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Some Observations on the So-Called Doctrine of Mutual Remedy and its Application in Kentucky

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NOTES

SOME OBSERVATIONS ON THE SO-CALLED DOCTRINE OF MUTUAL REMEDY AND ITS APPLICATION IN KENTUCKY

Probably no other doctrine in the field of equity has caused so much confusion as the doctrine that in order for one person to be given specific performance the remedy must be available to the other party. The term "mutuality of remedy" (or rather "lack of mutual remedy") by which the doctrine was denominated, has a rather suggestive meaning (perhaps I should say meanings), and yet a very indefinite signification. Like a "Mother Hubbard", it can be used to cover a multitude of situations and at the same time explain none of them. It is not surprising that the bench fell victim to the mirage and early accepted and attempted to apply the doctrine without a thorough investigation as to the possibilities and pitfalls contained in it.

Before examining the Kentucky cases, it may be appropriate to examine very briefly the historical background of the doctrine. It has been intimated that the doctrine had its origin in the case of *Flight* v. *Bolland.*[1] In that case, *A,* an infant, entered into a contract with *B.* *B* refused to perform. *A* brought an action for specific performance of the contract. The plaintiff, being an infant, was not amenable to an order of a court of chancery. Had the defendant been the plaintiff he could not have had specific performance. The court dismissed the plaintiff's bill, saying, "It is not doubtful that it is a general principle of courts of equity to interpose only where the remedy mutual." However, it is probable that prior to *Flight* v. *Bolland* the view expressed by that case had been anticipated by the practitioners in chancery. There seemed to be the notion (which has by no means been entirely dispelled even today), that mutuality of remedy was an important requisite in equity. It was but natural that the courts should confuse "mutuality of obligation" with what they called "mutuality of remedy". Of

[1] 4 Russell 298 (1828).

course, where there is an absence of mutuality of obligation the agreement does not rise to the dignity of a contract. The doctrine of mutual remedy has no proper application except to a contract. But, the courts failed to observe this distinction and the notion grew that there was a special defense of lack of mutuality in the obligation applicable to the defendant in equity which might not be applicable to the same defendant when sued at law.[2]

Many judges and text-book writers have referred to cases decided long before *Flight* v. *Bolland* as supporting the assertion that there must be mutuality in the remedy. However, I believe that the examination by Professor Wm. Draper Lewis in his scholarly article[3] shows that these cases in fact were decided on other grounds.

In Fry on *Specific Performance of Contracts*[4] we find the statement:

> "A contract, to be specifically enforced by the court must be mutual,—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty, attending its execution in the former."

In a note to the section it is stated, "No rule in equity is more thoroughly settled than this". A similar rule was stated in Pomeroy's great work on *Equity Jurisprudence,* Sections 163, 165.

After the appearance of Lord Fry's treatise and Pomeroy's work, the courts began to quote verbatim from these two authorities.[5]

With the rule formulated by Lord Fry in mind, the courts, unfortunately for the rule, conceived a different use for the idea of "mutuality". It was argued that if the absence of mutuality

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[2] Bromley v. Jeffries, 2 Vernon 415 (1700); Clark v. Price, 2 Wilson Ch. 157 (1819); Howel v. George, 1 Maddock 13 (1815).

[3] 49 U. Pa. L. Rev. 270.

[4] Am. Ed. (1861) c. 8; Sec. 286, p. 198.

[5] For example, see: Ochs v. Kramer, 32 Ky. L. Rep. 762, 107 S. W. 260 (1908), (Fry, Sec. 440); Luse v. Deity, 46 Iowa 205 (1877), (Fry, Sec. 286); Richmond v. The Dubuque & Sioux City R. R. Co., 33 Iowa 443 (1871); Bumgardner v. Leavitt, 35 W. Va. 194, 13 S. E. 67 (1891), (Pomeroy, Sec. 165).

of remedy was a good reason for denying relief, *a fortiori,* if the defendant could have obtained relief, the plaintiff should have relief even though otherwise he would not be entitled to it. A number of cases decreed specific performance in favor of a vendor of land (whose remedy in damages was generally regarded as inadequate, and by the Restatement of Contracts is conclusively presumed to be inadequate), on the ground that since the vendee could secure specific performance if he sued for it, the vendor will be given specific performance.[6]

As a result of this development, we thereupon had the two following propositions of law:

(1) The plaintiff, even though otherwise entitled to it, will be denied specific enforcement if the defendant could not have obtained it.

