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NOTES.

LAW SCHOOL—THE NEW ACADEMIC YEAR—With the opening of this academic year, the Law School enters a new epoch in its existence. This year for the first time the new entrance requirements which were approved by the Board of Trustees in April, 1914, go into effect, and every candidate for admission to the Law School must have a college degree. We have no doubt that these requirements will prove beneficial to the Law School. Though doubtless for some years to come the classes will be smaller than they have been heretofore, they will have a greater fundamental knowledge and their progress will be more speedy. Similar requirements have been successful wherever they have been adopted.

We are happy to welcome the one new member of the Faculty, Edwin Roulette Keedy, Esq., who becomes Professor of Law. Professor Keedy was born at Boonesboro, Maryland, in 1880. His preliminary education was received in the public schools at Hagerstown, Maryland. He graduated from Franklin and Marshall College in 1899 and from the Harvard Law School in 1906. He was a member of the Law Faculty of Indiana University from 1906 to 1909. He was a Professor of Law in Northwestern University from 1909 to 1915. He was First Secretary of the American Institute of Criminal Law and Criminology from 1909 to 1910, and a member of the Commission of this Institute to investigate the administration of the criminal law in England, in 1910. In 1912 he investigated the administration of the criminal law in Scotland under the auspices of President Taft and Attorney-General Wickersham. In addition to Professor Keedy, Dr. Lewis returns to the Faculty from his year's leave of absence. Mr. Baker has resigned from the Faculty and will devote his whole time to active practice.

Several changes have been made this year in the curriculum. In the First Year Class, Dean Mikell will give a series of lectures on "Elementary Law"; the purpose of these lectures is to explain to the beginner the intrinsic nature of the law and the interrelation of its various branches. Professor Keedy will conduct the first year course on Associations in place of Mr. Schnader. In the Second Year Class, Dr. Lewis returns to take up his course on Partnership, and in addition will conduct the course on Trusts in Mr. Baker's place. Professor Keedy will teach Bills and Notes, and Mr. Loyd Equity. In the Third Year Class, Dr. Lewis will again teach Corporations, and Professor Keedy will conduct Criminal Procedure, Equity Pleading and Practice, and Public Service Corporations. Mr. Loyd will conduct a new course on Mortgages. In other respects the courses will be the same as they were last year.

We are gratified to announce that two new prizes have been established. Former students and friends of the late Professor Peter McCall have established in his memory a prize to be known as the Peter McCall Prize. This prize, amounting to eighty dollars, will be awarded each year to the member of the graduating class receiving the highest grades during the three years he attended the Law School. The American Law Book Company has placed at the disposal of the Faculty of the Law School of the University of Pennsylvania a set of "Cyc" with its annual annotations to date, to be given as a prize to the student who receives the highest honor in scholarship for the period of his senior year; with the further offer of three "Corpus Juris" scholarships of five hundred dollars each.

In conclusion, we feel that now as never before the Law School can look forward to a year of prosperity, and the LAW REVIEW heartily extends its best wishes of success.

E. W. M.

LAW SCHOOL—DEATH OF JOHN LISLE—On June 20th last, John Lisle, Esq., a graduate of the Law School, lost his life at Chelsea, New Jersey, in an effort to save another from drowning. Mr. Lisle had, since his graduation from the Law Department in 1910, not only practised actively and with growing success, but had written on legal subjects and done some excellent translation of legal works in other languages. Mr. Lisle had been requested to deliver a course of lectures this autumn in the Auxiliary Course of the Law School. His pleasant and courteous manner, his sterling character, and the great promise which he gave as a lawyer and writer, make his loss one which the Alumni of the School and its Faculty feel most deeply.

CONSTITUTIONAL LAW—SEGREGATION ORDINANCE—The efforts of municipalities to prevent conflict and ill-feeling between the white and colored races, by legislation providing for residential restrictions on either or both races, has not always met with the approval of State courts of last resort. The Baltimore, Winston and Atlanta ordinances[1] all were held unconstitutional, but the race segregation ordinance of the city of Louisville has triumphed.[2] By imposing identical restrictions as to the alienation of property in white or black blocks, by excepting buildings occupied prior to the adoption of the ordinance, the pitfalls of constitutional prohibition were avoided. So far as we have been able to learn, municipal segregation ordinances have been passed upon by the appellate courts of but four States.

