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Specific Performance - Mutuality of Remedy - Whether a Decree for Specific Performance May Issue Notwithstanding a Lack of Mutuality of Remedy at the Inception of a Contract

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is at the same time capable of intending to commit a positive act which is wrongful in itself.[12]

Although this case has not altered the rule of the non-liability of parents for the torts of their children,[13] it should, nevertheless, induce conscientious parents to make insurance provision for the protection of the estates of their children as well for compensating the innocent victims of intentional torts committed by their children.[14]

J. F. QUETSCH

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY—WHETHER A DECREE FOR SPECIFIC PERFORMANCE MAY ISSUE NOTWITHSTANDING A LACK OF MUTUALITY OF REMEDY AT THE INCEPTION OF A CONTRACT—The Supreme Court of Illinois, through the medium of the case of *Gould* v. *Stelter*,[1] was recently faced with the problem of whether a contract might be specifically enforced even though such a remedy would not have been available to both parties at its inception. Therein, the plaintiff, acting under a power of attorney, contracted to purchase a tract of land in her own name even though authorized to contract only in her principal's name. When the vendors refused to convey, the plaintiff filed a complaint for specific performance which, in the second count, sought a decree compelling the vendors to execute a deed either to the plaintiff or to her principal. The principal, nominally a defendant originally, then filed a cross-complaint seeking identical relief. The trial court, dismissed both the second count of the original complaint and the cross-complaint on the ground that mutuality of remedy did not initially exist between the principal and the defendants. In so doing, the court ignored the fact that the principal had since ratified the contract and become bound thereon. On appeal, the Supreme Court of Illinois reversed the decision and announced that the technical requirement of mutuality of remedy at the inception of a con-

[12] In the case under consideration, the court quoted from the opinion in Ellis v. D'Angelo, 116 Cal. App. (2d) 310 at 315, 253 P. (2d) 675 at 677 (1953), a case involving the legal sufficiency of a complaint charging a battery on the part of a four-year old boy, as follows: "Thus as between a battery and negligent injury an infant may have the capacity to intend the violent contact which is essential to the commission of battery when the same infant would be incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence."

[13] White v. Seitz, 342 Ill. 266, 174 N. E. 371 (1931); Paulin v. Howser, 63 Ill. 312 (1872); Dick v. Swenson, 137 Ill. App. 68 (1907). A note on the subject of parental responsibility for acts of juvenile delinquents appears in 34 CHICAGO-KENT LAW REVIEW 222.

[14] For further discussions of the tort liability of minors, see 1951 Ill. L. Forum 227 and 23 Mich. L. Rev. 9 (1924).

[1] 14 Ill. (2d) 376, 152 N. E. (2d) 869 (1958). Daily, C. J. filed a separate concurring opinion.

tract was no longer vital and its absence should not preclude the issuance of a decree for specific performance.

Prior to the decision in the instant case, there existed in Illinois two conflicting lines of authority as to whether a decree for specific performance may issue despite the absence of mutuality of remedy at the inception of a contract. The early case of *Gage* v. *Cummings*[2] adopted the view that specific performance would not be available to a party who was not initially bound on a contract for the sale of land since the contract was not then mutually enforceable, notwithstanding that party's subsequent ratification by tendering deed and filing suit. That case was, however, quickly qualified by the case of *Gibson* v. *Brown*[3] wherein the court granted specific performance to a vendor of land when the purchaser had knowledge of the vendor's lack of title thereto at the contract's inception and the vendor had perfected title in himself and tendered a good conveyance before filing a complaint for specific performance. The necessity of the existence of mutuality of remedy as a prerequisite to a decree for specific performance was further enunciated in decisions which denied relief to a plaintiff who might terminate his contractual obligation by notice or nominal payment,[4] or to a plaintiff who had contracted for the performance of personal services.[5] In these decisions, the contracts never were mutually enforceable. More recently, the doctrine was fortified by the case of *Wloczewski* v. *Kozlowski*[6] in which a decree for specific performance was denied to an undisclosed principal who had authorized his agent to orally contract for the purchase of property on his behalf. The court held that the relief sought could not be granted unless the contract was mutually enforceable and binding on the parties at the point of execution.

