The Law of California Co-Operative Marketing Associations

(CONTINUED FROM JULY ISSUE)

IN OUR previous discussion[59] we determined that the nature of the California co-operative associations was not such as to attach to them from their inception the stigma of illegal monopoly and that the solution of the question of legality or illegality of the contracts of each association depended entirely upon its conduct of its own affairs. Assuming, then, the legality of the contract, the granting or denying of specific performance depends primarily upon the adequacy or inadequacy of the remedy at law. Is there a plain, speedy and adequate remedy for the breach of a marketing contract of a co-operative association? The answer depends upon the terms of the particular contract.

There are two classes of marketing agreements—sales contracts and agency contracts. Sales contracts provide either for a sale to the association at the price obtained on resale or at a fixed minimum price plus the increase secured on resale. Agency contracts appoint the association the marketing agent of the grower members.

Among the sales contracts of California associations, that of the Poultry Producers of Central California, Incorporated, is typical. Similarly the marketing agreement of the Fruit Growers of California, Incorporated, typifies the agency contract. We shall consider each of these contracts in some detail.

THE SALES CONTRACT

The produce sale agreement of the Poultry Producers of Central California, Incorporated, is a contract for the purchase of all the eggs that the grower-member produces and intends to market, at the price which the association secures at resale, less the costs of transportation, packing and selling. The selling costs are limited to one cent per dozen eggs. The contract states that it is entered into "in compliance with the by-laws of the corporation and in pursuance to the express aims of the corporation for co-operative marketing and for the elimination of speculation in poultry products and in consideration of similar obligations undertaken by many other poultry producers."

[59] 8 California Law Review (July, 1920) 284 ff.

It is not an ordinary contract of purchase and sale. It is not a contract for the sale of a fixed number of eggs, but for the sale of all the eggs which the producer intends to market. The seller is obligated only while he is a poultry producer. He is not bound to remain in the business and the transfer of his farm and his poultry in good faith relieves both parties from their obligations. The buyer is a co-operative association which binds itself not to purchase eggs or poultry on the open market, but to purchase them only from producers who compose its membership. The agreement provides that it is "one of a series generally similar in terms, composing, with all such agreements, signed by individual sellers, one single contract between the buyer and the sellers, mutually and individually obligated under all of the terms thereof."

The contract was drawn and executed by producer-stockholders of the corporation on bchalf of themselves, individually as producers, and collectively as stockholders. It is a contract in which the individual sellers, composing a distinct corporate entity, are, as such, the buyers of their own product. Obviously, the contract is one for the sale of personalty. Are such contracts specifically enforceable?

SPECIFIC PERFORMANCE OF CONTRACTS INVOLVING PERSONALTY

Before the adoption of the Code, the California rule as to the specific performance of contracts involving personalty was stated as follows:

> "The jurisdiction of a Court of Equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property but altogether upon the question whether the breach complained of can be adequately compensated in damages. If it can, plaintiff's remedy is at law only; if not, he may go into a Court of Equity which will grant full redress by compelling specific performance on the part of the defendant. Accordingly, while it is a general rule that contracts for the sale and transfer of personal property will not be specifically enforced, yet, if there are circumstances in view of which a judgment for damages would fall short of the redress which the plaintiff's situation demands, as that by non-performance he will be greatly embarrassed and impeded in his business plans, or involved in a loss of profits which a jury cannot estimate with any degree of certainty, equity will decree specific performance."[60]

[60] Senter v. Davis (1869) 38 Cal. 450.

In a later case[61] it was contended that this rule was changed by the adoption of the Civil Code, which provides:

> "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation and that the breach of an agreement to transfer personal property can be thus relieved."[62]

However, the Court held:

> "It is well settled in this state that the aforesaid presumption is a disputable one and that where facts are alleged showing that pecuniary compensation will not afford adequate relief, the objection that an adequate remedy at law exists is removed and specific performance will in proper cases be enforced."[63]
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> "The fact that damages might be recovered does not affect the rule, unless they give adequate relief."[64]

This rule has been universally followed by the California courts; specific performance of contracts for the sale of personalty has been granted where the remedy at law was inadequate, and refused where the remedy was adequate. The California cases in which such equitable relief was granted involved either shares of stock[65] or mortgages,[66] while the cases in which the remedy was denied involved cattle without special value;[67] a newspaper route where no facts were alleged showing that damages would not afford full compensation;[68] orange trees of a variety bought and sold on the open market;[69] and jewelry and personal effects where there was no allegation that the articles were of rare nature or peculiar sentimental worth.[70]

In other jurisdictions specific performance has been granted of contracts involving tomatoes,[71] hops,[72] coal-tar,[73] fish-skins,[74]

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[61] Gilfallan v. Gilfallan (1914) 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D 784.

[62] Cal. Civ. Code, § 3387.

[63] Gilfallan v. Gilfallan, supra, n. 61.

[64] Fleishman v. Woods (1901) 135 Cal. 256, 261, 67 Pac. 276.

[65] Gilfallan v. Gilfallan, supra, n. 61; Wait v. Kern River Mining Co. (1909) 157 Cal. 16, 106 Pac. 98; Fleishman v. Woods, supra, n. 64; Krouse v. Woodward (1895) 110 Cal. 638, 42 Pac. 1085; Treasurer v. The Commercial Co. (1863) 23 Cal. 390; Sherwood v. Wallin (1905) 1 Cal. App. 532, 82 Pac. 566.

