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SPECIFIC PERFORMANCE OF RIGHT OF INSPECTION INCIDENT TO OPTION

By M. T. Van Hecke*

It frequently happens that a tract of land or a business is sold under such conditions that the only commercially sensible arrangement is a tentative contract whose finality is to await the results of a detailed investigation by the buyer into the characteristics of the seller's property. This investigation may be relatively unlimited in scope and intended to create a basis for an independent judgment as to the desirability of the proposed purchase. If so, the contract is likely to take the form of the conventional option to buy. The inspection may, on the other hand, be limited to designated items and intended as a substantiation either of the purchaser's previous understanding of the situation or of the representations of the seller which have already induced the present status of the negotiations. In this case, the transaction is often described in an instrument which in terms purports to be a present agreement to buy and sell the land or the business, with a privilege reserved by the purchaser to withdraw upon specified conditions. The buyer wants the seller to be so tied up that he (the buyer) may be assured of the availability of the property if the examination turns out satisfactorily. And the seller, confidently expecting that result, wants to bind the buyer as far as possible in advance. Usually the provisions as to the ultimate purchase and sale, such as price, terms, and closing, are clear. So also are those relating to the details of the investigation, such as matters to be looked into, which party is to bear the expense, extent of production of data and co-operation from the seller, time during which it is to

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be made, and the time allowed for and the effect of notice of the buyer's election to terminate the contract. As a rule, in this sort of arrangement, the withdrawal is to be effective immediately upon notice.

Careless draftsmanship occurs most frequently, however, in the description of the precise condition of the purchaser's reaction, after the inspection shall have been completed, which is to be a prerequisite of his privilege to quit. Frequently, he "may cancel this contract at any time" prior to a date mentioned. Often, he may bring the deal to an end "if, in his sole discretion, the results of the investigation are not satisfactory." Sometimes the clause reads, "if the results are not reasonably (or substantially) satisfactory." Once in a while the election is conditioned upon failure to discover certain designated matters to be in a described condition. Or, the option to terminate is to mature "if the seller's representations are not verified," either objectively or to the satisfaction of the buyer.

Suppose, now, that the buyer in due time proceeds to the contemplated examination of the seller's property, seeking in good faith to inform himself adequately before finally deciding whether to complete or drop the purchase, and suppose, further, that not because of any well-based quarrel with the purchaser's capacity to go through with the deal, but because of either the seller's wish to keep the property or to sell to a higher bidder, the inspectors are met by the seller's refusal to permit the investigation and by his repudiation of the entire transaction. What may the purchaser do? Doubtless, he may elect to take the property sight unseen, waive his privileges under the surrender clause, make the requisite tender, and sue either at law for damages\(^1\) or (assuming no innocent purchaser has intervened) in equity for a conveyance.\(^2\) But may he refuse to do any of these things, and, while his option to withdraw remains open and unexercised, have specific performance of the inspection privilege alone? The circuit court of appeals for the eighth circuit has recently said no.\(^3\)

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\(^1\)Gurfein v. Werbelovsky, (1922) 97 Conn. 703, 118 Atl. 32, and comment 32 Yale L. J. 496; Lilienthal Bros. v. Stearns, (C.C. Or., 1903) 121 Fed. 197; Morse v. Tillotson (C.C.A. 2d Cir. 1918) 253 Fed. 340.


\(^3\)Electric Management & Engineering Corporation v. United Power & Light Corporation (of Kansas) et al., (C.C.A. 8th Cir. 1927) 19 F. (2d) 311.
case in particular, however, let us look briefly at the more important legal problems raised generally by the foregoing situation.

Although "there is always danger in applying a generic term to a contract, and then subjecting it to the general rules controlling contracts of that nature, irrespective of its special stipulations," it may be observed that a contract of the sort under discussion might be treated as either a present sale, a contract to buy and sell, or an option to buy. Where the subject matter is land or a building, it is difficult to conceive of so informal a writing creating a title thereto in the buyer. Otherwise, when the thing bought and sold is the controlling interest in a business as represented by its corporate stock. Following the suggestion that "an option to purchase if he liked is essentially different from an option to return a purchase if he should not like," it is believed that the language summarized in the opening paragraph of this paper would usually be construed to create a determinable, but until determined a fully existing, bilateral contract to buy and sell, as distinguished from the offer contained in the conventional option.