The municipal segregation ordinance enacted by the City Council of Baltimore and passed upon by the Maryland Court of Appeals in *State* v. *Gurry*,[3] simply prohibited a white person from moving into a block inhabited solely by colored persons and prohibited colored persons from moving into a block inhabited solely by whites. Unlike the Louisville ordinance, it contained no reservation in protection of vested rights existing at the time of the enactment of the ordinance. The Louisville ordinance provided that "Nothing herein contained shall be construed to prevent any person who, at the date of the passage of this ordinance, shall have acquired, or possessed the right to occupy any building as a residence, place of abode, or place of assembly from exercising such right." Upon a consideration of the ordinance enacted in Baltimore, the Maryland court held that the attempted exercise of the police power was of such char-

[1] State v. Gurry, 121 Md. 534 (1913); State v. Darnell, 166 N. C. 300 (1914); Carey v. City of Atlanta, 84 S. E. Rep. 456 (Ga. 1915).

[2] Harris v. City of Louisville, 177 S. W. Rep. 472 (Ky. 1915).

[3] State v. Gurry, 121 Md. 534 (1913).

acter as to preclude the court from assuming that the legislature intended to confer on the municipality the power to affect vested rights in the manner sought by the ordinance.

The municipal legislature of the city of Winston, North Carolina, adopted a segregation ordinance which was passed upon by the Supreme Court of North Carolina in the case of *State* v. *Darnell*.[4] The ordinance, like the Baltimore ordinance, contained no saving provision in protection of vested rights existing at the time of the adoption of the ordinance. The opinion is notable in that the court seems to have been impressed by the time-worn sophistry that, if the power exist to segregate white and blacks, then the power must likewise exist to segregate Republican and Democrat, persons of Irish descent and those of German descent, Protestant and Catholic. This argument was conclusively disposed of by the Supreme Court of the United States in *Plessy* v. *Ferguson*.[5] In delivering the opinion of the court, Mr. Justice Brown said:

> "The reply to all this is that every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good and not for the annoyance or oppression of a particular class. So far then as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation and with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the Fourteenth Amendment than the Acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned or the corresponding acts of State legislatures."

The municipal legislature of Atlanta enacted a segregation ordinance which was passed upon by the Supreme Court of Georgia in the case of *Carey* v. *City of Atlanta*.[6] This ordinance, like the Baltimore ordinance, failed to contain any saving clause in protection of vested rights acquired before the passage of the ordinance. The

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[4] Note 1, *supra*.

[5] Plessy v. Ferguson, 163 U. S. 537 (1895).

[6] Note 1, *supra*.

Georgia court held that the ordinance destroyed the right of the individual to acquire, enjoy and dispose of his property, and that it was void, as being in controvention of the due process clause of the Federal Constitution. There is nothing in the Louisville ordinance[7] which takes away from any person the right to acquire property anywhere in the city; but the ordinance does prohibit any colored person from occupying as a residence a building in any block in which the greater part of the houses are occupied by white persons and *vice versa;* however, persons owning or occupying property at the passage of the ordinance are in no way affected.

If it be conceded that the right of alienation is a vested right which cannot be taken away altogether by legislation, still such is not the effect of the Louisville ordinance. An indirect restriction upon the right of alienation resulting from the denial of the probability of alienation to certain classes of purchasers cannot be held to be a complete destruction of the power to alienate or deprivation of a vested right, violative of the constitutional guaranties. The principle is well settled that reasonable restraints upon the use of private property and upon the liberty to contract do not constitute a deprivation of "life, liberty or property without due process of law" within the meaning of the Fourteenth Amendment.[8]

It was argued that the ordinance violated the Fourteenth Amendment because it prevented the residence of negroes in more desirable portions of the city. It is hard to see, however, how this could be construed to be a denial of the equal protection of the laws. For the enforced separation of the races alone is not a discrimination or denial of the constitutional guaranty.[9] If such separation should result in the members of the colored race being restricted to residence in the less desirable portions of the city, they could render those portions more desirable through their own efforts as the white race has done.

The public policy of different States in respect to the separation of races has long been exhibited in legislation. By legislative mandate the races have been separated upon public conveyances, where by virtue of necessity they must otherwise have been associated;[10] by legislative mandate they have been separated in the public schools,[11] and the laws of a number of States prohibit mar-

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[7] Note 2, *supra.*

[8] Mugler v. Kansas, 123 U. S. 623 (1887); Crowley v. Christensen, 137 U. S. 86 (1890).

