

## Mutuality of Remedy in Respect to Assignment of Contracts

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**MUTUALITY OF REMEDY IN RESPECT TO ASSIGNMENT OF CONTRACTS.**—The legal interpretation of the effect of an assignment of a contract is that it effects a transfer of the rights only, under a contract as distinguished from the duties under a contract.<sup>1</sup> Therefore the other party to a contract has no rights against an assignee, as an assignee acquires no contractual duties, but merely rights, which he may enforce or not, as he chooses. If he chooses not to take the benefit of the bargain he has bought, the suit by the other party must be directed against the assignor, the party with whom he contracted.<sup>2</sup>

“A judgment requiring the assignee of the vendee to perform at the suit of the vendor would operate as the imposition of a new liability on the assignee, which would be an act of oppression and injustice, unless the assignee had, expressly or by implication, entered into a personal and binding contract with the assignor, or with the vendor, to assume the obligations of the assignor.”<sup>3</sup>

However, as an assignee takes the rights under a contract, he is entitled to sue the other party to the contract. But in view of the earlier interpretation of the doctrine of Mutuality of Remedy, the right of an assignee to obtain specific relief in equity, has been the subject of much discussion and variance of opinion and decision. As Fry stated the doctrine, “the contract to be specifically enforced must as a general rule 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.”<sup>4</sup>

This interpretation was finally adopted in the early decisions of the New York courts, but not without many conflicts. Chancellor Kent in the early case of *Benedict v. Lynch* wrote:<sup>5</sup>

“Though there are other cases in which an agreement has not been deemed within the Statute of Frauds, and a specific performance has been decreed, when the contract was signed only by the party sought to be charged—yet the contrary opinion appears, from the most recent decisions to be now prevailing.”

In a later case in respect to the same point Chancellor Kent stated his opinion to be, that a contract lacking the element of

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<sup>1</sup> Williston, *Contracts* (1920) p. 756 *et seq.*

<sup>2</sup> *Schaffer v. Vandewater*, 160 App. Div. 803, 145 N. Y. Supp. 769 (1st Dept. 1914); *Anderson v. New York, etc., R. Co.*, 132 App. Div. 183, 116 N. Y. Supp. 954 (1st Dept. 1909); *New York Phonograph Co. v. Davega*, 127 App. Div. 222, 111 N. Y. Supp. 363 (2nd Dept. 1908); *Suydam v. Dunton*, 84 Hun. 506, 32 N. Y. Supp. 333 (2nd Dept. 1895).

<sup>3</sup> *Langel v. Betz*, 250 N. Y. 159 (1928) at 162.

<sup>4</sup> *Fry, Specific Performance* (5th ed. 1910) at 231.

<sup>5</sup> 1 *John's Ch.* 369 (N. Y. 1815).

mutuality was unenforceable.<sup>6</sup> Hence, since the other party to a contract has no remedy against an assignee, an assignee was not entitled to specific performance against him. A series of cases over a period of years ending with *Levin v. Dietz*<sup>7</sup> added to the weight of opinion that mutuality at the inception of a contract between the parties sued and suing was of the essence. In not a few of these cases, however, the writings on the subject were *obiter dicta*.

Then the pendulum began to swing in the opposite direction, culminating in the epochal opinion of Judge Cardozo, in the case of *Epstein v. Gluckin*:<sup>8</sup>

"Later cases have made it clear that the decisions there made (in the *Wadick* and *Levin* cases) will be closely confined and not extended by analogy. 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 the rule today. 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 the plaintiff or to defendant."

It would be unjust for example if after performance under a decree of equity the common law remedy of damages would be the defendant's sole security for the performance of the plaintiff's side of the contract.<sup>10</sup> This modern interpretation fully accomplishes what the doctrine of mutuality of remedy seeks, and this without the fetters and cumbersome results of the earlier interpretation, under which the law recognized an assignee's rights and then declared them to be unenforceable so far as specific relief was concerned.

