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Contracts--Mutuality of Obligation

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mediæval common law was that civil liability was based upon an act causing damage, if that act fell within one of the causes of action provided for by the law, and this idea excluded any direct reference to negligence as a cause of liability.[13] Damage to the person was remedied by trespass, which would only lie in the presence of a direct act of violence to the individual harmed. But, since damage may result to the person through the doing of an act lawful in itself, but because of surrounding circumstances an act of violence to the injured party, it was necessary to develop a new form of action, which was known as trespass on the case.[14] Thus it may be seen that the plaintiff in the early conception of negligence did not sue to recover for the doing of a "wrong" as such, but rather that his right to bring an action was the culmination of the development of the idea that he had been personally wronged, although not by an act directed against him personally, and so should be afforded a remedy.

The opinion of the Court of Appeals indicates that negligence will not be considered as a tort unless it results in the commission of a wrong, which in turn imports the violation of a right owing to the individual seeking redress.

J. W. B.

CONTRACTS—MUTUALITY OF OBLIGATION.—It is ancient learning that mutual promises give rise to a contract. So long and well settled is this proposition that the thought rarely arises to-day that such was not always the law.[1] However, from that doctrine, there has devolved the rule finding expression in the statement that there must be mutuality of obligation to render a contract binding on the parties thereto. Williston, in criticism thereof, says that "this form of statement is likely to cause confusion, and however limited, is at best an unnecessary way of stating that there must be a valid consideration."[2] The criticism of the learned author is merited.

Primarily, where contract liability is sought to be imposed, the quest is directed to ascertaining whether there is a valid consideration supporting the obligation intended to be enforced. The rule embodied in the statement that there must be mutuality, as though that were a requisite in the formation of contracts, is ofttimes an insecure guidepost confounding the seeker. For mutuality of obligation is never found in unilateral contracts; and the equitable as distinguished from the legal tenet tends towards greater confusion, for lack of

[13] 8 Holdsworth, History of English Law, p. 449.
[14] *Ibid.*

[1] The Growth of the Law, Honorable Benjamin N. Cardozo (p. 39).
[2] Williston on Contracts, Vol. 1, Sec. 140.

mutuality, as that expression is used by courts of equity, does not imply that the contract before the court of chancery is invalid.[3]

Mutuality in actions for specific performance, to which the equitable rule has application "not only requires the existence of a valid contract but 'mutuality' of remedy." The rule itself has so many well-defined exceptions as to render it almost entirely inefficacious.[4] Indeed, although the rule as to the necessity for mutuality in obtaining a decree for specific performance of a contract has been rationalized by the courts of this State, the decisions rendered, however, may not tend for greater clarity in a general consideration of the doctrine, for, in effect, they multiply the exceptions thereto.[5] Mutuality of remedy, as a requisite of a contract sought to be specifically enforced, is now important "only in so far as its presence is essential to the attainment of that end." [6] Hence, even here, departure is found. The true quest of the court of equity in such case is whether the decree if rendered will operate without injustice or oppression either to plaintiff or to defendant." [7] Consequently, the presence or absence of mutuality is not the determining factor.

Returning to the purely legal aspects of the doctrine, it will be found that mutuality of obligation may exist and the contract, nevertheless, will be without legal efficacy, and this apart from questions of public policy. A promise by A in consideration of a promise by B to perform something which the latter was already under a contractual duty to do for the former,, is unenforceable. Although mutual promises are here present, such a contract is nevertheless invalid. The same promise made by C, however, to A and B, in return for their promise not to break their agreement with each other or, in other words, to preserve their contract, is valid.[8] The form of the mutual promise, in either case, may be identical. The enforceability thereof, it will be seen, is not dependent upon the fact that mutuality of promise is present but upon the existence or non-existence of a valid consideration. That the latter is the fundamental factor is indicated by the very authorities recently decided purporting to invoke the doctrine of mutuality.

In a leading case [9] decided by the Court of Appeals, it was said:

> "The agreement was not under seal, and, therefore, fell within the rule that a promise not under seal by one party, with none by the other, is void. Unless both parties to a

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[3] *Ibid.*

[4] *Supra,* note 2, Vol. 3, Secs. 1433–4.

[5] Address before City Bar Association by Andrews, *J.*, printed on editorial page, N. Y. L. J., June 25, 1927.

[6] Epstein v. Gluckin, 233 N. Y. 490, 494, 135 N. E. 861 (1922).

[7] Epstein v. Gluckin, *supra.*

[8] DeCicco v. Scweizer, 221 N. Y. 431, 436, 117 N. E. 807 (1917); Schwartzreich v. Bauman-Basch, Inc., 231 N. Y. 196, 204, 131 N. E. 887 (1921); McGovern v. City of N. Y., 234 N. Y. 377, 387, 138 N. E. 26 (1923).

[9] Schlegel Mfg. Co. v. Cooper's Glue Factory, 231 N. Y. 459, 461, 132 N. E. 148 (1921).

contract are bound, so that either can sue the other for a breach, neither is bound."