[9] Note 5, *supra.*

[10] West Chester R. Co. v. Miles, 55 Pa. 209 (1866); Louisville R. Co. v. Mississippi, 133 U. S. 587 (1889); Ohio Valley R. Co. v. Lander, 104 Ky. 431 (1898); Morrison v. State, 116 Tenn. 534 (1905).

[11] People v. Quincy Board of Education, 101 Ill. 308 (1882); Hoker v. Town of Greenville, 130 N. C. 472 (1908); Berea College v. United States, 211 U. S. 50 (1908).

riages between white persons and negroes or persons of more than a stated proportion of African blood.[12] In view of the fact that this legislation is upheld partly in recognition of the peril to race integrity induced by mere propinquity, we see but little difference in the prevention by law of the association of white and colored pupils in the schools of the State and in the prevention of their living side by side in their homes.

G. H. K.

COPYRIGHT — INFRINGEMENT — ABRIDGMENT OF COPYRIGHTED BOOKS—The custom of "cramming" knowledge (predigested and made palatable by tutors) into students too indolent to condense for themselves the prescribed text-books, is widespread. Occasionally, the practice is vigorously condemned by the scholastic authorities, but it is unusual for the matter to meet with judicial disapproval, as occurred in a recent case,[1] in which the following interesting facts were involved: The defendant, a tutor, gave private instructions to students in Harvard University taking a course in economics under a professor who had copyrighted a book, "Principles of Economics," which was published by the plaintiff. The defendant prepared brief outlines of the text-book covering the subjects to be discussed at his next meeting with the students and allowed them to keep the outlines during the intervals between their weekly conferences. It was understood by the students that the outlines were to be returned at the end of the week and were not to be used except in preparation for the conferences. These were destroyed after they had been so used. The defendant also prepared other outlines for use, not at a particular conference dealing with a particular part of the book, but for tutoring in preparation for a final examination in one of the courses in economics. These were intended to outline all the subject matter covered in that course during a certain term, and were given to the students to be kept until immediately before the examination and then returned to the defendant. In some manner, these outlines got into the possession of the plaintiff, who thereupon brought a bill in equity for an injunction to restrain infringement of the copyright. The court held that both forms of outline,—which frequently quoted from the copyrighted book words and sentences likely to catch the attention and remain in the memory, and which treated in an abridged and paraphrased form the topics of the book, although the author's order and arrangement were not always followed,—were in violation of the Copyright Act of 1909,[2] which secures to the owner of a

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[12] Scott v. State, 39 Ga. 321 (1869); State v. Jackson, 80 Mo. 175 (1873).

[1] MacMillan Co. v. King, 223 Fed. Rep. 862 (1914).

[2] Copyright Act of March 4, 1909, Comp. St. 1913, §9519.

copyright in a literary work the exclusive right to "print, reprint, publish, copy and vend the copyrighted work"[3] and "to make any other version thereof"[4] and which also provides that the copyright shall protect "all the copyrightable component parts of the work copyrighted and all matter therein in which copyright is already subsisting."[5] The court excellently summarized the situation as follows:

> "Though the reproduction of the author's ideas and language is incomplete and fragmentary, and frequently presents them in a somewhat distorted form, important portions of them are left substantially recognizable. If they had not been so left, the defendant's evident purpose could not have been accomplished. It seems obvious that what he was trying to give and what his pupils were trying to get, was an acquaintance with the contents of the book, which should resemble as much as possible that acquaintance which they would have obtained for themselves by following with sufficient diligence the university course of instruction for which the book was the appointed text-book. Nor do I see any reason to doubt that these outlines might readily cause the student to think he could meet the minimum requirements without using the book itself."

In conclusion, the court held that the defendant's abridgment constituted "versions" of substantial portions of the book, such as the plaintiff alone had the right to make.

