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NOTES

PURCHASE BY THE TRUSTEE IN BOND ISSUE FORECLOSURES

The foreclosure of trust deeds securing bond issues has been the source of a large number of difficult problems, one of the most troublesome of which is the adjustment of the relationship between majority and minority bondholders in realizing on the mortgage security.[1] Upon default, the traditional procedure has

[1] The difficulties have been accentuated by the attitude the courts have assumed toward bond issue foreclosures. Conventional rules derived from mortgage foreclosure cases have generally been applied, and the reorganization phase of bond issues has been ignored. Thus the courts have frequently denied minority bondholders the right to intervene in the foreclosure proceedings, on the theory that the trustee represents adequately the interests of all bondholders. Palmer v. Bankers' Trust Co., 12 F. (2d) 747 (C.C.A. 8th 1926); Guaranty Trust Co. v.

been to attempt a reorganization by means of a bondholders' protective committee with which the bonds are deposited.[2] At a foreclosure sale the committee is in a position of great advantage; it can use its deposited bonds to apply on the purchase price of the property, and need raise only enough cash to pay the distributive share of non-depositing bondholders and the expenses incident to sale and reorganization. Because of the large amount of cash necessary, outsiders are usually precluded from bidding at the sale. The danger to dissenters that the sale price will be wholly inadequate is readily apparent.[3]

In an attempt to protect the interests of the non-depositing bondholders, a number of practices have been developed by the courts. An upset price may be set;[4] confirmation of the sale may be refused unless the purchase price is adequate;[5] or confirmation may be refused unless the sale is made pursuant to a fair plan of reorganization[6] which offers an equal opportunity to participate to all bondholders of the same class.[7]

A further attempt to solve this difficult problem is presented by the recent case of *Straus v. Chicago Title and Trust Co.*,[8] in which the Illinois Appellate

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Chicago, M. & St. P. Ry. Co., 15 F. (2d) 434 (D.C.N.D. Ill. 1926); Chicago, G.W.R. Land Co. v. Peck, 112 Ill. 408, 435–436 (1885); St. L. & Peoria R. Co. v. Kerr, 153 Ill. 182, 196, 38 N.E. 638 (1894); Farmers' Loan & Trust Co. v. Lake St. Elevated R. Co., 173 Ill. 439, 459–460, 51 N.E. 55 (1898); American Trust & Safe Deposit Co. v. 180 E. Delaware Bldg. Corp., 262 Ill. App. 67 (1931). Similarly, foreclosure records lacked any indication of the existence of a bondholders' protective committee.

[2] See Rodgers, Rights and Duties of the Committee in Bondholders' Reorganizations, 42 Harv. L. Rev. 899 (1929); Rohrlich, Protective Committees, 80 Univ. Pa. L. Rev. 670 (1932); note, 43 Yale L. Jour. 330 (1933).

[3] The amount to be received by the non-depositors is determined by the amount bid at foreclosure sale. Inasmuch as there is practically no competition the bondholders' committee will be able to name its own price, subject to the possibility of judicial review. The committee will set the price as low as possible, to reduce the amount of cash needed to pay off the non-depositors.

[4] For the development of the upset price doctrine, see Spring, Upset Prices in Corporate Reorganization, 32 Harv. L. Rev. 489 (1919); Weiner, Conflicting Functions of the Upset Price Doctrine in a Corporate Reorganization, 27 Col. L. Rev. 132 (1927); Kearns, Upset Price in Corporate Reorganizations, 26 Ill. L. Rev. 325 (1931).

[5] Federal Title Guaranty Co. v. Lowenstein, 113 N.J. Eq. 200, 166 Atl. 538 (1933); Michigan Trust Co. v. Cody, 249 N.W. 844 (Mich. 1933).

[6] Investment Registry v. Chicago & M. E. R. Co., 212 Fed. 594, 609 (C.C.A. 7th 1913); Guarantee Trust Co. of New York v. Missouri Pac. Ry. Co., 238 Fed. 812, 816 (D.C.E.D. Mo. 1916).

[7] See Rodgers, *supra* note 2, 901–902, and authorities there cited.

[8] 273 Ill. App. 63 (1933). A minority bondholder, owning less than one per cent of the entire issue, appealed from an order denying him leave to file an intervening petition setting out that a decree of sale had been entered three months before, and that no efforts had been made to hold a sale. The petitioner sought to have the mortgaged property sold at a fair price to be set by the court, and, unless the property was bid in at that price, sought to have the trustee directed to purchase at the sale for an amount equal to the mortgage indebtedness. The trus-

court held (1) the trustee under the trust indenture has the *power* to bid in the property for the benefit of all bondholders, and (2) if no outsider bids the full value of the property as fixed by the court, under some circumstances the trustee is under a *duty* to bid in the property at the sale, and will be compelled by the court to do so. This result was reached on the unique theory that the court of equity was exercising its jurisdiction over trusts rather than over foreclosure proceedings.