(2) The plaintiff, even though otherwise not entitled to it, will be granted specific enforcement if the defendant could have obtained it.

For some unknown reason, the courts failed to observe that the two propositions, as stated, were inconsistent and incapable of application. As can be readily seen, each rule was applicable to every case.

A number of writers did see the apparent inconsistency and attempted to explain it away. However, they proposed drastic modifications of one or both rules, which modifications were never adopted by the courts.

It is patent that the courts found it necessary to engraft exceptions upon the rule that there must be mutuality of remedy at the time of the formation of the contract. Eight propositions were stated by Dean Ames where the doctrine did not apply.[7] As might be expected, the exceptions literally "ate up the rule", although the courts continued to talk about the necessity for mutuality of remedy.

Strong judges openly began to criticize the rule as generally stated and others to deny it altogether. For example, in the

[6] Raymond v. San Gabriel Val. L. & W. Co., 1893 C. C. A., 53 Fed. 883 (1893); Dollar v. Knight, 145 Ark. 522, 224 S. W. 983 (1920); Pearson v. Gardner, 202 Mich. 360, 168 N. W. 484 (1918); Springs v. Sanders, 62 N. C. 67 (1866); Prudential Ins. Co. v. Berry, 153 S. C. 496, 151 S. E. 63 (1930); McCaskill Co. v. Dekle, 88 Fla. 285, 102 So. 252 (1924); Jackens v. Nicolson, 70 Ga. 198 (1883).

[7] 3 Col. L. Rev. 1.

much discussed and well-reasoned case of *Epstein* v. *Gluckin*[8] we find the now classic statement of Judge Cardozo—"If there ever was a rule that mutuality of remedy existing not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule today." And see the statement in *Javiere* v. *Central Altagracia*[9] by Holmes, J., "There is too a want of mutuality in the remedy, whatever that objection may amount to."[10]

Dean Ames in his scholarly article[11] stated the true principle to be that "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." The American Law Institute's Restatement of the Law of Contracts, by means of Sections 373, 374, and 375[12] incorporates the principle stated

[8] 233 N. Y. 490, 135 N. E. 861 (1922).

[9] 217 U. S. 502, 508, 54 Law Ed. 859, 30 Supt. Ct. 598 (1910).

[10] See further Williston on Contracts, Vol. III, Sec. 1433.

[11] 3 Col. L. Rev. 1, 2, 3. And see Judge Cardozo's statement in Epstein v. Gluckin (supra n. 8), "What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant."

[12] Sec. 373. "Specific enforcement may properly be refused if a substantial part of the agreed exchange for the performance to be compelled is as yet unperformed and its concurrent or future performance is not well secured to the satisfaction of the court."

Sec. 374. (1) "Except as stated in Subsection (2), specific enforcement will be refused if a condition precedent to the duty to be enforced has not been and cannot be performed and is not excused, or if a condition subsequent terminating the duty has occurred."

(2) "Specific enforcement will not be refused by reason of provisions in the contract which make the duty of performance depend upon conditions, precedent or subsequent, of such a nature that refusal of a decree will effectuate an unjust penalty or forfeiture, and if substantial performance of the agreed exchange is assured as required by the rule stated in Section 373."

Sec. 375. (1) "Specific enforcement will not be decreed if the plaintiff has himself committed a material breach and its refusal will not effectuate an unjust penalty or forfeiture."

(2) "Specific enforcement may properly be decreed in spite of a minor breach or innocent misrepresentation by the plaintiff, involving no substantial failure of the exchange for the performance to be compelled."

(3) "If specific enforcement is decreed in spite of a breach by the plaintiff, the defendant has a right to compensation for such breach. This may be given either by making a just abatement in the price or other performance to be rendered by the defendant, or by making the decree conditional on payment to the defendant of reasonable compensation in money."

by Ames and secures the purposes which were instrumental in the formation of the old rules regarding mutuality of remedy. And Section 372[13] repudiates the two inconsistent rules that sprang up, and a restatement of the rules is made that corresponds with the rules laid down by the overwhelming majority of cases.