Early English cases[6] adopted as a test of infringement of copyright by abridgment the quantity of the material abstracted. Later English[7] and American[8] cases, decided before the passage of the Act of 1909,[9] held that a substantial condensation of the original work did not constitute a piracy, if intellectual labor and judgment had been required. However, the value of the selections made and the probable effect on the original work were also important factors in determining whether an abridgment was an infringement.[10] Some courts believed the abridgment to be a form of beneficial

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[3] §1a.
[4] §1b.
[5] §3.
[6] Dodsley v. Kinnersley, Amb. 403 (1761).
[7] Hawkworth v. Newbery, Lofft. 775 (1774).
[8] Folsom v. Marsh, 2 Story, 100 (U. S. 1841); Lawrence v. Dana, 4 Cliff. 1 (U. S. 1869).
[9] *Supra*, n. 2.
[10] Gray v. Russell, 1 Story, 11 (U. S. 1839).

advertisement to the author.[11] Others regarded the abridger "rather as a sort of jackal to the public to point out the beauties of authors."[12] The recent English Copyright Act of 1911 failed to reserve to the owner of the copyright the right of abridgment.[13]

The courts have not been frequently called upon to interpret the American Copyright Code of 1909[14] so far as abridgments are concerned. In what appears to be the only case,[15] in which a question similar to that in the principal case has arisen, the court held that if an abridgment goes no further than to "give just enough information to put the reader upon inquiry regarding the contents of the copyrighted book, there was no infringement." In that case, the owner of a copyrighted opera libretto of forty-six pages sought to restrain the publication of a half page synopsis thereof in a book called "Opera Stories." In refusing to grant an injunction, the court said a literal definition of the words "make any other version thereof" "might even lead to the ludicrous result of condemning as an infringer the writer who publishes a laudatory notice of a picture or a poem. The historian who describes the charge of the cuirassiers at Friedland will hardly expect to be sued by the owner of the copyright covering Meissonier's great painting—'1807.' The editor who reports the departure of 'the captains and the kings' and the dispersion of the navy after a celebration will probably be astonished if accused of infringing 'The Recessional.'" Obviously, the principal case presents a much stronger argument for an injunction and the decision therein is clearly in accordance with the requirements of the Act of 1909.[16]

A. L. L.

FEDERAL EMPLOYERS' LIABILITY ACT—WHEN IS AN EMPLOYEE ENGAGED IN INTERSTATE COMMERCE—The federal Employers' Liability Act[1] provides that "any common carrier shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," thereby effectually removing the common law fellow servant defence available before the passage of the act in question. Consequently the question as to whether or not a par-

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[11] *Supra*, n. 6.

[12] Tinsley v. Lacy, 1 H. and M. 47 (1861).

[13] Copinger on the Law of Copyright, 5th Ed. (1915), p. 158.

[14] *Supra*, n. 2.

[15] G. Ricordi & Co. v. Mason, 201 Fed. Rep. 182-185 (1911-1912); affirmed on appeal, 210 Fed. 277 (1913).

[16] See accord: Bowker on Copyright (1912), p. 80.

[1] Act of Congress of April 22, 1908, 35 U. S. Stat. 65, c. 149.

ticular individual is engaged in interstate commerce becomes of the utmost importance in every case arising in a State where the common law doctrine is still in force or where there has been no legislative enactment similar to the federal act.

An examination of the various decisions on this point leads to the conclusion that the real test is this: Was the instrumentality on which the individual was working when injured actually in use in interstate commerce, or merely temporarily out of use for the purpose of repair. If so, such individual was engaged in interstate commerce. The leading case is *Pedersen* v. *Delaware, Lackawanna and Western Railroad Company*,[2] where the plaintiff was employed in repairing a bridge which had been used in both interstate and intrastate commerce. While crossing a temporary bridge used in place of that being repaired, carrying a sack of rivets to be used in the old bridge, he was injured. Mr. Justice Van Devanter said:

> "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all these instrumentalities be kept in repair. . . . We are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. . . . True a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

If it can be proved that the instrumentality in question fulfilled the requirements laid down in the Pedersen case the courts have gone far in applying the doctrine of that case and in allowing recovery by the injured employee. In a recent Pennsylvania decision[3] the plaintiff was injured while binding together rails used in interstate commerce with copper wire in connection with the installation of a new automatic electric signal system. The Supreme Court of Pennsylvania allowed recovery. In *Lombardo* v. *Boston and Maine Railroad*[4] where the plaintiff when injured was repairing a track in the yards of a paper company used by the defendant in interstate and intrastate commerce, it was held that he was engaged in interstate commerce. So too, where the plaintiff was returning on a hand-car from his work which consisted of ballasting an interstate track, and was injured by the negligence of a fellow employee, it

[2] 229 U. S. 146 (1913).

[3] Glunt v. Pennsylvania R. R. Co., 249 Pa. 522 (1915).

