EQUITY—SPECIFIC PERFORMANCE—AFFIRMATIVE ASPECT OF DOCTRINE OF MUTUALITY—[Missouri].—Plaintiff, who had paid the full purchase price as vendee in a land sale contract, sued at law on the contract.[1] Defendants, answering, prayed that plaintiff be required specifically to accept the deed. Over plaintiff's objection, the suit was tried in equity on defendant's prayer for specific performance. *Held:* Since plaintiff could have got specific performance against defendants, defendants were entitled to specific performance against the plaintiff under the theory of mutuality of remedy. *Rice v. Griffith.*[2]

The doctrine of mutuality of remedy in specific performance seems first to have been formulated by Fry in his work on *Specific Performance.*[3] This doctrine has two aspects, negative and affirmative. The former, which denies specific performance to a plaintiff when defendant could not have got it against him, has been severely criticized by numerous text writers[4] and has been so riddled with exceptions that it can hardly be said to be a rule.[5] Until the instant case, all but one[6] of the Missouri decisions concerning mutality dealt with its negative aspect.[7] The affirmative doctrine, illustrated by the instant case, is seldom enunciated. It is most often found in suits by a vendor of land to require the purchaser to *pay the purchase price* and take the deed.[8] In these cases, however, the real reason for the equity

1. Probably a suit for money had and received. Plaintiff contended that defendants had rescinded the contract.

2. (Mo. App. 1940) 144 S. W. (2d) 837.

3. See Fry, *Specific Performance* (3d Am. ed. 1884) 214, (2d Am. ed. 1861) 198.

4. See, e. g., Restatement, *Contracts* (1932) sec. 372(1); Walsh, *Equity* (1930) 345, sec. 69; 5 Williston, *Contracts* (Rev. ed. 1937) 4007, sec. 1433; Ames, Mutuality in Specific Performance (1903) 3 Col. L. Rev. 1; Cook, The Present Status of the "Lack of Mutuality" Rule (1927) 36 Yale L. J. 897; Durfee, Mutuality in Specific Performance (1922) 20 Mich. L. Rev. 289.

5. Ames, supra note 4, lists eight exceptions.

6. Paris v. Haley (1875) 61 Mo. 453.

7. Denying recovery: Glass v. Rowe (1890) 103 Mo. 513, 539, 15 S. W. 334; Warren v. Castello (1891) 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; dissent, Sherwood, J., in Jones v. Williams (1897) 139 Mo. 1, 87, 39 S. W. 486, 40 S. W. 353; McCall v. Atchley (1914) 256 Mo. 39, 164 S. W. 593; Falder v. Dreckshage (Mo. App. 1921) 227 S. W. 929. See also Russell v. Geyer (1836) 4 Mo. 384, 414; Mastin v. Halley (1875) 61 Mo. 196, 201. The following are a few of the cases enunciating exceptions to the rule: Smith v. Wilson (1901) 160 Mo. 657, 61 S. W. 597; Nokol v. Becker (1927) 318 Mo. 292, 300 S. W. 1108; Jones v. Jones (1933) 333 Mo. 478, 63 S. W. (2d) 146, 90 A. L. R. 219.

8. Kahn v. Orenstein (1921) 12 Del. Ch. 344, 114 Atl. 165; Morgan v. Eaton (1910) 59 Fla. 562, 52 So. 305, 138 Am. St. Rep. 167; Migatz v. Stieglitz (1906) 166 Ind. 361, 77 N. E. 400; Rock Island Lumber & Mfg. Co. v. Fairmont Town Co. (1893) 51 Kan. 394, 32 Pac. 1100; Bowman v. Waugh (1922) 223 Ill. App. 563; Hopper v. Hopper (1863) 16 N. J. Eq. 147; Johnston v. Wadsworth (1893) 24 Ore. 494, 34 Pac. 13; Kipp v. Laun (1911) 146 Wis. 591, 131 N. W. 418; Heins v. Thompson & Flieth Lumber Co. (1917) 165 Wis. 563, 163 N. W. 173. The instant case seems to be the first actual Missouri decision on the affirmative theory of mutuality of remedy, although there was *dicta* in Paris v. Haley (1875) 61 Mo. 453, that the vendor might obtain specific performance on the basis of mutuality of remedy.

jurisdiction would seem to be the inadequacy of the legal remedy because of the uncertainty of the measure of damages.[9] The difference between the contract price and the market value of the land may often be nominal, and the vendor is left with land for which there is no ready market, and upon which taxes and other liabilities may accrue.

In the instant case, the vendee had paid the entire purchase price. No cases were cited, and none have been found in which a vendee in such a situation was required by specific performance to accept a deed.[10] The language of the opinion is somewhat ambiguous. Although it indicates that the decision was based entirely upon the ground of mutuality of remedy,[11] yet the court groped for some further basis for its holding. This basis seems to be inadequacy of remedy at law, on the tenuous ground that specific performance is necessary to rid defendants "of the land and all the burdens and liabilities attaching to it."[12] Inadequacy of relief at law has always been a basis on which equity has acted.[13] Therefore, if there is such inadequacy of legal remedy, it would seem unnecessary to talk about mutuality of remedy at all. In the instant case, it might even be argued that defendants' relief at law, as defendants, was adequate, since plaintiff had filed her suit at law and in the normal course of events would have taken the deed if she had lost.