However, there was one more step to be taken in the process of establishing the mutuality doctrine in its modern dress and to clarify

<sup>6</sup> *Clason v. Bailey*, 14 Johns. 484 (N. Y. 1817).

<sup>7</sup> *Palmer v. Gould*, 144 N. Y. 671, 39 N. E. 378 (1895); *Stokes v. Stokes*, 148 N. Y. 708, 43 N. E. 211 (1896); *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903 (1903); *Ide v. Brown*, 178 N. Y. 26, 70 N. E. 101 (1904); *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571 (1908); *Levin v. Dietz*, 194 N. Y. 376, 87 N. E. 454 (1909).

<sup>8</sup> 233 N. Y. 490, 135 N. E. 861 (1922).

<sup>9</sup> *Catholic F. M. Society v. Aussani*, 215 N. Y. 1, 109 N. E. 80 (1915); *Trustees of Hamilton College v. Roberts*, 223 N. Y. 56, 119 N. E. 97 (1918); *Hoffey v. Lynch*, 143 N. Y. 241, 38 N. E. 298 (1894); *Waddle v. Cabana*, 220 N. Y. 18, 114 N. E. 1054 (1917); *Heald v. Ortrand Hastings Co.*, 223 N. Y. 575, 135 N. E. 924 (1922); *Stone, The Mutuality Rule in New York*, 16 Col. L. Rev. 443.

<sup>10</sup> *Ames*, 3 Col. L. Rev. 1.

its effect as thus interpreted. It is difficult to understand how the decision in the *Epstein* case, wherein the assignee was plaintiff, could be regarded as a basis upon which to rest the proposition that the vendor is to be permitted to sue the assignee of the vendee. Nevertheless, there remained considerable doubt that the earlier application of the mutuality doctrine was to be dispensed with so easily. Now that it was held that the assignee could sue for specific performance, it was contended, that since equity is equality the converse ought to be true. Reciprocity ought to be permitted. The Appellate Division held, therefore, that the vendor could compel specific performance against the vendee's assignee.<sup>11</sup> Upon reaching the Court of Appeals this erroneous conception was corrected and the third party denied performance against the assignee.<sup>12</sup> It was pointed out that the question in the *Epstein* case was wholly one of remedy rather than right, and the extent of the holding in that case was that mutuality of remedy is important only so far as its presence is necessary to attain the ends of justice. No new rights were created by the *Epstein* decision, the interpretation of the assignment of a contract still remains that an assignee does not assume the duties under an assigned contract, but only succeeds to the rights thereunder. Because it was adjudicated that no injustice is done if the assignee enforces his rights, did not mean the burdening of him with duties not assumed, and the creation of a new right in the vendor. Equity follows the law and specific performance is a remedy predicated only upon the existence of a legal right.<sup>13</sup>

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DAMAGES OR RENT?—Landlords early found it necessary to provide some means of securing unto themselves the profit of their position. The lease which evidences the agreement with the tenant is, as such, merely an agreement for the use of the premises. Out of that use a rent issues<sup>1</sup> and so *a priori* when the use is terminated no further rent can accrue. Even though the tenant has broken a condition of his tenancy, for example, the payment of rent, the landlord if he re-enters and is repossessed of the estate terminates all his rights under the lease except the right to collect arrears of rent. Therefore,

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<sup>11</sup> *H. & H. Corp. v. Broad Holding Corp.*, 204 App. Div. 569, 198 N. Y. Supp. 763 (2nd Dept. 1923); *Langel v. Betz*, 224 App. Div. 266, 229 N. Y. Supp. 712 (2nd Dept. 1928).

<sup>12</sup> *Langel v. Betz*, 250 N. Y. 159 (1928).

<sup>13</sup> *Pomeroy's, Specific Performance* (3rd ed. 1926) Sec. 52 *et seq.*

<sup>1</sup> A right to a certain profit (something not before in esse whether in labor, provisions or part of annual product, money, or other thing) issuing annually or periodically out of lands and tenements corporeal in return for land that passes—Gilbert, Rents, 9.