[66] Shannon v. Cavanaugh (1910) 12 Cal. App. 434, 107 Pac. 574. See also Kirch v. Wattell (March 29, 1919) 28 Cal. App. Dec. 767, 181 Pac. 111.

[67] McLaughlin v. Piatti (1865) 27 Cal. 451.

[68] Senter v. Davis, supra, n. 60.

[69] Emirizian v. Asato (1913) 23 Cal. App. 251, 137 Pac. 1072.

[70] Christin v. Clark (1918) 36 Cal. App. 714, 173 Pac. 109.

[71] Curtice Bros. Co. v. Catts (1907) 72 N. J. Eq. 831, 66 Atl. 935.

[72] Livesley v. Johnston (1904) 45 Ore. 30, 76 Pac. 946, 106 Am. St. Rep. 647, 65 L. R. A. 783.

ore,[75] timber,[76] oil,[77] and ships.[78] Of course, in each of these cases the court found the existence of the essential feature for the application of the principles of equity—the lack of a plain, speedy and adequate remedy at law. Is this feature present in the poultry contract? If it is, the contract is a proper subject for specific performance.

Lack of an Adequate Remedy at Law

There are certain necessary activities which accompany the efficient marketing of poultry products. The very character of these activities in a co-operative association precludes the possibility of adequate compensation by the payment of damages upon the breach of a contract of sale. Grading, storing, shipping, and selling can all be done more cheaply per unit on a large scale than on a small, and the larger the scale the smaller the unit cost.[79] Hence, by the default of one member, the cost per unit to the association, and therefore to every other member, is increased as the association cannot purchase other eggs to replace those of the defaulting member; it is limited to the eggs of its members. The greater the number of defaulting members, the greater the unit cost until finally the maximum cost set in the contract will have been exceeded. This can result only in disruption. Can these added costs, which, according to the fundamental laws of economics are created by the producer's breach of contract, be determined in a court of law?

The association has made certain expenditures relying upon the signed contracts. It has engaged employees and administrators, leased buildings, contracted for boxes and fillers, and arranged for transportation facilities and storage space, all based upon the contracts of its members. These obligations were incurred upon the assumption that each member would abide by his contract and each is liable for his share thereof. Can the

[73] Equitable Gas Light Co. v. Scranton Coal Tar Co. (1884) 63 Md. 285.

[74] Gloucester Isinglass Co. v. Russian Cement Co. (1891) 154 Mass. 92, 27 N. E. 1005, 26 Am. St. Rep. 214, 12 L R. A. 563.

[75] American Smelting and Refining Co. v. Bunker Hill etc. Co. (1918) 248 Fed. 172.

[76] Strause v. Berger (1908) 220 Pa. 367, 69 Atl. 818, in a jurisdiction considering timber to be personalty. The same result would be reached in jurisdictions considering the sale as one of realty, Omaha Lumber Co. v. Co-operative Investment Co. (1913) 55 Colo. 271, 133 Pac. 1112.

[77] Texas Co. v. Central Fuel Oil Co. (1912) 194 Fed. 1, 114 C. C. A. 21.

[78] Great Lakes & St. L. T. Co. v. Scranton Coal Co. (1917) 239 Fed. 603, 152 C. C. A. 437.

[79] Because of the operation of the economic law of increasing returns.

money value of such obligations be determined in a court of law? The life of the association with its accompanying benefits to the producer depends upon united action. This phase of the matter is well stated by the California Supreme Court in Dyer Brothers v. Central Iron Works.[80] In this case all of the parties were structural iron and steel manufacturers of San Francisco. They entered into a contract for the mutual protection and advancement of their business interests. The contract is described by the court as follows:

> "To be more precise, the contract recites that the parties thereto were desirous of protecting themselves against various and sundry demands of their employees; that the parties were unable to resist, settle or arbitrate said demands singly and severally without great loss to themselves and injury to their business; that, in the event of any parties withdrawing from the agreement and ceasing to act in concert with the remaining parties, great damage and loss would result which might not be recoverable under the law of damages and which damage would be impracticable of ascertainment or proof under the rules of evidence. . . . . The contract requires that each party pay into a common fund a sum of money in cash, or promissory notes given in lieu thereof, the amount thereof to be determined by the gross annual business of the party making such payment. This fund was to be kept intact until the termination of the agreement, by lapse of time or otherwise, and then be distributed among the parties who had kept the covenants and conditions of the contract in the proportion which the amount of their respective payments into the fund bore to the whole of said fund. All of the parties elected to make the required payments by means of promissory notes. The complaint alleges failure on the part of defendants to observe and abide by the terms of the agreement, thereby causing great loss to plaintiffs and necessitating the termination of the agreement, and prays that all the parties to said contract be directed to pay into the common fund contemplated by the contract the respective sums represented by their several promissory notes and that such common fund be distributed among plaintiffs, or those determined by the court to be entitled to participate in the distribution under the terms of the contract."

Defendants demurred to the complaint on the ground that the sums represented by the promissory notes constituted penalties and not liquidated damages. The court, in holding that a breach of this contract made a proper case for liquidated damages, stated:

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[80] (Apr. 3, 1920) 59 Cal. Dec. 419, 189 Pac. 445.

