MUTUALITY OF OBLIGATION AND REMEDY AS A REQUISITE TO EQUITABLE RELIEF, WITH SPECIAL REFERENCE TO OIL AND GAS LEASES.

The Supreme Court of Illinois has recently decided in the case of *Ulrey* v. *Keith*,[1] that a court of equity will not afford protection to a lessee under a so-called "oil and gas lease," where the lessee, by the terms of the instrument, is given the right to terminate the lease at any time. While recognizing the lease to be binding on the lessor in a court of law, they deny the right of the lessee to obtain an injunction restraining the extraction of oil and gas by one claiming under a subsequent lease, which is admittedly void. Operations by a trespasser would, of course, be enjoined on the ground of waste, but a bill for an injunction against the lessor and his subsequent lessee is said to be a bill seeking a virtual specific performance of the first lease as against the lessor. This is refused for "lack of mutuality in remedy."

The defense of lack of mutuality in remedy has long been a weapon in the hands of astute counsel with which to perplex the mind of a court sitting in equity. For this reason the novelty of the question as applied to oil and gas leases is all the more surprising. Since the year 1859, the date of the discovery of oil in Western Pennsylvania, to the present time, when the existence of these valuable minerals has been found to extend to thirty of the forty-six states of the Union, a vast amount of litigation has taken place concerning the respective rights of adverse lessees. During this period of time many leases, similar in form to the lease

[1] 86 N. E. (Ill.) 696.

involved in *Ulrey* v. *Keith,* have been before the courts.[2] Now, apparently for the first time, the question here raised is presented, and squarely decided.[3]

In order to apprehend the full force and effect of this decision, as well as the reasoning of the Illinois court, a short statement of the facts is necessary: The lease in question was executed for the term of five years and "as much longer as oil and gas is found in paying quantities." It contained the usual provisions of the oil and gas lease with both a prospective and a present consideration moving from the lessee. The prospective consideration was a reservation of a one-eighth royalty of all the oil and a certain rental to be paid for each producing gas well. The present consideration consisted of the nominal sum of "$1.00, the receipt of which is hereby acknowledged," and covenants by the lessee to drill a well within twelve months or, in default thereof, to pay a rental at the rate of $1.00 per acre per year. It also contained the following so-called "surrender clause":

"It is agreed that upon the payment of $1.00 at any time * * * said parties of the second part, their successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms, shall cease and determine and this lease becomes absolutely null and void."

The lease was duly recorded, a well was drilled by the lessee in four months, but operations were then discontinued for a time. A second lease was then executed by the owner of the premises to other parties, who took possession and began operations. Whereupon the prior lessee filed his bill in equity, asking an injunction restraining defendants from

---

[2] The following are a few cases granting equitable relief where the point was not noticed: *Compton* v. *People's Gas. Co.,* 89 Pac. (Kan.) 803; *Pittsburgh, etc., Co.* v. *Bailey,* 90 Pac. (Kan.) 803; *Northwestern Ohio Gas Co.* v. *Browning,* 15 Ohio C. C. Rep. 84; *Friend* v. *Mallory,* 52 W. Va. 53; 43 S. E. 114; *Logan Nat. Gas Co.* v. *Great Southern Oil & Gas Co.,* 126 Fed. 623; *Brewster* v. *Lanyon Zinc Co.,* 140 Fed. 801; *Allegheny Oil Co.* v. *Snyder,* 106 Fed. 764.

[3] *Watford Oil & Gas Co.* v. *Shipman,* 233 Ill. 9, contains a dictum that a surrender clause in an oil and gas lease destroys the right to equitable relief. But the case went off on other grounds.

drilling for oil or gas. A decree by the lower court granting the injunction was reversed by the Supreme Court on the ground that a "suit to enjoin the violation of a contract is governed by the same rules as a suit to enforce specific performance." Since the existence of the surrender clause would prevent an enforcement of the lease against the lessee, there was held to be a lack of mutuality in remedy which precluded equitable relief against the lessor. So far from suggesting that the lease became *nudum pactum* by reason of the lessee's option to terminate, this is distinctly denied and the validity of the contract sustained. The decision, therefore, is one relating solely to the remedy available under a binding contract.

