THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 51 O. S. } { 42 N. S. }	OCTOBER, 1903.	No. 10.
-----------------------------------	----------------	---------

THE PRESENT STATUS OF THE DEFENCE OF WANT OF MUTUALITY IN SPECIFIC PERFORMANCE.¹

In 1828, in *Flight v. Bolland*, Sir John Leach laid down the principle that in cases of specific performance the remedy must be mutual, and refused to give specific performance to an infant² plaintiff. This was the first authoritative statement of the principle of the necessity for mutuality in remedy. Since this case, however, the validity of such a defence has been from time to time conceded on both sides of the Atlantic by courts and text-writers.

The statement that the remedy of specific performance

¹ Previous articles on the defence of want of mutuality will be found in 49 A. L. R. (O. S.), pp. 270, 383, 447, 507, 559; Vol. 50, pp. 65, 251, 329, 394, 523.

² *Flight v. Bolland*, 4 Rus. 298. *Dicta* to the same effect will be found in *Richards v. Green*, 23 N. J. Eq. 536, 1872, 538; *Ten Eyck v. Manning*, 52 N. J. Eq. 47, 1893, 51. In these cases the emphasis is laid on the want of mutuality in the obligation of the parties rather than in the remedy. In *Seaton v. Tohill*, 53 Pac. Rep. 170, Colo., 1898, the infant had specific performance in spite of the defence. See the first paper on this defence by the author, 49 A. L. R. (O. S.) 270.

should be mutual seems to be due to two things. One is the thought that a court of equity is a court which, in a peculiar sense, must be fair to all parties. The other is the fact that the plaintiff always has his action for damages if his bill for performance is denied, and the consequent feeling that the relief is, in a sense, discretionary. The result is the idea that this court, which must be fair to all, should refuse this discretionary relief unless it is able to control the plaintiff in the same manner as he would have it control the defendant.

The court's inability to control the plaintiff's performance of his side of the contract, because perhaps of the personal or complicated nature of that which he undertook to do, may relate to the plaintiff's past, present or future obligations. There are, therefore, three possible ways in which there may be want of mutuality in the remedy. This mutuality may be lacking at the inception of the contract, but not at the time the bill is brought. For instance, A. may agree to convey land X. to B., though at the time A. may have neither a good title to X. nor the power to obtain one. A. may, however, secure a good title and then bring his bill against B. for specific performance. Here there would be a want of mutuality in the inception of the contract, but none at the time of the suit. Again, there may be want of mutuality at the time of the decree. Take the case of the infant plaintiff which was before Vice-Chancellor Leach. At any time before decree, if the infant had chosen to withdraw his bill, the defendant could not have prevented him from doing so, or have had specific performance against the infant. Had the court seen fit in that case to grant the prayer of the plaintiff's bill, at the very moment they would be making a decree against the defendant, they would be powerless to grant a similar decree in his favor. Lastly, there may be what we may call want of mutuality after the decree is made. If an infant contracts to buy land for a present sum of money, though the remedy is not mutual at the time of the decree, a decree in his favor, being conditioned on the payment of the money, leaves nothing to be performed by the plaintiff after the defendant has obeyed the decree. But there are many contracts

in which one party agrees to do an act on the faith of the other's promise to perform some act in the future, and this act, which is to be performed in the future, may be of a character not enforceable by any court. Thus B. may agree to pay A. a sum of money, and A. may agree in return for the present payment of the money to perform personal services for B. If now A. should bring a bill against B. for the money and the court should grant the prayer of the bill, after B. had obeyed the decree, A. would have obligations to perform which the court could not enforce.

Some have stated the defence of want of mutuality of remedy so as to apply to cases in which there is want of mutuality at the inception of the contract. Thus Lord Justice Fry in his work on Specific Performance, says: "A contract to be specifically enforced by the court must, as a general rule, be mutual, that is to say, such as might at the time it was entered into, have been enforced by either of the parties against the other of them."³ But the result of our previous papers on this defence is to show, that mutuality of remedy existing at the inception of the contract has never been required. Thus, whether we regard a contract in which one party holds an option as a contract lacking mutuality in obligation or mutuality in remedy, there is now no doubt, that if the party holding the option desires to exercise it, he may enforce the other party's obligations, in spite of the fact that, between the inception of the contract and the exercise of the option, the court could not have given the defendant similar relief.⁴ So also a plaintiff can have specific performance when he has performed all his obligations under the contract, though these obligations were of such a character that a court of equity could not have compelled the plaintiff to have performed them.⁵

³ Section 460, Edition of 1903.

⁴ See articles by the author in 49 A. L. R. (O. S.), pp. 270, 327, 383, 447 and 507.

⁵ Thus in spite of the objection of want of mutuality, where the plaintiff had agreed to go on certain land and improve it, in return for a conveyance of a part, having improved the land, he succeeded in his bill for the performance of the defendant's covenant to convey; *Thurber v. Meves*, 119 Cal. 35, 1897. *Welch v. Whelpley*, 62 Mich. 15, 1886, 21, is a similar case. See further, *Wynn v. Garland*, 19 Ark. 23, 1857,

Again, though it may be doubtful if an infant plaintiff can maintain a bill for specific performance of a contract, there is no doubt but that the infant, coming of age and affirming the contract, may maintain his bill, in spite of the fact that at the time the contract was entered into

36, where the plaintiff had per his agreement dug a ditch, and *Boyd v. Brown*, 34 S. E. Rep. 907, W. Va., 1899, where he had dug for oil. So also where one promises to convey land for professional services, the services having been performed he will be made to convey. *Ballard v. Carr*, 48 Cal. 74, 1874, 80; *Howard v. Throckmorton*, 48 Cal. 483, 1874, 489; *Topeka Water Supply Co. v. Root*, 56 Kas. 187, 1895. In all of these cases the defence of want of mutuality was raised. See also *Wakehan v. Barker*, 82 Cal. 46, 1889, 49 (*Dicta*), and *Frue v. Houghton*, 6 Colo. 318, 1882, 324, 325, where the character of the services performed is not mentioned.

In the following cases specific performance was given the plaintiff who had performed acts which he could not have been made to perform, the defendant's counsel or the court failing to raise or discuss the question of want of mutuality: *Allen v. Cerro Gordo Co.*, 40 Ia. 349, 1875, where the plaintiff had performed legal professional services, and *Lane v. May & Thomas Hardware Co.*, 121 Ala. 296, 1898, where the plaintiff had built a house.

It is not unusual in cases where parole contracts to convey land are sought to be enforced, to find that the consideration for the conveyance has been the performance of acts which the court could not have compelled the plaintiff to perform. In these cases, while we are apt to find that the question arising under the Statute of Frauds is discussed at length, neither court nor counsel are apt to raise any question of mutuality. For examples of such cases see: *Denlar v. Hile*, 123 Ind. 68, 1889, *Lothrop v. Marble*, 81 N. W. Rep. 885, S. D., 1900, and *Bryson v. McShane*, 35 S. E. Rep. 848, 1900, where the plaintiff had performed a promise to support the defendant, and *Telford v. The Chicago P. & M. R. R. Co.*, 172 Ill. 559, 1898, where the plaintiff had built a railroad on the faith of the defendant's promise to convey certain land. In *Linsay v. Warnock*, 93 Ga. 619, 1894, where the defendant had promised to convey certain minerals in return for the plaintiff's exploration of the land, the question of mutuality is discussed in connection with the Statute of Frauds, the plaintiff not having signed the contract, but not in connection with the fact that the court could not have forced the plaintiff to explore for minerals.

In all these cases the plaintiff was by the terms of the agreement obliged to perform the personal services or other acts which, at the time of bringing his bill, he had performed. These cases are sometimes confused with those in which there is originally no contract between the parties, but a mere offer on the part of the defendant that if some personal service or similar act is performed by the plaintiff, the defendant will in consideration convey land, and, at the time of bringing

there was want of mutuality in obligation and remedy.⁶ Or again, in jurisdictions where the fourth section of the English statute of frauds is in force, the defendant in an action for the specific performance of a contract concerning land cannot successfully maintain the defence of want of mutuality, though the plaintiff has not signed any memorandum of the contract, and therefore, before the plaintiff brought his bill, the defendant could not have enforced the contract against the plaintiff.⁷ Lastly, contracts in which the vendor has agreed to convey to the vendee a good title to certain land, will be enforced at the vendor's instance if he offers a good title before decree, even though the vendee proves that at the time the vendor entered into the contract he did not have either a good title to the land or the legal power to obtain a good title, and therefore that it would have been impossible for the court at the inception of the contract to have given the defendant the relief which the plaintiff now desires to obtain and does obtain.⁸

Examples of all these cases in which, in spite of want of mutuality in the remedy, specific performance is given, occur as early as the eighteenth century. They cover all possible instances in which it may be said, that there was want of mutuality in the remedy at the time of entering into the contract, but none at the time the decree was made. In all, at the inception of the contract, the court could not, at the instance of the defendant, have enforced the plaintiff's obligations; but in all, had the plaintiff discontinued his suit

his bill the plaintiff has accepted the defendant's offer by performing the act in question. In these cases there is no possible want of mutuality either in obligation or in remedy. The defence of want of mutuality in such cases has, however, been occasionally, though never successfully, raised. These cases we have discussed in 49 A. L. R. (O. S.) 315, note 15.

⁶ For a discussion of cases involving the specific performance of contracts made by infants, married women and dependent persons generally, see articles by author in 49 A. L. R. (O. S.) 270, 271; and 50 A. L. R. (O. S.) 251.

⁷ For a discussion of the Statute of Frauds and the defence of want of mutuality in the remedy, see article by the author in 49 A. L. R. (O. S.) 559.

