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SPECIFIC PERFORMANCE OF CONTRACTS—DEFENCE OF LACK OF MUTUALITY.[1]

Sixth Paper.

CONTRACTS OF INFANTS, MARRIED WOMEN AND LUNATICS.

The object of this paper is to examine how far the defence to a bill for specific performance of want of mutuality has been or can be applied to cases where the plaintiff is either an infant, a married woman, or a lunatic. We will deal with each separately, and first with those cases in which the bill is brought by an infant. I have already pointed out that the first clear application of the defence of want of mutuality in the remedy to a bill for specific performance occurred in the English case of *Flight* v. *Bollard*, decided in 1828.[2] The plaintiff in that case was an infant. As they could not decree specific performance against the infant, the court held that

[1] The other papers will be found 49 A. L. R. pp. 270, 382, 445, 507, 559, and Vol. 50, p. 65.

[2] 4 Rus. 298; 49 A. M. L. 270. For an explanation of the case of *Clayton* v. *Ashdown*, 9 Vin. Abr. 393 (1710), which is sometimes cited as a case involving specific performance against an infant, see 49 A. L. R. 271.

they would not grant it in his favor.[3] In a recent case in Colorado, *Seaton* v. *Tohill*,[4] the court, without reference to the doctrine of want of mutuality in the remedy, refused to admit the plea of the plaintiff's infancy, saying that this would be "permitting the adult party to directly reap the benefit from the infancy of the contracting party." This is the only American case I have seen. From it we may infer that, in the United States, the ability of a defendant to resist specific performance on the sole ground of the infancy of the plaintiff and the consequent lack of mutuality in the remedy is an open question. The position of the Colorado court amounts to this: That the tendency of the law to protect an infant and to prevent others from taking advantage of the infancy, is stronger than the policy which requires mutuality in the remedy.[5]

A contract of a married woman, on which she can sue or be sued at law, she can in equity be decreed to perform to the same extent as if she were unmarried.[6] Therefore, when a married woman seeks to enforce a contract made with her, the question before the court is not whether the remedy is mutual. In such cases the real question is the existence or non-existence of a valid contract. The idea of more than one court in cases involving the enforcement of contracts of married women, that the question before them was one involving mutuality, has led to a good deal of confusion of

[3] See further, *Lumley* v. *Ravenscroft*, L. R. 1 Q. B. 683 (1895).

[4] 53 P. 170 (1898).

[5] In a final paper of this series I hope to deal with the value of the rule requiring mutuality in the remedy.

[6] This statement is apparently a necessary inference from the language of the statutes enabling married women to contract: *Klecka* v. *Ziegler*, 32 A. 241, Md. (1895). See also *Young* v. *Young*, 45 N. J. Eq. 27 (1889), 41; *sed quare Chamberlin* v. *Robertson*, 31 Ia. 408 (1871); *see infra*, note 17. There is also an Irish case, *Fennelly* v. *Anderson*, 1 Ir. Ch. 706 (1851), 712, which may be regarded as throwing some doubt on the assumption. There a husband and wife agreed to sell certain household interests of the wife. It appears that the woman might have rendered the contract binding on her by acknowledging it under the statute of 4 & 5 W. 4, c. 92; but it is to be presumed that she did not do so. The court seem to admit that the woman is not bound, and could not be made to convey, pp. 710, 712, yet they grant specific performance. Compare argument of Ambler

language. Thus in *Richards* v. *Green*,[7] the court had under consideration a contract by a married woman to purchase land and give a bond and mortgage as part payment. The married woman had no separate property. The contract as an executory contract was void. There would, therefore, seem to be no question of the plaintiff's inability to secure a conveyance.[8] The court, however, discussed lack of mutuality in the remedy, citing the case of the infant plaintiff, *Flight* v. *Bolland*.[9] Similar confusion appears in the language of the Supreme Courts of at least two other states. The Pennsylvania Supreme Court say, in reply to the defence of want of mutuality, in a suit involving a contract by a married woman to purchase real property, that the defence does not apply where the "one under legal disability has performed."[10] Now the woman in the case in question had merely tendered the purchase price. If the contract of the