". . . . The agreement in question provides a complicated arrangement for the purpose of meeting various conditions incapable of being satisfactorily dealt with by individual action, and sets forth at length the peculiar facts surrounding the subject-matter of the contract. The securing and maintaining of united action in certain contingencies by the parties thereto was the gist of the contract, and from the terms of the contract it is apparent that the parties thereto considered that any independent action in regard to the matters within the scope of the contract was likely to produce serious losses and defeat the aims and purposes contemplated by the parties."

In the Dyer case, the iron manufacturers agreed to market collectively the jobs they had to offer; in the co-operative association contracts, the parties agreed to market collectively their products. In the Dyer case, the parties agreed to bargain collectively for their labor; in the co-operative association contracts, the parties agreed to bargain collectively for the sale of their products. This case cites the case of Associated Hat Manufacturers v. Baird-Unteidt Company,[81] which involved an association of hat manufacturers similar to that formed in the Dyer Brothers case. The by-laws provided liquidated damages in the amount of $5000 for the breach of any resolution or order of the association. A resolution was passed declaring for the open shop and prohibiting any member from recognizing the labor union formed by their employees. Defendant, who was a member of the association, disobeyed the order and was sued for the $5000 liquidated damages. The court, in rendering judgment for the plaintiff, stated:

"We see, too, that the damages from a breach must be uncertain and incapable of exact estimate in advance of breach and after breach are neither readily susceptible of proof nor of precise appraisal. It is obvious that the breach of the resolution might result in the breaking up of the association or in projecting it into a long and expensive fight with the union. The strength of the association lay in the maintenance of a united membership. Weakness, perhaps disintegration, might follow the secession of the members in the Danbury district."

It would seem that the words of these courts would likewise apply to the co-operative association contracts under discussion.

[81] (1914) 88 Conn. 322, 91 Atl. 373.

In accordance with the recommendations of the Office of Markets and Rural Organizations of the Department of Agriculture,[82] the majority of agricultural co-operative organizations limit their activities to their own members and are not permitted to handle the products of non-members. This is the situation in the Poultry Association. The association makes contracts for the resale of its eggs relying upon the contracts signed by its members. If a member does not deliver, the association cannot buy in the open market and may be unable to perform its contracts with third parties. Since it cannot buy on the open market, the difference between market value and contract price is not a true measure of damages.

Curtice Brothers v. Catts[83] has much in common with the situation under discussion. In granting specific performance of a contract to sell and deliver all the tomatoes produced on certain land, the court stated:

> "Complainant's factory has a capacity of about one million cans. The season for packing lasts about six weeks. The preparations made for this six weeks of active work must be carried out in all features to enable the business to succeed. These preparations are based primarily upon the capacity of the plant. Cans and other necessary equipment including labor must be secured in advance with reference to the capacity of the plant during the packing period. With this known capacity and an estimated average yield of tomatoes per acre, the acreage of land necessary to supply the plant is calculated. To that end the contract now in question was made with other like contracts covering a sufficient acreage to assure the essential pack. It seems immaterial whether the entire acreage is contracted for to insure the full pack, or whether a more limited acreage is contracted for and an estimated available open market depended upon for the balance of the pack. In either case, a refusal of the parties who contract to supply a given acreage to comply with the contracts leaves the factory helpless, except to whatever extent an uncertain market may perchance supply the deficiency. The condition which arises from the breach of the contracts is not merely a question of the factory being compelled to pay a higher price for the product. Losses sustained in that manner could with some degree of accuracy be estimated. The condition which occasions the irreparable injury by reason of the breaches of the contracts is the

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[82] Bulletin 541, Dept. Agric. (1918); Farmers Bulletin 718, Dept. Agric. (1916).

[83] Supra, n. 71.

inability to procure at any price, at the time and of the quality needed, tomatoes to insure the successful operation of the plant. If it should be assumed as a fact that upon breach of contracts of this nature, other tomatoes of like quality and quantity could be procured in the open market without serious interference with the economic arrangements of the plant, a court of equity would hesitate to assume to interfere, but the very existence of such contracts proclaims their necessity to the economic management of the factory. The aspect of the situation bears no resemblance to that of an ordinary contract for the sale of merchandise in the course of an ordinary business. The business and its needs are extraordinary in that the maintenance of all the conditions prearranged to secure the pack are a necessity to insure the successful operation of the plant."

In Gloucester Isinglass Company v. Russia Cement Company,[84] specific performance was granted of a contract for the sale of fish-skins to be used in the manufacture of glue. In discussing the adequacy of the remedy at law, the court said:

"The next objection of the defendant is that even if it violates its contract it is not shown that the plaintiff has not an adequate remedy at law. The only remedy which the plaintiff could have at law would be by a recovery of damages for the failure of the defendant to deliver," or to allow to the plaintiff its due proportion of the fish skins. "It sufficiently appears that the principal market for them is in Gloucester, that most of the skin producers there are under contract with the defendant, and that the fish-skins are of very limited production. 'If the plaintiff is unable to obtain skins produced by firms which have contracted with the defendant,' it is found that 'it will be very difficult, if not impossible, for it to carry on its business.' This continuing injury, leading to difficulties in the management of the plaintiff's business, and possibly to its utter destruction, is one that could not be measured in damages. It would be practically impossible to estimate the amount of the injury, or to repair it. The plaintiff's property invested in the manufacture must lose a considerable, but uncertain, amount of its value. The injury thus threatened would be practically irreparable."