The power of the trustee to purchase the property on behalf of all bondholders, in the absence of specific enabling provisions in the trust indenture, has been both affirmed[9] and denied.[10] No case admitting such power, however, has permitted or required its exercise over the objections of the trustee and the majority group. Heretofore the device of purchase by the trustee at the foreclosure sale has been used only as a means of avoiding a cash payment to minority bondholders, and as one possible way of forcing a plan of reorganization on them. The prior decisions, moreover, have not enunciated a definite rule governing all situations,[11] as may have been the intention of the present case.[12]

The decisions denying the power of the trustee to purchase at the sale ignore

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tee contended that there was no provision in the trust deed giving him the power to purchase the property for the benefit of all bondholders; that if he did make the purchase the bondholders would own the property as tenants in common, and innumerable title difficulties would arise; and that even if he did have the power to bid the exercise of that power was discretionary and immune from court interference in the absence of bad faith or gross negligence on the part of the trustee. *Held:* order denying leave to intervene reversed.

[9] Hoffman v. First Bond & Mortgage Co., 116 Conn. 320, 164 Atl. 656 (1933); Silver v. Wickfield Farms, Inc., 209 Iowa 856, 227 N.W. 97 (1929); First National Bank v. Neil, 137 Kans. 436, 20 P. (2d) 528 (1933); noted in 47 Harv. L. Rev. 358 (1933); Nay Aug Lumber Co. v. Scranton Trust Co., 240 Pa. 500, 87 Atl. 843 (1913); Watson v. Scranton Trust Co., 240 Pa. 507, 87 Atl. 845 (1914).

The trust indenture may expressly authorize the trustee to buy the mortgage security for all the bondholders. Sage v. Central R. R. Co., 99 U.S. 334, 25 L. Ed. 394 (1879); Etna Coal & Iron Co. v. Marting Iron & Steel Co., 127 Fed. 32 (C.C.A. 6th 1904); Real Estate Trust Co. v. Pa. Sugar Refining Co., 239 Pa. 456, 86 Atl. 1074 (1913).

The bondholders may impliedly assent to a purchase by the trustee. Barnes v. Chicago, M. & St. P. Ry., 122 U.S. 1, 20, 7 Sup. Ct. 1043, 30. L. Ed. 1128 (1887).

[10] Equitable Trust Co. v. U.S. Oil & Refining Co., 35 F. (2d) 508 (D.C. Wyo. 1928); Werner, Harris & Buck v. Equitable Trust Co., 35 F. (2d) 513 (C.C.A. 10th 1929); Bradley v. Tyson, 33 Mich. 337 (1876); Detroit Trust Co. v. Stormfeltz-Loveley Co., 257 Mich. 655, 242 N.W. 227 (1932); Beckman v. Emery-Thompson Co., 9 Ohio App. 275 (1918).

[11] For example, it was said in First National Bank v. Neil, *supra* note 9, at 446: "A positive and definite rule cannot be laid down as to when a court should make an order permitting the trustee, under a deed of trust where specific authority is lacking, to bid on behalf of the bondholders under terms and conditions the court may fix, as such an order must necessarily depend on the existing facts and circumstances."

[12] Inasmuch as the case was not before the court on its merits but only on the denial of the motion to intervene, much of the language of the opinion might well have been omitted. Its inclusion indicates a desire by the court to settle the correct procedure to be followed in future foreclosures.

the suggestion that the foreclosure of a trust deed is substantially a proceeding for the enforcement and liquidation of a trust, and stress instead the non-depositing bondholders' rights to be paid in cash. As was stated in *Werner, Harris & Buck v. Equitable Trust Co.*:[13]

> There was no power in the court to compel the holder of a single bond to participate in a bid for the property, if he did not wish to do so; the rights of the bondholders were measured by their bonds and the trust deed securing the same and any provision absent therein authorizing the trustee to bid for and on behalf of the bondholders, there was no power in the court to confer such authority upon the trustee . . . . if the property is sold at public sale he has a right to take his proportion of the best bid that can be secured in cash and cannot be compelled to become an owner of an undivided interest in the property.