in *Daniel* v. *Adams*, Ambler, 495 (1765), 497. The actual decision can be supported on the theory that the contract was with the husband, and that prior to filing the bill he had offered a good conveyance: see *infra*, p. 255. This last idea seems to be in the mind of the court; note the language and case cited p. 710. In Pennsylvania, under the Act of 1893, P. L. 344, there was a difference of opinion as to whether the contract for the sale of her land by a married woman had to be separately acknowledged by her, but no doubt as to the power of a court of equity to decree specific performance if the contract was properly entered into. Compare *Reed's Est.*, 3 Pa. D. R. 503 (1893), with *Wertlinger* v. *Jack*, 16 Pa. C. C. 112 (1895). The Act of 1901, P. L. 67, expressly does away with the necessity for a separate acknowledgement.

[7] 23 N. J. Eq. 536 (1872). A married woman's power to contract in New Jersey is confined to contracts relating to her separate property: Gen. Stats. N. J. (1895), p. 2014. In *Richards* v. *Green* the one hundred dollars paid by the wife in signing the contract, and the five hundred dollars tendered subsequently, was the property of the husband: see p. 538.

[8] *Richards* v. *Green* was ultimately decided against the defendant on the ground that there was a binding contract between him and the husband.

[9] In the case before the court there was of course in a possible sense want of mutuality in the remedy, *i. e.*, the same want of mutuality which exists in every case of an agreement between two or more persons which is not the source of legal obligations on either party.

[10] *Yerkes* v. *Richards*, 153 Pa. 646 (1893), 630. The case was not brought for the specific performance of the contract, but was a suit for damages for the breach of the contract.

married woman had been void, the mere offer on her part to perform it would not have made it a good contract. In Pennsylvania, however, a married woman, though she has no separate property, can bind herself by an executory contract to purchase real property.[11] Her mere willingness to perform, therefore, did not remove an existing disability or make the remedy mutual. The mutuality of the obligation and remedy existed from the inception of the contract. In a Missouri case, *Warren* v. *Costetto*,[12] a married woman was in possession of land under a lease. The lessor, after the lease was executed and when the woman was in possession, gave her a bond conditioned to convey the land.[13] There was no consideration for the bond, and formal contracts are abolished in the state by statute.[14] The lessor died. The woman offered to pay his widow the consideration for the conveyance designated in the bond, and on the latter's refusal to accept, brought a bill for specific performance. The bond could be regarded as a continuing offer to sell,[15] which offer had been accepted by the tender of the purchase price. Had the plaintiff not been a married woman, there would have been after the tender an obligation on the defendant to convey the land which obligation equity would have enforced. The fact of her being a married woman prevented her under the laws of the state from contracting except in respect to her separate property.[16] If the money tendered was her own, there would appear to be no question but that she had a right to specific performance. In that case there was no contract before the tender; but the tender was evidence of the acceptance of the continuing offer contained in the bond. If

[11] *Campe* v. *Horn*, 158 Pa. 508 (1893), 511. This case, as well as the principal case, is decided under the Married Woman's Property Act of 1887, P. L. 332, since superseded by the Act of 1893, P. L. 344; P. & L. Dig. Laws, Col. 2887, *et sec.*

[12] 19 S. W. 29 (1892).

[13] The bond expressly stated that it was not binding on the woman to take the land; *i. e.*, the bond did not recite a bilateral contract of sale between the obligor and the obligee, but, on the contrary, expressly negatived any such assumption: see 49 A. L. R. 507.

[14] Rev. Stats., Mo. (1899), § 893, p. 308.

[15] See Fourth Paper, 49 A. L. R. 508.