The reason for the existence of this surrender clause, which is found in most oil and gas leases, is to be found in the conditions under which such leases are taken. Men who make a business of taking leases visit undeveloped, or "wild-cat" territory, far ahead of operations, and lease a number of adjoining farms in a vicinity, so as to make up a "block" of leases. It is necessary that a large block of leases be obtained, as otherwise the operator would risk his money in sinking wells and discovering oil for whomsoever might obtain the adjacent territory. The expenditure is large, the chances of finding oil small. Consequently, if the result be such as to discourage further developments in that vicinity, it is necessary, for the protection of the operator, that he have the privilege, upon the payment of a small sum or the rentals due to date, of surrendering all his leases and shielding himself from further liability. Since the lessee shoulders all the risk, this provision is surely not unfair,[4] and it is only by reason of the technical rule requiring mutuality in the remedy that the injunction is refused.

Before considering the various questions involved in determining the correctness of this decision, it would be of advantage to examine the nature of the interest acquired by

[4] See *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801, and *New American Oil & Mining Co.* v. *Troyer*, 77 N. E. (Ind. 1906) 739.

the lessee under an oil and gas lease. If such a lease vested in the lessee an estate in the oil and gas, there would be an estate in the land which would of itself be the proper object of equitable relief. Such a construction would dispense with any discussion as to mutuality. The requirement of mutuality in remedy applies only to executory contracts, and, supposing the lease to grant an estate in the land, wrongful extraction of the oil and gas would be enjoined, as coming under the ancient head of equitable jurisdiction called Waste.[5] But the courts, at an early date, held that oil and gas, owing to their fleeting and fugitive character, were minerals *ferœ naturæ*—like wild animals or running water, they could not be the subject of absolute ownership until reduced to possession.[6] Although not yet established beyond controversy, the better opinion seems to be that, before oil or gas is found, the lessee has the vested right to search; after it is found, the vested right to produce; but no title in the oil itself until actually in possession.[7]

In seeking to enforce the lease against a subsequent lessee in a court of equity, the right of the lessor to forfeit the first lease is often involved. Here we find a modification of the rule that equity abhors a forfeiture. Owing to the peculiar nature of oil and gas as minerals, and the consequent importance of diligent operations, a clause giving to the lessor the right to forfeit for failure to drill within a specified time is not considered odious.[8] But no such right exists unless

---

[5] *Gillespie* v. *Fulton Oil & Gas Co.*, 236 Ill. 188; *Bettman* v. *Harness*, 42 W. Va. 433; 26 S. E. 271.

[6] *State* v. *Ohio Oil Co.*, 150 Ind. 21, affirmed in 177 U. S. 190; *Funk* v. *Haldeman*, 53 Pa. 229; *Westmoreland* v. *Dewitt*, 130 Pa. 235; *Venture Oil Co. v. Fretts*, 152 Pa. 451; *McNish* v. *Stone*, 152 Pa. 457 (note); *Parish Fork Oil Co.* v. *Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. (W. Va.) 655; *Lowther Oil Co.* v. *Miller-Sibley Co.*, 53 W. Va. 501; 44 S. E. (W. Va.) 433. But see Stoughton's Appeal, 88 Pa. 198; *Duke* v. *Hague*, 15 Penna. Weekly Notes Cases, 353; *Jennings* v. *Bloomfield*, 199 Pa. 638; *Wilson* v. *Youst*, 43 W. Va. 826; 28 S. E. (W. Va.) 781.

[7] *Parish Fork Oil Co.* v. *Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. 655.

[8] *Brown* v. *Vandergrift*, 80 Pa. 142; *Monroe* v. *Armstrong*, 96 Pa. 307.

expressly provided for in the lease,[9] and, consequently, *Ulrey* v. *Keith* cannot be justified on the ground that the lessee had forfeited his rights by inactivity.

Where no operations have been commenced under an oil and gas lease, the courts, because of the peculiar nature of the right granted, have come to treat it as no better than an executory contract. In doing so, however, they have overlooked the fact that, although no property right may exist in the land, the lessee does possess a vested right to search—a valuable property right which should be protected by injunction from irreparable injury. If the lessee's right to *produce* will be thus protected,[10] it is difficult to see why his right to *search* will not be guarded in the same manner. Protection of a property right was one of the grounds on which an injunction was granted in *Singer Sewing Machine Co.* v. *Union Buttonhole Co.*,[11] where there had been a grant of an exclusive patent right. In his opinion Judge Lowell says:

"But the contract contains in itself, as we have seen, not only executory agreements on both sides, but a present grant, for value, of the exclusive right to sell; and my present impression is, that such a grant is good, and is to be enforced, so long as it lasts, whether the remainder of the contract is mutual or not, provided the whole contract, including the grant, is not so unequal as to be void in a court of equity, which, as at present advised of the facts, I see no reason to hold."

