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Equity--Mutuality as a Basis for Equitable Relief

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bility of the master to the servant himself, there is no apparent reason for changing the meaning of the term to include scope of employment, when dealing with the liability of the master to a third person for the tort of the servant.

From the foregoing we have seen that the two factors determining the liability of the master for the torts of his servant are severable in meaning and operation, one from the other, and cannot properly be applied to a set of facts in a singular form. The said set of facts may fall within one term and without the other. Both tests may apply to some cases. In others the master may be liable for acts occurring in the course of employment but without the scope of employment; in still others he may be liable for acts occurring within the scope of employment but without the course of employment, of course, as in the motorcycle case, where one test applies the other may be implied. The court might argue that since the authority was extended to include the servant's ride home, the time and space limits of the employment might also be implied to extend that far. This would admit of the application of Mr. Mechem's single test. To a careful thinker such reasoning must appear untenable. The master's liability is not being contested in this case, but only that it should be based on the double test. His liability is based on his subsequent ratification, using for the moment the illustrative hypothesis set forth above, and on that alone.

A standardization of terminology in treating this particular subject would not go amiss. The tests for the liability of the master for the torts of his servant which have been separately treated herein should be separately stated and separately applied to the cases as they come up. Such a course would undoubtedly result in clarification of the subject for the student.

HOWARD H. WHITEHEAD.

EQUITY—MUTUALITY AS A BASIS FOR EQUITABLE RELIEF

A testator bequeathed his estate, consisting of corporate stock, to his wife. One half thereof was to go to his mother, sister and brothers should his wife marry again. Thereafter the widow contracted to sell the stock; and upon the purchaser's refusal to perform she brought suit for specific performance of the contract. The court granted specific performance without stating the ground upon which it was given.¹

Assuming that the widow had the right to sell the stock, upon which ground was the remedy given, mutuality of remedy or the inadequacy of the remedy at law? The court's silence does not obviate the uncertainty of its view. The question remains, will the Kentucky courts grant specific performance to one party of the contract

¹Harris, et al. v. New, et al., 167 Ky. 262, 180 S. W. 375 (1915).

simply because the other is entitled to it? The writer believes that this question should be answered in the negative.

The doctrine of mutuality, as it stands, has been discussed and criticized considerably by judges and text writers in recent years. Each develops a different theory, but apparently all reach the same result.²

The restatement of contracts states the doctrine in two parts.³

- (1) "The fact that the remedy of specific performance is not available to one party is not sufficient reason for refusing it to the other party.
- (2) "The fact that the remedy of specific performance is available to one of the parties to a contract is not in itself sufficient reason for making the remedy available to the other; but it is of weight when it accompanies other reasons, and it may be decisive when the adequacy of damages is difficult to determine and there is no other reason for refusing specific performance."

One can readily see that the doctrine of mutuality may be invoked either as a basis for granting equitable relief or as a basis for denying it. The former is to be the thesis of the discussion, and will be hereafter referred to as the doctrine of mutuality.

It is obviously expedient to quote the various theories proposed by text writers. Ames invokes the analogy of the mortgagor-mortgagee relationship to that of the vendor-purchaser relation, to show the impracticability of the doctrine of mutuality.

"In truth the vendor's right to specific performance has nothing to do with the question of mutuality. The vendor from the time of the bargain holds the legal title as security for the payment of the purchase money and his bill is like a mortgagee's bill for the payment and foreclosure of equity of redemption. This view is confirmed if we consider the position of a vendor who has conveyed before the time fixed for payment. He is now a creditor just as if he had sold goods on credit, and there is no more reason why he should have a bill in equity than any other common law creditor."⁴

The theory proposed that the vendor-purchaser relation is analogous to that of *mortgagee-mortgagor* breaks down in some instances. The vendor under an executory contract holds legal title and is entitled to the rents and profits.⁵ Under the *modern view* of mortgages the mortgagor holds legal title, the mortgagee having only a chattel interest in the land.⁶ According to some cases, the vendor bears the

² Clark, *Principles of Equity*, Sec. 48; Horack, *Specific Performance for the Purchase Price*, 1 Iowa Law Bull. 53; Ames, *Mutuality in Specific Performance*, 3 Col. L. R. 1; Williston, V. 3, Sec. 1443.

³ American Law Institute, Restatement of Contracts, Sec. 372.

⁴ Ames, 3 Col. L. R. 1, 12.

⁵ In re Boyle's Estate, 154 Iowa 249, 134 N. W. 590 (1912); Tucker v. McLaughlin-Farroe Co., 36 Okl. 321, 129 Pac. 5 (1912).