Independently of these matters, the provisions governing the inspection itself will be either of two types: an exchange of unconditional promises, on the part of the buyer to make the investigation and on the part of the seller to facilitate it in a co-operative spirit; or a similar promise by the seller, but with the matter left optional as to the buyer. The first type is perhaps the more usual. The distinction is, moreover, relatively immaterial, save as bearing upon the issue of consideration, for by our hypothesis the purchaser has elected to inspect and is bringing his bill to coerce the seller into allowing him to do so.

Consideration to support both the seller's promise to grant the inspection and his promise to convey may arise from any one or any combination of four sources. A seal will of course still have its common law significance in some states. Usually these contracts recite the payment by the buyer to the seller of a small amount of cash. Everywhere save in one or two states which regard one dollar as insufficient, this would fill the bill. Often

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4Hogan v. Richardson, (1924) 166 Ark. 381, 266 S. W. 299, noted in 9 Minnesota Law Review 394; Rude v. Levy, (1908) 43 Colo. 482, 96 Pac. 560.
the buyer expressly undertakes to stand all or part of the cost of the examination. Usually, he is to do so whether the matter is mentioned or not. Where a corps of experts in accounting, law or engineering is required to do the work, especially if apparatus for drilling or mining has to be brought onto the premises, this expense may be large. Thus, either the express or implied assumption of this responsibility or the actual expenditure of money for that purpose (except where it was not contemplated by the seller) has been held to constitute consideration.9 If there is an unconditional promise by the buyer to make the inspection, this alone would furnish the necessary consideration for the inspection rights.10 But the authorities are divided,11 as to whether the mere promise to buy coupled with the limited withdrawal privilege is enough. It is submitted that this promise is not "illusory" if, in spite of the use of such sweeping language in one clause as that previously quoted, the buyer's exercise of his privilege to quit is by the whole tenor of the instrument, the nature and main purpose of the inspection, and the character of the transaction, to be predicated upon a fair and honest test, made judicially and in good faith and not upon an arbitrary and capricious will irrespective of the facts. There is no room here for purely subjective satisfaction in the sense of compliance with the vagaries of individual taste, sentiment or feeling. Instead, especially where in large measure the inspection is to be made for the purpose of substantiating detailed representations concerning the characteristics of the property, the cancellation must be based upon a judgment that can be checked objectively by the chancellor.12


10Williston, Contracts, sec. 61 at note 94.

11See Corbin, Effect of Options on Consideration, 34 Yale L. J. 571, 583-589, 32 Yale L. J. 496; Patterson, Illusory Promises and Promisors' Options, 6 La. L. B. 129, 134-152; but see 1 Williston, Contracts, sec. 104 at note 91; Tentative Restatement, Contracts, American Law Institute (1926) secs. 77, 82 (e) and comment. Quere, Gibson v. Riehle, (1914) 26 Col. App. 127, 140 Pac. 933.

If the difficulties incident to the inspection and withdrawal features were absent, there could be little question of the specific enforceability in equity of the ultimate sale contemplated by this type of contract, whether the subject matter be land, a business as a going concern, 13 or the controlling interest in a corporation as represented by stock obtainable only from the defendant and without a market price. 14 Relief at law could not adequately compensate the purchaser. The question would not be whether a jury would be in a position to assess damages at all, but whether, however accurate the legal measure of damages might be in this connection, any amount of money thereby obtained would secure to the purchaser that (or its equivalent) to which the contract was designed to entitle him. In other words, the purchaser may insist that he has a right to obtain this land, or a controlling share in this company, not in what someone else may think a venture just as good. And the common law remedies afford no way to get just that. 16 It is sometimes stated, however, that equity will not give relief where the parties contemplate the acquisition of the control of a public service corporation. 17 But it is not the mere transfer of control of such a company that has been deemed offensive to public policy in these cases; rather, it has been the means used to attain that end. Thus, in Foll's Appeal, 18 the court felt that it would be lending itself to a speculative scheme of one man to manipulate the affairs of a bank with a bare majority of the stock acquired upon borrowed capital, to the likely injury of the bank. Similarly, in Gleason v. Earles, 19 the court was called upon to give effect to a pool of bank stock which would take control out of the hands of those elected by the stock-