The other line of authority in Illinois stemmed from the case of *Ullsperger* v. *Meyer*.[7] In that case, the court held that want of mutuality of remedy arising from the failure of the purchaser to sign a contract for the sale of land, could not be successfully pleaded as a defense by the

2 209 Ill. 120, 70 N. E. 679 (1904). This decision was overruled by the instant case insofar as it is based on mutuality of remedy.

3 214 Ill. 330, 73 N. E. 578 (1905).

4 Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696 (1908). Specifically, the court held that a plaintiff who could terminate his obligations under a contract at any time by paying a nominal fee was not entitled to a decree for specific performance since the contract was not mutually enforceable.

5 Barker v. Hauberg, 325 Ill. 538, 156 N. E. 806 (1927). Specifically, the court held that a plaintiff who had contracted to perform social work for life was not entitled to a decree for specific performance since the contract was not mutually enforceable.

6 395 Ill. 402, 70 N. E. (2d) 560 (1947). It should be noted that the lack of mutuality of remedy was only one of three alternative grounds for the decision.

7 217 Ill. 262, 75 N. E. 482 (1905).

vendor who did sign, since the plaintiff's subsequent act of filing a complaint for specific performance rendered the contract mutual. Through the years, there have been several decisions in Illinois which have allowed specific performance even though the remedy was not available to both parties when the contract was executed.[8] In these decisions specific performance was decreed because mutuality of remedy arose by subsequent acts. Noting these decisions, the concurring opinion in the instant case would not have examined the mutuality doctrine but would have considered the subsequent act of filing a cross-complaint as sufficient to render the contract mutually enforceable. This concept was also recognized in the New York case of *Epstein* v. *Gluckin*[9] wherein a purchaser's assignee, under a contract for the sale of land, was granted a decree for specific performance notwithstanding the initial lack of a mutually enforceable contract between the vendor and the plaintiff. The court asserted that the subsequent act of filing suit was sufficient to entitle the plaintiff to the relief sought.

In view of the concurring opinion in the instant case, it might be argued that it was unnecessary for that court to have abolished the deeply entrenched necessity of the existence of mutuality of remedy at the inception of a contract. However, it is well that the court scrutinized the doctrine and explored its mechanistic application. In so doing, the decision has finally terminated the necessity for ritualistic adherence to the rule and has liberated the courts of equity from the compulsion to invoke exceptions thereto in order to escape its sometimes harsh consequences. Perhaps the most rewarding result of the instant case is its contribution towards settling and clarifying the long existing divergence of opinion by establishing that it no longer matters when mutuality arose, so long as it exists. By so doing, the court has also re-emphasized an important distinction between law and equity. Law courts determine cases in the light of conditions present when the cause of action arises; equity courts, on the other hand, dispose of equitable causes on the basis of conditions present at the time of the hearing thereof.

M. GLAIT

[8] Laegeler v. Bartlett, 10 Ill. (2d) 478, 140 N. E. (2d) 702 (1957), holds that a defendant who contracts to convey more than he owns will be compelled at the suit of the purchaser to convey as much as he does own and the defense of mutuality will fail since the act of filing suit renders the contract mutually enforceable for so much as the defendant owns. In Lewis v. McCreedy, 378 Ill. 264, 38 N. E. (2d) 170 (1941), where the assignee of a purchaser's interest in a contract for the sale of land tendered the full purchase price and filed suit, the contract was deemed mutually enforceable. See also Espadron v. Davis, 385 Ill. 304, 52 N. E. (2d) 716 (1944), to the effect that the act of filing suit by the assignee of a contract for the purchase of realty renders the contract mutually enforceable.

[9] 233 N. Y. 490, 135 N. E. 861 (1922).