⁶ Wash on Mortgages, Sec. 51, The Lien Theory of Mortgages in the U. S.

risk of loss under executory contracts unless the intention of the parties is otherwise.⁶ If the vendor has conveyed and placed the purchaser in possession the object of specific performance has already been performed. Now the only relief desired by the vendor would be the recovery of the purchase price.

The case of *Jones v. Newhall*⁷ stands for the proposition that equity will not decree specific performance of a written contract for the sale of land at the instance of the vendor, if all that is to be done on the part of the purchaser is the payment of the purchase price.

Clark, *Principles of Equity*, Sec. 172, states the rule of mutuality to be as follows:

"The doctrine of mutuality has apparently been invoked in favor of vendors and purchasers, lessors and lessees in two classes of cases. If the subject matter of the contract is such that the damages would be inadequate to the purchaser so that he would ordinarily have obtained specific performance, that is if the buyer's common law remedy is inadequate, the court will not inquire into the seller's common law remedy. The other is that of the rule of part performance as taking a case out of the Statute of Frauds, so that the purchaser could get specific performance."

The author goes on to say, at page 155, that

"the doctrine of mutuality is difficult to justify. It is an illustration of the tendency of equity courts to limit the scope of discretion and widen the field of fixed law."

The court decisions are obviously conflicting. Some hold that mutuality alone is a sufficient basis for equitable relief. To state the rule differently, if the contract is of such a nature that the purchaser could have it specifically enforced, the vendor can do so irrespective of the remedy at law.⁸ The rule is also invoked in enforcing performance of contracts for the sale of unique chattels.⁹

Many of the decisions in granting or denying relief do not men-

⁶ *Lebman v. Lovenson*, 236 Mass. 221, 128 N. E. 13 (1920); *Thompson v. Gould*, 20 Pick. (Mass.) 134 (1838) (dictum); *Vanneman*, 8 Minn. L. Rev. 127.

⁷ 115 Mass. 244 (1874).

⁸ *Lewis v. Leckmere*, 10 Mod. 503, 88 Eng. Rep. 828 (1720); *Adams v. Messenger*, 147 Mass. 185, 17 N. E. 491 (1888); *Adderly v. Dixon*, 1 Simons and Stuart 607 (1824); *Cheale v. Kenward*, 3 De Gex. & J. 27 (1858); *Kenney v. Wexhauz*, 6 Maddack & Gidart 355 (1822); *Migatz v. Stieglitz*, 166 Ind. 361, 77 N. E. 400 (1906); *Rock Island Lumber Co. v. Fairmont Town*, 51 Kan. 394, 32 Pac. 1100 (1893); *Spring v. Sanders*, 62 N. C. 67 (1866); *Raymond v. San Gabriel, Etc., Co.*, 53 Fed. 883 (1893); *Hopper v. Hopper*, 16 N. J. Eq. 147 (1863); *Anderson v. Wallace Lumber Co.*, 30 Wash. 147, 70 Pac. 247 (1902); *Morgan v. Eaton*, 59 Fla. 562 (1910); *Cobe v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329 (1912); *Kipp v. Laim*, 146 Wis. 591, 131 N. W. 418 (1911); *Saint v. Beal*, 66 Mont. 292, 213 Pac. 248 (1923).

⁹ *Young v. Collier*, 31 N. J. Eq. 444 (1879); *Phillips v. Berger*, 8 Barb. (N. Y.) 527 (1850) (Contract for sale of judgment); *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963 (1908) (stock); *Perin v. McGibbin*, 53 Fed. 86 (1890).

tion the rule; while others plainly indicate that mutuality is not a basis for relief.¹⁰ The court says in the case of *Eckstein v. Downing*¹¹ that equity enforces performance of a contract not on the ground of mutuality, but on the ground that the plaintiff has not an adequate remedy at law. The court granting specific performance in favor of the vendor in the decision of *Park et al. v. Koopman*,¹² says, "A court of equity will uphold contracts for sale of land and enforce performance when they are entered into fairly, and with complete understanding on both sides. Under such circumstances the party who is seeking specific performance having performed his part of the contract will be granted relief, not as a favor but as a matter of right."