The validity of such a lease having been established in *Poe* v. *Ulrey*,[12] and the contract declared to be binding on the lessor, the court in *Ulrey* v. *Keith* deny the obligation to be one of equitable cognizance. An anomalous condition of the law is seen to exist. The lessor cannot avoid the lease by declaring a forfeiture. If, however, the lessee has

[9] *Thompson* v. *Christie*, 138 Pa. 230; *Marshall* v. *Forest Oil Co.*, 198 Pa. 83; *Harness* v. *Eastern Oil Co.*, 38 S. E. (W. Va.) 662.

[10] *Westmoreland, etc., Gas. Co.* v. *Dewitt, supra.*

[11] Fed. Cas. 12, 904.

[12] 233 Ill. 56. This was a case where the lessor brought a bill in equity to have a lease declared null and void for want of mutuality of obligation. It was held that the surrender clause did not invalidate the lease, and that an estate at the will of one of the parties was not thereby rendered an estate at the will of the other.

not taken possession, the lessor can indirectly accomplish the same result by executing another lease, and the rightful lessee is practically helpless. The latter cannot bring ejectment.[13] Remitted to his action at law for breach of contract, the lessee is given a remedy hopelessly inadequate. As was said *arguendo* in *Grummett* v. *Gingrass*,[14] after the legislature of that state had changed the law laid down in *Rust* v. *Conrad*.[15]

"An action at law for damages would be entirely illusory, and the result would be that the development of the mineral wealth of the Upper Peninsula would be retarded, if the law, as laid down by the Supreme Court, had not been changed by the legislature."

Since the amount of oil and gas underneath the land, less the expense incident to its production, is incapable of measurement, the damages are far from being easily ascertainable. An irreparable injury is allowed to be inflicted on the holder of an admitted legal right, while the arm of equity is stayed by invoking the rule requiring mutuality of remedy. Such leases are thus rendered practically worthless. Unless possession is immediately taken, they must be held subject to the whim of every unscrupulous lessor who desires to make a better bargain by leasing for better terms than he was at first able to obtain.

The practical result of such a state of the law can hardly be beneficial. Thousands of leases will be jeopardized in a state where oil and gas have only recently been discovered. It is usually the policy of the courts to encourage development of the natural resources of the state wherever possible, and, taking judicial notice of peculiar conditions surrounding certain industries, they have been known to modify rules

---

[13] *Watford Oil & Gas Co.* v. *Shipman*, 233 Ill. 9; *Dark* v. *Johnston*, 55 Pa. 164; *Kelley* v. *Keys*, 213 Pa. 295. The reason is that a lessee for oil and gas purposes who has not taken possession has not an absolute right to possession. His interest is only an incorporeal one with a qualified right to possession for searching for oil and gas. Though sometimes called an incorporeal hereditament, it is, of course, a chattel real, and not strictly a hereditament. *Brown* v. *Beecher*, 120 Pa. 590.

[14] 77 Mich. 369.

[15] *Infra*.

of law and equity accordingly.[16] When this argument was urged upon the Illinois Court they answered that they were bound by precedent; but whether or not the cases they considered binding were really in point will be considered later.

A full discussion of the effect of the surrender clause upon the legal contract is without the scope of this article. Although the question should be free from doubt, the courts have been led astray by specious arguments of counsel, and much confusion has resulted. There has been a failure to distinguish between cases involving the type of lease shown above, and another form of lease, wherein the lessee appears to enter into an obligation, only to be relieved therefrom by later provisions in the lease.[17] In such cases the lease is

---

[16] In *New American Oil, &c., Co.* v. *Troyer*, 77 N. E. (Ind.) 739, the Supreme Court of Indiana refused to apply to an oil and gas lease the ordinary rule of their state that a lease terminable at the will of one of the parties was terminable at the will of the other also. This departure they justified on the ground that practical conditions in the oil and gas world (*i. e.*, the risk and uncertainty involved in searching for fugitive minerals like oil and gas) demand a surrender clause in favor of lessee.

It might be noted here that the Supreme Court of Pennsylvania in *Sanderson* v. *Pennsylvania Coal Co.*, 113 Pa. 126, went further in breaking away from authority than the Illinois Court was called upon to do. In that case the development of the coal resources of Pennsylvania was favored, and the coal company was allowed to pollute a stream, to the injury of the lower riparian owner, by pumping into it water from the mine.