[4] 223 Fed. Rep. 427 (1915).

was held that he was still engaged in interstate commerce.[5] And, where a fireman was about to report for duty on an interstate train and was struck and killed while approaching the station, through the negligence of a fellow servant, recovery was allowed.[6] And in *North Carolina Railroad Company* v. *Zachary*[7] the Supreme Court of the United States held that the doctrine of the Pedersen case applied where a fireman having oiled and inspected his locomotive preparatory to an interstate trip, had left his engine and was injured while crossing the tracks on his way to his boarding house. All these cases serve to show that the courts will apply the federal act in extreme instances, once it has been shown that the instrumentality in the particular case was a part of interstate commerce.

On the other hand it has been decided that unless the instrumentality in question actually was in use in interstate commerce, or had been in use and was temporarily out of use for the purposes of repair, that the federal act does not apply. This occurs most frequently when a new instrumentality is being constructed which is intended for use in interstate commerce but has not been so used when the injury complained of occurred. In *Bravis* v. *Chicago, Milwaukee & St. Paul Railway Company*[8] the plaintiff was injured while engaged in the construction of a bridge some six hundred feet from the railroad which was to be used in conjunction with a "cut-off." No tracks had been laid on this bridge at the time. Judge Sanborn, of the Circuit Court of Appeals, Eighth Circuit, said: "Those employed in the preparation or construction of roadbeds, rails, ties, cars, engines, and other instrumentalities which are intended for use in interstate commerce, but have never been, and are not in use therein, are not employed in interstate commerce, and are not protected by the Act." So too, where the plaintiff when injured was engaged in the construction of an incompleted tunnel which was a part of a "cut-off," no recovery was allowed because of the fellow servant rule.[9]

Therefore, as stated above, it seems that the test applicable to the question as to whether or not an individual is engaged in interstate commerce, is whether or not the individual in question was working on an instrumentality which was actually in use in interstate commerce, or was merely out of use temporarily for the purpose of repair. If so, the federal Employers' Liability Act applies, and otherwise it does not.

J. W. L.

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[5] San Pedro, L. A. & S. L. R. Co. v. Davide, 210 Fed. Rep. 870 (1914).

[6] Lamphere v. Oregon Railroad & Navigation Company, 196 Fed. Rep. 336 (1912).

[7] 232 U. S. 248 (1913).

[8] 217 Fed. Rep. 234 (1914).

[9] Jackson v. Chicago, M. & St. P. Ry. Co., 210 Fed. Rep. 485 (1914).

EQUITY JURISDICTION—SPECIFIC PERFORMANCE—MUTUALITY —The defence of "lack of mutuality" in a suit for the specific performance of a contract has given considerable trouble to the courts of equity and has been the subject of much discussion and considerable comment, mostly adverse, on the part of text-writers and students of the law.[1] In the words of the late Professor James Barr Ames, the doctrine, briefly, is as follows: "Equity will not compel specific performance by a defendant if after performance, the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract."[2]

The question has presented itself in many different aspects and many exceptions have arisen which have come to be as well settled as the rule itself. One of the earliest of these is that which grants specific performance at the instance of a party not originally bound by a contract within the Statute of Frauds because he did not sign the memorandum, against another who did sign it, on the theory that by resorting to a suit for specific performance, the party who did not sign thereby adopts the agreement and renders it obligatory upon himself.[3]

The courts are uniform in enforcing a contract made with an infant if he is in court asking the chancellor to act. This proceeds on the same theory.[4] Curiously enough, there is not such a uniformity in regard to similar contracts made with a *feme covert*, but the weight of opinion is that equitable relief should be granted.[5]

There is a decided split as to the problem of when a contract should be examined for mutuality. Most courts hold that if at the time of the litigation, the contract is enforceable by both parties, relief should be granted, but there is a strong minority, supported chiefly by the federal decisions, which maintain that a contract not mutual at the outset is unenforceable specifically in equity. This

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[1] See the exhaustive article of Professor Wm. Draper Lewis in 40 AM. LAW REG. 387, 393. See also article of H. C. McClintock, Esq., in 58 UNIV. OF PENNA. LAW REV. 16, and the article of the late Professor James Barr Ames, in 3 COL. LAW REV. 1.

[2] See 3 COL. LAW REV. 1.