In Great Lakes Company v. Scranton Coal Company[85] defendants had agreed to furnish plaintiff with certain sized vessels for the carriage of coal. No other boats of the required size were obtainable, while rail shipments would have disrupted plaintiff's business as it had been organized for water transportation. The

[84] Supra, n. 74.
[85] Supra, n. 78.

court held that such facts presented a case of inadequacy of legal remedy sufficient to justify specific performance. Likewise courts have frequently granted specific performance of contracts for the purchase and sale of personalty which could be secured elsewhere only at great inconvenience or expense.[86]

In light of these decisions and of the peculiar nature of co-operative associations, a breach of the contract under discussion clearly presents a case wherein there would be no adequate remedy at law, and wherein specific performance should be granted.

But other objections to specific performance may be advanced. It may be contended that the contract is unfair or uncertain; that it involves personal services or a lack of mutuality of remedy; or contains a liquidated damage clause. These objections will next be discussed.

Unfairness

Section 3391 of the Civil Code provides that specific performance cannot be granted unless the contract is just and reasonable as to the defendant. It has been contended that this contract is unjust and unreasonable in that it leaves certain matters to the discretion or judgment of the buyer. For example the contract provides that the eggs shall be sold at the best price obtainable in the buyer's judgment, and that the rules and regulations for standardization, handling, and packing may be established by the buyer. But these clauses of the contract do not mean that the whim or caprice of the buyer shall determine these matters.

In Livesley v. Johnston,[87] in which specific performance was granted, the contract provided:

> "Should said hops be from any cause of a lesser quality than choice, or not delivered in the condition herein agreed upon according to the judgment of said parties of the second part or their agent, the party of the second part shall nevertheless have the privilege of taking the same, or so many of them as will cover the amount advanced on said crop of hops, with interest at the rate of 8 per cent per annum, at a reduction in price equal to the difference in value between such hops and choice. . . . . It is furthermore agreed that

[86] Strause v. Berger, supra, n. 76; American Smelting and Refining Co. v. Bunker Hill Co., supra, n. 75; Equitable Gas Light Co. v. Baltimore Coal Tar Co., supra, n. 73; Texas Co. v. Central Fuel Co., supra, n. 77. See also Butterick Publishing Co. v. Fisher (1909) 203 Mass. 122, 89 N. E. 189.

[87] Supra, n. 72.

> the party of the second part, through their agents, shall have the right to determine at picking time when said advances are contemplated to be made, whether or not the growing crop at that time is in proper condition, and if such agents of the party of the second part shall determine that the growing crop is not in such condition, that said party of the second part shall be released from any obligation to furnish any picking money as called for in this contract."

The court thoroughly analyzed and discussed these provisions of the contract and pointed out that the buyer

> "could not reject the hops upon mere whim or sheer volition, but must in good faith exercise an honest judgment in the premises. . . . . Being a party and passing judgment upon their own case, good morals and decent propriety would suggest that they act with circumspection and a considerate regard for the rights of the seller as well as their own, and the law will look with greater scrutiny upon their determinations than if they were wholly disinterested arbiters. . . . . If the sale had been the ordinary one of goods or chattels, the buyer, as we have seen, would have exercised his judgment as to rejection at his peril, and the goods or chattels could be shown, notwithstanding, to be of the quality and condition agreed upon. In a sale like the one at bar, the buyer must also accept, unless, in his honest judgment, exercised in absolute good faith, the commodity is not such as was contracted for. If so exercised, his determination becomes final, because the parties have so agreed; but if he exercises his judgment arbitrarily, capriciously, or fraudulently, with the sheer purpose of avoiding his obligation to accept, it will not avail him, as the actual quality and condition of the hops may then be inquired into, notwithstanding his adverse determination. . . . ."

The California law as to actions arising on "dissatisfaction" clauses of contracts[88] is the same as that adopted by the Oregon court in the hop case, where specific performance was granted. There is no reason to doubt that the California courts will follow the Livesley decision in a similar case. This holding on the question of unfairness has a like application to the question of uncertainty.

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[88] Tiffany v. Pacific Sewer Pipe Co. (1919) 58 Cal. Dec. 35, 182 Pac. 428; Van Denmark v. California Home Assn. (1919) 30 Cal. App. Dec. 269, 185 Pac. 866; Thomas Haverty Co. v. Jones (April 22, 1920) 32 Cal. App. Dec. 23.

Uncertainty

Section 3390 of the Civil Code provides that an agreement cannot be specifically enforced if its terms are not sufficiently certain to make the precise act which is to be done clearly ascertainable. Does the poultry contract fall within this rule? It may be contended that the contract is uncertain because no definite number of eggs is specified; because no specific price is named; or because certain matters are left to the judgment or discretion of the buyer.

In Henrici v. South Feather Land and Water Company,[89] the objection of uncertainty was raised against the specific performance of a covenant to furnish water for irrigation where no definite amount of water was specified. The court stated:

> "It is argued that the agreement is too uncertain to be capable of enforcement. But we think there is no merit in this contention. No specific amount of water was mentioned, but the company agreed 'to furnish water for irrigation on the lands described.' The fair meaning of this language is that the amount to be supplied was that reasonably necessary for irrigating the land."

