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**Equity - Lack of Mutuality of Remedy at Inception of Contract Held  
No Defense in Action for Specific Performance - Gould v. Stelter,  
14 Ill. 2d 376, 152 N.E. 2d 869 (1958)**

DePaul College of Law

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intoxication and death in the proximate cause-and-effect relationship necessary to recovery.<sup>24</sup>

This case has enunciated no new theories or rules to be applied to Dramshops Act cases in the future. It has, however, demonstrated something more valuable. A complicated problem stemming from a unique set of facts has been resolved upon the basic principles of cause and effect. In other words, the case of *Kirulik v. Cohn* is an indication of the logical extreme to which the interpretation of the phrase "in consequence of" can be drawn.

<sup>24</sup> Instruction given to the jury as to the meaning of the term "proximate cause" directed them to look for "that cause which, in a natural and continuous sequence, unbroken by any other cause, produced the event. The consequences must be natural and probable consequences as distinguished from a possible consequence." Abstract of record, instruction 13 at 340.

#### EQUITY—LACK OF MUTUALITY OF REMEDY AT INCEPTION OF CONTRACT HELD NO DEFENSE IN ACTION FOR SPECIFIC PERFORMANCE

Manilow was a purchaser of real estate. His agent, Gould, sued the record title holders, the true beneficial owners, and their broker, for specific performance on a contract for the purchase of land. Manilow executed to Gould a general power of attorney in 1948, and on numerous occasions since then, Gould had entered into contracts for the purchases of real property, executing the instruments in her own name but on behalf of Manilow. In 1953, the beneficial owners authorized and directed their broker to put the property in question up for sale. The broker and Manilow negotiated the terms of a contract for the purchase of this land. The broker then obtained the signature of the record title holders and submitted the contract to Manilow who orally instructed Gould to sign her name on his behalf. On many occasions since the contract has been signed, Manilow repeated his affirmation of the contract, including the act of filing suit in this case.

Defendants moved to dismiss upon the ground that the power of attorney authorized Gould to contract in the name of Manilow and on his behalf, and not in her own name. They argued that Manilow was not bound by the contract because there was an absence of mutuality of remedy at the inception which precludes recovery. The trial court sustained the motion to dismiss and Gould appealed directly to the Illinois Supreme Court since a freehold was involved. The supreme court held that lack of mutuality of remedy at the inception of a contract is no longer a defense to a suit for specific performance. *Gould v. Stelter*, 14 Ill. 2d 376, 152 N.E. 2d 869 (1958).

The question before the supreme court was: To what extent does the doctrine of mutuality of remedy in specific performance cases survive today?<sup>1</sup>

There were, until the decision in the instant case, two conflicting lines of authority in Illinois as to whether mutuality of remedy is necessary at the inception of the contract. The defendants relied on the line of authorities which followed *Gage v. Cummings*,<sup>2</sup> wherein the court, in accordance with Lord Justice Fry stated:

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.<sup>3</sup>

The defendants further relied on *Wloczewski v. Kozlowski*<sup>4</sup> which also held that specific performance for the sale of land will not be granted unless the contract is mutually enforceable and binding on both parties at the point of execution. This rule had also been stated previously in *Ulrey v. Keith*<sup>5</sup> and *Barker v. Hauberg*.<sup>6</sup>

The other line of reasoning included the case of *Ullsperger v. Meyer*.<sup>7</sup> The court in this case, while it was clearly an exception to the *Gage* case, held:

Want of mutuality arising from the failure of both parties to sign cannot be successfully pleaded as a defense by the party who did sign, as the act of filing a bill for specific performance binds the plaintiff and renders the contract mutual.<sup>8</sup>

Not only did the *Meyer* case prove to be an exception to the *Gage* case but there has been a multiplicity of instances in which specific performance has been allowed, although the remedy was not available to both parties when the contract was executed.<sup>9</sup> These cases have, in effect,

<sup>1</sup> The court held it was unnecessary to determine whether the power of attorney from Manilow authorized Gould to sign the contract in her own name, and at once turned to the contention that specific performance will not lie unless that remedy was available to both parties at the time the contract was executed.

<sup>2</sup> 209 Ill. 120, 70 N.E. 679 (1904).

<sup>3</sup> *Ibid.*, at 121 and 680. Consult Fry on Specific Performance, § 286.

<sup>4</sup> 395 Ill. 402, 70 N.E. 2d 560 (1946).

<sup>5</sup> 237 Ill. 284, 86 N.E. 696 (1908).

<sup>7</sup> 217 Ill. 262, 75 N.E. 482 (1905).

<sup>6</sup> 325 Ill. 538, 156 N.E. 806 (1927).

<sup>8</sup> *Ibid.*, at 264 and 484.

<sup>9</sup> *Laegler v. Bartlett*, 10 Ill. 2d 478, 140 N.E. 2d 702 (1957); *Espadron v. Davis*, 385 Ill. 304, 52 N.E. 2d 716 (1944); *Lewis v. McCree*, 378 Ill. 264, 38 N.E. 2d 170 (1941);

allowed specific performance because mutuality of remedy had arisen by virtue of subsequent acts.