However, it was not my sole purpose at the beginning of this paper to investigate the sources of the rules governing mutuality of remedy, but to discuss briefly the main Kentucky decisions and compare their holdings with the Rules stated in Section 372 of the Restatement of the Law Contracts.

There are three leading cases in Kentucky that state a general rule contrary to Section 372 but avoid the consequences of the rule on other grounds.[14]

The first case, *Burton* v. *Shotwell,* emphatically states the rule formulated by Lord Fry and in the opinion the court cites Fry on *Specific Performance,* Section 286. But the rule had no application in the case as it was found that the inability of the defendant to enforce the contract against the plaintiff arose from his own conduct. However, at the time of the formation of the contract, it could not have been enforced by either party, as the defendant was to transfer certain shares of stock in a company to be organized in the future.

The case of *Burton* v. *Shotwell* was followed by *Moayon* v. *Moayon.* In that case, a husband and wife were living apart because of grounds of divorce the wife had. The wife was preparing to petition for a divorce. The husband agreed that he would convey one third of his estate in trust for their children if she would drop the suit and resume her relation as wife. The wife assented and before conveyance the parties resumed living together. The husband refused to convey the property and the wife sued for specific enforcement of the

[13] (1) "The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party."

(2) "The fact that the remedy of specific enforcement is available to one party to a contract is not in itself a sufficient reason for making it 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 enforcement."

[14] Burton v. Shotwell, 76 Ky. (13 Bush) 271 (1877); Moayon v. Moayon, 114 Ky. 505, 72 S. W. 33 (1903); Ochs v. Kramer, 32 Ky. L. Rep. 762, 107 S. W. 260 (1908) (approves Lord Fry's rule).

contract. The husband contended that there was no mutuality of remedy under the contract. The court admitted the general proposition that there must be mutuality of remedy but held that the contract on the part of the wife was executed and granted the specific enforcement sought.

In *Ochs* v. *Kramer*, the court again stated (in slightly different language), the rule laid down by Lord Fry, but in that case the court found that the contract was mutually enforceable at the time of its formation and the defendant had merely lost his right to enforce it due to his own conduct. The court cited *Moore* v. *Fitz Randolph*.[15]

Thus, from those three cases it may be seen that a doctrine contrary to Section 372 of the Restatement of Contracts has been announced, though in each case it was held inapplicable because of the particular circumstances. In all three cases, the defendant by the decree would run no risk of being compelled to perform without receiving the agreed exchange. No Kentucky case has ever denied specific enforcement on the ground of lack of mutuality of remedy. On the contrary, an examination of the Kentucky cases (which reach a result in accord with Section 372), discloses that the Kentucky court has so qualified the doctrine announced in *Burton* v. *Shotwell, Moayon* v. *Moayon,* and *Ochs* v. *Kramer* (and, hence, Lord Fry's rule), that the exceptions show that our court in the three cases cited did not stop to consider the problems which are properly involved in Lord Fry's statement.

The first exception in Kentucky that I wish to indicate (Ames' seventh proposition), is that "a plaintiff who has performed his part of a contract, although he could not have been compelled in equity to do so, may enforce specific performance by the defendant". Three main cases uphold this proposition.[16] The better case of the three, *Moayon* v. *Moayon,* has been discussed *supra.* The above proposition is now generally accepted.[17]

[15] 6 Leigh (Va.) 175 (1835). "Both parties must by the agreement have a right to compel a specific performance."

[16] Logan County Nat'l Bank v. Townsend, 8 Ky. L. Rep. 694, 3 S. W. 122 (1877); Moayon v. Moayon, 114 Ky. 855, 72 S. W. 33 (1903); Allen v. New Domain Oil & Gas Co., 24 Ky. L. Rep. 2169, 73 S. W. 747 (1903).