[17] Such a lease was involved in the much-quoted case of *Eclipse Oil Co.* v. *South Penn Oil Co.*, 47 W. Va. 84; 34 S. E. 923. Here there was a lease for three years with covenants to drill within a certain time or pay rental, followed by a surrender clause providing that lessee should have the right "at any time to surrender up this lease and be relieved from *all moneys due and conditions unfulfilled.*" To quote from the language of the Court, "the covenant to pay is brought to birth by the lease only to die at the hands of its mother, a case of fœtal strangulation which kills the mother." The distinction between this and the Illinois case is obvious, for in the latter lease the surrender clause relieved the lessee only from the liabilities thereafter to accrue. But see *Thompson* v. *Christie*, 138 Pa. 230, and *Hooks* v. *Forst*, 165 Pa. 238, where the point was apparently overlooked.

So also where the lease is for a term of years, with a proviso that the lessor may declare a forfeiture, unless the lessee complete a well within a specified time or pay a rental. There being no obligation imposed on the lessee, the lease falls for want of consideration. *Cortelyou* v. *Barnsdall*, 236 Ill. 138; *Knight* v. *Indiana Iron Co.*, 47 Ind. 105; [departed from in *New American Oil & Mining Co.* v. *Troyer*, 77 N. E. (Ind.) 739]; *Glascow* v. *Chartiers Trust Co.*, 152 Pa. 48; (but see suggestion of a promise to be implied on the part of the lessee in *Ray* v.

rendered *nudum pactum*, and is, therefore, terminable at any time at the will of either party. But in cases where a definite obligation is imposed on the lessee, the great weight of authority is in favor of supporting the lease in spite of the lessee's option to terminate.[18]

Where a lease was granted for a specified term of years, the common law of England at an early day refused to allow a lessor the correlative right of termination because his lessee possessed such right.[19] So in cases involving oil and gas leases some of our courts have laid great stress upon the existence of a definite and permissible term.[20] In other courts, the leases have been sustained merely upon the one dollar consideration recited;[21] though there seems to be a difference of opinion whether the one dollar will support a lease only for a term of years as specified,[22] or will also support the privilege of extending the lease by the payment of rental.[23] Another fact which would seem to be of importance is that this surrender clause is ordinarily based upon the separate and valuable consideration of one dollar to be paid when the election to surrender is made. Since it is always open to parties to agree upon terms for a discharge of the contract, it might be argued with some force that this surrender clause should be treated as a separate contract,

---

Natural Gas Co., 138 Pa. 576); *Petroleum Co.* v. *Coal & Mfg. Co.*, 89 Tenn. 381; *Steelsmith* v. *Gartlan*, 45 W. Va. 27; 29 S. E. 978; *Huggins* v. *Daley*, 99 Fed. 606; *Federal Oil Co.* v. *Western Oil Co.*, 112 Fed. 373, affirmed in 121 Fed. 674. See also *National Oil Co.* v. *Teel*, 67 S. W. (Tex.) 545; *Roberts* v. *McFaden*, 74 S. W. (Tex.) 111.

[18] *Poe* v. *Ulrey*, 233 Ill. 56; *New American Oil & Mining Co.* v. *Troyer*, 77 N. E. (Ind.) 739; *Brown* v. *Fowler*, 62 N. E. 76; 65 Ohio, 507; *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801; *Thompson* v. *Christie*, 138 Pa. 230; *Hooks* v. *Forst*, 165 Pa. 238. *Contra: Jennings-Haywood Oil Syndicate* v. *Development Co.*, 44 So. (La.) 481.

[19] *Dann* v. *Spurrier*, 3 Bos. & Pul. 399 (1803).

[20] *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801; *Brown* v. *Fowler*, 65 Ohio, 507; 63 N. E. 76; Cf. *Effinger* v. *Lewis*, 32 Pa. 367.

[21] *Poe* v. *Ulrey*, 233 Ill. 56; *Brown* v. *Ohio Oil Co.*, 21 Ohio C. C. 117; *Lowther Oil Co.* v. *Guffey*, 52 W. Va. 88; 43 S. E. 101. *Contra: Guffey Petroleum Co.* v. *Oliver*, 79 S. W. (Tex.) 884 (no covenants by lessee).

[22] *Brown* v. *Ohio Oil Co.*, *supra*.

[23] *Oil Co.* v. *Snyder*, 106 Fed. 764.

which could not invalidate the instrument any more than if it had been written upon a different piece of paper at a different time.

The binding nature of the contract having been once established, the question presents itself whether the obligation is one of equitable cognizance.