[16] Rev. Stat., Mo. (1899), § 4335.

the money was not her own there would appear to have been no obligation either in law or equity resting on the defendant, because the plaintiff's right to contract was limited to her separate property. The court, however, discussed the case as if the contract which was sought to be enforced was that which was entered into at the time the bond was delivered, and dismissed the plaintiff's bill on the double ground of lack of consideration and lack of mutuality in obligation and remedy arising from the fact that the plaintiff was a married woman[17]

In England, when imprisonment for debt existed, a married woman was not liable to imprisonment for non-payment of a debt even though the debt was binding on her separate estate. In *Dowling* v. *Maguire*,[18] a married woman, having contracted to purchase with her separate property right to appoint to a benefice, sought specific performance of the contract. The defendant raised the defence of lack of mutuality in the remedy, because of the plaintiff's immunity from imprisonment for debt. The court disregarded the defence. It will be noticed that the lack of mutuality was rather in the remedy at law than in the remedy in equity.[19]

Where a husband contracts to sell the land of his wife, the court may regard the husband as acting as agent for his wife; in other words, they may consider the wife as the real contracting party. Whatever the value of this inference, it has been made in cases where the husband, at the time of the contract, expressly stated that the land was not his own but his wife's. If the contract is regarded as a contract with

[17] In Iowa, in *Chamberlin* v. *Robertson*, 31 Ia. 408 (1871), Beck, J., who writes the opinion, treats a contract of a married woman as voidable, not void, and comes to the conclusion that, as the married woman in the case before him had partly performed, she could enforce. The majority of the judges, however, regard the contract, in view of the plaintiff's part performance, as enforceable against the plaintiff's separate estate. It is not clear whether they regard the original contract as voidable by the married woman before her part performance, though this may be inferred from Judge Beck's statement of their position on p. 414.

[18] L. & G. Temp. Plunkett, 1 (1834).

[19] From the remarks of the court on p. 19, it is doubtful whether the exact nature of the defense was understood.

the wife, the question arises, as in cases where a married woman has made an executory contract for the purchase of land, is she, under any enabling statute, competent to make such a contract? If she is not, as pointed out, there is no contract, and of course the vendee cannot be made to take the land, even though the husband offers a deed signed by the wife. This result is reached in Virginia.[20] In that state, at least down to the Code of 1887, a married woman, though she could make a good title to her separate property, seems to have been unable to make a valid executory contract for its sale.[21] In the first case just cited, *Watts* v. *Kenny,* the husband of a married woman agreed to sell land which he held in the right of his wife. The husband and wife attempted to enforce the contract. The court take the position that the "wife in this case is the essential contracting party,"[22] and one of the grounds for dismissing the bill is the lack of mutuality arising from the fact that the woman was not bound. As in the other cases which we have discussed, this appears to be only an unfortunate way of saying that there was no contract. In *Chilowe Iron Company* v. *Gardner* the court again regarded an agreement by a husband to sell his wife's land as failing to create contractual obligations between the parties. In the last case cited, *Cheatham* v. *Cheatham,* the husband and wife both entered into the contract of sale. In this case, therefore, there is more reason for regarding the contract as with the wife, and consequently void. Here too it is made plain that the court believe that the agreement is not binding on either party.[23]

[20] *Watts* v. *Kenney,* 3 Leigh 272, Va. (1831), 291; *Chilowie Iron Company* v. *Gardner,* 79 Va. 305 (1884), 311; *Cheatham* v. *Cheatham,* 81 Va. 395 (1886), 403.

[21] If she conveyed she could enforce payment or any other covenant of the vendee: *Shenandoah Valley R. R. Co.* v. *Dunlop,* 86 Va. 346 (1889).

[22] P. 290.

[23] Pp. 510-511. The fact that a married woman in Virginia, at the time these last two cases were decided, could not make a valid contract for the sale of her separate real property seems extraordinary, in view of the language of the Act of 1877, as amended by the Act of 1878. The statute mentioned provides that a married woman in relation to her separate property shall have "the power to contract in relation thereto,

In criticism of these Virginia decisions, it may be pointed out that where one agrees to sell his wife's land, the inference that she is the contracting party is, to say the least, strained. On its face the contract is with the husband, and unless the wife also signs the contract of sale, with no one but the husband. When the husband offers a deed signed by his wife he fulfills his contract to give a good title to the land. Under this conception, at the time the contract is made there is no lack of mutuality in the obligation of the parties; there is, however, a lack of mutuality in the remedy. The husband, not having a good title nor the legal power to obtain one, cannot be made to convey. On the other hand, when he brings his bill he is able to offer a good title. The question raised is identical with that which always arises when the vendor, who has no title at the time of the contract, acquires a title before the time for conveyance, which