⁸ For a discussion of this subject, see article by author in 50 A. L. R. (O. S.) 523.

immediately before the decree in his favor, leaving his side of the contract unexecuted, the defendant could have at once brought his bill against the one time plaintiff and obtained specific performance. We may, therefore, at least affirm, that the idea that the remedy should be mutual was born with the limitation that want of such mutuality at the inception of the contract which does not exist at the time the court is called upon to make a decree is not sufficient to defeat the plaintiff's bill.⁹

Some courts perceiving that mutuality in the remedy at the inception of the contract is not required, and noticing at the same time that in many cases where specific performance has been granted that this want of mutuality has been cured before decree, have laid down the rule, that to obtain specific performance, while it is not necessary that there should have been mutuality of remedy at the time the contract was entered into, it is necessary that there should be mutuality of remedy at the time of the decree. This statement is unquestionably supported by the decision in the case in which the necessity for mutuality of remedy was first authoritatively announced. But as we have seen, it is to-day doubtful whether the courts will apply the defence of want of mutuality in the remedy, where that defence is based on the infancy of the plaintiff.¹⁰ It is at the same time not doubtful that no attention will be paid to the defence in the only other possible instances in which want of mutuality of remedy exists at the time of the decree, but not afterwards. Thus a contract between a fiduciary and his principal will often be enforced in favor of the principal though not against him, or a contract obtained by fraud will be enforced against but not in favor of the wrongdoer.¹¹ In many cases of this character the innocent plaintiff might withdraw his bill immediately prior to a decree in his favor, and yet the defendant be still unable to enforce the contract.¹² Again, in

⁹ For an opinion to this effect, see *Water Supply Co. v. Root*, 56 Kan. 187, 1895, 197.

¹⁰ See article by author, 49 A. L. R. (O. S.), page 271.

¹¹ For a statement of these exceptions, see article by Professor Ames, 3 Columbia Law Rev., 1.

¹² The writer has no doubt of the soundness of this statement, but he is unable to discover a case in which the wronged party in cases

contracts for the sale of land the vendor may be so far unable to fulfill his side of the contract as to preclude any possibility of the courts granting a decree in his favor, yet, at the instance of the vendee, the court will make the vendor perform his contract as far as he is able to do so. In such a case the plaintiff unquestionably has a right to withdraw the bill at any time prior to decree.¹³ Lastly, in England, one who makes a voluntary settlement, and then enters into a contract to sell the property, can be compelled to live up to his contract, the settlement being avoided in favor of the purchaser, but the vendor cannot force the buyer to take the property, nor will the court assist the vendor to get rid of the settlement.¹⁴

The practice of granting specific performance in these cases existed before the defence of want of mutuality in the remedy was fully developed. Thus we are forced to the conclusion that, except in the case of the infant plaintiff, a court of equity has never refused specific performance on the ground of want of mutuality in the remedy existing at the time of the decree, but not afterward.

There remain, however, cases in which there is not only want of mutuality at the time of the decree, but want of mutuality after the decree is made, that is, cases in which, should the court make the defendant perform, the plaintiff would still have unexecuted covenants which the court would be powerless to enforce. Professor Ames, believing that a court will not grant specific performance in cases falling under this class, and at the same time recognizing the two exceptions just mentioned to the statement that the remedy must be mutual at the time of the decree, has, in a recent article in the *Columbia Law Review*, formulated the following rule: "Equity will not compel specific performance by a defendant if, after performance, the common law remedy of damages would be his sole security for

falling under the classes mentioned in the text, having brought a bill for specific performance, afterwards withdrew the same, and became defendant to a bill to enforce the same contract.

¹³ For a discussion of this class of cases, see article by author in 50 A. L. R. (O. S.), 329.

¹⁴ *Smith v. Garland*, 2 Meriv. 123, 1817.

the performance of the plaintiff's side of the contract."¹⁵ His idea is that the defendant must never be able to say to the court: "You obliged me to live up to my part of this contract, and now you cannot make the plaintiff perform his part." Mutuality of remedy, in the sense that the court must see that they are able to grant similar relief in the future to the defendant, must exist before a court will grant a bill for the specific performance of a contract. This statement does not conflict with any of the rules of law discussed in our previous papers. If it had been made in 1828 it would not have conflicted with any then existing decision, as at that time, as far as the writer is aware, there was no reported decision in which the plaintiff had asked for specific performance though he had future obligations to perform which the court could not enforce. It is the object of this paper to take up this class of cases, cases all of which occur after 1828, and ascertain how far the defendants have been able to successfully raise the defence. Or, put in another way, our object is to trace the development of the idea that the remedy should be mutual in practically the only class of cases to which the idea in 1828 could have been applied without reversing the ancient practice of the court. We will first discuss the English and then the American cases.

A few years after the decision in *Flight v. Bolland*, Vice-Chancellor Shadwell in *Kimberley v. Jennings*,¹⁶ expressed a similar, but much broader rule than that given by Sir John Leach in *Flight v. Bolland*. He said that an agreement which chancery cannot perform in whole, it cannot perform in part.¹⁷ It will be perceived that this statement covers all cases in which there is, at least after the decree, want of mutuality in the remedy, and also all cases in which the defendant, besides having unexecuted promises which the court can enforce, has also unexecuted promises which the court cannot enforce. Thus, if at the

¹⁵ Col. Law Rev., pp. 2, 3. Professor Ames has here written an interesting and learned article which will repay careful reading. He reaches somewhat different conclusions than those reached in this article, both as to what is and what ought to be the law in respect to the defence of want of mutuality.

¹⁶ 6 Sim. 340, 1836.

¹⁷ Page 352.

time A. brings his bill for specific performance against B., A. has unexecuted covenants which should be performed in the future, but which the court would be powerless to enforce, there exists an inability on the part of the court to enforce the contract as a whole; but there is also a similar inability when the court can enforce some but not all of the things which the defendant has undertaken to do. Suppose, for instance, B. promises to act for a season at A.'s theatre, and not to act during that season at any other theatre. There is no mechanical difficulty in the court's enforcing B.'s negative promise, but the court cannot force B. to act at A.'s theatre, and therefore cannot perform the contract as a whole, though there does not exist any want of mutuality in the remedy.

In *Kimberley v. Jennings*, the defendant, Jennings, a young man, had made a contract with the plaintiffs, a firm of merchants. In this contract Jennings promised to act as clerk and traveling salesman for the plaintiffs for six years on a certain salary. He also expressly promised not to work during the term for anyone else. The plaintiffs, besides promising to pay his salary, also agreed that at the end of six years they would take the defendant into partnership with them on terms to be then arranged. After being in the plaintiffs' employ for nearly twelve months, Jennings attempted to terminate the contract and connect himself with rival merchants. The plaintiffs prayed that Jennings should be restrained, for the remainder of the term, from engaging in any business similar to that in which the plaintiffs were engaged. The Vice-Chancellor believed that the agreement for a partnership at the end of six years was an important part of the contract, and that this part was so vague that the court could not execute it.¹⁸ In this view of

¹⁸ He also thought that it was not the meaning of the contract, that the defendant should not work for anyone but the plaintiffs for six years; but that the contract meant merely, that if he continued to work for and receive a salary from the plaintiffs, he should not at the same time work for anyone else. This construction of the contract was sufficient to decide the case. Furthermore, he expresses his opinion to the effect, that if the contract is to be construed as the plaintiffs contend, it is a hard bargain and equity should have nothing to do with it.

the contract it would have been possible to decide the case on the ground that the minds of the parties had never met over an important ingredient, or on the ground that there was want of mutuality in the remedy, as the defendant could not have forced the plaintiffs to take him into partnership on indefinite terms. But the Vice-Chancellor chose, as stated, to place his decision on the broad ground: "This agreement cannot be performed as a whole, and therefore this court cannot perform any part of it."¹⁹ In this way the necessity for mutuality in the remedy had no sooner been clearly expressed, than a principle was stated capable of much wider application, but including cases in which there would be want of mutuality after decree. For the next few years, and to a certain extent throughout all subsequent English thought on specific performance, the idea that a court of equity must be able, if it is to enforce a contract at all, to enforce it as a whole, has received more attention than the idea that the remedy must be mutual. Thus within two years of *Kimberley v. Jennings*, the Chancellor, Lord Lyndhurst, emphasized the same idea in *Ranger v. The Great Western Railway Co.*,²⁰ though in view of the facts of the case before him his remarks are *dicta*. A contractor agreed to build a railroad, payment for the work to be made as the construction proceeded. After a portion of the work had been completed the company seized the contractor's plant, and refused to allow him to proceed with the contract. The contractor brought a bill against the company to compel them either to permit him to proceed or elect to terminate the contract, in which event he asked for an account. The demurrer of the defendants was overruled, but the chancellor believed that if the bill had merely asked that the defendants be restrained from interfering with the plaintiffs, and had contained no alternative prayer, he would have dismissed it, because he could not enforce the entire contract. He says: "If, however, the contract is to be proceeded with, it is obviously of a nature over which this court cannot take jurisdiction, by way of directing specific performance; and not having that jurisdiction over the entire contract, the court will not assume it over a particular part of

¹⁹ Page 352.