Ever since the rule requiring mutuality of remedy as a condition precedent to equitable relief [24] was first clearly enunciated in *Flight* v. *Bolland*,[25] where an infant was denied specific performance on his contract to convey land, it has been repeated with a frequency only equalled by the number of times it has been misunderstood. In its development this rule has been greatly modified.[26] A sentence from Fry on Specific Performance, which was quoted in the early decisions, will illustrate.[27]

"A contract to be specifically enforced by a court must, as a general rule, be mutual—that is to say, such that it might, *at the time it was entered into*,[28] have been enforced by either of the parties against the other of them."

Though a few courts appear to have followed this statement of the law,[29] it has finally become well established that lack of mutuality at the time the contract was entered into will be entirely disregarded, provided the remedies are mutual at the time the contract comes before the court.[30] In other words, mutuality may be supplied by performance of the non-enforceable acts. But, even taking the rule in its

[24] Whether the existence of the right to specific performance to a contract, should give the other party the same right, is an altogether different question. For an excellent review of the law on this point, see an opinion by Smith, J., in *Eckstein* v. *Downing*, 64 N. H. 248.

[25] 4 Russ. 299 (1828).

[26] *Lamprey* v. *St. Paul, &c., Railway Co.*, 89 Minn. 187.

[27] Third Ed., page 215.

[28] The italics are ours.

[29] *Hope* v. *Hope*, 8 De G. M. & G. 731; *Luse* v. *Deitz*, 46 Ia. 205; *Ten Eyck* v. *Manning*, 52 N. J. Eq. 47 (dictum); *Shenandoah Val. R. R. Co.* v. *Dunlop*, 86 Va. 346; *Norris* v. *Fox*, 45 Fed. 406.

[30] *Wilks* v. *Georgia Pac. R. R. Co.*, 79 Ala. 180; *French* v. *Boston Nat. Bank*, 179 Mass. 404; *Welch* v. *Whelpley*, 62 Mich. 15; *Howe* v. *Watson*, 60 N. E. (Mass.) 314; *Woodruff* v. *Woodruff*, 44 N. J. Eq. 349.

modified form, it is overloaded with so many exceptions [31] that one is surprised at the unqualified finality with which it is often laid down. Confusion reigns among the decisions. The text-book writers have done little to clarify the law because of their parrot-like utterances and failure to grasp the true principle involved.[32]

The confusion of thought on the subject is directly traceable to the different senses in which the word "mutuality" is used. When a court speaks of "mutuality" without further limiting the word, it may mean one of two things: mutuality of obligation, or mutuality of remedy. "Want of mutuality of obligation" is ordinarily used to denote an absence of *quid pro quo*—that there is an agreement, but no binding contract. It may mean, however, that there is a binding contract by the very terms of which one party cannot compel the other to perform (an option is an example of want of mutuality of obligation in this sense of the phrase). "Want of mutuality of remedy" properly means that there is a binding contract, but, from the nature of the consideration moving from plaintiff to defendant, the defendant cannot compel specific performance of his part of the contract. The most ordinary example of such a case is a contract for the conveyance of land in return for personal services to be performed.[33] Here there is an infirmity in the equitable machinery, which cannot compel the rendition of services, but not in the contract itself. The granting of such a decree would give one party an unfair advantage over the other by requiring one to execute his side of the contract in full, and leave him to his remedy at law for

---

[31] For a list of obvious exceptions to the rule requiring mutuality in remedy before specific performance will be decreed, see article by Prof. Ames, 3 *Columbia Law Review*, 1. Absolute identity of remedy is, of course, unnecessary. *Grove* v. *Hodges*, 55 Pa. 504.

[32] The subject has been ably treated in two enlightening articles of comparatively recent date; one, by Prof. Lewis, of the University of Pennsylvania, in a series of articles in 49 *American Law Register*, pp. 220, 317, 383, 447, 507 and 559; the other, by Prof. Ames, in 3 *Columbia Law Review*, p. 1.

[33] *Chadwick* v. *Chadwick*, 121 Ala. 580.

enforcing the obligation running to him. Viewed in this light, the purpose of the rule requiring mutuality of remedy is simply that one party to a contract shall not be required to perform, unless performance by the other party is given or assured.[34] Such a rule is neither "artificial" nor "difficult to understand and remember."[35]