The doctrine of mutuality of remedy at the inception has been rejected in almost all jurisdictions,<sup>10</sup> and has also drawn much criticism from legal scholars.<sup>11</sup> The doctrine has been entirely rejected by the *Restatement of Contracts*, Section 373.

The Illinois court has now, by its decision in the *Gould* case, overruled the *Gage* and *Wloczewski* cases insofar as they were based upon a supposed want of mutuality at the inception. The court has adopted the rules and reasons set down by Justice Cardozo in *Epstein v. Gluckin*.<sup>12</sup> In an action for specific performance the court stated the true situation:

In such an exercise of jurisdiction, there is no risk of hardship or injustice to the vendor. The assignee, by the very act of invoking the aid of equity, assumes the duty of performance, and subjects himself to any conditions of the judgment appropriate, thereto. . . . At first the vendor had the obligation of the vendee, and of no one else. The obligation thus imposed has not been lost, but another has been added. Someone has at all times been charged with the duty of performance. The continuity of remedy is unbroken from contract to decree.

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 defendant. . . . Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end.<sup>13</sup>

The law in Illinois is that so long as there is justice done between the parties, mutuality of remedy is important only insofar as its presence is essential to the attainment of this end. Therefore it matters not when mutuality arose, so long as it exists.<sup>14</sup>

The impact of no longer needing mutuality of remedy at the inception of a contract has been widespread in that a majority of states now follow the rule of Justice Cardozo in the *Epstein* case.

In accordance with the concurring opinion in the *Gould* case, it may be argued that it was unnecessary for the purposes of the *Gould* case, for

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Estes v. Furlong, 59 Ill. 298 (1871). Consult: Kovacs v. Krol, 385 Ill. 593, 53 N.E. 2d 456 (1944), a contract contingent upon the purchaser's ability to secure a loan may be specifically enforced.

<sup>10</sup> Van Zandt v. Heilman, 54 N.M. 97, 214 P. 2d 864 (1950); Zelleken v. Lynch, 80 Kan. 746, 104 Pac. 563 (1909); Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861 (1922).

<sup>11</sup> Ames, Mutuality in Specific Performance, 3 Colum.L.Rev. 104 (1903); Cook, The Present Status of the Lack of Mutuality Rule, 36 Yale L. J. 897 (1927); 1 Harv. L. Rev. 104 (1887); Simpson, 50 Years of American Equity, 50 Harv. L. Rev. 171 (1936); Williston on Contracts, § 1433 (1938).

<sup>12</sup> 233 N.Y. 490, 135 N.E. 861 (1922).

<sup>13</sup> *Ibid.*, at 862.

<sup>14</sup> Gould v. Stetler, 14 Ill. 2d 376, 152 N.E. 2d 869 (1958).

that court to have overruled the doctrine as laid down in the *Gage* and *Wloczewski* cases. However, there is no doubt that the *Gould* case did clarify and settle the law that equity does not require mutuality of remedy to exist at the inception of a contract, but that such mutuality may also occur by the commission of subsequent acts.

FEDERAL TORT CLAIMS ACT—MUNICIPALITY NOT ALLOWED TO USE SOVEREIGN IMMUNITY AS DEFENSE AGAINST FEDERAL GOVERNMENT COUNTERCLAIM

On April 13, 1958, a City of Newark ambulance collided with a United States mail truck. The city brought an action against the United States in the District Court under the Federal Tort Claims Act in the amount of \$3,000.<sup>1</sup> The United States asserted a counterclaim for damage to the mail truck totaling \$245.75. The court found the concurrent negligence of both drivers to be the cause of the accident. Judgment on the counterclaim was entered for the municipality on the grounds that the defendant was prevented from raising a defense of contributory negligence by New Jersey decisions as applied under the Federal Tort Claims Act. Recovery was denied to the city because the negligent act of the ambulance operator was an "active wrongdoing" and, as such, was imputable to the municipality under New Jersey case law. Upon appeal by the plaintiff, the United States Court of Appeals, Third Circuit, affirmed the decision, but held that the United States was not precluded from asserting a defense of contributory negligence. *City of Newark v. United States*, 254 F. 2d 93 (C.A. 3d, 1958).

This case raises the unusual point of whether the Federal Tort Claims Act should be read literally, when such an interpretation results not only in waiver of the sovereign immunity of the United States, but also in the enhancement of the position of the municipal corporation by depriving the federal government of a defense which it had prior to the passage of the Act.

The immunity of the United States to actions commenced without its express consent is traceable to the English political concept that the King can do no wrong. While this political concept was repudiated in this country, the legal doctrine, that the Crown was nevertheless immune from suits to which it did not consent, has been consistently and vigorously applied to the federal government.<sup>2</sup> Prior to the Federal Tort Claims Act, relief against the federal government for legal wrongs committed by its

<sup>1</sup> 60 Stat. 846 (1946), 28 U.S.C. § 1346 (b) (c) (1948).

<sup>2</sup> U.S. Const. Art. III, § 2, cl.1; *Feres v. United States*, 340 U.S. 135 (1950); *Kansas v. United States*, 204 U.S. 331 (1907); *United States v. McLemore*, 45 U.S. 286 (1846).