[17] Poultry Producers of S. Cal. v. Barlow, 189 Cal. 278, 208 P. 93 (1922); Le Noir v. McDaniel, 80 Fla. 509, 86 So. 435 (1920); Lamprey v. St. Paul & C. R. Co., 89 Minn. 187, 94 N. W. 555 (1903); Roche v.

The second exception that I wish to point out (Ames' fourth proposition), is that "a vendor, whose inability to make a perfect title debars him from obtaining a decree against the vendee, may be forced by the vendee to convey with compensation". Two main cases (both old ones) support this proposition.[18] Thus, in *McConnell's Heirs* v. *Dunlap's Devisees,* the devisor of the defendants contracted to convey 500 acres out of one of two tracts. He did not have 500 acres in either of the two tracts. Upon suit by the heirs of the vendee, the court held that if the vendor is able to convey part of the tract only, the vendee may, at his election, compel a conveyance of that part, and recover damages for the deficiency, or he may refuse to take such part, and recover damages for the whole. In *Jones* v. *Shackleford* (a better case), the court laid down the following proposition: "Although a vendor cannot insist upon the vendee's accepting a part performance of the contract, yet the vendee may insist upon a specific execution in part and damages for the residue, where the vendor is unable to perform *in toto.*" Later cases indicate a similar view. The Kentucky cases are in accord with the general view.[19]

The third exception that I wish to point out (Ames, eighth proposition), is that "One who has contracted to sell land not owned by him and who, therefore, could not be cast in a decree, may, by acquiring title before the time fixed for conveyance, compel the execution of the contract by the vendee." The leading case in Kentucky is *Tapp* v. *Nock.*[20] In that case the vendor Nock, at the time of the formation of the contract with Tapp, did not have the legal title to the contracted premises but merely an executory contract with the owner for the purchase of the premises. Two months after the formation of the contract, Nock acquired title and tendered a deed to the premises

Mahar, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857 (1918); Cokayn v. Hurst, 10 Seldon Soc. 141; Whitney v. Hay, 181 U. S. 77, 21 S. Ct. 537 (1901); Burgess v. Burgess, 206 Ill. 19, 137 N. E. 403 (1922); Howe v. Watson, 179 Mass. 30, 60 N. E. 415 (1901).

[18] McConnell's Heirs v. Dunlap's Devisees, 3 Ky. (Hardin) 44 (1805); Jones v. Shackelford, 5 Ky. (2 Bibb) 410 (1811).

[19] Swain v. Burnette, 76 Cal. 299, 18 Pac. 394 (1888); Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27 (1893); Davis v. Parker, 96 Mass. (14 Allen) 94 (1867); Catholic Foreign Mission Soc. of America v. Oussani, 215 N. Y. 1, 109 N. E. 80 (1915); Burrow v. Scammell, 19 Ch. D. 175 (1881).

[20] 89 Ky. 414, 12 S. W. 713 (1889).

which Tapp refused. Nock was granted specific performance. This case is in line with the weight of authority.[21]

The fourth exception that I wish to point out is that "although the vendor's title is defective at the date of the formation of the contract, if he perfects his title by the date for performance, he may force the vendee to perform." Several Kentucky cases have announced this proposition.[22] These cases are in accord with the weight of authority.[23]

The fifth exception may properly be stated as follows: "A contract by a married woman to sell her land, even though it cannot be enforced against her, will be enforced against the vendee if the husband of the vendor is willing to join in the conveyance at the time enforcement of the contract is sought". The leading case is *Hoffman* v. *Colgan*.[24] In that case, Mrs. Hoffman agreed to sell her property to Colgan. The husband of Mrs. Hoffman never signed the contract, but joined in a deed to the premises. Upon Colgan's refusal to complete the contract, Mrs. Hoffman and her husband sought specific enforcement. To the objection by the vendee that the contract was not mutual, since not binding on Mrs. Hoffman, the court answered that the objection could not be raised where the party originally not bound to perform had performed. As can be seen, the court treated the case as being one where there was no binding contract at all, but the tender of the deed by the vendor and her husband constituted an acceptance of the vendee's offer to purchase. By Section 2128 of Kentucky Statutes[25] a contract by a married woman to sell her realty, in which the husband is not a party, is treated as void.[26] I presume, therefore, by considering *Hoffman* v. *Colgan* and the later case of *Brown* v. *Allen* together,

[21] Heller v. McGuin, 261 Ill. 588, 104 N. E. 158 (1914); Melton v. Stuart, 213 Ala. 574, 105 So. 659 (1925); Bianchi v. Herman, 105 N. J. Eq. 226, 147 Atl. 505 (1929); Wylson v. Dunn, 34 Ch. D. 569 (1887).