Does the option to terminate the lease by a surrender thereof preclude equitable relief? The question appears to have been first raised in *Rust* v. *Conrad*,[36] a Michigan case, which, like the one before the Illinois Court, concerned the development of the state's mineral resources. This was a bill for specific performance of a contract to execute a lease to plaintiff for mining purposes, in consideration of plaintiff's exploring the property for iron ore. The defendant was allowed to set up, as a defense to the suit, the fact that the lease agreed upon gave the lessee the privilege of terminating it upon thirty days' notice. The Court based their decision on the ground that equity should never interfere where the power of revocation exists, at the same time observing that there was nothing of hardship, inequality or unfairness in the contract. Two distinct principles of equity appear to have been confused: one, that a court will not do a vain or useless thing; the other, that there must be mutuality in remedy. In all but one of the cases relied on by the Court it was the defendant who possessed the power of revocation—a situation vastly different from the principal case, where the option to terminate was in the plaintiff. That *he* might subsequently see fit to renounce the contract would seem to be a contingency that might "safely be left to take

[34] This was clearly stated as early as 1849 in *Waring v. Manchester Co.*, 7 Hare, 482, where Vice-Chancellor Wigram said, p. 492:
"The court does not give relief to the plaintiff, although he be otherwise entitled to it, unless he will on his part do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to be something which the court cannot give him, it certainly has been the generally understood rule that that is a case in which the court will not interfere."

[35] See such criticism of the rule by Prof. Langdell in 1 *Harvard Law Review*, 104.

[36] 47 Mich. 449 (1882).

care of itself."[37] Pressing for his rights under the contract, he disavows any intention to exercise his right to terminate the same.[38] *Marble Co.* v. *Ripley*,[39] alone among the cases cited by the Michigan Court seems to sustain their decision. This case, decided by the United States Supreme Court in 1869, has befuddled the minds of many courts in applying the rule requiring mutuality of remedy. Though rightly decided on its facts, it contains a broad, sweeping dictum that, "when a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other." On this point the case has been discredited,[40] and is in direct conflict with two later cases in the same court.[41]

Ulrey v. *Keith* follows *Rust* v. *Conrad*, but the Illinois Court rest their decision squarely on the ground of lack of mutuality in remedy, and are not bothered with the chimera of a decree that might be rendered nugatory by the very party seeking to obtain it. Without considering the real purpose of the rule requiring mutuality of remedy, the Illinois Court blindly follows the language applied by other courts to very different sets of facts. It is clearly a confusion of ideas to say that an option to terminate a contract creates a lack of mutuality in remedy. Any such lack exists by agreement of the parties, and, therefore, goes to the obligation of the contract. The rule requiring mutuality of remedy is properly applied only to cases where one party

---

[37] Prof. Ames's article in 3 *Columbia Law Review*, p. 1.

[38] The plaintiff might escape the question raised by the surrender clause by waiving his rights thereunder.

[39] 10 Wall. 339; 19 L. Ed. 955.

[40] *Singer Sewing Machine Co.* v. *Buttonhole Co.*, Fed. Cas. 12,904, where Lowell, J., says:

"I cannot think that the court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to within a year. Everything must depend upon the nature and circumstances of the business. In many of the cases that I have cited, the plaintiff had it in his power to end the contract."

[41] *Joy* v. *City of St. Louis*, 138 U. S. 1; 34 L. Ed. 843; *Franklin Telegraph Co.* v. *Harrison*, 145 U. S. 459; 36 L. Ed. 776.

cannot compel performance of that to which the contract entitles him,—cases where the arm of equity will be unable to make the plaintiff perform because of the nature of the act he has contracted to do.[42] Potter, J., writing the opinion of the Court in *Philadelphia Ball Club* v. *Lajoie,* repudiates the reasoning of *Rust* v. *Conrad,* and with convincing clearness says:[43]

"But mere difference in the rights stipulated for does not destroy mutuality of remedy. * * * In a fair and reasonable contract it ought to be sufficient that each party has the possibility of compelling the performance of the promises which were mutually agreed upon."

In refusing to recognize lack of mutuality in remedy as a defense to a bill for specific performance, where this lack of mutuality springs from the terms of the contract, some courts have relied on cases enforcing options to purchase land or options of renewal contained in a lease.[44] An option is, of course, valueless unless it can be specifically enforced, and it is now well settled that, if founded on valuable consideration, specific performance will be granted in spite of the fact that, when the option is given, one party is bound and the other not.[45] Such cases, however, are not really in point; for upon filing a bill to enforce the option, a bilateral contract arises. An option, given under seal and for a valuable consideration, is an irrevocable offer, and the act of filing the bill constitutes an acceptance of that offer.[46] It thereupon

---

[42] For a clear exposition of these principles as applied to contracts involving options to terminate, see Dr. Lewis's Third Paper in 49 *American Law Register,* 447, at pages 460 and 461.