On this theory it would seem that even though the trustee did purchase the property at foreclosure sale the dissenters could nevertheless recover their *pro rata* share of the purchase price in cash.[14] Moreover, a state statute which authorized a trustee to bid at the request of the majority bondholders was held unconstitutional as impairing the obligation of contract.[15]

Another objection to the trustee-purchase device is that serious title problems may arise. Upon purchase by the trustee it has been suggested that each bondholder acquires an estate in the property which may be subjected to the lien of judgments and dower or curtesy; as a result, the trustee will be unable subsequently to pass a merchantable title to the property. It would seem, however, inasmuch as the trustee holds title to the property for the sole purpose of liquidation by resale, that the bondholders have an interest only in the proceeds of the sale, and not in the property to be sold.[16] This potential difficulty as to title may also be avoided by the insertion of a provision in the decree of sale that the bondholders' interest in the property is deemed to be personalty, and the entire legal *and equitable* fee is vested in the trustee. Similar provisions in trust instruments as to the nature of the interest of the beneficiaries have been upheld.[17]

It has also been urged that the Statute of Uses would execute the trust and vest legal title to the property in the bondholders, who might thereupon main-

[13] *Supra* note 10, at 514.

[14] Beckman v. Emery-Thompson Co., *supra* note 10; but cf. Yondorf v. Newman, Ill. App., 1st Dist., no. 36185, decided Dec. 11, 1933.

[15] Detroit Trust Co. v. Stormfeltz-Loveley Co., *supra* note 10.

[16] Pomeroy, Equity Jurisprudence (4th ed. 1918), § 992: "Where the trust is to sell the *corpus* of the property and to distribute the proceeds among the creditors, legatees and the like, the beneficiaries plainly acquire no proper estate in the original trust fund prior to its sale; their right and interests attach to the proceeds of this fund, which are to be paid to or distributed among them." Cf. Rogers v. New York & T. Land Co., 134 N.Y. 197, 217, 32 N.E. 27, 34 (1892).

[17] Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926); Sweesy, Admx. v. Hoy, 324 Ill. 319, 155 N.E. 323 (1927); Aronson v. Olsen, 348 Ill. 26, 180 N.E. 565 (1932).

tain an action for partition. Inasmuch as sufficient duties are imposed on the trustee to make the trust an active one and not subject to the operation of the Statute of Uses, however, it has been held that such a suit could not be maintained.[18]

Several more serious objections may be made. It would seem that the power of a court of equity to authorize a trustee to deviate from the terms of an orthodox trust should not be extended to allow deviation from trust deeds securing bond issues. In the last analysis, an orthodox trust and a trust to secure a bond issue differ inherently in nature; the latter is in substance a mortgage,[19] adapted to the needs of large financing. The trustee in such cases is a nominal party, and the courts should not be misled because he is described as "trustee."[20] To extend the function of trust deeds to situations not contemplated by the parties may seriously cripple their commercial expediency.

Moreover, if it be insisted in the face of these arguments that the trustee has the power to make the purchase, the broad language of the *Straus* decision should be limited carefully. The opinion is perhaps open to the construction that the trustee will be required to purchase in all cases where there is no bid by an outsider at the upset price set by the court. This ignores entirely the possibility that the majority may be able to refinance the property and pay the minority the sum they would have received if an outsider had bid the upset price at the sale. In such a case it would seem there is no sound justification for requiring the trustee to bid at the behest of the minority.

If thus limited, the effect of the decision will be to allow the court to establish and enforce an effective upset price. Heretofore, attempts to utilize the upset price device in protecting minority bondholders have often proved futile.[21] Prices once set have in many instances been reduced by the court to allow committees to consummate purchases when they otherwise would have been unable to do so. If in the future the majority is unable to purchase at a price fixed by the court, under this interpretation of the *Straus* decision the property must be bid in by the trustee.

Even where the committee cannot pay non-depositors on the basis of the price set by the court, if a substantial majority of the bondholders agree to a plan of reorganization which has been adjudged fair and offers the minority equal rights to participate, the trustee should not be required to purchase. To hold otherwise would increase substantially the potential "nuisance value" of the dissenter's bonds.

[18] Hoffman v. First Bond & Mortgage Co., *supra* note 9; Yondorf v. Newman, *supra* note 14.

[19] First National Bank v. Neil, *supra* note 9.

[20] See Posner, Liability of the Trustee under the Corporate Indenture, 42 Harv. L. Rev. 198 (1928); cf. Ettlinger v. Persian Rug & Carpet Co., 142 N.Y. 189 36 N.E. 1055 (1894).