The affirmative application of the mutuality rule has been condoned by a few writers.[14] It is, however, expressly rejected by the American Law Institute's Restatement of Contracts.[15] The theory of mutuality has so often been connected with its discredited negative aspect that the resurrection of an affirmative doctrine is apt to confuse rather than clarify. Furthermore, there seems little justification for extending equity jurisdic-

9. See Maryland Clay Co. v. Simpers (1902) 96 Md. 1, 53 Atl. 424; Restatement, *Contracts* (1932) sec. 360; Walsh, *Equity* (1930) 341, sec. 68.

10. In all the cases cited by the court, suit was to require defendant to pay the balance of the purchase price and accept the deed.

11. See, e. g., Rice v. Griffith (Mo. App. 1940) 144 S. W. (2d) 837, 842: "It is well settled that a vendor as well as a vendee, may maintain an action for specific performance. Various reasons have been advanced for this rule. * * * In this state the doctrine has been based upon the theory of mutuality."

12. In Rice v. Griffith (Mo. App. 1940) 144 S. W. (2d) 837, 843, the court quoted from Fry, *Specific Performance:* "* * * it will be apparent that damages will not place the vendor in the same situation as if the contract had been performed; for then he would have got rid of the land and all of the burdens and liabilities attaching to it, and would have the purchase money in his pocket; whereas, after an action for damages, he still has the land, and, in addition, damages * * *." It is noteworthy that this same passage was quoted in Paris v. Haley (1875) 61 Mo. 453, wherein the court stated that the passage would have no application to a case such as that, where the vendor had the notes of the purchaser in his pocket. Here the vendor had the *cash* in his pocket.

13. See, e. g., Walsh, *Equity* (1930) 133, sec. 25.

14. McClintock, *Equity* (1936) 115, sec. 66; Durfee, supra note 4.

15. Sec. 372(2). "The fact that the remedy of specific enforcement is available to one party to a contract is not in itself a sufficient reason for making the remedy available to the other."

tion to a case where the remedy at law is adequate; and if the remedy is inadequate, there is a sufficient basis for equity jurisdiction without reference to the mutuality doctrine.[16] V. M.

EVIDENCE—ADMISSIBILITY OF TELEPHONE CONVERSATIONS—IDENTIFICATION OF CALLING PARTY—[Missouri].—In a suit to recover accrued rent, plaintiff introduced evidence concerning a dunning letter which plaintiff's lawyer had written to one of the defendants. In order to show defendants' knowledge of the letter, plaintiff sought to introduce his lawyer's testimony concerning a telephone conversation that took place when the lawyer was called by a party who identified himself as one of the defendants, saying he had received the letter and wanted to talk to plaintiff's lawyer about it. From the court's refusal to admit this testimony plaintiff appealed. *Held*, that the testimony was admissible. *Morriss v. Finkelstein*.[1]

Generally, evidence of telephone conversations is admissible when the witness can identify the other speaker.[2] Therefore, the circumstances under which identification is sufficiently certain give rise to the only real problem. It has long been held in most jurisdictions that a conversation is admissible when it is related by the person who called the listed number of an office or person, and received an answer. There is a presumption that the person answering the telephone was the person listed, or one authorized by him to answer.[3] Identification of the voice of the person answering in such cases has not been held to be a requisite of identification.[4]

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16. The affirmative mutuality doctrine was rejected because of adequacy of the legal remedy in G. W. Baker Mach. Co. v. U. S. Fire Apparatus Co. (1916) 11 Del. Ch. 386, 97 Atl. 613, and in Eckstein v. Downing (1887) 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404. On the other hand, in the early case of Yulee v. Canova (1864) 11 Fla. 9, specific performance at the suit of a vendor of sugar was decreed on the basis of mutuality of remedy, even though the relief sought was merely in the nature of compensation in damages or value. In Morgan v. Eaton (1910) 59 Fla. 562, 52 So. 305, 138 Am. St. Rep. 167, and in Migatz v. Stieglitz (1906) 166 Ind. 361, 77 N. E. 400, there are *dicta* to the effect that specific performance would be decreed even though there was a remedy at law.

1. (Mo. App. 1940) 145 S. W. (2d) 439.

2. Hammond Lumber Co. v. Weeks (1930) 105 Cal. App. 315, 287 Pac. 573; Meyer Milling Co. v. Strohfeld (1929) 224 Mo. App. 508, 20 S. W. (2d) 963, cert. quashed in State ex rel. Strohfeld v. Cox (1930) 325 Mo. 901, 30 S. W. (2d) 462; Williamson-Halsell-Frasier Co. v. London (1932) 154 Okla. 24, 6 P. (2d) 671.

3. Wolfe v. Missouri Pac. Ry. (1888) 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; Guest v. Hannibal & St. Joseph Ry. (1898) 77 Mo. App. 258; Meeker v. Union Electric Light and Power Co. (1919) 279 Mo. 574, 216 S. W. 923; Ozark Fruit Growers Ass'n v. St. Louis-San Francisco Ry. (1932) 226 Mo. App. 222, 46 S. W. (2d) 895; Shelton v. Wolfe Cheese Co. (Mo. 1936) 93 S. W. (2d) 947. See 7 Wigmore, *Evidence* (3d ed. 1940) 616, sec. 2155; McKelvey, *Evidence* (4th ed. 1932) 206, 207, sec. 131.

4. Theisen v. Detroit Taxicab and Transfer Co. (1918) 200 Mich. 136, 166 N. W. 901, L. R. A. 1918D 715; Barrett v. Magner (1908) 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531; Globe Printing Co. v. Stahl