Other courts have found no difficulty in enforcing contracts for the sale of all of the tomatoes produced on certain land;[90] all of the ores from certain properties owned or leased by the seller;[91] and all of the coal-tar that might be produced by defendant for five years.[92]

The second basis for the contention is that the contract provides for resale at the best price under market conditions. This is clearly a certain sum; far more certain than a reasonable amount of water for irrigation purposes. Specific performance has been often granted in the case of contracts for sale at a "fair" price;[93] and the United States Supreme Court, in Joy v. St. Louis,[94] granted to a railroad specific performance of an agreement giving it the right to use another railroad's right of way "under such terms and for such fair and equitable compensation . . . . as may be agreed upon by the companies." The court declared that equity could decide what was a "fair and equitable" compensation.

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[89] (1918) 177 Cal. 442, 448, 170 Pac. 1135.
[90] Curtice Bros. v. Catts, supra, n. 71.
[91] American Co. v. Bunker Hill Co., supra, n. 75.
[92] Equitable Co. v. Baltimore Co., supra, n. 73.
[93] 2 Pomeroy's Equitable Remedies (2d ed., 1919) § 767, n. 19.
[94] (1890) 138 U. S. 1, 34 L. Ed. 843, 11 Sup. Ct. Rep. 243.

The third argument is that certain matters are left to the judgment or discretion of the buyer. Livesley v. Johnston,[95] which was previously discussed on the question of fairness,[96] and in which specific performance was granted, contained similar clauses.[97] In the Joy case,[98] the contract provided for "such reasonable regulations and terms" and "for such fair and equitable compensation to be paid . . . . therefor as may be agreed upon by the companies." The United States Supreme Court pointed out that:

> "Not only are the regulations and terms to be reasonable, but the compensation is to be fair and equitable. Although the statement is that compensation is to be such 'as may be agreed upon by such companies,' yet the statement that it is to be 'fair and equitable' plainly brings in the element of its determination by a court of equity. If the parties agree upon it, very well; but if they do not, still the right of way is to be enjoyed upon making compensation, and the only way to ascertain what is a 'fair and equitable' compensation, therefore, is to determine it by a court of equity. Such is, in substance, the agreement of the parties. The provision cannot be construed as meaning that, if the parties do not agree, there is no compensation, and that because there can be no compensation, there is to be no enjoyment of the right of way. In this view, it cannot be said that the court is making an agreement for the parties which they did not make themselves."

The poultry producer's contract is neither unfair nor uncertain; no successful objection to specific performance can be interposed on these grounds. Does it require, however, the performance of covenants which equity will not specifically enforce: covenants for personal service?

Personal Service

Section 3390 of the Civil Code provides that an obligation to render personal service cannot be specifically enforced. In determining whether the poultry contract involves personal service, the

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[95] Supra, n. 72.

[96] Supra, p. 392.

[97] "It is furthermore agreed that the party of the second part, through their agents, shall have the right to determine at picking time when said advances are contemplated to be made, whether or not the growing crop at that time is in proper condition, and if such agents of the party of the second part shall determine that the growing crop is not in such condition, that said party of the second part shall be released from any obligation to furnish any picking money as called for in this contract."

[98] Joy v. St. Louis, supra, n. 94.

obligations of the association and of the grower will be considered separately.

The decisions and dicta of the California courts have considered as personal service surveying and mapping land,[99] legal services,[100] painting and graining,[101] building and operating a railroad,[102] caring for and attending an elderly person,[103] reclaiming land,[104] oil development work,[105] clearing and cultivating land,[106] opening and working a mine and erecting a quartz mill,[107] removing buildings, and laying out, grading, and oiling streets,[108] manufacturing and selling perfumes,[109] using one's best endeavors to sell property,[110] holding and caring for orange trees and "balling" them when delivered,[111] and preparing patented medical remedies.[112] No services such as these are involved in the poultry contract.

The grower agrees to sell and deliver to the association all the eggs produced or acquired by him that he intends to market or sell. He does not agree to produce any eggs, he merely agrees to sell and deliver to the buyer all that he actually produces. This distinction was noted by the Oregon court in Livesley v. Johnston:[113]

> "We are not to be understood as holding that the defendant may be required to perform the labor or carry on the project of producing crops, but, after they have been produced . . . . plaintiffs are entitled to specific performance."

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[99] Cooper v. Pena (1863) 21 Cal. 404.

[100] Bullard v. Carr (1874) 48 Cal. 74; King v. Gildersleeve (1889) 79 Cal. 504, 510, 21 Pac. 961; Archer v. Harvey (1912) 164 Cal. 274, 277, 128 Pac. 410.

[101] Wakeham v. Barker (1889) 82 Cal. 46, 22 Pac. 1131.

[102] Lattin v. Hazard (1891) 91 Cal. 87, 27 Pac. 515; Pacific etc. Ry. Co. v. Campbell-Johnston (1908) 153 Cal. 106, 94 Pac. 623.

[103] Howlin v. Castro (1902) 136 Cal. 605, 611, 69 Pac. 432; Roy v. Pos (July 26, 1920) 60 Cal. Dec. 88.

[104] Moore v. Tuohy (1904) 142 Cal. 342, 75 Pac. 896.

[105] Los Angeles etc. Co. v. Occidental Oil Co. (1904) 144 Cal. 528, 78 Pac. 25.