²⁰ 1 Railway Cas., 1, 1838.

the contract, or interfere with a view of enabling the plaintiff to proceed with his work."²¹ Again, in 1842, the idea received the sanction of Sugden, then Lord Chancellor of Ireland, in the case of *Gervais v. Edwards*.²² In that case the land of A. was separated from that of B. by a stream. This stream overflowed its banks. A. and B. agreed to change the channel and build a dam. The work was to be undertaken under the direction of arbitrators. The arbitrators made an award. This award, however, did not and could not affect a clause of the contract which provided, that if after the work was completed damage of a certain kind was done to B.'s land, A. should give him land in compensation. Sugden refused specific performance of the award at the instance of A., because he could not execute every part of the contract, believing that by "the rule of the court," if he was called upon to execute the contract, he "must specifically execute every portion of it."²³ Or, as he explained in *Lumley v. Wagner*,²⁴ he could not leave unperformed anything which he subsequently might be called upon to perform.²⁵

The language in the case of *Gervais v. Edwards*, and the principle that the court in cases of specific performance must be able to perform the whole contract, was further strengthened by the case of *Hills v. Croll*,²⁶ decided by Lord Chancellor Lyndhurst in 1845. The defendant in this case promised to purchase from the plaintiff, and from no one else, for a period of fourteen years, all the acids which he, the defendant, should require in the manufacture of ammonia.²⁷ The plaintiff on his part promised to manufacture or purchase elsewhere the acid demanded by the de-

²¹ Pages 51, 52.

²² 2 Du. & War. 80, 1842.

²³ Page 83.

²⁴ 1 De G. M. & G. 604, 1852, 626.

²⁵ It will be noted that in this case there is no evidence that the court could not enforce the clause of the contract in reference to the possible damage done by the dam, if such damage occurred. Sugden's objection seems to be that the decree he was asked to make might not complete the contract.

²⁶ 2 Phillips 60, 1845.

²⁷ He also promised to give the plaintiff an option on all the ammonia he produced. This promise, however, was not material to the question before the court.

defendant.²⁸ The agreement had been in force for some time, the plaintiff living up to his side of it, when the defendant began to purchase acids of other persons. The plaintiff brought his bill to restrain the defendant from purchasing from any one but himself. Lord Lyndhurst believed that he had no power to make the plaintiff manufacture acid or purchase it elsewhere and deliver it to the defendant.²⁹ Therefore, from his own conception of the limited nature of his powers, should he have granted plaintiff's bill, there would, after the decree, have been want of mutuality—he could not have made the plaintiff perform his side of the contract. But it is not on the ground of want of mutuality in the remedy that he dismisses the plaintiff's bill, but on the broader ground, equally applicable to the facts of the case: "That unless the court can decree specific performance of the whole contract, it will not interfere to enforce any part of it."³⁰

With these cases enforcing his own expressed opinion in *Kimberley v. Jennings*, Vice-Chancellor Shadwell had presented to him the case of *Dietrichsen v. Cabburn*.³¹ In this

²⁸ From the report it is doubtful whether the plaintiff had the right to purchase the acid elsewhere; but this view of the contract was taken by Lord Lyndhurst.

²⁹ His inability to force the plaintiff to purchase the acid elsewhere may be questioned. If the acid was easily purchasable on the market, there would appear to be no difficulty in a court of chancery ordering a person to purchase it, if such action was necessary in order to do full justice to the parties.

³⁰ Page 62.

³¹ 2 Phillips 52, 1846. We should also refer here to the case of *Rolfe v. Rolfe*, 15 Sim. 88, 1846, a case decided by Vice-Chancellor Shadwell. There was not any element of want of mutuality in the remedy, or any want of ability on the part of the court to enforce the contract as a whole. But perhaps because of the extraordinary ground, in view of the fact of the case, on which the Vice-Chancellor put his opinion, the case is often confused with the line of cases we are discussing. The facts are as follows: A, B and C were in partnership as tailors. They agreed to dissolve, A paying B and C each \$1000, and A further covenanting to employ B as a cutter, as long as A continued in the business of tailor. B covenanted not to carry on the business of a tailor, either alone or with any other within twenty miles of the Standard on Cornhill. B began to violate this negative stipulation, and A brought his bill to restrain him. Here was a case in which the court could completely perform the unexecuted promises of either party. The defendant had made the promise not to engage in the busi-

case the defendant had agreed with the plaintiff that the latter should act for twenty-one years as the wholesale agent for the defendant's patent medicine, and that the defendant should supply the plaintiff with all the medicine he sold at a discount of 40 per cent. The defendant also promised not to supply anyone else the medicine at a greater discount than 25 per cent. After the contract had been in operation for about six years, the defendant began supplying other persons with the medicine at more than 25 per cent discount. The plaintiff's bill prayed for an injunction, and an account of the profits realized by the defendant from sales already made in violation of the agreement. The defendant's demurrer was allowed by the Vice-Chancellor. Here we have a want of mutuality after decree. It was impossible for the court to force the plaintiff to continue to act as selling agent of the defendant. The court was also unable to force the defendant to perform all his covenants. He could not be made to manufacture and supply patent medicine to the plaintiff. The case was appealed to Lord Chancellor Cottenham. The case was argued on appeal without any apparent reference to the rule requiring mutuality in the remedy, but on the broader rule that the contract must be capable of being performed by the court *in toto* or not at all. It is necessary to bear this in mind if we wish to understand Lord Cottenham's opinion. Had the defence of want of mutuality in the remedy been emphasized, it is not unlikely that the very attractiveness of the phrase might have been sufficient to defeat the plaintiff. But to Lord Cottenham's mind it is evidently a case which must be decided one way or the other according as

ness of a tailor, and the plaintiff's promise to employ the defendant if he, the plaintiff, continued such business, could be completely enforced by restraining the plaintiff from conducting the tailoring business unless he employed the defendant. The Vice-Chancellor chose to treat the case as illustrating an exception to the rule that a court must be able to perform the contract *in toto* if it is to perform it at all. In reply to a citation of his own expressed principle he points out that the contract now before him is divisible; the defendant was not to carry on the business of a tailor, and the plaintiff was to employ the defendant as a cutter. It is needless to remark that all contracts could be made divisible on this simple process of pointing first to the covenants of one party and then to the covenants of the other.

to whether he agrees or not with the proposition that the contract must be capable of being performed as a whole. In considering this proposition he finds that it is contrary to the opinion which he believes to have been expressed by Lord Eldon in two cases, *Morris v. Colman*³² and *Clarke v. Price*.³³ In neither of these cases was there any want of mutuality in the remedy. Lord Cottenham had, however, grounds for drawing from the language of the great chancellor, the conclusion that Lord Eldon would not have hesitated to restrain a defendant from breaking a negative covenant, though he had also an unexecuted affirmative covenant which the court could not enforce; in other words, that Lord Eldon would, under some circumstances, have enforced a contract in part though he could not have enforced it as a whole.³⁴ Whether Lord Cottenham was or was not right in his interpretation of Lord Eldon's opinion, the important point is that, coming to the conclusion that the statement that a contract to be performed at all must be performed *in toto* was incorrect, he immediately infers that there is nothing to support the defendant's contention and reverses the decision of the Vice-Chancellor. One effect, therefore, of the attempt to maintain a proposition much wider than the necessity for mutuality of remedy, is a decision in which specific performance is granted, although after decree there was want of mutuality in the remedy. We may almost say that the doctrine which would require a court to refuse to direct a contract to be performed at all unless

³² 18 Ves. 437, 1812.

³³ Wil. Ch. 157, 1819.

³⁴ Vice-Chancellor Shadwell in *Kimberley v. Jennings* had not noticed this apparent conflict between the statement there made by him with the opinions of Lord Eldon in the cases referred to, because, as is clear from his opinion in *Kemble v. Kean*, 6 Sim. 333, 1829, 336, 337, he regarded Lord Eldon in *Morris v. Coleman* as dealing with a case of partnership, and looked upon his language there as confined to cases of partnership. In *Clarke v. Price* the injunction was refused.

It may even be doubted whether Vice-Chancellor Shadwell meant that his expressed principle in *Kimberley v. Jennings* should have a wider application than the rule requiring mutuality in the remedy after decree, for in *Hooper v. Brodrick*, 11 Sim. 47, 1840, he was apparently willing, had the facts warranted him in doing so, to restrain a lessee from doing anything to forfeit a license, though he expressly declares that he has no power to make him live up to his affirmative covenant to maintain an inn.

it can direct the execution of every part of it, falling of its own weight, carried with it in this case the less ambitious defence that the remedy should be mutual.

Within a short time of the decision in *Dietrichsen v. Cabburn*, the case of *Waring v. Manchester, Sheffield and Lincolnshire Ry. Co.*,³⁵ came before Vice-Chancellor Wigram. The plaintiff had agreed to build, and had in part built, a road ten miles long for the defendant, when the latter refused to allow him to continue. The plaintiff asked that the defendant be restrained from interfering with his, the plaintiff's continuation of the work, his counsel citing *Dietrichsen v. Cabburn*. The Vice-Chancellor dismissed the bill, saying that it was impossible to suppose that Lord Cottenham intended to throw any doubt on what was the settled law of the court; namely, that no relief was to be given the plaintiff if that which the defendant was entitled to was something which the court could not give and which was to be done at a future time.³⁶ With submission it may be pointed out, that by his decision Lord Cottenham did throw much more than doubt on such a proposition. He in effect denied its applicability to the case before him. The contracts in *Dietrichsen v. Cabburn* and *Waring v. The Railway* are essentially similar. In both the plaintiff had continuous services to perform which the court could not enforce, and which, at the time the bill was brought, were in part unperformed. The only difference is, that in the case before Lord Cottenham, unlike that of *Waring v. The Railway*, the court could not make the defendant completely perform his promises. If this difference was to have any effect it certainly was not the effect of denying the relief in the railway case which had been given in *Dietrichsen v. Cabburn*. We must therefore regard the cases as conflicting.

If Vice-Chancellor Wigram has left a decision *contra* to *Dietrichsen v. Cabburn*, Vice-Chancellor Parker, during

³⁵ 7 Hare, 482, 1849.