[22] Logan v. Bull, 78 Ky. 607, 617 (1880) (quoting Fry's rule); Smith v. Cansler, 83 Ky. 367, 7 Ky. L. Rep. 317 (1885); Tyree v. Williams, 6 Ky. (3 Bibb) 365, 367 (1914) (dictum).

[23] Dresel v. Jordan, 104 Mass. 407 (1870); Bianchi v. Herman, 105 N. J. Eq. 226, 147 Atl. 505 (1929); Binchney v. Morton, 30 F. (2d) 885 (C. C. A.) (1929); Perry v. Ritze, 110 Neb. 386, 193 N. W. 758 (1923).

[24] 25 Ky. L. Rep. 98, 74 S. W. 724 (1903).

[25] Ky. Stat. (Carroll, 1930) Sec. 2128. " . . . She may make contracts and sue and be sued, ..., except that she may not make any executory contract to sell or convey or mortgage her real estate, unless her husband join in such contract. . . . ".

[26] Brown v. Allen, 204 Ky. 76, 263 S. W. 717 (1924). There are other Kentucky cases in accord.

that if the vendee should withdraw his offer before the husband and wife joined in a deed and offered it to him, or the husband otherwise in writing assented to the contract, then the vendor would have no right of action whatever.

But the writer is doubtful of the theory that there is no binding contract at all, but the tender of the deed by the vendor and her husband constitutes an acceptance of the vendee's continuing offer to purchase in view of the Kentucky decisions, arising under the Statute of Frauds,[27] where it is said that when a memorandum must be signed by the "party to be charged" (I refer to contracts concerning the sale or transfer of an interest in land) this means the vendor, and where the vendor does not sign, neither party is bound, regardless of who brings the action.[28] Perhaps it is explainable on the ground that Kentucky practically stands alone in its interpretation of this part of the Statute of Frauds.[29] However, it may be true that the fifth proposition is stated in terms that are too broad. But the result reached in *Hoffman* v. *Colgan,* despite the narrow ground stated by the court, upholds the proposition as stated. The result reached by *Hoffman* v. *Colgan* has been adopted by other cases.[30]

The sixth exception that I wish to point out, perhaps, cannot be said to be an actual exception to Lord Fry's rule. The proposition is that "where the defendant by delay or other conduct on his part subsequent to the contract has lost his right of equitable relief against the plaintiff, he cannot complain of being compelled to perform specifically." In *Ochs* v. *Kramer*[31], *K* sold *O* a parcel of land, one hundred dollars being paid at the time of the execution of the contract and the remainder to be paid in a month when the deed was to be made, and if not paid the down payment was to be forfeited as liquidated damages and the contract void at the vendor's election. *O* refused to

[27] Ky. Stat. (Carroll, 1930), Sec. 470.

[28] Murray v. Pate, 36 Ky. (6 Dana) 335 (1838) (similar to Hoffman v. Colgan, but involving the statute of frauds); City of Murray v. Crawford, 138 Ky. 25, 127 S. W. 494 (1910); Evans v. Stratton, 142 Ky. 615, 134 S. W. 1154 (1911); Wren v. Cooksey, 147 Ky. 825, 145 S. W. 116 (1912); Smith v. Ballou, 211 Ky. 281, 277 S. W. 286 (1925).

[29] 28 L. R. A. (N. S.) 680, 684, 690, 691, 695, 700, 701, and the Kentucky cases there cited.

[30] Bianchi v. Herman, 105 N. J. Eq. 226, 147 Atl. 505 (1929); Dresel v. Jordan, 104 Mass. 407 (1870).

