that was decided was the question whether a supposed decree in 1723 barred the suit. There a life dropped in 1710. There was no attempt at renewal for thirty-seven years, but there were actions on the part of the landlord which might have been taken to excuse the tenant.

¹³ 1 Ridgw. 187 (about 1778).

but the English courts again reversed the decree. Lord Thurlow followed Lord Mansfield, in saying that equity would not relieve against gross laches, and furthermore that the English courts would not recognize the lax practice of granting renewals which had prevailed in Ireland. Lord Redesdale says, in 1802, in the case of *Lennon v. Napper*,¹⁴ that the decision under the peculiar facts of the case was proper even under the practice of the Irish courts. However that may be, either the decision, or the opinion or both, seems to have created a great deal of uneasiness. One-seventh of the land in Ireland was at this time held under these leases. The Irish Parliament immediately passed an Act, 19 and 20, Geo. III., c. 30, for the "relief of tenants holding under leases for lives containing covenants for perpetual renewal." This act provided "that the courts of equity upon an adequate compensation being made shall relieve such tenants (those who have neglected to renew after lives have dropped) and their assigns notwithstanding such lapse of time, if no circumstances of fraud be proved against such tenants." This act, while it may not have reversed the law as applied in *Bateman v. Murray*, annulled the effect of Lord Thurlow's language, and made the local practice in Ireland in regard to these leases binding on the English courts.¹⁵

¹⁴ 2 S. & L. 682, 1802.

¹⁵ The reported cases decided subsequent to the statute are: *O'Neil v. Jones*, 1 Ridgw. 170, 1785; *Boyle v. Lysaght*, V. & S. 135, 1787. In the first case there was an express reservation in the lease that unless a life was renewed within six months after a life dropped, no renewal was to be granted. Yet the renewal was granted after at least two lives had dropped, though it is a question if the bill was granted, because the court thought there had been a subsequent promise to renew. The case of *Magrath v. Muskerry*, V. & S. 1667, 1787, was brought before the statute; the statute did not affect it and the relief was denied.

It was held that where the landlord on the dropping of a life makes a demand on a tenant to renew or pay the fine, the tenant must pay the fine within a reasonable time. What is a reasonable time depends on circumstances. Six months is suggested in *Deane v. Marquis*, of Waterford, 1 S. & L. 451, note; more than six months had elapsed in that case, though because of peculiar circumstances the relief was granted, while it was denied in *Jackson v. Saunders*, 1 S. & L. 443, 1804, though six months had not elapsed from the time of the formal demand on the part of the lessor.

There is no difference in principle between a lease with an option to renew and a lease with an option to buy. While the former are almost unknown in this country, the latter are rare in England, and in the eighteenth century seem to have been almost unknown. A case containing such a lease is reported in 1785 and another in 1808, but neither involve the specific performance by a court of equity of the option to purchase,¹⁶ and as far as I am aware the specific performance of such an option was not involved in any reported English case until 1842. It was then assumed without argument that specific performance of the option to purchase would be granted.¹⁷

The examination of these cases involving options in leases shows that when such a lease came before the court, the court regarded the tenant as having from the start a perpetual interest in the land, or at the least an interest for the second lease, and not as having merely a contract with the defendant. This attitude of the court of equity, so evident from the cases, must have been the reflex of the attitude of the country as a whole. The conditions under which these leases seem to have first been granted, the possession of the plaintiff and his probable improvement of the land, made it necessary for the court to give effect to the covenant of the lessor to renew at the option of the lessee. Had the courts not granted specific performance they would have failed to protect what was in the eyes of the parties and of the people generally an existing right to possession of land. As I have said, the economic fact was opposed to the application of the general rule requiring mutuality in the obligation. And that being so it is natural, not only that the court should refuse to apply the general rule in the particular instance,

¹⁶ *Lawes v. Bennett*, 1 Cox. Eq. 167, 1785; *Townley v. Bedwell*, 14 Ves. 591, 1808.

¹⁷ The case is *Drant v. Vause*, 1 Y. & C. C. C. 580. There is, page 581, merely a statement that specific performance was granted, the devisee of the lessor being defendant. The case discusses the question whether executor or the devisee of the lessor is entitled to the purchase money. Lessee's options to purchase were enforced in *Collingwood v. Row*, L. J., 26 Eq. N. S. 649, 1857; *Welchman v. Spinks*, 5 L. T. N. S. 385, 1861. Specific performance is mentioned as having been granted in a similar case in *Weeding v. Weeding*, 1 J. & H. 424, 1861.

but it is also natural that the fact that they were *pro tanto* abrogating that rule should never occur to either court or counsel. The existence of these decisions under leaseholds does not prove therefore that the idea that equity would have nothing to do with a contract containing an option did not exist. The cases are no more authority to prove such a proposition than they show that in the eighteenth century the courts of equity granted specific performance though the defendant showed that the plaintiff had been guilty of gross laches. All this becomes plain when once we grasp the fact that the court in these cases regarded themselves as protecting interests in land, rather than exercising their jurisdiction to enforce contracts.