or for the disposal thereof . . ." See Burk's Notes on the Property Rights of Married Women in Virginia, ed. 1893, p. 76. Yet in *Cheatham* v. *Cheatham* the court, quoting from Professor Minor, say: "That if the husband and wife agreed to sell and convey the wife's land, the agreement cannot be specifically enforced against either of them; not against the wife, because she is incapable of binding herself by any executory contract . . ." See pp. 402, 403. See also Burk's Notes, pp. 23-25. The explanation may be that the comma after the word "thereto," in the sentence quoted from the Act, makes the Act read: That a married woman has the right to make contracts in relation to her separate estate, and has the right to dispose of her separate estate; but that the word, "contracts," and consequently the power to contract, is confined to "contracts" in relation to her separate estate; and that the words, "in relation to," have a technical meaning which does not include sale, but only contracts in relation to the improvement, and contracts on the faith of, the separate estate. The text of Minor quoted by the court was written in 1875, that is before the statute. It is repeated in an edition published after the statute: Minor's nstitutes, Vol. 1, 3d ed. (1882), p. 344. This edition also contains a criticism on the Act of 1877, and indeed on all modern legislation concerning the status of married women: *ib.*, p. 346, *et sec.* The court may have been in sympathy with the criticism.

It would appear that there ought not to be any doubt but that under the present Code of Virginia a married woman can make an executory contract for the sale of her lands. The Code of 1887, § 2888, says: "She may make contracts, as if sole, in respect to trade, etc., . . . *and her said separate estate.* . . ."

good title he asks the purchaser to take. As we will see in a subsequent paper, the defence of lack of mutuality cannot be successfully raised in such a case. On this theory, therefore, the husband who contracts to sell the land of his wife can have specific performance, provided his wife will put him into a position to offer a good title. There are several cases in which the courts adopt this view.[24] In two cases, one in Iowa and one in New Jersey,[25] the court regarded the contract as with the husband, and yet refused specific performance at his instance, though he offered a good deed, on the express ground of want of mutuality in the remedy. In both cases the court ignored the doctrine that if the vendor offers a good title at the time the bill is brought, the defence of lack of mutuality does not apply. It is curious also to note that the court in the Iowa case, *Luse* v. *Deitz,* rely on *Bromley* v. *Jeffries* and *Lawrenson* v. *Butler* both of which have, as I have pointed out in a previous paper, nothing to do with lack of mutuality in the remedy.[26] The New Jersey case relies on *Lawrenson* v. *Butler* and cases following that case in this country, but particularly on the case of *Luse* v. *Deitz* itself.

When a married man agrees to sell his own land, and in accordance with this contract offers a deed signed by his wife, which is refused, there is, if the vendor proceeds in equity, a want of mutuality in the remedy. The married woman could not have been forced to join her husband in the conveyance and sign away her right of dower. But here again the plaintiff has obtained a good title before bringing his bill, and the original want of mutuality in the remedy is disregarded. Indeed, there would be even less reason for allowing the defence of want of mutuality in the remedy to prevail in such a case than when the woman is the owner of the land at the time of the agreement with her husband. For, where a married woman, having an inchoate right of dower in her husband's lands, refuses to join with him in a convey-

[24] *Logan* v. *Bull,* 78 Ky. 607 (1880); *Dressel* v. *Jordan,* 104 Mass. 407 (1870). See also *Smith* v. *Cansler,* 83 Ky. 367 (1885), 371.

[25] *Luse* v. *Deitz,* 46 Ia. 205 (1877); *Ten Eyck* v. *Manning,* 52 N. J. Eq. 47 (1893).