[31] 32 Ky. L. Rep. 762, 107 S. W. 260 (1908).

perform and *K* brought suit for specific enforcement. *O* contended that since *K* could forfeit the down payment and declare the contract voided, at his election, the contract was wanting in mutuality of remedy. In overruling *O's* contention and exposing the fallaciousness of his argument, the court quoted verbatim from Fry on *Specific Performance,* Section 440 and *Moore* v. *Fitz Randolph.*[32]

As a seventh exception, which like the sixth proposition is perhaps not truly an exception, it is well settled that "an option holder may get a decree for specific performance if he exercises his power in accordance with the terms of the contract and performs all conditions precedent."[33] However, originally in Kentucky where a lessee under a lease had the option of purchasing the land, the option could not be enforced by the lessee.[34] The court treated that portion of the contract as not being mutually binding on both parties so far as specific execution was concerned. The rule was not changed until 1888 in *Bank of Louisville* v. *Baumeister.*[35]

In connection with option contracts, care should be exercised not to confuse the rule stated above with the peculiar doctrine prevailing in Kentucky as to mineral options. Since *Litz* v. *Goosling,*[36] it is clear that a stated consideration of one dollar is not sufficient to sustain these agreements.[37] The doctrine is not extended to other options.[38] The doctrine has recently been severely criticized by the Kentucky court.[39]

However, with the possible exception as to the mineral option cases, Kentucky is in accord with the great weight of authority as to the rights of an option holder to secure specific enforcement.[40]

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[32] *Supra,* n. 15.

[33] Bacon v. Ky. Central Ry. Co., 95 Ky. 373, 16 Ky. L. Rep. 77, 25 S. W. 747 (1894); Walton's Exr. v. Franks, 191 Ky. 32, 228 S. W. 1025 (1921); Garvin v. Steen, 243 Ky. 256, 47 S. W. (2d) 1010 (1932).

[34] Boucher v. Van Buskirk, 9 Ky. (2 A. K. Marsh) 349 (1820).

[35] 87 Ky. 6, 7 S. W. 170 (1888).

[36] 93 Ky. 185, 19 S. W. 527 (1892).

[37] Thompson & Co. v. Reid, 31 Ky. L. Rep. 176, 101 S. W. 964 (1907); Noble v. Mann, 32 Ky. L. Rep. 30, 105 S. W. 152 (1907); Berry v. Frisbie, 120 Ky. 337, 86 S. W. 558 (1905); Stamper v. Combs, 164 Ky. 733, 176 S. W. 178 (1915).

[38] Sparks v. Ritter, 204 Ky. 623, 265 S. W. 26 (1924).

[39] Union Gas & Oil Co. v. Weideman, 211 Ky. 361, 277 S. W. 323 (1925).

[40] Frank v. Schnueltzen, 187 Fed. 515 (C. C. A.) (1911); O'Connell

As the eighth exception, it is well settled that "an assignee of a purchaser of an interest in land will be given specific enforcement of the contract against the vendor".[41] However, in the cases that have arisen in Kentucky, it is probable that the assignee assumed the obligation to perform the assigned contract. The general rule is that the assignee of a contract right can get specific performance on the same terms and conditions as could the assignor, even though the obligor would not have had a like remedy against the assignee.[42]

As a final exception, co-operative marketing associations have been given a decree for specific performance, though the supposed requisites of mutuality of remedy do not exist.[43] The objection was in fact raised in *Potter* v. *Dark Tobacco Growers Co-operative Association*. The association had no capital stock, was not operated for profit and was not permitted to buy, handle or sell tobacco except for its members. However, the court treated the contract as mutually binding as to obligations but ignored the problem of mutuality of remedy. The Kentucky cases are in accord with the overwhelming weight of authority. The cases are too numerous to cite.

There are a number of cases in Kentucky that discuss the absence of mutuality of remedy that properly involve the absence of mutuality of obligation and hence deal with agreements that do not arise to the dignity of contracts.

I wish to point out that the fifth proposition stated by Dean

v. Lampe, 206 Cal. 282, 274 Pac. 336 (1929); Anderson v. Bills, 335 Ill. 524, 167 N. E. 498 (1929); Boston & W. St. R. Co. v. Rose, 194 Mass. 142, 80 N. E. 498 (1907); Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, 97 N. E. 43 (1911); Dallas v. Gates, 133 Ore. 300, 289 Pac. 497 (1930).