[21] Fearon v. Bankers Trust Co., 238 Fed. 83 (C.C.A. 3d 1916); Sebree v. Cassville & W. R. Co., 212 S.W. 11 (Mo. 1919); Farmers Loan & Trust Co. v. Oregon & Pacific R.R. Co., 28 Ore. 44, 40 Pac. 1089 (1895).

The result in the *Straus* case is justified by the court as a method of maintaining the *status quo* until general business conditions improve, thereby protecting the interested parties from the dangers of a forced sale in a depressed market.[22] Although this object is commendable, the device adopted to effectuate it may well involve a sacrifice of certain rights of the bondholders. If the maker or guarantor of the bonds is solvent, purchase by the trustee at a high upset price would reduce the deficiency judgment otherwise obtainable. Such a result might be theoretically defensible as an attempt to protect the interest of the owners or of junior liens, but as a practical matter the requirement of a bid by the trustee will often operate to shut out such parties in cases where they might otherwise have been recognized on traditional reorganization.

A significant problem raised by the present case is the possibility of reorganization subsequent to the purchase by the trustee for the benefit of the bondholders. The language of the opinion would seem to indicate that the trustee is to hold and manage the property until an actual liquidation. Before that time the trustee would be operating the property without the benefit of specific trust directions, and would be forced to turn to the chancellor for instructions to avoid the danger of personal liability.[23] In effect, then, the court would be managing the property, and the inefficiency of judicial management is well recognized. While some of these objections might be obviated by including detailed terms as to the administration of the trust in the decree of sale, it must be remembered that the trustee is not selected primarily for his ability to manage the mortgaged property.

If the trustee-purchase device is to become one step toward reorganization, however, certain advantages over the present practice might be gained. For example, an unquestioned[24] jurisdiction over the plan of reorganization, and fees and expenses incident thereto, would be conferred upon the court. Where the plan takes the form of liquidation by distribution of corporate shares or participation certificates, the courts may still be compelled to face the vexatious problem of determining whether new securities are being forced upon the dissenter.[25]

WALTER V. LEEN

[22] Even at a subsequent sale by the trustee the market may still be low and the beneficiaries may bid at the resale. Similar problems would then arise with respect to those who do not join as in the present situation.

[23] Wahl v. Schmidt, 307 Ill. 331, 138 N.E. 604 (1903); Prine v. Whitten, 87 Ind. App. 407, 158 N.E. 826 (1927); Ashley v. Winkley, 209 Mass. 509, 95 N.E. 952 (1911); Digney v. Blanchard, 226 Mass. 335, 115 N.E. 424 (1917); Knipp v. Bagby, 126 Md. 461, 95 Atl. 60 (1915); Rogers v. Wheeler, 43 N.Y. 598 (1871).

[24] Such a reorganization would be part of the administration of the trust. Under existing practice it has been thought that the court was without jurisdiction to examine the plan of reorganization.

[25] This question was raised in Coriell v. Morris White, Inc., 54 F. (2d) 255 (C.C.A. 2d 1931); note, 45 Harv. L. Rev. 697 (1932); cf. Canada Southern R. Co. v. Gebhard, 109 U.S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020 (1883).

DOES A CORPORATION ACTING AS TRUSTEE HOLD IN JOINT TENANCY WITH ITS CO-TRUSTEE?

The problem of whether or not a corporation acting as a trustee may be a joint tenant with an individual acting as a co-trustee is interesting in view of an apparent *static* situation in American legal theory.

The general rule is that two or more individuals acting as co-trustees will be treated as joint tenants, and on the death of one, the legal title to the trust property passes to the survivor or survivors.[1] This doctrine has been retained even in jurisdictions which have abolished joint tenancy by statute.[2] The retention is due to the convenience of the doctrine of survivorship in the administration of trust estates. Corporations, however, have never been considered as capable of holding in joint tenancy with an individual.[3] The reasons given for this result are that there is no mutual right of survivorship because of the corporation's perpetual life and that there is too great a difference between the legal ownership of the natural person which passes to his heirs and the legal ownership of the corporation with its perpetual succession.[4]

Of the few American decisions on the question of joint tenancy between individuals and corporations the most outstanding are *Telfair v. Howe*,[5] and *Moore Lumber Co. v. Behrman*.[6] In the first, the testatrix directed her executors to pay the residue of her estate to a corporation and a non-existent society. The court held that since a corporation cannot hold in joint tenancy it could not take the whole and that the testatrix therefore died intestate. In the latter case, A, under contract with a corporation, furnished material and labor in improving property owned by the corporation and B, a natural person. When A sought to recover from B, he failed on the ground that B would be liable only if he held in joint tenancy with the corporation and that a corporation could not hold in joint tenancy either with an individual or another corporation.