[106] Thurber v. Meves (1897) 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Furtinata v. Butterfield (1910) 14 Cal. App. 25, 110 Pac. 962.

[107] Stanton v. Singleton (1899) 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334.

[108] Brown v. Town of Sebastopol (1908) 153 Cal. 704, 96 Pac. 363, 19 L. R. A. (N. S.) 178.

[109] Berry v. Moulie (1919) 57 Cal. Dec. 321, 179 Pac. 685.

[110] Jolliffee v. Steele (1908) 9 Cal. App. 212, 214, 98 Pac. 544.

[111] Emirizian v. Asato (1913) 23 Cal. App. 251, 137 Pac. 1072.

[112] Anderson v. Neal Institute Co. (1919) 26 Cal. App. Dec. 931, 173 Pac. 779.

[113] Supra, n. 72.

An obligation to deliver is not an obligation to render personal service. Courts have found no difficulty in ordering the delivery of hops,[114] cord-wood,[115] patented articles,[116] ores,[117] and crude petroleum,[118] and of stacking lumber,[119] and similarly should find no difficulty in ordering the delivery of eggs.

Besides agreeing to deliver, the seller contracts to observe and perform any rules and regulations prescribed by the buyer to standardize the quality of eggs and the manner of handling and shipping. Such a contract does not involve personal service. In Neal v. Parker[120] the defendant agreed to deliver lumber of a definite size and shape; he resisted specific performance on the ground that delivering such lumber involved personal service in sawing the lumber in the required dimensions. But the court decreed specific performance, declaring that it was common knowledge that it does not require any special skill to cut boards to a specified width and thickness.

The buyer, on its part, agrees to resell the eggs at the best prices obtainable in its judgment under market conditions, and to pay to the seller the amounts received from such sales after deducting the marketing costs and expenses. Does the buyer thereby bind itself to perform personal services?

The important consideration in most co-operative marketing contracts is the pooling arrangement. It is immaterial to a grower whether his particular product is sold, as his returns are based upon his share of the pool. A co-operative association does not appeal to the grower because of its personal skill and ability to market—its appeal is based on its ability to reduce overhead costs per unit. It can make these reductions in unit cost because its large volume of business brings into operation the economic principle of increasing returns.

When a contract is made with a broker to sell certain produce, the grower looks to the personal skill and ability of the broker with whom he deals. Personal service is the essence of such a contract. This is not the case where farmers combine in a co-operative marketing association. The value of such an asso-

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[114] Livesley v. Johnston, supra, n. 72.
[115] Ridenbaugh v. Thayer (1908) 10 Idaho 662, 80 Pac. 229.
[116] Adams v. Messinger (1888) 147 Mass. 185, 17 N. E. 491.
[117] American Smelting Co. v. Bunker Hill Co., supra, n. 75.
[118] Texas Oil Co. v. Central Co., supra, n. 77.
[119] Neal v. Parker (1904) 98 Md. 254, 57 Atl. 213.
[120] Supra, n. 119.

ciation does not arise from its personal skill and ability as a marketer, but from its very character as a co-operative association. The farmer looks toward the co-operative pool for the benefit of his contract, not to the peculiar selling ability of the association.

From this viewpoint, therefore, it is submitted that personal services are not involved in these contracts. This is further borne out by the corporate nature of the association. The fundamental principle underlying equity's refusal to grant specific performance of a contract to render personal service is the principle which underlies the Thirteenth Amendment.[121] Specific performance of a personal obligation means involuntary servitude. Hence equity cannot enforce the obligation of a natural person to render personal service.

Equity, however, will enforce mere ministerial acts which may be done by an agent or any other person.[122] Such acts are not considered personal service. Where the defendant is a corporation, there can be no doubt that equity may direct it to perform mere ministerial functions, such as delivery, endorsement or transfer. But may equity direct a corporation to perform acts which if done by an individual would amount to personal service? Since a corporation must always act through its agents, it would seem that a situation cannot exist which involves its involuntary servitude. The reason for the inability of equity to decree specific performance of such an obligation thus vanishes when the obligor is a corporation. The rule must fall with the reason.

The contract under consideration is neither unfair nor uncertain; it is submitted that it does not involve personal service. We are next confronted with the principle that equity will not specifically enforce a contract which does not afford mutuality of remedy.

Mutuality

The defense of lack of mutuality may be based upon two separate and distinct grounds: First, that the remedy of specific performance should not be granted to the association because it would

[121] "It would be an invasion of one's natural liberty to compel him to work for or remain in the personal service of another. One who is placed under such restraint is in a condition of involuntary servitude—a condition which the law of the land declares shall not exist. . . ." per Harlan, J., in Arthur v. Oakes (1894) 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414. See also Clark, Specific Performance (1919) p. 72.

[122] Adams v. Messinger, supra, n. 116; Neal v. Parker, supra, n. 119; Livesley v. Johnston, supra, n. 72; Ridenbaugh v. Thayer, supra, n. 115; American Smelting and Refining Co. v. Bunker Hill Co., supra, n. 75; Texas Co. v. Central Oil Co., supra, n. 77.

be denied to the grower; and second, because even though such a decree might be granted, the association could render it nugatory. Neither of these defenses, however, is of any avail to the contract breaker.

The rule of mutuality as laid down in the Civil Code, section 3386, reads:

> "Neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance."