³⁶ Page 492. In support of this proposition he cites *Ranger v. The Great Western Railway Co.*, 1 Railway Cas. 1, 1838, discussed *supra*, note 20. A similar position seems to be taken by Knight-Bruce, V.-C., in *Jackson v. The North Wales Railway Co.*, 6 Rail and Canal Cas. 112, 1849. In this case, however, the plaintiff seems to have failed to prove the existence of the contract.

the same period, has apparently given us his opinion in its favor, in the case of *Great Northern R. R. Co. v. Manchester, etc., R. R. Co.*³⁷ In this case two railroad companies made a contract for the use of each other's tracks and depots. The defendant company tried to prevent the use of its tracks by the plaintiff company. The Vice-Chancellor seems to admit that he cannot enforce all the covenants on either side, but in view of *Dietrichsen v. Cabburn* sees no reason why he should not enforce an implied negative covenant of the defendant. In *Johnson v. Shrewsbury and Birmingham Ry. Co.*,³⁸ Lord Justices Knight, Bruce and Turner follow Vice-Chancellor Wigram in an unconscious repudiation of *Dietrichsen v. Cabburn*. The plaintiff asked for an injunction to prevent the defendants from terminating a contract in which the plaintiff had undertaken to work the defendants' line for seven years. The plaintiff's bill is dismissed, on two grounds; one, that it would force on the defendants a servant whom they did not want; the other, that there was want of mutuality in the remedy. As far as the first ground is concerned, if we agree with the court's interpretation of the contract, it is, by itself sufficient to warrant the action taken.³⁹ In regard to the second ground it will be noticed that the emphasis is placed on the want of mutuality in the remedy, rather than on the idea that the court is unable to perform the contract as a whole. This is also true of *Waring v. The Railway*.⁴⁰

³⁷ 5 De G. & Sm. 138, 1851, 148.

³⁸ 19 E. L. & Eq. 584, 1853, s. c. 3 De G. M. & G. 915.

³⁹ In *Dietrichsen v. Cabburn* the effect of the action of the court was to force on the defendant a selling agent for his patent medicine whom he did not want; but the contract did not contemplate that there should be any consultations or intimate personal relations between the parties. Whether the same was not true in this case may be questioned. The court, however, thought otherwise, and so thinking, could not have forced, under the precedents, a servant on an unwilling master.

⁴⁰ There are at least two other English cases similar to this case of *Johnson v. The Railway Co.* One is the earlier case of *Pickering v. Bishop of Ely*, 2 Y. & C. C. 249, 1843, also decided by Knight-Bruce. In that case the plaintiff claimed the right to act as receiver of rents for the bishop. He asked for an injunction to prevent the appointment of anyone else, or any interference with his own access to the

In this uncertain state of the law the case of *Stocker v. Wedderburn*⁴¹ came before Vice-Chancellor Page Wood. In this case the defendants had agreed to form a company and purchase the plaintiff's patents, and the plaintiff had agreed to assign the patents and give his whole time for two years to promoting the interests of the company. The defendants refused to proceed and the plaintiff asked for specific performance, *Dietrichsen v. Cabburn* being cited for the proposition that, "It is no objection that the plaintiff's part of this agreement is such as the court would not decree to be performed, because by his bill he offers to perform his part."⁴² The Vice-Chancellor, referring to this argument, admits the soundness of Lord Cottenham's decision in *Dietrichsen v. Cabburn*, but he points out a distinction between that case and the one before him. "Where," he says, referring to the earlier case, "a person is ordered by an injunction to perform a negative act of that kind, the whole benefit of the injunction is conditioned upon the plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved. But," he adds, "in this case if I were to compel the plaintiffs to form themselves into a registered company I could not afterwards undo that whatever were to happen."⁴³

title deeds of the property of the see. The case is prior to *Dietrichsen v. Cabburn*. Want of mutuality in the remedy is made a ground for the dismissal of the bill; but the principal reason is that the court could not force on the bishop a servant he did not want. The other case is *Brett v. East India & London Ship Co.*, 2 H. & M. 404, 1864, a case decided nearly twenty years after *Dietrichsen v. Cabburn*. The company had agreed to employ Brett as its broker and publish his name as such broker on all their advertisements. They dismissed him in violation of the terms of this contract, and he asked the court to restrain them from publishing any advertisements without his name as broker. The court refused to do this, because it would in effect be forcing on the company a servant, something which the court would not do. Nothing is here said of the want of mutuality in the remedy, which would have existed after decree had the injunction been granted, as the court could not then have forced the plaintiff to continue to act as broker for the company.

⁴¹ 3 K. v. J. 393, 1857.

⁴² Page 402.

⁴³ Page 405

Here we have a new thought, and one which would appear to have little in common with the idea that there must be mutuality in the remedy. The belief in the necessity for mutuality has to support it the feeling that a court of equity should not do for one party what it is not able to do for the other. Vice-Chancellor Page Wood, however, commends the decision in a case where this want of mutuality exists; but at the same time points out that the court must not force one of the parties, the party defendant, into a position where the plaintiff can trap him. In the case before him, if he compelled the defendants to form a company the plaintiff might refuse to work for the company, and the court not only could not compel him to do so, but could not restore the defendants to their present position. The plaintiff would have trapped the defendants with the aid of the court, and the court could not extricate the defendants. It is this last element, not the want of mutuality in the remedy, which caused him to dismiss the plaintiff's bill.

The idea expressed by Page Wood in *Stocker v. Wedderburn* controls his decision in *Peto v. Brighton and Tunbridge Wells Ry. Co.*⁴⁴ In this case the plaintiffs agreed to build a railroad according to certain plans. As the work progressed, they were to receive in payment the stocks and bonds of the company. The court refuses to restrain the company from dealing with other contractors or interfering with the plaintiffs' execution of the work, pointing out that should the plaintiffs, after receiving some of the bonds, refuse to continue to build the road, the market for the remaining bonds would have been injured by the very fact of the plaintiffs' failure.⁴⁵ As in *Stocker v. Wedderburn* there was more than want of mutuality in the remedy. Should the plaintiffs fail to carry out their side of the contract, not only would the court be unable to force them to do so, but the defendants would have been placed by the order of the court in a position from which they should be relieved, irrespective of the question of the power of the court to give specific performance, and the court could not relieve them.

Though the idea that a court of equity if it could not en-

⁴⁴ 1 H. & M. 468, 1863.

⁴⁵ Page 487.

force the entire contract would not enforce it at all, had not appeared for some time, it had not been distinctly repudiated since Lord Cottenham's opinion in *Dietrichsen v. Cabburn*. One might imagine indeed that it could have hardly survived the celebrated case of *Lumley v. Wagner*,⁴⁶ which had been decided in 1852, as Lord St. Leonards in that case had expressly held that a court of equity could direct a defendant to live up to a negative promise, though it had no control over the defendant's correlative positive promise.⁴⁷ Yet in a case decided ten years after *Lumley v. Wagner*, and about the same time as *Peto v. The Railway Company*, the case of *Ogden v. Fossick*,⁴⁸ the principle "that the court being unable to carry into effect the whole agreement, ought not to have decreed the specific performance of part of it" is made by Lord Justice Turner the reason for dismissing the bill.⁴⁹ The facts in *Ogden v. Fossick* present a case in which, as in *Stocker v. Wedderburn* and *Peto v. The Railway Company*, there was more than want of mutuality in the remedy. The defendant had promised to grant the plaintiff a lease, and as part of the consideration the plaintiff was obliged to hire the defendant as clerk and salesman. Had the defendant been ordered by the court to grant the lease, the court would not only have been unable to force the

⁴⁶ 1 De G. M. & G. 604, 1852.

⁴⁷ It may be here asked: How did Lord St. Leonards (Sugden) reconcile his decision in *Lumley v. Wagner* with his language in *Gervais v. Edwards*? In his opinion, referring to the Irish decision, he says that case "has no bearing on the present case, for here I leave nothing unperformed which the court can ever be called upon to perform" (page 626). In other words, he reduces his language in *Gervais v. Edwards* so as to make it apply only to a case where the plaintiff has unexecuted covenants which the court might be called upon to perform and which it cannot perform. He thus makes *Gervais v. Edwards* stand for the principle of mutuality of remedy after decree or no remedy, nothing more.

⁴⁸ 4 De G. F. & J. 426, 1862.

⁴⁹ Pages 433, 434. He regards the decision in *Lumley v. Wagner* as an example of a class of cases in which the court issues an injunction to prevent irreparable damage; thus placing the opinion of Lord St. Leonards on an absurd ground, and indicating that he has no sympathy with that celebrated case. *Lumley v. Wagner*, however, is now law in England; see *Montague v. Flockton*, L. R. 16 Eq. 189, 1873; *Donnell v. Bennett*, L. R. 22 Ch. D. 835, 1883.

plaintiff to hire the defendant, but might have been unable to restore the premises to the defendant, a relief to which he would be then entitled. Thus, though the principle expressed in this case is *contra* to that in *Lumley v. Wagner*, and would also include the defence of want of mutuality in the remedy, on the facts before the court the decision can be reconciled with the principle stated by Page Wood in *Stocker v. Wedderburn*. The same may be said of a decision given three years later in *Blackett v. Bates*,⁵⁰ by the Court of Appeals. In this case a dispute having arisen between two persons whom we may call A. and B., the matter was referred to an arbitrator. The arbitrator made an award which required that B. should give A. a lease for twenty-one years, and that during the life of this lease A. should keep a certain private railway in repair, and, as long as A. kept engines on the road, he, A., should furnish B. with power to draw B.'s cars. B., refusing to give the lease, A. brought a bill against him for specific performance, the court treating the bill as if the award had been a contract between the parties. Vice-Chancellor Page Wood decided in favor of the plaintiff on the ground that he could enforce all the unexecuted covenants of the plaintiff.⁵¹ In this view of the case there could of course be no objection to the decree on the ground of want of mutuality or the inability to enforce all the covenants of both parties. Lord Chancellor Cranworth did not believe that he could force the plaintiff to keep the road in repair. He also believed that the award required the plaintiff to maintain an engine to draw the defendant's cars, and that therefore he could not enforce the plaintiff's unexecuted covenants. He reverses the decision of the Vice-Chancellor "for this short and simple reason—that the court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks, the lease; but the defendant cannot get what he is entitled to . . ."⁵² Though the defence of want of mutuality is not expressed in terms, it is the thought back of the sentence just quoted. At the same time the facts of the case are essentially similar to

⁵⁰ L. R. 1 Ch. App. 117, 1865.