The distinction between lack of mutuality in remedy and lack of mutuality in obligation is elaborately treated from an historical standpoint by Dr. Lewis in his First and Second Papers, 49 *American Law Register,* page 220, and *id.,* page 383. The development of the English Law, as traced in these articles, is most instructive, showing how the English Courts have gradually come to confine themselves to lack of mutuality in remedy as a defense to a suit for specific performance, and disregard, entirely, the defense of lack of mutuality in obligation, so long as it does not amount to *nudum pactum.*

[43] 202 Pa. 210, 219.

[44] *Green* v. *Richards,* 23 N. J. Eq. 32; *Van Doren* v. *Robinson,* 16 N. J. Eq. 259.

[45] See *Am. & Eng. Enc. of Law,* Vol. 21, p. 928.

[46] For two recent cases treating an option as a continuing offer and

becomes mutual both in obligation and remedy. Consequently, such cases are not authority for the proposition that specific performance will be granted where the mutuality in remedy is lacking by reason of the agreement between the parties. A true test of this proposition would be one where an option was granted for the purchase of land at a certain price, acceptance to be made within a specified period, and a substantial sum paid as hand money. Before the expiration of the time set, the optionor prepares to sell the land to a third party, and the optionee, without signifying his intention to accept the option, brings a bill for an injunction to restrain the threatened transfer of the land. Although no such case has been discovered, there would seem to be no good reason why the optionor should not be enjoined from a breach of his expressed or implied obligation not to sell to a third party. If the option agreement could not be immediately recorded, the injury to the optionee would be irreparable, and an injunction should lie to protect the exclusive privilege which had been granted.

Although *Rust* v. *Conrad* and *Ulrey* v. *Keith* were wrongly decided, there is a distinction between the two cases which should not be overlooked. In the former case, the plaintiff was asking the court to compel defendant to perform an executory contract, while in the latter case, the plaintiff was asking the court to enjoin certain acts, which would amount to a breach of the contract. It is the distinction between affirmative and negative relief. While it is true that a bill for an injunction, restraining defendant from a breach of his contract, is virtually a bill seeking the specific performance of the contract, does it follow that affirmative and negative relief must always be governed by the same rules and doctrines?

The loose statement often found in cases and text-books, to the effect that injunctions and decrees are granted accord-

---

dealing with the nature and enforceability of the optionee's right, see *Barnes* v. *Rea*, 219 Pa. 279, and *Barnes* v. *Rea*, *id.* 287. See also Wald's *Pollock on Contracts* (Williston's Ed.), p. 28.

ing to the same rules, should be qualified with many exceptions. It is true that the same general principles of equity apply to both forms of relief: the plaintiff must have clean hands;[47] the contract must be supported by something more than nominal consideration;[48] the terms of the contract must be certain.[49] But if, by reason of the circumstances of the cases, or the power of equity to mould its decree, the reasons for refusing specific performance do not apply to the writ of injunction, the hand of the Chancellor should not be arbitrarily withheld.

Although the early English cases held otherwise, it was finally decided in the leading case of *Lumley* v. *Wagner*,[50] that the negative part of a contract would be enforced by injunction, where actual performance of the contract could not be decreed. This doctrine is now well established in most of our states.[51] In that case the defendant had agreed to sing in plaintiff's theatre for a certain number of nights and not to sing elsewhere. It was held that equity would enjoin defendant from singing elsewhere, although the court could not compel actual performance of defendant's personal services.[52] This class of cases, though having nothing to do with mutuality of remedy, does, nevertheless, serve to show an important distinction between affirmative and negative relief in equity. From them we see that these two forms of relief are not governed by the same rules, if the same reasons for withholding the one do not apply to withholding the other.

Returning, now, to cases involving contracts containing options to terminate, we find that in suits to restrain the breach of such contracts, equity has the power to supply any lack of mutuality by moulding its decree. The injunction

---

[47] *Gas Light Co.* v. *Town of Lake*, 130 Ill. 42.
[48] *Railway Co.* v. *City of East St. Louis*, 182 Ill. 433.
[49] *Cleveland* v. *Martin*, 218 Ill. 73.
[50] 1 De G. M. & G. 604.
[51] See 22 *Cyc. Law & Procedure*, p. 845. and cases cited.
[52] This case contains another point which we consider below.

restraining defendant from a breach can be made conditional upon continued performance on the part of the plaintiff. Injunctive relief in the proper form can thus obviate the objection which might apply to a decree compelling specific performance. The injunction sought by the plaintiff will remain in force only so long as he himself performs his duties, and thus the defendant becomes the beneficiary under the decree.[53] On the other hand, in a bill for specific performance of a contract to convey land for personal services, the present deed of the land cannot, in the nature of things, be conditioned upon the performance of services which continue into the future.