[41] Respass v. McClanaham, 9 Ky. (2 A. K. Marsh.) 577 (1820); Hancock v. Hancock, 17 Ky. (1 T. B. Mon.) 121 (1824); Benjamin v. Dinwiddie, 226 Ky. 106, 10 S. W. (2d) 620 (1928) (dictum).

[42] Lenman v. Jones, 222 U. S. 51, 32 S. Ct. 18 (1911); Perry v. Paschal, 103 Ga. 134, 29 S. E. 703 (1897); Welch v. McIntosh, 89 Kan. 47, 130 Pac. 641 (1913); First Nat. Bank v. Corp. Sec. Co., 128 Minn. 341, 150 N. W. 1084 (1915); Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922).

Contra: Lunt v. Lorscheider, 285 Ill. 589, 121 N. E. 237 (1918); Horwitz v. Kreuzer, 140 Md. 414, 117 A. 563 (1922).

[43] Owen County Burley Tob. Soc. v. Brumback, 128 Ky. 137, 32 Ky. L. Rep. 916, 107 S. W. 710 (1908); Grant County Board of Control v. Allpin, 152 Ky. 280, 153 S. W. 417 (1913); Potter v. Dark Tob. Growers Co-Operative Association, 201 Ky. 441, 257 S. W. 33 (1923) (based on statute).

Ames in his article,[44] certainly is not the law in Kentucky as to contracts concerning the sale of an interest in land. It seems that only the vendor need sign in order to bind both parties.[45] The signature of the vendee alone is insufficient, even though he is the defendant in the action.[46] The court refuses to adopt a theory of continuing offer in these cases, as was adopted in *Hoffman* v. *Colgan*[47] under the Married Woman's Act.[48]

The Kentucky court never adopted the view that the "plaintiff, even though otherwise not entitled to it, will be granted specific enforcement if the defendant could have obtained it". It is not so much as mentioned in any Kentucky case. It is stated by the Kentucky court that although a vendee can get a decree for specific performance by a vendor whose title is defective, or the land deficient in quantity, with compensation for the defects, the vendor can not enforce the contract against the vendee.[49] The Kentucky cases permitting a vendor to sue for specific enforcement of a contract for the sale of an interest in land do not mention mutuality of remedy as a basis.[50] No doubt Subsection 2 of Section 372 of the Restatement would be approved by the Kentucky Court.[51]

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[44] 3 Col. L. Rev. 1. "Notwithstanding the opinions of Lord Redesdale and Chancellor Kent to the contrary, a party to a bilateral contract, who has signed a memorandum of it, may be compelled to perform it specifically, although he could not maintain a bill against the other party who had not signed such a memorandum."

[45] Wren v. Cooksey, 147 Ky. 825, 145 S. W. 1116 (1912); Evans v. Stratton, 142 Ky. 615, 134 S. W. 1154 (1911); Smith v. Ballou, 211 Ky. 281, 277 S. W. 286 (1925); Reeves v. Walker, 219 Ky. 615, 294 S. W. 183 (1927); Benjamin v. Dinwiddie, 226 Ky. 106, 10 S. W. (2d) 620 (1928).

[46] Armstrong v. Lyen, 148 Ky. 59, 145 S. W. 1120 (1912); City of Murray v. Crawford, 138 Ky. 25, 127 S. W. 494 (1910); Smith v. Ballou, 211 Ky. 281, 277 S. W. 286 (1925).

[47] *Supra*, n. 20.

[48] Murray v. Pate, 36 Ky. (6 Dana) 335 (1838).

[49] McConnell's Heirs v. Dunlap's Devisees, 3 Ky. (Hardin) 44 (1805) (dictum); Jones v. Shackelford, 5 Ky. (2 Bibb) 410 (1811) (dictum).

[50] M'Gee v. Beall, 13 Ky. (3 Litt.) 190 (1823); Johns v. Union Ice Cream Co., 145 Ky. 178, 140 S. W. 145 (1911).

[51] "The fact that the remedy of specific enforcement is available to one party to a contract is not in itself a sufficient reason for making it 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 enforcement."