⁵¹ His decision is reported, 2 H. & M. 270, 1865.

⁵² Page 124.

Stocker v. Wedderburn. Had the court granted the lease they might not afterwards have been able to undo that, as the rights of third parties might have intervened. There was, therefore, more than the mere inability to enforce the plaintiff's side of the contract, but it is on the principle requiring mutuality in the remedy, and not on that expressed by Vice-Chancellor Page Wood in *Stocker v. Wedderburn*, that the court supports its decision.⁵³

In *Stocker v. Wedderburn* and *Peto v. The Railway Company*, we have cases which may be said to recognize the principle that want of mutuality in the remedy after decree is not of itself sufficient to defeat the plaintiff's right to specific performance. At the same time the cases themselves stand only for the positive proposition, that a court of equity will not grant specific performance, if by so doing they may place the defendant in a position in which he would be entitled, in view of the court's inability to make the plaintiff perform his side of the contract, to further affirmative relief, which relief the court sees it might be unable to grant. In *Wilkinson v. Clements*,⁵⁴ however, we have a case essentially similar to *Dietrichsen v. Cabburn*. The defendant, who owned a large tract of land, made a contract with one, Wood, in which Wood agreed to put up a large number of houses on the defendant's land, and the defendant agreed that when a certain number of houses were completed he would grant a lease of those houses. Wood mortgaged his rights under this contract to the plaintiff, who completed some of the houses and demanded that the defendant give him a lease of the houses finished. In view of

⁵³ It may here be asked why could not this last case and *Ogden v. Fossick* be brought under the decision of *Dietrichsen v. Cabburn* by asking the court to insert in the lease a clause defeating it if the plaintiff did not live up to his side of the contract. Had such a clause been intended by the parties to the contract in the first case and the arbitrator in the second case, the clause indicated could have been inserted by the court. The cases would then have been similar to *Dietrichsen v. Cabburn*. But such a clause in the lease does not seem to have been part of either the contract or the award, and for the purpose of overcoming the objections to the specific enforcement of a contract as made the court cannot insert provisions which do not form part of the agreement between the parties.

⁵⁴ L. R. 8 Ch App. 96, 1872.

the recent confirmation of the idea, that the court to grant specific performance must be capable of executing the contract as a whole, it is not surprising that this case was argued by the defendant's counsel on this principle.⁵⁵ Vice-Chancellor Wickens dismissed the bill on the ground, that as the completion of the rest of the houses could not be specifically enforced, the court could not perform the entire contract. On appeal, however, this decision was reversed and relief given to the plaintiff, because the principle referred to had no application to a contract "which in its very terms, and from its very nature, contemplated successive performances of successive parts independently of one another."⁵⁶ Lord Justice James here stated a principle not heretofore expressed. While admitting the possibility of vitality in the defence that if the contract cannot be enforced as a whole, it will not be enforced at all, he points out that the principle cannot be applied to divisible contracts, that is contracts in which each act to be performed by one party contemplates a simultaneous act to be performed by the other, each series of acts being complete in itself.

Wilkinson v. Clements is the last English case of which the writer is aware in which the defendant would have been warranted by the facts in setting up the defence of want of mutuality, or the inability of the court to perform the whole contract because they had no control over the plaintiff's unexecuted side of the contract. From the few cases discussed we find the existence of two ideas. One that there must be mutuality in the remedy; another that the court must be able to enforce the whole contract. These two ideas are not necessarily antagonistic to each other. Both include the idea that a court will not give a decree for specific performance, where the only security for the plaintiff's performance is an action of damages. Yet this statement is *contra* to at least two decisions, *Dietrichsen v. Cabburn*

⁵⁵ As late as 1871, in *Merchants' Trading Co. v. Banner*, 12 Eq. Cas. 18, a case in which there was not any want of mutuality in the remedy, but in which, as in *Lumley v. Wagner*, the court was unable to make the defendant live up to all his covenants, Lord Romilly, M. R., dismissed the plaintiff's bill on the ground that, as he could not perform the agreement as a whole, he could do nothing.

⁵⁶ Page 110.

and *Wilkinson v. Clements*.⁵⁷ A third idea is, that if the court, should it grant specific performance, would not only be unable to make the plaintiff live up to his side of the contract, but would be unable to give the alternative affirmative relief to which the defendant would be then entitled, specific performance should be denied. This idea is in effect contrary to the requirement of mutuality in the remedy after decree, because it admits that such want of mutuality by itself is not sufficient to defeat the plaintiff's bill. Though it is in accord with the two cases *contra* to the principle that there must be mutuality in the remedy after decree, it is itself *contra* to two other cases, *Waring v. The Railway*, and the second ground for the decision in *Johnson v. The Railway*.⁵⁸ These last cases are also *contra* to a fourth idea, which admits the defence that the court must be able to perform the contract as a whole, if at all, but denies its applicability to cases in which the plaintiff has a series of acts to perform, each one of which forms a distinct part of the contract.⁵⁹

From this résumé it will be perceived that it is impossible to reconcile all the English cases. It is also impossible to state that mutuality of remedy after decree will not be required. One principle, however, seems to be firmly established, and that is, that if in addition to want of mutuality in the remedy of specific performance, the court perceives that if they grant the plaintiff's bill, they may place the defendant in a position from which they cannot extricate him, then specific performance will be denied. Again, it would seem that it was at least likely that the idea that mutuality in the remedy is essential would not be applied to cases in which it was

⁵⁷ 2 Phillips 52, 1846; L. R. 8 Ch. App. 96, 1872.

⁵⁸ 7 Hare 482, 1849; 3 De G. M. & G. 915, 1853.

⁵⁹ From this point of view there is no distinction between *Dietrichsen v. Cabburn*, *Wilkinson v. Clements*, and *Waring v. The Railway*. In the first case each of the acts in the series to be performed by the plaintiff was the sale of the defendant's patent medicine. For each act the plaintiff paid a commission. In *Waring v. The Railway*, each act was the daily running of the trains, for which the plaintiff received a stated sum, or a stated portion of the receipts. In *Wilkinson v. Clements* the act was the erection of a certain number of houses, on which the defendant was to grant a mortgage.

clearly the intention of the parties that the contract should consist of successive acts on the part of the persons contracting, each of which was complete in itself. If we are right in the last position, there may be something left in England of the defence of want of mutuality in the remedy; but certainly not a great deal. We shall now turn to the American cases.

Perhaps the first case in the United States, in which a plaintiff asked for specific performance where there was want of mutuality after decree, is that of *Ross v. Union Pacific Railway Company*,⁶⁰ decided by the late Justice Miller of the Supreme Court. An act of Congress granted to the railway company a certain amount of land and government bonds for every mile of road constructed. The construction had to be approved by the government. The plaintiff and the defendant company entered into a contract in which the plaintiff agreed to construct three hundred miles of road and the defendant agreed to pay for every mile \$16,000 in United States bonds, \$11,500 in bonds of the company secured by mortgage, and \$6,000 in full paid stock of the company. These payments were to be made as each section of forty miles was accepted by the United States. The plaintiff expended about \$40,000 in preparing to execute the contract, when the defendant repudiated it, made arrangements with other parties to build the road, and to carry out this last arrangement mortgaged its property and was about to issue bonds on this mortgage. The object of the bill was to restrain the issue of the bonds under the mortgage, and for a decree compelling the specific performance of the contract. Mr. Justice Miller refused the motion for the injunction, which refusal involved the dismissal of the bill, for two reasons, one being the want of mutuality in the remedy.⁶¹ In dealing with this question he does not

⁶⁰ 1 Woolworth 26, 1863.