[26] 2 Vern. 415 (1700); 1 Sch. & Lef. 13 (1802); A. L. R. 270.

ance of the land, the defect in the vendor's title is comparatively slight, and the vendee can, in most jurisdictions, force him to convey his own interest with compensation for failure to convey his wife's interest.[27]

There is an impression that in the eighteenth century the Court of Chancery, while they would not issue a decree against a married woman, would order the husband to fulfill his contract of sale by procuring the joinder of his wife. If this impression is correct, then, even had the doctrine of lack of mutuality in the remedy as a defence to specific performance existed, which it did not, it would not have applied to contracts with married men for the sale of land. But as will be seen from the note on these decrees, the extent of this doctrine has been exaggerated. If the purchase money had not been paid by the vendee he could not obtain such a decree, and therefore if the vendee offered a conveyance and demanded the purchase money, there would have been ground for the contention of a defendant, who was asked to fulfil a contract with a married man for the purchase of real property, that the defence of want of mutuality in the remedy should be applied to his case.[28]

[27] This subject, which is part of the larger subject of the partial specific performance of contracts, will be treated in the June number.

[28] NOTE: ON DECREES AGAINST A MARRIED MAN TO COMPEL HIS WIFE TO JOIN IN A CONVEYANCE.

In *Voux* v. *Gleas*, 4 & 5 Edw. 6 fo. 35, 1552, reported in Toth. (ed. 1820) 92, the fact that a husband was bound to exercise his control over his wife in order to compel her to perform what the court considered her legal obligation is recognized. It was there ordered that he enter into a recognizance "that his wife shall release her right." See also where a man was bound to see that his wife brought in "certain evidences." *Kings College* v. *Ragland*, 4 Eliz. li. A. fo. 73, 1561, cited, Toth. (ed. 1820) 106. So also in *Griffin* v. *Tailor*, 1629, reported in Toth. (ed. 1820) 106, the Court of Chancery ordered a man to procure his wife to acknowledge a fine. These cases are all cited in 4 Vin. Abr. 203, pl. 1, 2, 3. It is probable from the remarks in *Otread* v. *Round*, 4 Vin. Abr. 203, pl. 4, that the Chancery case of *Griffin v. Tailor* was one for the specific performance of a contract by the husband and wife to sell the wife's land, and that the wife still persisting in her refusal, the husband went to jail for contempt. An early and unquestioned reported expression by a Court of Chancery of a wife's obligations to fulfill a contract made by her husband is found in *Baker* v. *Child*, 2 Vern. 61 (1688). The entire report of the case is contained in a single sentence, as follows: "Where a feme covert, by

The third class of dependent persons are lunatics. The contract of a lunatic is void. No question, therefore, of the specific performance of such contracts can arise. But where

agreement made with her husband, is to surrender, or levy a fine, though the husband died before it be done, the court will by decree compel the woman to perform the agreement." The case of *Barrington* v. *Horn*, 2 Eq. Cas. Abr. 17 (1714); s. c. 5 Vin. Abr. 547, pl. 35, is the first reported case in which a decree against a husband directed him to procure the joinder of his wife. There the husband covenanted to levy a fine and procure his wife to join, and the court "Decreed that the husband the defendant should procure his wife to join with him in a fine to the plaintiff according to his covenant, since he has taken upon him to do it, and the plaintiff has paid the full value of the estate." Four years afterwards in *Otread* v. *Round*, 4 Vin. Abr. 203, pl. 4 (1718) (also called *Outram* v. *Round*), where a husband and wife conveyed by lease and release the wife's land, and covenanted that the wife should levy a fine of the same to the use of the purchaser, the court refused to decree the husband to compel his wife to do so. As stated, the court apparently refer to *Griffin* v. *Tailor* as a similar case and disapprove of the action of the court. No mention is made of *Barrington* v. *Horn*. It will be noticed that there are two differences between the cases. In *Otread* v. *Round* it is the wife's land; again, the contract has in no wise been executed by the purchaser. The case of *Winter* v. *Devereux* (1723), referred to in 3 P. Wm. 189, note B, seems to have been a similar case to *Barrington* v. *Horn*. There, however, the Master of the Rolls is said by the reporter Williams to have suggested another reason for the decree; namely, that in all cases it is to be presumed that the husband, where he covenants that his wife shall levy a fine, hath first gained her consent for that purpose. In *Hall* v. *Hardy*, 3 P. Wm. 187 (1733), a decree, as in *Barrington* v. *Horn* was procured against the husband, the court saying, "There have been a hundred precedents." It is doubtful if the "hundred precedents" existed, as Chief Baron Gilbert, writing in 1756, intimates a doubt as to the propriety of such decrees: See Forum Romanum, p. 245. The reporter Williams, writing in 1749, in the same note to which we have before referred, 38 Wm. 189, note B, suggests that a decree would not be granted where it was impossible for the husband to procure the joinder of his wife; adding that this would be especially so in a case, "where the husband offered to return all the money, with interest and costs, and to answer all damages." The case supposed by the reporter had already occurred. In *Otread* v. *Round*, 4 Vin. Abr. 203, pl. 4, 203 (1817), Lord Cowper had, as we have seen, already refused specific performance in such a case; and later a similar action was taken in *Daniel* v. *Adams*, Amb. 495 (1764), a case where there was evidence that the contract had been made without the wife's authority, and none of the purchase money had been received by the husband. In this last case the court said, that *Barrington* v. *Horn* and *Hall* v. *Hardy* proceeded on the ground of fraud, as in those cases the