[1] Daily v. Sherratt, 2 Eq. Cas. Abr. 742 (1738); 1 Perry, Trusts (7th ed. Baldes, 1929), 584, § 343.

[2] 1 Beach, Trusts and Trustees (1897), 217, § 104; 1 Perry, *supra* note 1, 584, § 343.

[3] Angell & Ames, Corporations (11th ed. Lathrop, 1882), 167, § 185; 1 Beach, *supra* note 2, 217, § 104; 4 Thompson, Corporations (3d ed. White, 1927), 45, § 2457; 1 Tiffany, Real Property (2d ed. 1920), 625, § 191.

[4] Dewitt v. San Francisco, 2 Cal. 289, 290 (1852); Tiffany, *supra* note 3. See Bennet v. Holbeck, 2 Wms. Saunders 319, note 4, 85 Eng. Rep. 1113 (1682) where it is said, "And this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the king nor any corporation can be a joint tenant with a private person. For there is no mutuality: The private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship, for the king and corporation can never die."

But see Co. Litt. § 280 (Coventry, ed. 1830), where Coke expressly says that there may be a joint tenancy without equal benefit of survivorship "as if a man lets lands to A and B during the life of A, if B dies A shall have all by the survivor, but if A dies B shall have nothing." See also § 296.

[5] 3 Rich. Eq. (S.C.) 235 (1851).

[6] 144 Misc. 291, 259 N.Y.S. 248 (1932).

The only authorities relied on in the latter case were Blackstone[7] and the English case of *The Law Guarantee & Trust Society v. Governor & Co. of the Bank of England.*[8] The decision in this case was reluctantly reached by a court that felt itself bound by old authority.[9] As a direct result, Parliament two years later adopted legislation which allowed stock to be transferred to and held in the name of an individual and a corporation which would be treated as holding in joint tenancy with the individual.[10] The question was completely settled in England in 1899 by an act which empowered corporations to hold real and personal property in joint tenancy in the same manner as if they were individuals.[11]

What the view of the American courts would be if the problem were presented in the trust situation is conjectural, but in view of the New York decision, it is quite probable that the old law would be followed. The attitude of the trust companies is varying. Some consider the problem important, while others show a complete lack of interest. It is an almost universal practice, however, to expressly provide in the trust instrument for survivorship in the trust company on the death of the individual co-trustee.[12]

At one time a corporation was not thought capable of acting as a trustee. The lack of conscience in which trust and confidence could be reposed by the settlor, the inability of the court of equity to compel performance because the artificial body of a corporation could have no conscience on which a court of conscience could act, and the impossibility of imprisoning a corporation as a method of enforcing equity's purely personal decrees were thought insurmountable difficulties.[13] But these technical rules have been overcome.[14] The technicalities of joint tenancy do not seem as serious as these, and it is possible that the common law may overcome them without the aid of statute.

GERALDINE W. LUTES

[7] 2 Bl. Comm. 148

[8] 24 Q.B.D. 406 (1890).

[9] Willion v. Berkly, 1 Plow. 223, 75 Eng. Rep. 339 (1562); Bennet v. Holbeck, *supra* note 4.

[10] 55 & 56 Vict. c. 39, § 26.

[11] Bodies Corporate Act, 62 & 63 Vict. c. 20. See In re Thompson's Settlement Trusts, [1905] 1 Ch. 229; Godefroi, Trusts & Trustees (4th ed. Williams, 1915), 496.

[12] The following is a typical trust deed provision for survivorship in the corporation. "Upon the death, resignation, refusal or inability of..... to act as Trustee hereunder, the Trust Company shall have, as sole Trustee, all title, rights, powers, duties, discretions and obligations herein conferred upon and vested in said Trustees jointly."

[13] Perry, Trusts, *supra* note 2, § 42; Lewin, Trusts (12th ed. Dale & Streeton 1911), 2.

[14] Perry, *supra* note 2, 31, § 42; Lewin, *supra* note 13, 7.