[3] See the early case of Hatton v. Gray, 2 Cases in Chancery, 164 (Eng. 1684). See also Sylvester v. Barn, 132 Pa. 467 (1890); Kroh v. Wassner, 75 N. J. Eq. 109 (1908); cases collected and cited in Ames' "Cases on Equity Jurisdiction", p. 421, n.; and cases cited in the note to Western Timber Co. v. Kalama Lumber Co., 6 L. R. A. (N. S.) 397.

[4] Fliglit v. Bolland, 4 Russell, 299 (Eng. 1828). See also cases cited in Ames' Cases, p. 423, n.

[5] Fennelly v. Anderson, 1 Irish Chancery Reports, 706 (1851); Armstrong v. Maryland Coal Co., 67 W. Va. 591 (1910). See, *contra*, Gage v. Cummings, 209 Ill. 120 (1904), and adverse criticism and cases cited therein in Fry: "Specific Performance" (3rd Ed.), p. 217.

problem is well illustrated by those contracts which call for the sale of land not at the time the property of the vendor, but which is subsequently acquired by him. The majority view is that want of title at the time of the contract is no defense if the plaintiff can give title at the time of the decree,[6] but the federal courts are committed to the opposite doctrine. The force of the leading case, however,[7] has been somewhat broken by a later decision of the same court,[8] where it is held that the rule denying specific performance does not apply if the vendee is honestly informed at the time the contract is made that the vendor does not have title to the property but has reasonable expectation of securing it before the time set for the actual conveyance.

The problem has also arisen in cases involving contracts for personal services. One view is that since the party contracting to render the services can not be compelled to perform, he likewise should be made to seek his remedy at law, though he be in court, ready and willing to perform his part of the agreement,[9] but the modern attitude seems to be that the question of compelling performance on the part of the plaintiff, should he refuse, should not be anticipated and that he should be entitled to a decree.[10] Of course the doctrine of mutuality is obviously not applicable to unilateral contracts.[11]

But options have given the courts the most trouble in this respect. The right to demand specific performance of a lessor's contract to renew a lease at the option of the lessee is well established, since the courts were familiar with this sort of contract long before the doctrine of mutuality arose.[12] Moreover, the courts invariably hold that if there is any consideration, however slight, for an option to buy or sell land, specific performance should not be

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[6] Musselman's Appeal, 65 Pa. 480 (1870); Armstrong v. Maryland Coal Co., *supra*, n. 5.

[7] Norris v. Fox, 45 Fed. Rep. 406 (1891).

[8] Day v. Mountin, 137 Fed. Rep. 756 (1905).

[9] Hills v. Croll, 2 Phillips, 60 (Eng. 1845). See also cases cited in voluminous note in Ames' Cases, p. 428.

[10] Singer Co. v. Buttonhole Co., Holmes, 253 (U. S. Cir. Ct. 1873); Butterick Pattern Co. v. Rose, 141 Wis. 533 (1910).

[11] Howe v. Watson, 60 N. E. Rep. 415 (Mass. 1901). See also Ames' Cases, p. 430, n.

[12] McCormick v. Stephany, 57 N. J. Eq. 257 (1898). For a full collection of the numerous English and Irish decisions, see article by Professor Lewis, *supra*, n. 1. For the American cases, which are few in number, see Ames' Cases, p. 432, n.

denied.[13] But the contract which provides for a lease with the option in the lessee to terminate it at will or upon short-time notice, is the rock upon which the cases split. The majority view is that such a clause does not present an unsurmountable obstacle in the way of a decree of specific performance and the decisions, which are numerous, are well illustrated by the so-called "base-ball cases."[14] The minority view, on the other hand, is supported by a strong line of cases, though the jurisdictions which have adopted it are few. This theory is that a defendant should not be compelled to make a lease or perform a contract which he could not enforce, but which the lessee or promisee, the very person who is asking the court to act, may terminate at his desire. This principle was applied in Michigan, in a case involving a contract to lease mining lands with a clause enabling the lessees to terminate upon thirty days' notice,[15] but this decision had such an injurious effect upon the development of the mineral wealth of the State that the legislature in the following year gave to the holder of an option in such a lease an absolute right to specific performance in chancery despite the clause of surrender contained therein.[16] The doctrine is still enforced in Illinois, however,[17] and it has been regarded always as the rule of the federal courts. The leading case turned upon a contract whereby one party agreed to cut and deliver all the marble the other party could use, the latter agreeing to take it all, but with the power to terminate the arrangement upon a year's notice. The court refused specific performance.[18] Though there is ground, from the very nature of the case, for reasonable doubt as to whether this decision is not mere *obiter dicta,* and though there are apparently no decisions in the same court which squarely support it in all its force,[19] it has been cited universally as announcing the rule of the federal courts.[20]