a person of sound mind enters into a contract and then becomes insane, there is a good contract; the trouble is with its enforcement. A Court of Chancery cannot make a decree

purchase money had been received; adding that, "where the wife is bound she must have done something to confirm the agreement or receive some benefit from it." It may be presumed that payment of the purchase money to the husband would be a benefit to her within the meaning of the sentence quoted. Within these limitations, however, in the latter part of the eighteenth century, the doctrine was well established, that a court would decree a husband to procure his wife to join with him in a conveyance, where he had made a covenant to that effect, provided some of the purchase money had been paid by the plaintiff, and provided the defendant did not offer to return this money. Though positive proof of the wife's refusal to join in the deed would probably have prevented the court from issuing a decree, in the absence of evidence her consent to the original contract would be presumed. *Barrington* v. *Horn* was followed in *Withers* v. *Purchard* (1795), a case referred to in 7 Ves. 475.

With the beginning of the nineteenth century the idea of ordering a husband to procure his wife to join in a deed received severe criticism. In 1802 Sir James Mansfield, in a case at law, *David* v. *Jones*, 5 Bos. & Pul. 267, said: "The covenant upon which this action is brought is such as the Court of Chancery would not now enforce, and indeed nothing can be more absurd than to allow a married woman to be compelled to levy a fine, through the fear of her husband being sued and thrown into gaol, when the general principle of law is, that a married woman shall not be compelled to levy a fine." Yet in the same year Sir William Grant, in *Morris* v. *Stephenson*, 7 Ves. 474 (1802), issued such a decree, though he was careful to lay emphasis on the fact that in the case before him the plaintiff could not be restored to his original position and the defendant did not allege that he could not procure the joinder of his wife. P. 478.

It is probable that the doubts of Lord Eldon, expressed in *Emery* v. *Wase*, 8 Ves. 505 (1803), really caused the practice of issuing these decrees to fall into desuetude. In that case a married man and his daughter agreed to sell land to A. at the valuation of C. C. valued, and A. brought his bill for specifi performance of the award, asking that his wife join. The bill was dismissed. Lord Eldon confirmed this dismissal on the ground that there was evidence that C. had performed his duties carelessly. He also discussed decrees against married men to procure their wives to join. Speaking of the alleged presumption that the contract was entered into with the wife's consent, he says: "If this was perfectly *res integra*, I should hesitate long before I should say the husband is to be understood to have gained her consent, and the presumption is to be made that he obtained it before the bargain, to avoid all the fraud, that may be afterwards practiced to procure it." Pp. 514, 515. He also states that the argument shows the whole question of these

against a lunatic.[29] The court acts *in personam.* The inability of the court to grant full relief to the purchaser of land whose vendor has, since the purchase, become insane, is illustrated by the case of *Hall* v. *Warren.*[30] There the defendant contracted to sell his land to the plaintiff, but before the bill was brought he became deranged. The court directed an issue to be tried, whether the defendant was sound at the time he entered into the alleged contract. Sir William Grant says,