Nevertheless the existence of these cases under leaseholds was destined to abolish, at least in England, the idea that there must be in equity a mutuality of obligation in a contract not necessary when a suit is brought on the contract at law. The passing away of the old idea of mutuality was an unconscious process, brought about by several factors, one of which was the tendency of the mind towards logical consistency. If A. leases to B. with a covenant to renew the lease for one or more terms, and B. goes into possession and makes improvements, B. has equities to enforce a renewal, which do not exist in a mere contract between A. and B. in which B. has an option to purchase A.'s land. It is possible that cases like *Bridges v. Hitchcock*, granting specific performance in the first case, and cases like *Bromley v. Jefferies*, denying it in the second, could have existed until the present time had the difference between them been examined and emphasized by the courts dealing with the earlier cases. At the same time the only difference is the fact of the possession of the plaintiff in the first case and his possible improvement of the land on the faith of the defendant's covenant. In all other respects the cases are identical. They are both contracts containing an option, and as no one in the eighteenth century discussed the possible distinction between them it is not unnatural that the rule granting specific performance in the case of options in leases would tend to become the rule in all optional contracts. Had the cases involving the application of the original general rule

requiring mutuality in the obligation been numerous, the mere analogy between these cases and options in leases would not have had any effect. But the cases applying the general rule were few, while the cases under leaseholds seem to have been of constant occurrence, and an old rule seldom applied tends to be lost when the application of an exception, not recognized as an exception, becomes the daily practice of the courts.

While we may believe the factors just mentioned had their influence in the unconscious abrogation of the old idea of lack of mutuality as a defence in equity, it is doubtful by themselves they would ever have produced that result, had it not been that the English courts of equity in the first part of the nineteenth century made a totally different application of the defence of lack of mutuality. This application was made in the case of *Flight v. Bolland*.¹⁸ It is not necessary here to discuss this decision. I have done that at length in my first paper. It is only necessary to point out here that in this case the court refused to grant specific performance to an infant on the ground that the remedy was not mutual. From that time lack of mutuality as a defence in equity meant a definite thing, but something very far from the lack of mutuality which defeated the plaintiff in *Bromley v. Jefferies*. In the earlier case lack of mutuality was lack of mutuality in the obligations as fixed by the parties; in the latter case it meant that the court of equity being unable to make the plaintiff perform his unexecuted promises, would not force the delinquent defendant to perform his promises. Whether lack of mutuality as a defence had ever been perfectly clear is doubtful. It certainly was not clear at the beginning of the nineteenth century in England. The effect of *Flight v. Bolland* was to attach a definite meaning to this indefinite defence. It clarified the atmosphere. From that time to this, whatever confusion has existed or still exists in this country as to the meaning of the defence, in England, it has meant lack of mutuality in the remedy in equity, and nothing else.

This new meaning of mutuality enabled contracts contain-

¹⁸ 4 Russell 298, 1828.

ing an option to be enforced without the necessity of regarding such enforcement as any exception to the rule. When the party who holds the option elects to exercise it he is bound as much as the other party. Thus if there is a contract containing an option to purchase, the plaintiff having made his election is as much bound to pay the money, as the defendant to convey the land, and furthermore a court of equity can make the plaintiff perform his promise. There is no lack of mutuality in the remedy. Simple contracts, that is contracts not in leases, in which one party gives the other an option to buy land, though common with us, are rare in England. As far as I am aware no such case (subsequent to those mentioned in the first paper as denying specific performance) arose until *Emuss v. Smith*, decided in 1848.¹⁹ At that time from the causes we have detailed the old idea of mutuality in the obligation as a special defence in equity was forgotten, the defence of lack of mutuality in the remedy did not as stated apply; there were the numerous cases enforcing such options in leases, and there is no evidence that either court or counsel thought of doubting the correctness of the decree enforcing the plaintiff's option. The case does not deal with that question, but with the disposal of the money paid by the purchaser.²⁰ And though the case cited is the only English case on the specific performance of options to purchase land not in leases which I have been able to find, there would appear to be no doubt but that the old rule of *Bromley v. Jefferies*, and the principle of lack of mutuality for which it stands is completely dead and that where a contract contains an option based on a consideration, no idea of lack of mutuality will in England ever again prevent the party holding the option from having specific performance.²¹

The development which we have examined in this and the previous paper has, I believe, a value beyond the mere

¹⁹ 2 DeG. & Sm. 722.

²⁰ The case states, however, page 729, that specific performance had been granted at the suit of the purchaser.

²¹ In *Homfray v. Fothergill*, 1 Eq. Cas. 567, 1866, an option to purchase a partner's interest before third persons had an opportunity to buy was enforced.

information involved. It illustrates one of the ways in which legal changes are brought about. We have first a general and important principle of law. In this instance the principle is that it is not proper for a court of equity to enforce a contract where one party only is bound. Contracts in which the plaintiff has had an option are not enforced. But the application of this principle in a single instance, the renewal of leases, would result in the courts refusing to protect a right of property recognized by the community as entitled to protection. In one sense the old idea is not disregarded. No one thinks of applying it to options in leases. The exception survives in the law, without being recognized as an exception. Circumstances make the instances of the application of the exception numerous, while the courts have comparatively little opportunity to apply the old general rule. The old rule of lack of mutuality as a defence is partially forgotten, or at least ceases to have whatever of clearness it originally possessed. Then a case comes before the court not under the old rule, but the old rule of lack of mutuality as defeating specific performance is in terms applied to the case, and thereafter the defence takes its meaning from the facts of the new case. Lack of mutuality in the obligation becomes lack of mutuality in the remedy. The same phrase, lack of mutuality, is used, but the defence is different. The rule granting specific performance in the case of options in leases, is no longer an exception to the rule requiring mutuality in equity because that rule has taken on a new meaning. Thus all is prepared for the final step which is to grant specific performance in a case not under the original exception to the old statement of the defence. When this step is taken optional contracts become enforceable in equity. The old defence of lack of mutuality passes completely away. Another and totally different rule takes its place.

The American cases discussing the specific performance of contracts in which the plaintiff has had an option, and the ideas in this country of the defence of lack of mutuality I hope to take up in my next paper.

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