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17Second headnote to the state report in Ryan v. McLane, (1900) 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501; first headnote to the state report in Foll's Appeal (1879) 91 Pa. St. 434, 36 Am. Rep. 671.
19(1914) 78 Wash. 491, 139 Pac. 213, 51 L. R. A. (N.S.) 785.
holders. And in *Ryan v. McLane*,\(^{20}\) the purchaser had made his contract with a committee holding the stock of many owners under a voting pool (itself deemed illegal) knowing that the committee had by the contract violated restrictions upon its powers of sale. The company involved was a railroad. There is no public policy prohibitive of a contract to purchase and sell the controlling interest in the stock of a public utility, when free from such inequitable incidents or consequences.\(^{21}\)

Moreover, if, as is often the case, it is alleged that the vendor is about to dispose of the property, or has actually disposed of it to one with notice, the original buyer under a specifically enforceable bilateral contract may have adequate interlocutory relief to preserve the status quo at least until a hearing may be had on the merits.\(^{22}\) He is entitled thus to be assured of the continued availability of the property, especially where it consists of easily negotiable securities. Otherwise, a successful ending to the litigation would be a barren victory.

And, just as clearly, (still assuming the absence of any option) the buyer may have appropriate equitable relief against any attempted disruption of his express or implied right to inspect the premises or to be furnished with information concerning them. The decided cases bearing upon this point are few, and they deserve more than passing attention. Three will be considered in the text.

*Smith v. Peters*\(^{23}\) was an action for specific performance of a contract to sell a house and fixtures, the former at a named price and the latter at a price to be designated after an appraisal by a Mr. Lound. The latter attempted to make the valuation but was denied access to the house by the seller. Upon motion, the court compelled the vendor to allow the entry and to enable the appraisal to proceed, saying, in the course of the opinion:

"I have no hesitation in saying that there is no limit to the practice of the court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the performance of its functions, namely, the administration of justice at the hearing of the cause. . . . The defendant has ad-

\(^{20}\)(1900) 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501.


\(^{23}\)(1875) L. R. 20 Eq. 511.
duced no evidence in defence of his conduct; he has obstructed Mr. Lound in the performance of the duty which he has agreed that he should perform. Can it be tolerated, in a country where violence is not allowed, in which Mr. Lound and his clerks would not be permitted to force an entry, although in pursuance of an agreement, that a court of justice shall say no provision can be found for such a case, and that it shall be permitted for defendant to say, 'Although I have sold this furniture and fixtures at a valuation to be made by Mr. Lound, a valuer of my own choice, I will at my will and pleasure so obstruct Mr. Lound in the performance of his duty, and prevent his completing the valuation which I have already contracted he shall make?' I do not believe it to be the law of this court, and I do not believe it will ever be so decided."

*Kann v. Wausau Abrasives Co.*, presented this situation. The defendant owned the only available commercial supply of crystalline garnet in the United States. It used only a portion of this in its own manufacturing operations, and contracted to sell to the plaintiff a certain quantity to be delivered before a date mentioned. In the same instrument, it gave the plaintiff an option to purchase, during a five-year period, the entire output of the mine in excess of defendant's requirements. It also agreed to furnish to the plaintiff, six months prior to the beginning of this period, written information as to the amount of ore on the property, its own requirements, and its capacity for delivery, and to core-drill the mine for this purpose. The plaintiff made repeated and unsuccessful attempts to obtain the stipulated information. There were delays and adjustments concerning the original order which are not material now. This was a bill for specific performance of the agreement to furnish the information. The plaintiff had previously exercised his option as to the excess over the five-year period, sight unseen, as it were, but under the facts alleged in his bill he claimed the privilege to elect whether to apply for specific performance of the contract for future deliveries or to waive specific performance and sue for damages. He averred, however, that he could not intelligently make that decision without the promised information. The court overruled a demurrer to the bill, saying in part:

"The relief which the plaintiff asks for in the first instance is analogous to discovery by an inspection of the mine. Discovery is sought to enable the plaintiff not only to elect his remedy, but to determine his damages in case he elects pecuniary compensation instead of specific performance. In such a situation the trial