decrees, "not quite so well settled as it has been understood to be." P. 514. The argument which was destined to do away with the practice had been made by Romilly, with a Mr. Lloyd. P. 510. It was not correct to say that there was a conflict in the cases. As I have tried to show those cases in which the decree was denied merely tended to limit the granting of the decree to cases in which the purchase money had been paid, and there was no evidence that the wife refused to join. Though the opinion in *Emery* v. *Wase* seems to have been the deciding influence which ended the practice of issuing these decrees, the point was not decided by Lord Eldon, and it is characteristic of that judge, that several years afterwards, in *Innes* v. *Jackson,* 16 Ves. 356 (1809), he intimates that if it was necessary "upon a principle of a certain class of cases, perhaps this court would have decreed the husband to procure his wife to join in levying a fine." P. 367. This, however, seems to be the last intimation that the court might issue such a decree. *Howel v. George,* 1 Mad. 1, a case decided in 1815, involved the question whether a man can be decreed to procure his wife and son to join in a recovery. Vice-Chancellor Plumer says that the matter was not much pressed in argument, and adds: "It could not be argued that a man should be compelled to use his marital and parental authority to compel his wife and son to do acts which ought only to be spontaneously done." He cites Sir James Mansfield and Lord Eldon's criticism on the old cases with approval; but at the same time he takes care to point out that in the case before him the court is asked to make the father use his parental authority over the son, and that even the eighteenth century cases have not gone so far. I know of no further mention of the doctrine until the case of *Fenelly* v. *Anderson,* 1 Ir. Ch. 706 (1851). There the court referred to the power, once existing in a Court of Chancery, to compel a husband to procure his wife to join in a fine; adding that the power no longer exists. This has been the universal assumption ever since.

[29] The case of *Owen* v. *Davies,* 1 Ves. Sr. 82 (1747), is not contrary to this statement. There the vendor, after entering into a contract for the sale of his land, became a lunatic; but the legal title to the land was in trustees, and therefore it was not necessary for the court to make an order against the lunatic in order to vest a good title in the purchaser.

[30] 9 Ves. 605 (1804).

that provided the contract was made when the defendant was of sound mind, he does not see why the plaintiff is not entitled to all the court can give him, which is the right to enjoy the land during the life of the lunatic.[31] On the death of the lunatic the plaintiff could, we may suppose, compel the heir to convey the land.[32] When, therefore, there is no power conferred on the court by statute over the real property of lunatics, if the committee of the lunatic attempt to enforce a contract for the sale of land entered into by the lunatic before he becomes deranged, there would appear to be a want of mutuality in the remedy. So far as the writer is aware, the question of want of mutuality in the remedy in such cases has never arisen, nor is it likely to arise, as it is usual to find that the powers of the Court of Chancery have been extended, so as to enable the court to vest a good title in a vendee of land, where, since the contract of sale, the vendor has become insane.[33] Should the question arise, however, we believe there would be a tendency to disregard the defence of want of mutuality, at least in the United States; in other words, that, as in the care of the infant plaintiff, the tendency to protect dependent persons would prove stronger than the belief that there should be mutuality of remedy in equity.[34]

William Draper Lewis.

[31] P. 612.

[32] See the order in *Pegge* v. *Skynner*, 1 Cox Eq. 23 (1784), which was a bill for specific performance of a contract where one of the lessors had become a lunatic. Lord Thurlow ordered: "That the defendant Skynner should execute a counterpart of a lease, and also the defendant Richardson (the lunatic), when he should be capable of so doing."

It is incorrect therefore to say, as the court did in *Yauger* v. *Skinner*, 14 N. J. Eq. 389 (1862), p. 395, "that the purchaser may enforce the completion of the contract by a bill for specific performance; for in New Jersey at that time there does not seem to have been any statute authorizing the committee of the lunatic to make a good title to his lands except in the case of a sale to pay debts for maintenance. See P. L. (1852), p. 91. Even at the present time it is apparently doubtful whether the lunatic's committee can be authorized to sell land in fulfillment of a contract of sale made by the lunatic before he became insane: Gen. Stats. N. J. (1895), p. 1701, § 26; P. L. (1885), p. 30. The case of *Yauger* v. *Skinner* did not involve the question.

[33] For examples of these statutes see: 16 & 17 Vict. c. 70, § 122; P. & L. Dig. Laws Penna. (1894), Col. 2826, § 53.

[34] See *supra*, p. 252.