⁶¹ The other reason was his belief in his inability to make the defendants specifically perform their entire agreement. The delivery of the stock and bonds of the company, these being limited in quantity, might he thinks be enforced; but not the delivery of United States bonds, for these being practically unlimited in quantity, can always be procured on the market, and one bond is as good as another. As he cannot enforce all the defendant's obligations, he believes that he

cite or discuss either *Dietrichsen v. Cabburn* or *Stocker v. Wedderburn*, but turns at once to the question whether it is possible for a court of equity to decree the construction of a railway three hundred miles long. Coming to a negative conclusion on this point he dismisses the bill. The case is similar to the English case of *Peto v. The Railway*.⁶² In both cases the plaintiff had agreed to build and was willing to build a railroad; in both payment was to be made in the stocks and bonds of the defendant company as the work progressed. In either case the plaintiff might have built part of the road, received the agreed stocks and bonds, sold them on the market, and then failed to complete the road. In each

cannot enforce the defendant's negative obligation not to do anything which would put it out of their power to perform their contract. The principal case cited is *Gervais v. Edwards*. (See *supra*, note 22.) It will be noted that this conclusion, even assuming that the court cannot enforce all the defendant's obligations, is contrary to the then decided case of *Lumley v. Wagner*, which has since become generally recognized as law in this country, unless we regard the insertion of an express negative as necessary to relief in this class of cases. (For a discussion of cases similar to *Lumley v. Wagner* in the United States, see 49 A. L. R. (O. S.), 319.) But the curious part of the learned judge's position is, that he assumes that, as there is an ample remedy at law for the non-delivery of United States bonds, a court of equity will under no circumstances enforce a contract to deliver them. This is not and never has been so. Ordinarily a court of equity will not give specific performance of a contract to deliver bonds where the bonds can always be purchased on the market. This is because there is in such a case an ample remedy at law. The contract is in effect a promise to give the bonds or pay the market value. But there is no fundamental objection to decreeing the delivery of such bonds or to the payment of money. The vendor of land obtains specific performance though the decree is that the defendant pay the purchase price. (See 50 A. L. R. (O. S.), 65.) The case before Mr. Justice Miller was not like *Lumley v. Wagner*, where the defendant had made two promises, one of which the court could not, even if it wanted to, enforce. The defendant promised to do two things, one for which the remedy at law was inadequate, and one in which it was adequate. There was no mechanical difficulty in the court's directing the performance of either. Taking hold of the case because of the failure of the common law remedy to give complete relief, there would appear to be no possible objection to the court's forcing the defendant to live up to his promises. This of course is not saying that the decision of the case is wrong, but merely that the first reason for the decision as given by the Justice will not bear investigation.

⁶² *Supra*, note 44.

had he done so the plaintiff's borrowing power would have been seriously impaired, and the court could neither make the plaintiff perform his obligations, give the defendant back the bonds, or cancel the mortgage that had been placed on the road. *Ross v. The Railroad* is, therefore, an example of a case in which the decision could have been placed on the ground, that to grant the bill might place the defendants in a position from which the court could not extricate them, but in which the court contented itself with placing the decision on the want of mutuality in the remedy. Similar to *Ross v. The Railroad* are the cases of *Bourget v. Monroe*,⁶³ *Ikerd v. Beavers*⁶⁴ and *Chadwick v. Chadwick*.⁶⁵ In all of these cases the plaintiff sought specific performance of the defendant's promise to convey him land, on the faith of the plaintiff's undertaking to support the defendant. In each one the reasons for the court's dismissal of the plaintiff's bill was that the plaintiff could not be made to support the defendant,⁶⁶ and therefore the remedy was not mutual.⁶⁷ Here again the same conclusion would have been reached had the court chosen to apply the principle enunciated by Vice-Chancellor Page Wood. Had the court granted the prayer of the plaintiff's bill, he might have sold the land and then failed to support the defendant, and the court assumed that they would have then no power to make him do so.⁶⁸

There are other American cases in which the idea that the

⁶³ 25 N. W. Rep. 514, Mich. 1885.

⁶⁴ 106 Ind. 483, 1886, 487; see also *dicta*, *Denlar v. Hill*, 123 Ind. 68, 1889, 70.

⁶⁵ 25 So. Rep. 631, Ala. 1899.

⁶⁶ The Supreme Court of New Hampshire seems to have come to an opposite conclusion; see *Hackett v. Hackett*, 40 Atl. Rep. 434, N. H. 1893; *Stillings v. Stillings*, 42 Atl. Rep. 271, N. H. 1894, 272. There is apparently a *dictum* to the same effect by Lord Langdale, in *Hill v. Gomme*, 1 Beav. 540, 1839, 554.

⁶⁷ In each case there were other sufficient reasons for the decision.

⁶⁸ In *Grimmer v. Carlton*, 93 Cal. 189, 1892, the court went so far as to cancel a deed which had been given in consideration of a promise to support on the ground that, as there could not be specific performance, the contract lacked mutuality. This is using the word "mutuality" in the sense of "consideration."

Where the contract in effect provides that the deed conveying the land shall contain a clause defeating it, if support is not given, there would appear to be no objection to specific performance, at least under

remedy should be mutual has defeated specific performance in cases similar to *Dietrichsen v. Cabburn*. Three such cases are *Richmond v. The Dubuque and Sioux City R. R. Co.*,⁶⁹ *Pullman Palace Car Co. v. Texas and Pacific R. R. Co.*⁷⁰ and *Iron Age Publishing Co. v. Western Union Tele. Co.*⁷¹ In the first case the contract was, that the plaintiff should build a grain elevator at Dubuque and handle for a period of six, or possibly for twenty-one years, all the through grain of the railroad company. The railroad company expressly promised to give the plaintiff all its through grain. After the elevator had been built and the contract had been in operation for some time, the railroad company with which the contract was made was purchased by the defendant company, and instead of transshipping the grain, the consolidated company shipped it without change through Dubuque. The plaintiff company brought its bill to compel the delivery of the grain to it. The court thought that the plaintiff had an adequate remedy at law, and that if they had not, to force a common carrier to use any particular method, however antiquated, of conducting its business, would be against public policy. But the court, as stated, also believes the want of mutuality in the remedy would be sufficient to defeat the plaintiff's claim.⁷² "What assurance," asks Chief Justice Beck, "can equity give by its decree, that the plaintiffs will always be possessed of sufficient capital to carry on the business . . .?" The question of course must be replied to in the negative. But the same reply would have had to be given in *Dietrichsen v. Cabburn* to a similar question. In both cases, however, had the plaintiff refused to continue to perform the services, full justice could have been done the defendant by dissolving the injunction.⁷³ The case of *Pullman Car Company v. Texas Pacific R. R.* is

the principle of Vice-Chancellor Wood in *Stocker v. Wedderburn*. See, for a case in which the contract for support contained the proviso indicated, *Stamper v. Stamper*, 28 S. E. Rep. 20, N. C. 1897.

⁶⁹ 33 Iowa 422, 1871.

⁷⁰ 4 Wood, C. C. 317, 1882.

⁷¹ 83 Ala. 498, 1887.

⁷² Pages 486, 487. The overruled case of *Hills v. Croll*, 2 Phillips 60, 1845, is cited, but not the case of *Dietrichsen v. Cabburn*.

⁷³ Whether the other reasons given by the court can be supported it is outside the province of this paper to discuss.

substantially similar. The contract on the part of the plaintiff was to supply at fixed rates a sufficient number of Pullman cars to meet the needs of the defendant, and the bill was for an injunction to prevent the defendant company from making a similar contract with the plaintiff's rival. The court dismissed the bill, partly because the monopoly contemplated by the contract would prevent the adoption of improved methods of transportation, and partly because of the want of mutuality in the remedy.⁷⁴ The contract involved in the last case, *Iron Age Publishing Co. v. Western Union Tel. Company*, was the ordinary contract of the Associated Press with a local representative. The plaintiff, the publisher of a newspaper in Birmingham, alleged that he had a contract with the Associated Press to gather for the association all the news in his district, and that the association agreed to supply his paper, and no other paper in Birmingham, all the Associated Press news. The bill was to restrain the defendant from violating the negative term of this alleged contract. Again, the court believe the want of mutuality in the remedy sufficient to defeat the plaintiff's bill.⁷⁵ How is it practical, they ask, to compel the complainant to perform personal services as agent of the Associated Press?⁷⁶ In all of these cases the doctrine might have

⁷⁴ Page 324. In view of the fact that the defendant had to carry the plaintiff's cars there was an element in the case which brings up the question raised in *Lumley v. Wagner*. There was also a feature of the case which rendered any relief at least questionable, though the point was decided against the defendant. A clause in the original contract provided, that if at the end of two years the plaintiff wanted to enter into another and similar contract for fifteen years, then, on the plaintiff's indication of its desire, the defendant should enter into the second contract. This the defendant refused to do, and it was this second contract which the plaintiff sought to enforce. The court said the second contract was in force. Yet here we have, what is rare, a contract to enter into a contract; and, if the meeting of minds is essential to a contract, there was no meeting of minds over the second contract. The second contract did not exist and could not be sued on either in law or equity. There was merely a breach of the first contract. For a discussion of this question, see 49 A. L. R. (O. S.). 384.

⁷⁵ Page 510.

⁷⁶ The court also dismissed the bill on the ground that the contract

been applied, that full justice could be done the defendant, though there was want of mutuality in the remedy, by keeping the negative injunction asked for alive until the plaintiff failed to perform the services stipulated. Though in each case the court puts its decision on other grounds as well as on want of mutuality, in as far as they place their conclusions on that ground, the decisions are contrary to *Dietrichsen v. Cabburn*. Mere want of mutuality, standing alone, is held sufficient to defeat the plaintiff's bill.⁷⁷

The case of *Cooper v. Penna*.⁷⁸ might also be considered *contra* to *Dietrichsen v. Cabburn*. In this case the defendant and another were joint owners of a certain tract of land. Being desirous of having a partition of the tract, the defendant employed the plaintiff to make the necessary surveys and division, and agreed that as his compensation the plaintiff should have any three hundred and twenty acres which he should select out of the tract falling to the defendant. The plaintiff performed part of the work, and was willing to perform the residue, but the defendant refused to allow him to go on. Thereupon the plaintiff asked that the defendant be made to convey to him a certain three hundred and

itself was not clearly alleged, and that they had no jurisdiction over the defendant. They also regarded the case as presenting facts similar to *Lumley v. Wagner* and doubt whether that case should be followed.