The rule has been criticized elsewhere,[123] but it stands firmly established in California by a long line of cases.[124]

A contract to render personal service cannot be specifically enforced;[125] hence specific performance cannot be granted of an obligation for which personal service is the consideration.[126] But if the personal services have been performed or nearly so at the time suit is brought, then specific performance will lie. The test of mutuality is determined by the time of filing the bill and not the time of the execution of the contract.[127]

In the poultry contract no personal service is to be rendered by the buyer,[128] hence there is no basis for the application of the rule on this ground. But even conceding that personal service is involved, the contract is still specifically enforcible if the service has been substantially rendered before the action is brought.

The primary obligation of the association is to resell the eggs it receives from its members. If it has contracted in advance for

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[123] Bond, Mutuality in the Enforcement of Contracts for Personal Service, 55 Central Law Journal, 64; Clark, Specific Performance, § 181; Clark, Some Problems in Specific Performance, 31 Harvard Law Review, 271. See also Great Lakes v. Scranton Coal Co. (1917) 239 Fed. 603, 609; Montgomery Traction Co. v. Montgomery Light Co. (1916) 229 Fed. 672, 114 C. C. A. 82; Ames, Lectures on Legal History, p. 376.

[124] See cases cited supra, n. 99, 100, 101, 102, 103, 109, 110, 111 and 112.

[125] Cal. Civ. Code, § 3390.

[126] Supra, n. 124.

[127] Bullard v. Carr (1874) 48 Cal. 74; Thurber v. Meves (1897) 119 Cal. 35, 50 Pac. 1063; Spires v. Urbahn (1899) 124 Cal. 110, 56 Pac. 794; Brown v. Town of Sebastopol, supra, n. 51; Furtinata v. Butterfield, supra, n. 49; King v. Gildersleeve (1889) 79 Cal. 504, 510, 21 Pac. 961; Archer v. Harvey (1912) 164 Cal. 274, 277, 128 Pac. 410; Lattin v. Hazard (1891) 91 Cal. 87, 27 Pac. 515; Pacific Ry. Co. v. Campbell-Johnston (1908) 153 Cal. 106, 94 Pac. 623; Holin v. Castro (1902) 136 Cal. 605, 611, 69 Pac. 432; Roy v. Pos (July 26, 1920) 60 Cal. Dec. 88.

[128] Supra, p. 395 et seq.

the sale of substantially all its eggs, it has already performed its obligation to resell and any lack of mutuality of remedy that might have existed has been removed by such performance. Furthermore, in the poultry contract, it would appear that the seller has waived the defense of lack of mutuality. By the terms of the contract, the seller expressly agrees that specific performance will lie at the option of the buyer in case of breach of any material provision of the contract.[129] It is submitted that by this clause the seller waives any defense which tends to defeat the remedy of specific performance, provided that public policy does not prohibit the waiver.

Section 3513 of the Civil Code states as a maxim of jurisprudence:

> "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

It has been said that this section of the code represents the law of California and there are few provisions of the code which cannot be changed by the agreement of the parties.[130] Among the laws intended for a party's benefit, the advantages of which may be waived, are the statute of limitations;[131] exemption of property from execution;[132] statutory liens;[133] stockholders' liability;[134] and presentation and notice.[135] Is public reason any more involved in these rights than in the right to urge the defense of lack of mutuality?

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[129] Paragraph 11 of the contract provides: "The Seller agrees that in the event of a breach by him of any material provision hereof, particularly as to delivery or marketing of any eggs or poultry other than to or through the Buyer, the Buyer shall, upon proper action instituted by it, be entitled to an injunction to prevent further breach hereof and a decree for specific performance hereof, according to the terms of this agreement; and the Buyer and the Seller expressly agree that this agreement is not a contract for personal service or demanding exceptional capacity or talents and that this is a contract for the purchase and sale of personal property under special conditions and circumstances; and that the Buyer limits its purchases of eggs and poultry to producers co-operating with it under this form of contract and can not go out into the open markets and buy eggs or poultry to replace any which the Seller may fail to deliver; and that this contract will be the proper subject for the remedy of specific performance in the event of a breach thereof."

[130] 6 California Law Review, 444, at 447.

[131] State Loan Co. v. Cochran (1900) 130 Cal. 245, 252, 62 Pac. 466; Bliss v. Sneath (1898) 119 Cal. 526, 51 Pac. 848.

[132] Keybers v. McComber (1895) 67 Cal. 395, 7 Pac. 838; Stanton v. French (1890) 83 Cal. 194, 23 Pac. 355.

[133] Bowen v. Aubrey (1863) 22 Cal. 566.

[134] Wells v. Black (1897) 117 Cal. 157, 161, 48 Pac. 1090, 59 Am. St. Rep. 162, 37 L. R. A. 619.

[135] Cal. Civ. Code, §§ 3163 and 3190.

Public policy would be involved if the defense of personal service were waived. In that case, the inhibition of the Thirteenth Amendment against involuntary servitude would be breached.[136] But no principle of public policy is violated where the plaintiff is to perform personal service and the defendant waives the defense of lack of mutuality. If he may waive the statute of limitations, or presentation and notice, or stockholders' liability, it would seem that he may likewise waive the defense of lack of mutuality of remedy. This is particularly so in view of the modern tendency of courts to discard the rule except when the justice of the case requires its retention.[137]

Furthermore, the code as originally enacted in 1872 expressly provided for specific performance by agreement. It stated:[138]

> "Except as otherwise provided in this article, the specific performance of an obligation may be compelled . . . . 4. when it has been expressly agreed, in writing, between the parties to the contract, that specific performance thereof may be required by either party. . . . ."