Plaintiff there declared on a contract consisting of a letter written by a representative of the defendant company to the plaintiff stating in substance that the defendant had entered plaintiff's contract for requirements of glue for a designated year at a specified price, deliveries to be made during the year as ordered. At the bottom of that letter, plaintiff wrote "Accepted," affixing its signature. The Court pointed out that plaintiff "did not agree to do or refrain from doing anything. It was not obligated to sell a pound of defendant's glue or to make any effort in that direction. It did not agree not to sell other glue in competition with defendant's. The only obligation assumed by it was to pay 9c. a pound for such glue as it might order. Whether it should order any at all rested entirely on it. If it did not order any glue, then nothing was to be paid." Under these circumstances, it was held that the alleged contract was invalid "for lack of mutuality."

More recently, the Appellate Division of the Fourth Department, in deciding a similar case, quotes the following from Clark's New York Law of Contracts: "Unless the contract is supported by some other consideration, there must be as a general rule, mutuality of obligation to render it binding on either party." [10] The facts before the court were as follows: The plaintiff, a cigar manufacturer, made an agreement with the defendants, who were jobbers, not to sell cigars in certain territory without the defendants' consent, provided the defendants purchased of him not less than an average of 10,000 cigars weekly. The parties continued to deal with each other on this basis, the defendants at times purchasing in excess of the specified quantity, until the plaintiff wrote the defendants terminating the agreement. The defendants thereafter demanded further deliveries but the plaintiff refused to have any dealings with them. The plaintiff sued to recover the purchase price of a quantity of cigars and the defendants counterclaimed for an alleged breach of the contract. The Court held that the agreement was unenforceable for "lack of mutuality."

In this type of case, where one party is afforded an option of discontinuing or completely nullifying the agreement on his part and of fixing the measure and extent of his own performance, privileges which the other does not enjoy, Williston says much "confusion has arisen." [11] The question before the court really is "whether one party to the transaction can by fair implication be regarded as making *any* [12] promise" and "this," the author very properly says, "is simply an inquiry whether there is consideration for the other party's promise." [13]

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[10] Smith v. Diem, 223 App. Div. 572, 229 N. Y. S. 56 (4th Dept. 1928).
[11] *Supra*, note 2.
[12] Italics ours.
[13] *Supra*, note 2.

This is true in a series of interesting cases, in which it is said "mutual promises are implied." One of the most recent of these involves the charitable subscription, where it has been held that a bilateral agreement may exist though one of the mutual promises be a promise "implied in fact, an inference from conduct as opposed to an inference from words." [14] Other examples of this type of case are referred to and enumerated in Schlegel Mfg. Co. v. Cooper's Glue Factory.[15] A leading case of recent years is the well-known decision of the Court of Appeals in Wood v. Duff-Gordon,[16] "where there was used the classical phrase 'instinct with an obligation'." In referring to this authority, Judge Andrews of the Court of Appeals of this State, in an address to which reference has heretofore been made,[17] said:

> "In a certain contract an express promise by one party may be lacking, yet when the agreement is viewed as a whole it may be seen to be meaningless unless such a promise is implied. The grant to him of certain rights requires the assumption by him of correlative duties. The Courts will interpret such contracts as business men would ordinarily understand them, and they would understand the contract as intended to have business efficacy."

Here too, there is simply a search for a consideration and its existence is ascertained not by the attempted application of a naked formula but rules and reasons grounded in a firmer and more basic conception of human rights and conduct, and more consonant with a progressive administration of justice. To conclude, mutuality, as an equitable doctrine, has given way, as we have seen, to such rules of reason [18]; as a legal formula, it would seem that its existence is hardly essential as a practical aid in weighing and judging contractual rights and obligations.

R. L.

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[14] Allegheny Col. v. Nat. Chautauqua Co. Bank, 246 N. Y. 369, 377, 159 N. E. 173 (1927).

[15] 231 N. Y. 459, 462, 132 N. E. 148 (1921). "Thus, where the purchaser, to the knowledge of the seller, has entered into a contract for the resale of the article purchased (*Shipman* v. *Straitsville Central Mining Co.*, 158 U. S. 356; where the purchaser contracts for his requirements of an article necessary to be used in the business carried on by him (*Wells* v. *Alexandre*, 130 N. Y. 642); or for all the cans needed in a canning factory (*Dailey Co.* v. *Clark Can Co.*, 128 Mich. 591); all the lubricating oil for party's own use (*Manhattan Oil Co.* v. *Richardson Lubricating Co.*, 113 Fed. Rep. 923; all the coal needed for a foundry during a specified time (*Minnesota Lumber Co.* v. *Whitebreast Coal Co.* (160 Ill. 85); all the iron required during a certain period in a furnace (*National Furnace Co.* v. *Keystone Mfg. Co.*, 110 Ill. 427); and all the ice required in a hotel during a certain season (*G. N. Railway Co.* v. *Witham, L. R.*, 9 C. P. 16)."

[16] 222 N. Y. 88, 118 N. E. 214 (1917).

[17] *Supra*, note 5.

[18] *Supra*, note 7.