⁷⁷ The decision in *Simon v. Wildt*, 84 Kty. 157, 1886, 116, may also be considered *contra* to *Dietrichsen v. Cabburn*. A. promised to support B. and B. in consideration promised to refrain from suing A. on a debt due, and to give him the principal of the debt on his (B.'s) death. A.'s wife having died, B. refused to continue to live with A. and brought suit on the debt. A. asked in effect for an injunction to restrain this suit. The court found for B., partly on the ground that the changed circumstances rendered it impossible for B. to live with A., and partly because the contract is "devoid of mutuality as to specific performance." But, as long as A. was able and willing to carry out his contract, under the principle evolved from *Dietrichsen v. Cabburn*, B. could have been prevented from suing on the debt. This possibility is not discussed by the court.

In the similar case of *O'Brien v. Perry*, 130 Cal. 526, 1900, the court places its refusal to give the plaintiff, who was willing to support, relief, on the ground, not of want of mutuality in the remedy, but of want of mutuality in the obligation; that is, that contracts of this character are not valid contracts. To the same effect, see *Grimmer v. Carlton*, 93 Cal. 189, 1892, *supra*, note 68.

⁷⁸ 21 Cal. 403, 1863.

twenty acre tract which he had selected. The court on appeal dismissed the bill for specific performance on the ground of want of mutuality, as so far as the agreement was unperformed by the plaintiff, the court could not make him perform it. It is true that the exact prayer of the plaintiff's bill could not have been granted, as the services still to be performed were a substantial part of the consideration for the land, and under the terms of the agreement, these services were to be performed before the land was to be conveyed. But, had the principle which may be obtained from *Dietrichsen v. Cabburn* been applied, the court could have restrained the defendant from preventing the plaintiff continuing with the work.⁷⁹ A similar but clearer case in which the plaintiff was denied specific performance though the land was not to be conveyed until after performance of the services agreed on, is *Alworth v. Seymour*.⁸⁰ In that case the plaintiff agreed to try and recover certain property for the defendant. The defendant was to convey half the property to the plaintiff should he recover it. The plaintiff expended time and money in legal services. The defendant then tried to terminate the contract, and was about to convey her interest in the property to others. The plaintiff, by

⁷⁹ It may be that a fuller view of the facts than is given in the report would show that the acts to be performed by the plaintiff were those of an attorney, not those of a surveyor. If this was so, the injunction suggested, even under *Dietrichsen v. Cabburn*, could not be granted, as it would in effect have forced a servant on an unwilling master. See *Pickering v. Bishop of Ely*, *supra*, note 40.

The case of *Sturgis v. Galindo*, 59 Cal. 28, 1881, may have been similar to *Cooper v. Penna.*, but as the facts are not given either by the reporter or court, it is impossible to understand the opinion, or say that the case stands for anything, except that under some circumstances mutuality is necessary in bills for specific performance. In *Wakeham v. Barker*, 82 Cal. 46, 1889, the Supreme Court of California affirms its position in *Cooper v. Penna.* In the later case the plaintiff alleged in his bill that he had agreed with the defendant to perform certain services and in return the defendant was to convey him land. He further alleged that the services were performed until the defendant prevented him. A general demurrer was sustained, on the ground that the plaintiff must at least show what portion of the services had been performed, the thought apparently being, that unless they were substantially performed specific performance should be denied.

⁸⁰ 42 Mich. 526, 1890.

his bill, sought to enjoin the defendant from parting with her interest in the land. The court refused this relief on the ground, that, admitting the contract gave the plaintiff an interest in the land,⁸¹ there was no mutuality in the remedy.⁸²

There are other American cases, however, which have in effect applied the principle, that mere want of mutuality after decree is not of itself sufficient to defeat specific performance. The first case of this character is *Singer Sewing Machine Co. v. Button-Hole Co.*,⁸³ a case similar to *Dietrichsen v. Cabburn*. The defendants agreed to give to the plaintiff the exclusive right for a certain period to sell the machines manufactured by the defendants. After the agreement had been in operation for some time, the defendants began to take steps to dissolve, so as to avoid the arrangement with the plaintiff. This the court prevented by an injunction. It will be noticed that these facts, as those in *Dietrichsen v. Cabburn*, presented a case in which the court could neither force the defendant to live up to his promise to manufacture machines, nor force the plaintiff to continue to push their sale. As in *Dietrichsen v. Cabburn*, the want of mutuality arising from the second circumstance is not referred to by the court,⁸⁴ but the fact that all the covenants of the defendants cannot be enforced, is shown not to prevent the enforcement of the defendants' negative obligation to refrain from selling to any one else. From this point of view *Dietrichsen v. Cabburn* is cited, and its similarity to the case before the court pointed out.⁸⁵

⁸¹ They did not think it did, and on this ground also dismiss the bill.

⁸² Page 528.

⁸³ 1 Holmes, 253, 1873.

⁸⁴ The defence of want of mutuality is referred to, but on an entirely different point. The defendant alleged that the contract lacked mutuality because there was a clause enabling the plaintiff to terminate it at his option. The court doubted the alleged effect of the clause referred to, but declared that such a clause would not enable the defendant to raise such a defence. See, for a discussion of this phase of the case, 49 A. L. R. (O. S.), 333.

⁸⁵ Page 257. The court also thought that the contract vested a property right, in the nature of a franchise, in the plaintiff; pointing out that the jurisdiction to protect such a right was another ground for the injunction. See page 258. For a somewhat similar case in

A case somewhat similar to the foregoing is that of *Petrolia Manufacturing Co. v. Jenkins*.⁸⁶ There, the defendant agreed to buy from the plaintiff all the soap it used in its business for a period of twenty years, and the plaintiff agreed to put up a factory, and, by implication, to supply the defendant with all the soap it needed. The defendant having erected the factory, the plaintiff secured an injunction preventing the defendant from breaking its covenant, though of course the obligation to continue to furnish the soap could not have been enforced.⁸⁷ Another comparatively recent New York case is *Fashion Co. v. Siegel-Cooper Co.*⁸⁸ The plaintiffs had agreed to conduct, for a period of two years, the sale of fashion plates in the defendants' department store. The defendants were to supply space, the necessary bookkeeping, etc. They also agreed not to sell themselves, or allow anyone else to sell, fashion plates. Apparently before the contract had begun to be performed on either side, the defendants attempted to terminate the contract, and make a similar contract with another fashion plate company. The court thought themselves unable to enforce the defendants' affirmative covenants, but they thought they could restrain the defendants from violating the negative part of their undertaking, and they therefore restrained them from dealing with anyone else in relation to the sale of fashion plates.⁸⁹ As in *Singer Sewing Machine Co. v. Buttonhole Co.*, the want of mutuality in the remedy after decree is not referred to, the court in large part confining its attention to the fact that they are unable to make the defendants perform their affirmative covenants, the conclusion that this fact should not prevent the court giving the plaintiffs relief as far as possible being reached on the strength of the decision in *Lumley v. Wagner*, and

which the protection of the right of property was practically the sole ground of the court's action, see *Jones v. Williams*, 39 S. W. Rep. 486, Mo. 1897.

⁸⁶ 51 N. Y. Sup. 1028, 1898.

⁸⁷ There is no discussion of the want of mutuality in the remedy. On page 1031 the court say: "The contract did not lack mutuality." But they are here speaking of the alleged want of mutuality in the obligation, arising from the defendant's assertion, with which the court did not agree, that the plaintiff was not obliged to furnish the soap.

⁸⁸ 157 N. Y. 60, 1898.

⁸⁹ Affirming 30 N. Y. App. 504, 1898.

similar cases in this country. It will be noticed that in this case, unlike the case of *Dietrichsen v. Cabburn*, and the two American cases just mentioned, while the plaintiffs were willing to perform their side of the contract, nothing had been done at the time they brought their bill.

While, as pointed out, the three cases just discussed go so far as to ignore the existence of any rule requiring mutuality in remedy after decree, in none by the action of the court was the defendant put in a position from which the court could not extricate him. In any of the cases, had the plaintiffs refused after decree to live up to their obligations under the contract, while the court could not force them to do so, the defendants would be relieved from all future embarrassment by dissolving the injunction. There is, however, at least one American case in which relief was given the plaintiffs, though had they afterwards refused to perform their side of the contract, the court would not only have been unable to force them to do so, but would have been unable to restore the property of which by their decree they had deprived the defendants. The case is that of *The University of Des Moines v. Polk County Homestead Co.*⁹⁰ The plaintiffs agreed to erect certain college buildings on land furnished by the defendants, and to maintain a first class college for ten years. The defendants agreed to convey the land on which the buildings were to be built to the plaintiffs, and also to convey certain other lots to such persons as the plaintiffs should designate. The first part of the contract was carried out on both sides; that is the defendants conveyed the land for the college buildings, and the plaintiffs erected the buildings, though after considerable delay. The bill was to compel the defendants to convey one of the lots to the person designated by the plaintiffs. The want of mutuality arising from the inability of the court to force the plaintiffs to maintain a college of standard grade was raised by the defendants' counsel. The court, in dealing with this defence, confuse the want of mutuality in obligation with want of mutuality in remedy. In their opinion they use the language of an early Kentucky case which they

⁹⁰ 53 N. W. Rep. 1080, 1893.

refer to, *Breckenridge v. Clinkinbeard*,⁹¹ to the effect that when a plaintiff has performed so much of his part of the agreement that he cannot be put *in statu quo*, and is in no default for not performing the residue, he will be entitled to specific performance. In view of this statement and the facts of the case the Iowa decision may be said to stand for the proposition, that want of mutuality in the remedy after decree is no defence where the plaintiff cannot be restored to the position he was in before he performed that part of the agreement which was required to be performed at the time he brought his bill. Put in another light, the court, being placed in a position of inability to place the defendant *in statu quo* should they give the plaintiff specific performance, and a similar present inability to place the plaintiff in the position he was in before entering the contract should they dismiss his bill, prefer to choose to run the risk of doing a possible injustice to the defendant, to allowing the defendant to inflict a present similar injustice on the plaintiff.