THE AFFIRMATIVE DOCTRINE OF MUTUALITY

The affirmative doctrine of mutuality has been stated thus: If one party to a contract is entitled to specific performance, so *ipso facto* is the other, for the equitable remedy if it exists at all must be mutual.[1] The rule so stated would never allow a situation where one party would get specific performance, and yet the other party could not. But such situations exist and provide the basis for the well established doctrine of lack of mutuality.[2] On the other hand, the affirmative doctrine has been denied altogether, and it has been urged that the true rationale where it has been seemingly applied is inadequacy of legal remedy.[3] This explanation has been applied to those cases using the affirmative doctrine to justify decrees giving the purchase money to the vendor in contracts for the sale of personalty[4] as well as of land.[5] This denial of the doctrine fails to consider (a) the fact that the vendor is relieved of the necessity of showing inadequacy of legal remedy in jurisdictions applying the mutuality doctrine[6]

[1] Pomeroy, Specific Performance (3d ed. 1926), §§ 6, 165, cases cited; Williston, Contracts (1920), § 1443; Clark, Is There a Positive Rule of Mutuality?, 31 Harv. L. Rev. 271 (1917); Horack, Specific Performance for Purchase Price, 1 Ia. L. Bull. 53 (1915); Cogent v. Gibson, 33 Beav. 557 (1864); Raymond v. San Gabriel Valley Land and Water Co., 53 Fed. 883 (1893); Clark v. Cagle, 141 Ga. 703, 82 S.E. 21 (1914); Andrews v. Sullivan, 7 Ill. 327 (1845); Bumgardner v. Leavitt, 35 W.Va. 194, 13 S.E. 67 (1891); cases cited 36 Cyc. 565.

[2] The doctrine of lack of mutuality has various formulations reaching divergent results because of different limitations of the situations to which each is applicable. But each formulation when applied denies specific performance to a party otherwise entitled to it, for, it is said, the equitable remedy must be mutual. Fry, Specific Performance, (6th ed. 1921), § 460: "A contract to be specifically enforced by the court 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." Ames, Lectures on Legal History (1913), 371: "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." Cardozo, J. in Epstein v. Gluckin, 233 N.Y. 490, 494, 135 N.E. 861 (1922): "What equity exacts to-day as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or defendant." See also Pomeroy, *supra* note 1, § 163, 36 Cyc. 629; Cook, The Lack of Mutuality Rule, 36 Yale L. Jour. 897 (1927); Stone, The Mutuality Rule in New York, 16 Col. L. Rev. 443 (1916).

As to the incompatibility of the two doctrines of mutuality as usually stated see Ames, *op. cit.* 379; Clark, *supra* note 1; Pomeroy, *supra* note 1, § 165, n. (b).

[3] Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979 (1889); Eckstein v. Downing, 64 N.H. 248, 9 Atl. 626 (1887); Horack, *supra* note 1; Lewis, A Vendor's Right to Specific Performance, 41 Am. L. Reg. (N.S.) 65 (1902); Walsh, Equity (1930), § 68.

[4] Withy v. Cottle, 1 S. & S. 174 (1822); Adderly v. Dixon, 1 S. & S. 607 (1823); Cogent v Gibson, 33 Beav. 557 (1864); Bumgardner v. Leavitt, 35 W.Va. 194, 13 S.E. 67 (1891); cases cited Pomeroy, *supra* note 1, §§ 6, 165; cf. Baker Machinery Co. v. U.S. Fire Apparatus Co., 11 Del. Ch. 386, 97 Atl. 613 (1915); Anderson v. Olsen, 188 Ill. 502, 59 N.E. 239 (1901); Peck v. Beacon, 272 Ill. App. 424 (1933).

[5] Walker v. Eastern Counties Ry. Co., 6 Hare 593 (1848); Raymond v. San Gabriel Valley Land and Water Co., 53 Fed. 883 (1893); Robinson v. Appleton, 124 Ill. 276, 15 N.E. 761 (1888); cases cited Pomeroy, *supra* note 1, §§ 6, 165.

[6] McClurg v. Crawford, 209 Fed. 340 (1913); Dollar v. Knight, 145 Ark. 522, 224 S.W. 983 (1920); Clark v. Cagle, 141 Ga. 703, 82 S.E. 21 (1914).

and (b) the continued use of the language of mutuality by the courts.[7] Although it is difficult to point to a case granting specific performance at the suit of one whose legal remedies are clearly shown to be adequate,[8] it may be asserted fairly that there is an affirmative doctrine of mutuality.[9]

But the affirmative mutuality doctrine as it exists differs from the broad statement of it in that it is only applied where one party is entitled to specific performance and the only possible objection to giving it to the other is adequacy of his legal remedy; for example, as in suits by the vendor for the purchase money.[10] Its application has not extended to situations where some positive objection other than adequacy of legal remedy stands in the way of giving the remedy to the other party. Thus the mere fact that one party to a contract could get specific performance has not sufficed to give it to the other who is guilty of a fraud.[11] It does not apply where only one party has signed a memorandum sufficient for the statute of frauds;[12] where one party is an infant who has since the making of the contract attained his majority;[13] where the state is a

[7] The influence of the mutuality doctrine is shown by the fact that specific performance has been decreed for the vendor in a contract for the sale of land where he held notes for the purchase money. Andrews v. Sullivan 7 Ill. 327 (1845); Burger v. Potter, 32 Ill. 66 (1863).