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25(1925) 81 N. H. 535, 129 Atl. 374. This is an excellent opinion.
court will do what justice requires. Details of performance and supervision can be provided for in the decree. If discovery of the capacity of the mine proves unreasonably burdensome to the defendant, justice may require that the work be performed by the plaintiff himself at the defendant's expense. All such questions properly arise at the trial and can be disposed of there by the exercise of sound judicial discretion... Affirmative relief may be denied if to grant it would mean an unwarranted invasion of individual rights, or necessitate an impracticable amount of judicial supervision. But the precise remedy eventually awarded, whether specific performance or an injunction against a breach of defendant's negative promise, must of necessity depend upon an equitable consideration of all the evidentiary facts and circumstances.\textsuperscript{26}

To a similar effect is \textit{Johnston v. Frederick Stearns & Co.}\textsuperscript{27} There the defendant corporation sold a number of shares of its own stock to the plaintiff employe, to be paid for out of the earnings of the business. The sale was made in consideration of the employe's services and to induce his taking a greater interest in the success of the enterprise. A certificate was issued to him, reciting that the stock was held by the company as collateral until paid for. The seller reserved a preferential option of repurchase, upon the employe leaving the service of the concern, at a price equal to the amount of earnings to be credited on account of the stock. Five years later, the plaintiff left the company, and called for an adjustment of the stock account. This being refused, the employe sued for specific performance of the contract in the event the stock should be found to have been fully paid for out of the profits of the preceding five years, and asked for an accounting, to be had under the direction of the court, of the net earnings during this period and of the proportion of those earnings which should be credited on the stock represented by the certificate. A demurrer to the bill was overruled, the court observing:

"But it is to be noted that the means of ascertaining whether and the time at which the net earnings of these shares had amounted to sufficient to cancel the obligation were necessarily within the control of the defendant. We can conceive of no reason, therefore, why the complainant is not entitled to have an accounting of the business sufficient to determine the question of whether these shares have been fully paid or if not what proportion have been paid, and, if paid for out of the earnings of the

\textsuperscript{26}(1925) 81 N. H. 535, 129 Atl. 378, 379. The cases cited by the court have been omitted here. See also, the tacit adoption of a similar doctrine in \textit{Stanton v. Singleton}, (1898) 6 Cal., U. D. 129, 54 Pac. 587, at page 589 of the Pacific Reporter.

\textsuperscript{27}(1910) 160 Mich. 247, 125 N. W. 29.
company, at what time such payment was concluded. This to our mind is the chief purpose of this bill. The accounting is not, as suggested, merely incidental to a specific performance of the contract. It is the real basis or at least a sufficient basis for the interposition of a court of equity. . . . As to the scope of relief which complainant is entitled to, it is perhaps not essential that that be determined on this hearing; but we see no difficulty such as it is claimed by the defendant exists. It is suggested that the court cannot decree specific performance to [by?] the complainant of the provision that he shall not offer this stock to others for sale until it has been offered to the defendant. While this may not entitle the complainant to the stock, relieved of such a condition, it certainly does not relieve the defendant of the obligation to transfer the stock upon being fully paid, and the court would have power to protect the defendant in that respect by its final decree.\footnote{28160 Mir. 252, 125 N. W. 29. The cases cited by the court have been omitted here.}

Now, it will be recalled that the courts in the cases just discussed and cited have been unwilling to deny the plaintiff relief upon a mere demurrer to a bill, but have insisted that the case should go to a hearing upon the merits so that a final judicial discretion might be exercised after all of the relevant facts had been gone into. It appearing from the allegations of the bill that the purchaser has had a legitimate need for information, there has been no balance of injuries so visible upon the pleadings alone as to outweigh the good that a decree might do. This, whether the information was to be furnished by the seller to the plaintiff in a given form, or produced through an investigation to be conducted by the purchaser himself, by a third person, or by the seller. The precise theory of relief has varied from accounting, an analogy to discovery, or specific performance, to injunction, as the nature of the coercion necessary has required. Whether defendant has had an option to repurchase, the plaintiff an election between specific performance and damages, or the plaintiff was bound to proceed, the courts have vigorously expressed confidence in their capacity to tie up all the loose ends and protect both parties by a properly framed conditional decree. The seller has not been allowed to take advantage of delay caused by his own wrongful conduct. Far from being turned back by objections that the court was undertaking to enforce only a part of the transaction, the judges have found in the production of the information a sufficiently important objective independent of the enforcement of the ultimate aspects of the contract as a whole. And
the difficulties attendant upon any personal services involved have been either ignored or gotten around by a negative decree.29