These cases are all the American cases known to the writer in which the defendant could have raised the defence that there would be want of mutuality in the remedy after decree. From our review we may say that the doctrine that the remedy must be mutual in such cases has received more attention and certainly more commendation from the courts in this country than it has in England. At the same time there are a number of cases in which the defence has been ignored. On the other hand, the idea that a court to enforce a part of the contract, must be able to enforce it in its entirety, as applied to cases in which the court is unable to force the plaintiff to execute his side of the contract, has found with us absolutely no expression. Again, while in all but one of the cases where want of mutuality after decree existed, and in which the court granted specific performance, had the plaintiff refused to live up to his side of the contract, the court could have extricated the defendant

⁹¹ 2 Litt. 127, 1822, 128. As used in this Kentucky case the language is *dicta*; besides which the Kentucky court is referring to an entirely different question than that which was before the Iowa court; namely, the question how far the non full-performance of his obligations, where such failure to fully perform is not his fault, affects the plaintiff's right to specific performance.

from his position, nowhere do we find any statement similar to that of Vice-Chancellor Page Wood in *Stocker v. Wedderburn*.⁹² In the one case referred to, by obeying the court's decree, the defendant was placed in a position from which the court could not have extricated him had the plaintiff failed to live up to his unexecuted covenants.

In the first part of this article I have shown that if want of mutuality in the remedy after decree will not defeat a bill for specific performance, there is no such defence in the law; because want of mutuality in the remedy at the inception of the contract, or want of mutuality at the time of the decree, has never been held sufficient to defeat the plaintiff's bill except in the single instance of the infant plaintiff. The net result of our investigation may be said to be, that on both sides of the Atlantic there exists a conflict of authority on the question whether mere want of mutuality in remedy after decree, standing by itself, is a good defence, though in America the defence finds much more support than in England. If there can be said to be any tendency, the writer is of the opinion that the defence, never clearly understood, though often much talked of, is tending to disappear.

In view of the present uncertain state of the law perhaps an analysis of the propriety of the defence, considered apart from the cases, may not be out of place. As stated, the idea which lies at the basis of the opinion that the remedy should be mutual, is the feeling that a court of equity is essentially a court in which all parties are to be treated fairly, combined with the fact that the remedy of specific performance is a remedy in addition to the common law remedy in damages, and therefore it is peculiarly within the discretion of the chancellor to grant or refuse it. This element of fairness is said to be lacking where there is want of mutuality in the remedy after decree; where, in other words, the court might find itself unable to give specific performance to the defendant after having given it to the plaintiff. It is perhaps a matter of original apprehension, but this point of view does not appeal to us. Even if it did, the fact that where applied it tends to defeat justice would be

⁹² See *supra*, note 41.

sufficient to cause us to carefully examine its validity. Take a case like *Ross v. The Railroad*, with this difference that the plaintiff is to receive cash not bonds for his work. A. promises to build a railroad for B., and B. to pay him in cash as each mile is completed. A. is willing to proceed, has perhaps built some of the road. He asks the court to make B. live up to his obligations, as long as he, A., performs his. The argument in favor of mutuality in the remedy or no remedy runs like this: "You should not force me to live up to my obligations, because if you do, and then this plaintiff should fail to continue to live up to his obligations, you could not give me the relief he now asks you to give him." The strength of this argument lies in two assumptions. First, that it is probable that the plaintiff will not, after having obtained the court's decree, continue to live up to his side of the contract. Second, that in the event of the plaintiff failing to live up to his obligations, the decree now asked for, though fair and proper now, would by the plaintiff's subsequent conduct and the court's infirmity become unfair and improper. The first assumption is not correct as a matter of fact. The plaintiff by performing or offering to perform up to the time of bringing his bill, will in all probability continue to perform after the decree is made. In the first place he is apparently an honest man; in the second, the very fact that he has proceeded actively to try and keep the contract alive, shows that it is for his advantage to continue to live up to his obligations under it. Turning to the cases we cannot find one where the plaintiff was defeated because of want of mutuality, in which we can affirm that it was likely the plaintiff would have failed to continue to perform his obligations had the decree been in his favor. At the same time there is no record in any case like *Dietrichsen v. Cabburn*, that the successful plaintiff failed to continue to live up to his side of the contract. But, if the first assumption in support of the argument that the remedy after the decree should be mutual is false in fact, the second is not correct in inferring the existence of an element of injustice from the facts supposed. Suppose the improbable thing happens in the case just put, and A., after securing a decree preventing B. from having anyone else build his railroad,

himself refuses to proceed, where is the injustice to B.? He has been made to live up to his contract. *Per se* there is no injustice in that. He cannot now make A. perform his contract. This is unfortunate. In itself this inability of the court to help B. is a failure of justice to him; but is it not more or less a failure because the court has up to this time obliged B. to perform what he undertook to perform?

The illustration and argument just used apply only to a case in which the element of want of mutuality after decree exists, but nothing more. The idea that a court should not place a defendant in a position from which they cannot extricate him, the idea of Vice-Chancellor Page Wood, is not involved. If the plaintiff fails to live up to his contract the assumption is that the court, by reversing its action, dissolving the injunction which it is now asked to grant, would give to the defendant all the relief, except performance, which he would then have a right to claim apart from his claim for damages for the breach of the contract.⁹³

⁹³ Perhaps we should here point out an argument against issuing an injunction in the class of cases typified by our illustration, advanced by Somerville, J., in the *Iron Age Publishing Co. v. Western Union Tele. Co.*, 83 Ala. 498, 1887, 511 (see *supra* note 71 and text for the facts of the case). Speaking for the court he says: "The injunction asked for might involve the frequent necessity on the part of the court of hearing complaints from the defendant, charging the complainant with a breach of his duties. . . . There would thus be no end to the number of occasions, when the court might be called on, from year to year, to say whether the complainant has performed his duties in question faithfully and efficiently. . . ." In the first place it should be pointed out that this description of the possibilities of the case is exaggerated. If the defendant charged the plaintiff with not performing his duties, the charge would be either well or ill founded. If the former the injunction would be dismissed and the case would never again come before the court. If the defendant failed to substantiate his charge he could not again bring his bill unless he alleged entirely new matter, and if the court found his complaints again trivial he could be prevented, by the adjustment of the costs, from again unnecessarily worrying the court or the plaintiff. But even allowing some possible truth in the picture drawn by the learned judge, it may be pointed out that a court should hesitate to refuse to protect the plaintiff's rights, on the ground of the trouble involved. It is true that the plaintiff had a remedy at law, but in the case before the court this remedy was so inadequate that there should be more than a bare possibility of trouble to warrant the refusal of relief.

Where the court, should the plaintiff hereafter refuse to live up to his side of the contract, would not only be unable to force him to do so, but might also be unable to give the defendant the alternative relief to which he would then be entitled, we have something more than mere want of mutuality in the remedy. The idea of Vice-Chancellor Page Wood, which is applied in *Stocker v. Wedderburn* and *Peto v. The Railway*, has, as we have pointed out, nothing to do with want of mutuality. It rests, not on the idea of equality of remedy, but the thought that a court of equity must not place a defendant, whatever the justice of the plaintiff's cause, in a position from which he cannot be relieved should it become, as it may, proper to do so. One may agree to this proposition and yet be entirely out of sympathy with the idea that the remedy should be mutual. And yet the writer cannot agree with even this limitation of the plaintiff's right to relief. Take a typical case. A. may contract with B. that B. shall convey to him land, and in consideration therefor, A. will, after conveyance, serve B. for one year. In this case should the court make B. perform his side of the contract, it is possible that A. may resell the land and then refuse to perform his side of the contract. In such an event the court would not only be unable to give B. specific performance, which in the writer's eyes is no reason for now refusing A. specific performance, but would be unable to restore the land to B., and B. can unquestionably claim that he has a right, as between himself and A., to such restoration on A.'s failure to perform the promised services. Yet we may presume that in the case put the contract was a fair one. There was no question, for instance, but that the contract in *Peto v. The Railway*, or the contract in *Ross v. The Railroad*, was a fair contract. But why is the contract fair? Is it not because it is reasonable for B. to give his land to A. on the faith of A.'s promise to work for him, B.? Or in *Peto v. The Railway* or *Ross v. The Railroad*, the contract, if fair, must be so because it is reasonable for a railroad to promise to give bonds to a contractor for the work of building the road, and to pay out these bonds, as each mile or section of the road is completed. If the court forces the defendant to live up to his

contract in either case, they enforce a fair contract, and they never place the defendant in any position which, under his fair contract, he would not have placed himself had he been an honest man. Why should the court, being able to make the delinquent defendant live up to his obligations, hesitate to do so, because they would place him in a position in which he has expressly agreed to place himself? The record of cases in which the defendant has succeeded in the defence of want of mutuality, or in this other defence that the court will be unable to extricate him from a position in which, had he been honest, he would have placed himself, is a record of gross miscarriages of justice. In view of the uncertainty of the exact meaning of the defence of want of mutuality in the professional mind, and the fact that in recent cases we have a tendency to ignore it altogether, taken in connection with the fact that the ideas suggested by Page Wood have found little response in England and none in this country, it is perhaps not too much to hope, that in many of our jurisdictions the courts will soon be able to say that: "A plaintiff can have specific performance in all cases where the contract is fair and reasonable in all its parts, where he is not himself in default, and where the obligations of the defendant which he seeks to enforce are capable of being enforced by the court, and that to this rule there are no exceptions, either on the ground of want of mutuality in the remedy, or on the ground that the court cannot undo what it directs to be done."

William Draper Lewis.