[8] Horack, *supra* note 1, suggests a contract for the sale of a second-hand watch having belonged to defendant's father would furnish a test case for the mutuality doctrine. The very fact, however, that the watch is second-hand would be likely to make market value in this case no more than a concept, thus allowing the contention that the vendor's legal remedy is inadequate because damages are conjectural. Cf. 25 Mich. L. Rev. 546 (1927). A better test would be a contract for the sale of a commodity with an open market, as cotton, desired by the purchaser for some sentimental reason, as its having been grown on an historic battlefield. Though the purchaser's legal remedy is inadequate, such cotton being unique, the vendor can sell it at market price and with damages recoverable at law get everything he bargained for.

[9] Clark, *supra* note 1; Ames explains the affirmative mutuality doctrine: "The vendor, from the time of the bargain, holds the legal title as a security for the payment of the purchase money, and his bill is like a mortgagee's bill for payment and foreclosure of the equity of redemption." Ames, *supra* note 2, 380. For criticism of Ames' view see Clark, *supra* note 1; Williston, *supra* note 1, § 1443.

The Contracts Restatement (1932), § 372 (2), states the affirmative rule thus: "The fact that the remedy of specific performance is available to one party to a contract is not in itself a 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."

[10] Cases, *supra* note 7. Durfee, Mutuality in Specific Performance, 20 Mich. L. Rev. 289 (1922), states the affirmative doctrine: "Complainant, although he had an adequate remedy at law should be given relief if . . . . the other party would have been entitled to relief (provided there was no affirmative objection to the relief sought in the case before the court such as impossibility of compelling performance.)"

[11] Ames, *supra* note 1, 373; Williston, *supra* note 1, §§ 1435, 1525.

[12] Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979 (1889); Ames, *supra* note 1, 373; Williston, *supra* note 1, § 1437. But see Duvall v. Meyers, 2 Md. Ch. 401 (1850).

[13] Clayton v. Ashdown, 9 Vin. Abr. 393 (1714); note, 43 A.L.R. 120; Ames, *supra* note 1, 374; Williston, *supra* note 1, § 1438.

party;[14] and where the purchaser has become bankrupt;[15] frequently it has been held not to apply in bilateral contracts between fiduciary and principal.[16] Nor has the fact that one party is entitled to specific performance been a reason for decreeing specific performance of personal service contracts[17] or contracts the supervision of which the court believes too difficult to undertake;[18] in such situations the negative rule is more likely to be invoked to deny specific performance to either party.

It has been stated by eminent authority that after conveyance the vendor is not entitled to specific performance.[19] It would seem, *prima facie*, that under the formulation of the affirmative doctrine submitted, there is no other objection to specific performance for a vendor who has conveyed except the adequacy of his legal remedy, and that therefore he should be entitled to specific performance unless the rule here given is inaccurate. But it should be pointed out that no case has expressly refused the equitable remedy to a vendor who has conveyed on the grounds that to do so would be inconsistent with the affirmative mutuality rule. *Jones v. Newhall*,[20] the only case cited to support the proposition that a vendor cannot get specific performance after he has conveyed,[21] based its decision on the ground that the inadequacy of legal remedy provision in the Massachusetts statute makes it impossible to accept the affirmative doctrine of mutuality. And the objection to giving the vendor specific performance in such a case is not merely that the legal remedy is adequate but that it is practically identical with the equitable remedy, since nothing remains to be done under the contract but the payment of the purchase money.[22] Equity might well decline to exercise its jurisdiction to enforce a contract where it does just what is done at law.

[14] State Highway Comm. v. Golden, 112 N.J.Eq. 156, 163 Atl. 551 (1933).

[15] Contracts Restatement (1932), § 372, example 2.

[16] Ex parte Lacey, 6 Ves. 625 (1802); Ames, *supra* note 1, 373; Williston, *supra* note 1, § 1435.

[17] Cases denying specific performance to a party otherwise entitled to it because of the lack of mutuality doctrine are in point here, because if the affirmative doctrine is applied, both parties would be entitled to specific performance. Pickering v. Bishop of Ely, 2 Y. & C.C.C. 249 (1843); Heth v. Smith, 175 Mich. 328, 141 N.W. 583 (1913); cases cited Pomeroy, *supra* note 1, § 164.