There seem to be no reported decisions opposed. The Pennsylvania case of City of Williamsport v. Citizens' Water & Gas Co.,30 where it was held that mandamus and not a proceeding in equity was the proper remedy to compel a water company to permit a city about to acquire the waterworks to inspect its books and plant for the purposes of evaluation, goes off on this distinction: There was no contract involved. The city's option to purchase (which had been exercised) and the defendant's duty to permit an inspection were brought into existence by a statute31 which fixed the price upon an original cost and maintenance basis. Nevertheless, two of the justices dissented. One of them said:

"The object of this proceeding is to compel a conveyance of property under the terms of the statute. This involved an accounting in order to determine the value of the property and the amount to be paid therefor. The case is one in which the services of a chancellor are peculiarly appropriate and desirable, in order to dispose of the questions involved, justly and equitably to all parties concerned. Any remedy that may be attempted upon the law side of the court will be uncertain, inconvenient and inadequate. I would sustain the jurisdiction in equity."32

When we turn from the interim protection possible to a purchaser under a bilateral contract to buy and sell, to that which is afforded to an optionee under the conventional option to buy, in advance of his exercise of that option, we find an apparent but quite distinguishable split of authority.

It should first be noticed, however, that almost everywhere both law and equity courts protect the optionee, when the option is either under seal or for a valuable consideration which has been paid, against the usual effects of any attempted withdrawal of the offer by permitting later acceptance to create a new contract.33 Thus to recognize the continuance of the offeree's power to accept is equivalent to a specific performance of a more or less implied promise to keep the offer open and not to revoke it during the

30(1911) 232 Pa. St. 232, 81 Atl. 316.
31This distinction was recognized in Town of Boonton v. United Water Supply Co., (1914) 83 N. J. Eq. 536, 91 Atl. 814; affirmed in memo. opinion in 84 N. J. Eq. 197, 93 Atl. 1086.
period mentioned. This rests in large part upon a realization that
the commercial world demands absolute performance by the op-
tionor. "The purchaser of an option to buy or sell land pays for
the privilege of his election. It is that very privilege which the
other party to the contract sells." The purchaser, as to this
aspect of the transaction, where consideration is present, has fully
performed. The court is called upon to enforce the only executory
phase of this branch of the contract. Of course, in nearly all of
the decided cases, the offer has been accepted and the price ten-
dered, so that the court is really called upon not for interim pro-
tection alone but for an order compelling the conveyance itself. In
other words, for specific performance of the contract resulting
from the acceptance of the offer. Nevertheless, when the optionor
made his abortive attempt at withdrawal, which was subsequently
ignored and its usual efficacy denied, the offer had not been
accepted and might never have been. For the period allowed in
the contract, indirect relief without the aid of any decree has
therefore been afforded by both the common law and equity sub-
stantive law to the optionee.

It is a mere circumstance that there have been relatively few
reported cases where the optionee has found it advisable or neces-
sary, in advance of his own acceptance of the offer, either to pre-
vent the optionor from selling the property involved or from vio-
lating any duty to furnish the information upon the basis of which
the election was to be made. But this fact should not, while the
prescribed period is still unexpired, prevent the occasional needy
one from having the direct aid of a court of equity to assure the
forthcoming of that information and the continued availability of
the property. The seller has been as fully paid in this case as in
that where the seller merely tries to withdraw; his obligations are
just as fixed, and the optionee's need for the continuance of his
privileges is just as real. In a word, the same commercial necessity
exists here as a reason for the direct intervention of a court of
equity that serves as a basis for the irrevocability of the offer. A
properly framed decree will protect the optionor by releasing the
property upon the lapse of a period equal to that originally set
by the contract if an acceptance has not been made, and by so con-
trolling the production of information or the inspection as to work

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35Corbin, Option Contracts, 23 Yale L. J. 641, 648-649; Corbin, Of-
fer and Acceptance, 26 Yale L. J. 169, 190; 3 Williston, Contracts, sec.
1441.
the least hardship possible, especially where the optionee is to stand the expense thereof. The problems of personal service, delay caused by the seller himself, and performance of only a part of the transaction at this time, should be no more disturbing than in the bilateral contract cases previously discussed.