In this connection it is interesting to note a recent decision of the United States Supreme Court, in which this problem is discussed by Mr. Justice Van Devanter.[21] An oil and gas lease to be

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[13] Ross v. Parks, 93 Ala. 153 (1890); O'Brien v. Boland, 166 Mass. 481 (1896); Corbett v. Cronkhite, 239 Ill. 9 (1909); Schaeffer v. Herman, 237 Pa. 86 (1912). See, *contra,* Graybill v. Bugh, 89 Va. 895 (1893), overruled in Watkins v. Robertson, 105 Va. 269 (1906). See also Ames' Cases, p. 432, n.

[14] See Phila. Ball Club v. Lajoie, 202 Pa. 210 (1902), and cases cited therein by Potter, J.

[15] Rust v. Conrad, 47 Mich. 449 (1882).

[16] See Grumett v. Gingrass, 77 Mich. 369, 388 (1889).

[17] Ubrey v. Keith, 237 Ill. 284 (1908).

[18] Marble Co. v. Ripley, 10 Wall. 339 (1870).

[19] The question was not squarely met by the Court of Appeals in the recent case of Weegham v. Killefer, 215 Fed. Rep. 168 (1914), the last "base-ball" case of importance in the federal courts.

[20] See Federal Oil Co. v. Western Oil Co., 112 Fed. Rep. 373 (1902).

[21] Guffey v. Smith, 237 U. S. 101 (1915).

valid as long as oil and gas were found on the land gave the lessees the option to surrender it at any time upon the payment of one dollar, after which "all payments and liabilities thereafter to accrue should cease and determine." The lessor gave a subsequent lease of the same premises to the defendant's assignors, who took with notice of the prior lease. The complainants, assignees of the lessees under the first lease, brought a bill in equity to enjoin operations under the latter lease and to obtain a discovery and an accounting in respect of the oil and gas produced and sold in the course of operations already had. The court decreed accordingly.

The basis upon which the decision is founded is aside from the real problem and the court avoided the necessity of directly dealing with the earlier federal cases on the subject. It found that such a lease passes a "present vested right—'a freehold interest—in the premises, taxable as real property" and the court dwelt on this fact and upon the fact that under the laws of Illinois, in which State the cause of action arose, the holder of such a lease may not bring an action of ejectment thereon. The point was also made that any action at law for damages would be clearly inadequate. The court distinguished the cases of contracts containing an option of surrender on the ground that the case in question was not a case involving the specific performance of an executory contract to give a lease or even the enforcement of an executory promise in a lease already given, but rather one "to protect a present vested leasehold, amounting to a freehold interest, from the continuing and irreparable injury calculated to accomplish its practical destruction." In the words of Mr. Justice Van Devanter, "The complaint is not that performance of some promised act is being withheld or refused, but that the complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief." The court even held that "in a practical sense" the suit was one to prevent waste.

While the views of the learned justice are no doubt of great weight and importance, it is submitted that the decision in effect curtails the force of the earlier decisions on the subject, despite the effort to distinguish the two situations. It is difficult to understand the decree in any light other than that of a direct enforcement of rights under such a contract, if not of the very contract itself, which had previously been declared unenforceable repeatedly, and this is the more apparent in the principal case in view of the fact that the original lessor, who gave the option, was made a defendant in the suit. Surely this is enforcing the contract as to him, negatively at least.

But perhaps it is not too ambitious to suggest that the Supreme Court has come to the point where it realizes that its former position is not in accord with the modern trend of authority. In this light the case in question might well be an indication of a complete

reversal in the future. Indeed the court admitted that the rule formerly adhered to is "restrained by many exceptions," and has been "the subject of divergent opinions on the part of jurists and text-writers."

It is submitted that the majority view is logically sound and practically almost a necessity, though the federal doctrine is perhaps theoretically the better. While under such a contract it might be truthfully said that there is not true mutuality of right, there is mutuality of remedy, in that the party holding the option is ready and willing to perform and the question of compelling him to do so should not be considered until it arises.

It is submitted that the court in the principal case could hardly have been criticized had it squarely abandoned the earlier position of the federal courts.

L. B. S.