In the class of cases involving a contract to play baseball for a club, which is given the right to terminate the contract upon short notice, the salutary force of a conditional decree was for a long time overlooked. The courts held that the contract to play ball would not be negatively enforced in favor of the club by enjoining the player from signing with any other club, since there was a lack of mutuality of remedy.[54] But in *Philadelphia Ball Club* v. *Lajoie*,[55] the Supreme Court of Pennsylvania issued an injunction restraining a breach of the contract, basing their decision both on the ground that a difference in the rights stipulated for does not create a lack of mutuality of remedy,[56] and also on the ground that the injunction could be made conditional in form. On this latter point the court say:[57]

"Besides the remedy by injunction is elastic and adaptable and is wholly within the control of the court. If granted now it can be easily dissolved whenever a change in the circumstances or in the attitude of the plaintiff should seem to require it."

---

[53] See Pomeroy's *Equity Jurisprudence*, Vol. 6, Sec. 775.

[54] *Philadelphia Ball Club* v. *Hallman*, 8 Pa. Co. Ct. 58 (decided partly on the ground that contract was unfair); *Harrisburg Base-Ball Club* v. *Athletic Association*, 8 Pa. Co. Ct. 337; *Brooklyn Base-Ball Club* v. *McGuire*, 116 Fed. 782. See also *Metropolitan Exhibition Co.* v. *Ward*, 9 N. Y. Sup. 779 (contract held to lack definiteness as well as mutuality); *Metropolitan Exhibition Co.* v. *Ewing*, 42 Fed. 198; 7 L. R. A. 381.

[55] 202 Pa. 210.

[56] *Supra.*

[57] P. 221.

Turning from terminable contracts to cases involving a real lack of mutuality in remedy, we find that a conditional decree may cure the inequality, provided negative relief is sought. In *Lumley* v. *Wagner*,[58] the defendant had an adequate remedy at law, and could not have compelled his employment by either an affirmative or negative decree. The remedy in that case, therefore, was not mutual. But, if the plaintiff had been given a decree restraining defendant from singing elsewhere, to remain in force only so long as plaintiff himself performed, defendant would have been practically assured of performance on the part of the plaintiff.

This point was raised in the case of *General Electric Company* v. *Westinghouse Electric Company*,[59] recently decided in the United States Circuit Court for the Northern District of New York. A bill was filed for an injunction restraining the further violation by defendant of a contract for the sale of electric equipment. By the contract in question, plaintiff company agreed to sell and deliver controllers at specified prices to defendant company, although not exclusively to it. The defendant, on its part, agreed not to manufacture such controllers for use in the United States, and it was held that equity would enjoin defendant from a breach of this agreement. Recognizing the fact that defendant could not have affirmative or negative relief in equity for compelling plaintiff to furnish the controllers, the Court nevertheless granted negative relief in the shape of a conditional decree, and, in an elaborate opinion, say:[60]

"There is a class of cases where defendant may be enjoined from violating the negative part of an agreement when neither the plaintiff nor defendant can have specific performance of the affirmative side or part of the same agreement. The answer of equity in such cases to the want of mutuality in remedy is a conditional decree for performance, or enjoining a violation of the covenant—one good so long as plaintiff performs, and self-dissolving upon his failure to perform."

[58] *Supra.*

[59] 151 Fed. 664. This was a re-argument of the same case reported in 144 Fed. 458, where an injunction was refused partly on the ground that the remedy at law for damages was adequate, and partly on the ground of lack of mutuality in remedy.

[60] P. 672.

The distinction between affirmative and negative relief and the possibility of granting one, though there might not be power to grant the other, is being recognized with greater frequency as the courts see the injustice and absurdity of subjecting both forms of relief to a hard and fast rule, the meaning of which has been generally misunderstood. The question whether the existence of a surrender clause in an oil and gas lease destroys the mutuality of remedy so as to prevent equitable relief, is one of no small importance in many states. The lessee, being without adequate remedy at law, pressing for his rights under the contract, hardship and injustice will be worked if an injunction cannot be issued to restrain the operations of an adverse lessee. In view of the fact that there is no real lack of mutuality in remedy, that a conditional decree will operate with perfect fairness to all parties, no good reason for refusing the relief prayed for can be found. The Supreme Court of the state where the question has first been presented has, it is submitted, decided the case wrongly, under a misapprehension both of the true purpose of the rule, and the applicability of the precedents by which they considered themselves bound.

H. C. McClintock.

Pittsburgh, Pa.