[18] Johnston v. Ry. Co., 3 D.G.M. & G. 913 (1853); Pac. Ry. Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623 (1908); cases cited Pomeroy, *supra* note 1, § 164.

[19] Contracts Restatement (1932), § 360; Ames, *supra* note 1, 380; Williston, *supra* note 1, § 1443.

[20] 115 Mass. 244 (1874).

[21] The contract provided for the sale of shares in two land companies to be paid for in installments. The first four installments were designated as payment for the shares in one company, the last installments for the other. After the shares in one company had been paid for and transferred, the defendant refused to pay for the others. It was held the plaintiff was not entitled to specific performance because at law he could sue for the installment due, and that is precisely what he could get at equity.

[22] Contracts Restatement (1932), § 360, comment (e); Williston, *supra* note 1, § 1443: "All of these results would be sufficiently explained by saying that where the legal remedy secured not only adequate redress, but practically identical redress with that which could be given by equity, equity will decline jurisdiction."

Where neither party to a contract has signed a memorandum sufficient for the statute of frauds, but one party has done sufficient acts of part performance to entitle him to equitable relief, there is an affirmative objection other than adequacy of legal remedy to giving the other party specific performance, namely the statute of frauds. Thus, though language can be found in favor of applying the mutuality rule here,[23] it seems preferable to hold that the plaintiff must bring himself within the reason for the rule of part performance. He would have to show an irreparable change of position induced by the agreement, i.e., "equitable fraud,"[24] or acts unequivocally referable to a contract,[25] or both,[26] depending on the requirements of the jurisdiction. But specific performance may be granted because the acts of the other person constitute part performance, for the defendant's taking possession can be unequivocally referable to a contract,[27] and his acts, such as cutting the timber, may cause the plaintiff an irreparable change of position,[28] but this is based on considerations entirely different than mutuality.

The formulation of the affirmative doctrine here submitted does not conflict with the negative doctrine of mutuality which, regardless of how formulated, has never been used to deny the equitable remedy merely because adequacy of legal remedy might be an objection to specific performance. Thus a purchaser has never been denied specific performance merely because his vendor's legal remedy might be adequate.[29] Where the negative doctrine is invoked to deny specific performance to a plaintiff otherwise entitled to it, the objection to equitable relief on the defendant's part is some positive objection other than adequacy of legal remedy, such as plaintiff's being an infant,[30] compulsion of personal services,[31] or difficulty of supervision.[32]

SIDNEY ZATZ

[23] Sweeney v. O'Hara, 45 Ia. 34 (1876); Clark, *supra* note 1; Clark, Equity (1919), § 132. The authorities cited by him do not necessarily support his proposition.

[24] Burns v. Daggett, 141 Mass. 368, 6 N.E. 727 (1886); Williams v. Carty, 205 Mass. 398, 91 N.E. 392 (1910); Slingerland v. Slingerland, 39 Minn. 197, 39 N.W. 146 (1888); 32 Yale L. Jour. 89 (1922).

[25] Kine v. Balfe, 2 Ball & B. 343 (1813); Bradley v. Loveday, 98 Conn. 315, 119 Atl. 147 (1922); Pomeroy, *supra* note 1, § 108a; 32 Yale L. Jour. 846 (1923).

[26] Maddison v. Alderson, L.R. 8 App. Cas. 467 (1883); Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273 (1922).

[27] Kine v. Balfe, 2 Ball & B. 343 (1813); Price v. Hart, 29 Mo. 171 (1859); Morphett v. Jones, 1 Swans. 172, 181 (1818).

[28] In re Fay, 213 Pa. St. 428, 62 Atl. 991 (1906); Latom v. Brooker, 51 Mo. 148 (1872); Chambers v. Row, 36 Ill. 171 (1864); compare Pomeroy, *supra* note 1, § 105. Where mere possession by defendant is sufficient part performance, the giving up of possession by the plaintiff should be part performance. Kine v. Balfe, 2 Ball. & B. 343 (1813); Pyke v. Williams, 2 Vern. Ch. 455 (1703); Howard v. Patent Ivory Co., 38 Ch. Div. 156 (1888); Earl of Aylesford's Case, 2 Strange 783 (1727).

[29] Even Ames' statement of the negative rule does not consider this. See *supra* note 2. For a statement of the negative rule that does consider this see 27 Yale L. Jour. 261 (1917).

[30] Flight v. Bolland, 4 Russ. 298 (1829); note 43 A.L.R. 120; but see Seaton v. Tohill, 11 Colo. App. 211, 53 Pac. 170 (1898).

[31] See note 17 *supra*.

[32] See note 18 *supra*.