It is sometimes urged as an explanation of the rule of mutuality that the vendor's remedy at law is inadequate since it consists in the recovery of damages, often more or less conjectural because of the frequent difficulty of proving actual value of the land representing the difference between the stipulated price and the market value. Whereas in equity the complainant recovers the whole of the purchase money.¹³ An adequate remedy at law, which will deprive a court of equity of jurisdiction, is a remedy as certain, complete, prompt and efficient to obtain the ends of justice as the remedy in equity.¹⁴

In contracts for sale of land it is sometimes argued that the reason the vendor may come into equity to recover, or enforce payment of the purchase price is because a mortgage relation has been created between the parties by the contract of sale.¹⁵ It seems apparent that the plaintiff could recover the purchase price in an action at law. If the vendor had conveyed and placed the purchaser in possession, he would retain a mortgage as security. Whether the foreclosure proceedings are to be in equity or in law is usually governed by statute.

The Kentucky courts will decree specific performance of land contracts in favor of the vendor.¹⁶ If a purchaser fails or refuses to take the property according to the contract the seller's remedy is a suit to recover the purchase money, or in other words for a performance of the contract.¹⁷ The vendor also retains an equitable lien on the land

¹⁰ *Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626 (1887); *Lone Star Salt Co. v. Texas Shore Line Ry. Co.*, 99 Texas 434, 36 S. W. 355 (1905); *Hickey v. Dole*, 66 N. H. 336, 29 Atl. 792 (1890).

¹¹ 64 N. H. 248, 9 Atl. 626 (1887).

¹² 311 Ill. 350, 143 N. E. 80 (1924).

¹³ *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979 (1859); *Maryland Clay Co. v. Simperts*, 96 Md. 1, 53 Atl. 424 (1902); *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25 (1856); *Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626 (1887).

¹⁴ *Boyce v. Grundy*, 3 Pet. 210, 7 L. Ed. 655 (1830); *Spring Field Milling Co. v. Barnard & Leacs. Mfg. Co.*, 81 Fed. 261 (1897); *Brown v. Arnold*, 131 Fed. 723 (1904).

¹⁵ *Codt v. Wiltse*, 130 Iowa 139, 105 N. W. 510 (1906).

¹⁶ *McKee v. Beale*, 13 Ky. (3 Litt.) 190 (1823).

¹⁷ *Golden v. Lewis*, 176 Ky. 28, 195 S. W. 144 (1917); *Evans Admrs., et al. v. Clinton Bank, et al.*, 244 Ky. 270, 50 S. W. (2d) 563 (1932); *Collins v. Rickart*, 77 Ky. (14 Bush) 621 (1879).

if he takes no other security, whether a conveyance has been made or not.¹⁸

The rule in Kentucky appears to be that the right to a decree of specific performance of a contract relating to realty or personalty is based on the fact that damages for breach cannot be adequately compensated for in law.¹⁹ There are very few cases in Kentucky granting specific performance of an executory contract in favor of the vendor, nor in those few do the courts state the basis for the holding.

After an analytical examination of the authorities it does not appear that the court of equity regards so material the particular thing asked for. The complainant may either desire a specific thing or a sum of money. The court regards the position of the party asking the relief rather than the subject matter of the contract. It is the relation of the particular individual to the subject matter which the court regards as important. The question is, considering the individual and the relief which he could under the circumstances secure at law, is the legal remedy as to him adequate? If not, he will be granted specific performance even though he asked only for a sum of money. This relief will be granted, not on the theory of mutuality or foreclosure of redemption, but merely because of the inadequacy of the remedy at law.

JOHN EVANS.

A STERILIZATION LAW FOR KENTUCKY—ITS CONSTITUTIONALITY

Proposed statute:

(1) Whenever the Superintendent or Warden of the State's reformatories or hospitals for the insane or feeble-minded shall be of the opinion that it is for the best interest of the patient or inmate and society that any inmate of the institution under his care should be sexually sterilized, such superintendent or warden is hereby authorized to cause to be performed by some capable physician or surgeon the operation of sterilization on any patient or inmate confined in such institution affected with insanity, idiocy, imbecility, feeble-mindedness, or epilepsy: provided that such superintendent or warden shall have first complied with the requirements of this act.

(2) Such superintendent or warden shall first present to the trustees or managers of his hospital or reformatory a petition stating the facts of the cause and the ground of his opinion, verified by his affidavit to the best of his knowledge and belief and praying that an order may be entered by said trustees or managers requiring them to have performed by some competent physician to be designated by him in his petition or by said trustees or managers in their order upon the

¹⁸ Farmer & Arnold v. Samuel, 14 Ky. 187 (1823).

¹⁹ Edelen v. W. B. Samuel & Co., 126 Ky. 295, 130 S. W. 360 (1907).