This was amended in 1874 to read:

> "Except as otherwise provided in this article, the specific performance of an obligation may be compelled."

The subdivisions of the section including the paragraph quoted above were stricken from the statute. Thus before the amendment of 1874, specific performance by agreement was recognized by the California code. In 1895, in Krouse v. Woodward,[139] it was claimed that the amendment of 1874 narrowed this branch of equity jurisdiction in California, but it was there decided that the power of the court to enforce specific performance had not been so narrowed; it was further suggested in dictum that the jurisdiction of equity had been enlarged by the change. The dictum was repeated in Shannon v. Cavanaugh,[140] but without reference to the Krouse case, and was definitely repudiated by the supreme court in 1915 in Morrison v. Land,[141] again without mention of the Krouse case. The decision of the Krouse case that the power of equity had not been narrowed by the change of the code section in 1874, remains unimpeached, however, and must be taken

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[136] Supra, n. 121.
[137] Supra, n. 123.
[138] Cal. Civ. Code, § 3384.
[139] (1895) 110 Cal. 638, 641, 42 Pac. 1085.
[140] (1910) 12 Cal. App. 434, 439, 107 Pac. 574.
[141] (1915) 169 Cal. 580, 587-8, 147 Pac. 259.

as law. If specific performance by agreement was recognized by the California code in 1872, if the code amendment in 1874 did not narrow the former jurisdiction of equity, then specific performance by agreement is still permissible in California, subject to the proviso, "Except as otherwise provided in this code." And there is nothing in the code or elsewhere to prevent specific performance by agreement.

In view of the many rights which the California courts have held can be waived, in view of the tendency of the American courts to discard the rule of mutuality of remedy, in view of the code provision for specific performance by agreement and the decisions thereunder, it is submitted that the defense of lack of mutuality of remedy can be waived in California, and is waived by the clause of this contract. In any case, however, it must be borne in mind that this contract does not involve lack of mutuality of remedy. It requires no personal service of the corporation. If it did, the resulting lack of mutuality could be removed by substantial performance or by the seller's waiver of this defense.

But, even admitting that specific performance may be enforced against the association, it has been urged that mutuality of remedy is still lacking because the association has the power to render any decree nugatory.

The articles of incorporation of the Poultry Producers provide that the corporation may purchase any or all of the shares held by any member; the contract provides that the buyer and seller are relieved from their obligations in case the buyer avails itself of this right. Thus, it is said, the association, by purchasing all of the growers' stock, may extinguish its obligation and nullify a decree.

This question is thoroughly discussed by Professor Pomeroy.[142] He says:

> "The latest extension of the defense of lack of mutuality is to contracts which are terminable at the will or option of the plaintiff; a common example being the contract to lease for purposes of mineral exploration and development, with the stipulation that the lease may be surrendered at any time at the will of the lessee. A line of cases holds that inasmuch as specific performance would be refused at the suit of the lessor, since the lessee would have it in his power to render the decree of the court nugatory by immediately surrendering

[142] 2 Pomeroy's Equitable Remedies (2d ed. 1919) § 774.

his lease, therefore the lessee, however ready, willing and able to comply with his part of the contract for a considerable length of time, must fail of relief. The rule in question is not of very long standing. It dates from a *dictum* in Rutland Marble Co. v. Ripley and the decision in Rust v. Conrad.

"The decision in Rust v. Conrad was deemed so detrimental to the development of mineral resources of Michigan that it was promptly nullified by legislative act. (See 43 N. W. 999.)

"The cases succeeding these appear to have followed these eminent courts on the assumption that the rule was established by a long line of unquestioned authorities; none of them bear internal evidence of having examined the subject on principle.

"The well known rule that specific performance is to be refused of a contract to enter a partnership at will is pointed to as proof. The analogy, however, does not bear examination. The plaintiff, in the cause in question, gives a sufficient practical demonstration of his desire to carry out the contract and not abandon it by going to the expense of bringing suit. But the fallacy of these decisions goes deeper than this. Relief is refused, not because the court is unable to secure such performance as is due from the plaintiff while he elects to keep the contract alive, but because the court is unable to compel the plaintiff to do something *that he had never contracted to do, viz.,* to keep the contract alive for a definite, predetermined period. These holdings assume that the doctrine as to mutuality is an artificial rule of reciprocity, and wholly lose sight of its fundamental purpose, which is simply to secure performance on the plaintiff's part of his executory promise.

"The better view is that of the circuit court in Singer Sewing Machine v. The Button-Hole Co. (1 Holmes 253, Fed. Cas. 12, 904). There the court held that the objection of lack of mutuality would not prevent the enforcement of the contract, so long as it was actually kept alive by plaintiff's continued performance."

The reasoning of Professor Pomeroy appears to be based upon both justice and logic; the California courts may be expected to reach the same conclusion.

It would appear that the contract does not lack mutuality and that no valid objection to specific performance can be interposed on this ground. In addition, by its very terms, the contract prevents the seller from relying upon this defense.

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(To be continued.)