Nor is there any appreciable difficulty in the way of the court’s administrative handling of the defendant. When the court permits the optionee by a timely acceptance to create a bilateral contract in spite of an attempted revocation of the offer, no decree relating directly to the attempted revocation is necessary. It is merely overlooked. If the court is asked to prevent a threatened disposition of the property, the only judicial action called for is an easily enforceable injunction. If interference with a proposed investigation to be made by the plaintiff is to be prevented, the decree again is negative. The court does not have to try to make the defendant act affirmatively against his will. If the seller is to produce certain records and written instruments, the making and enforcement of this order is no more formidable than the time-honored relief of ordering a conveyance. And if the seller is to make certain tests as a basis for the ascertainment of the data called for, the court, as was said in *Kann v. Wausau Abrasives Co.*,36

"will do what justice requires. Details of performance and supervision can be provided for in the decree. If discovery of the capacity of the mine proves unreasonably burdensome to the defendant, justice may require that the work be performed by the plaintiff himself at the defendant’s expense. All such questions . . . can be disposed of . . . by the exercise of sound judicial discretion."

There is only one situation where the court is likely to hesitate before the prospect of making the defendant go through with his preliminary duties, namely, that of submitting a valuation to arbitrators to be appointed by the parties. Traditionally, it has been feared that the defendant’s nominee, by refusing to function properly, may render the whole proceeding futile. This has served to prevent the granting of this sort of relief, except where the work of appraisal was to be done by a person previously agreed upon and whose probable integrity appealed to the court, and where the court has in substance been asked to order a conveyance at a reasonable price. The courts have compelled the seller, as has been seen, to submit to and to permit an appraisal by the single

36(1921) 81 N. H. 535, 129 Atl. 374.
valuer in the exception first mentioned, 37 and in the other to sell at a price determined by some substitute for the unworkable arbitration by nominees. 38

There is, of course, this novel feature to be considered. The optionee, while seeking the aid of a court of equity to prevent a threatened sale of the property and to compel the defendant's co-operation in the production of the promised information, insists upon the continued existence of his own power to elect whether or not to accept the offer. Now, it has often been pointed out that two aspects of this transaction are to be kept separate in our thinking about the feature just mentioned, 39 as they were kept separate in the minds of the parties. One is the seller's offer to make a bilateral contract. The other is the unilateral contract to keep the offer alive, not to dispose of the property, and to facilitate a production of certain information. There is no duty on the optionee to buy until the offer has been accepted. But since he has not asked for the property itself we need not concern ourselves with that phase of the matter now. And so far as the objects actually in suit are concerned, the optionee has already done his part. He has promised, and is under a duty to make the inspection. The consideration for the seller's obligations, in most cases, has been paid. And even if the contract were under seal, the optionee has made, we are assuming, a bona fide attempt, supported by litigation, to undertake the inspection contemplated by both parties to the contract, if an opportunity can be obtained. In other words, he has given or tendered to the vendor all that the latter was entitled or expected to receive for his own undertakings. For when we remember that the production of data was by the contract to precede and furnish a basis for the optionee's election, it is impossible to imagine that the seller could ever have desired a promise to buy (i. e., a favorable election) as the price of his own duty to furnish that information.

Let us now look at the cases, first as to the interim protection against a threatened sale, and second as to inspections.

38 These cases are collected in Mutual Life Ins. Co. v. Stephens, (1915) 214 N. Y. 488, 108 N. E. 856. On the specific performance of arbitration contracts see note in 31 Yale L. J. 670, and an article by Hayes in 1 Corn. L. Q. 225.
39 Corbin, Option Contracts, 23 Yale L. J. 641, 648-649; Corbin, Offer and Acceptance, 26 Yale L. J. 169, 190; 3 Williston, Contracts, sec. 1441.
One of the most striking is *Manchester Ship Canal Co. v. Manchester Racecourse Co.* A contract under seal, but apparently without any consideration other than the respective promises, provided that if the racecourse, which lay alongside the canal, should ever be proposed to be used for dock purposes, the owner would give the canal company the "first refusal" thereof. The optionor entered into negotiations with a third company for the sale of the property for dock purposes and then offered it to the optionee at a price greatly in excess of what it expected to obtain from the third company. This was refused and a counter-offer of a supposedly reasonable price rejected. The trial court's decision is thus summarized:

"The right of the canal company to have the 'first refusal' of the property had arisen; a 'refusal' implied an offer, not at any price, however extravagant, the racecourse company chose to ask, but a price which some other person was willing to give, and which the canal company could, if they chose, accept, and which it was within their statutory powers to accept. And the learned judge granted an injunction restraining the racecourse company from selling the racecourse to any person or company without having first offered it to the canal company at the same cash price that the intending purchaser . . . was offering; and also an injunction restraining the defendants from completing or carrying out [the proposed deal with the third company] unless and until that had been done." This was sustained upon appeal, on the ground that the contract involved an implied negative undertaking, and in spite of a showing that the optionee could not actually buy without "taking fresh statutory powers," this having been known to both parties from the beginning. The question of mutuality was not discussed.

There is apparently but one case contra, namely, *Peacock v. Deweese.* There the optionee, in advance of any acceptance, was refused an injunction against the optionor parting with the property. The price and time were fixed, but the option was neither under seal nor supported by consideration, unless the latter could be found in the provision that the optionee bound himself to make such tests for ochre as were satisfactory to himself. Whether

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40 [1901] 2 Ch. D. 37.
42 [1901] 2 Ch. D. 42.
44 (1884) 73 Ga. 570.
he had made any tests does not appear. Nor did he ask to be permitted to make any. The main ground for refusing to enjoin a sale of the property to others was the finding that the agreement was gratuitous and entirely voluntary. In other words, the case was probably one where neither law nor equity would have permitted the optionee, after an attempted withdrawal of the offer, to have created a contract to sell by an acceptance in time. All of the Georgia code provisions cited show the real trouble to have been lack of consideration. But the court then went on to say:

"The contract in this case is not mutual and binding upon all the parties thereto. The plaintiff in error may comply at his option or will; there is nothing in the writing that compels him to do anything for the benefit of the defendant in error. Equity will not decree the specific performance of a contract against one party, where, by the terms of the contract, no specific performance could be decreed against the other party."45

The contrast between this apparently unnecessary bringing in of the now thoroughly repudiated mutuality notion of Mr. Justice Fry,46 and the complete freedom from any similar dogma of the Manchester Case,47 not to mention the square repudiation of the doctrine's applicability in the decision next to be discussed, is due solely to the absence of consideration.

In Town of Boonton v. United Water Supply Co.,48 an optionee was given interim relief as to an inspection almost as a matter of course. A contract between the town and the water company for water service provided that the town might purchase the waterworks and at any and all times might inspect the books and vouchers of the company. Consideration existed in the town's patronage of the company under the contract. The town demanded the right to make an inspection without first exercising its option to purchase. The New Jersey court of chancery held that it was entitled to make the inspection and that mandamus was not a proper remedy, saying in part:

"From my examination of the case I have reached the conclusion that the relief prayed for by the complainant should be granted. There is no doubt in my mind that, read in connection with the other provisions of the contract, the words 'at any and all times,' which appear in paragraph eleven, mean that the water

45Peacock v. Deweese, (1884) 73 Ga. 571.
47[1901] 2 Ch. D. 37.
48(1914) 83 N. J. Eq. 536, 91 Atl. 814; affirmed in memo. opinion in 84 N. J. Eq. 197, 93 Atl. 1086.
company bound itself to give the inspection, even if the town did not exercise its option to purchase. The privilege, it appears, was incorporated in the contract to give Boonton a chance to know the true conditions before it should agree to exercise its option. This is frequently done where the public is concerned and is to be the purchaser. And it is no doubt true that without such right it would be difficult to get the people at large to sanction the making of a contract such as the one under consideration.... The suggestion made by counsel for the defendant, that the relief should not be granted because there is a want of mutuality if this is done before the town exercises its option, cannot prevail in view of our decisions, and further this contract by its terms gives this right of inspection to the town authorities—a right not given to the company. In other words, one party to this contract has a right which the other has not. The principle of mutuality cannot apply under these circumstances.... No hardship is suffered by the water company by an order for inspection as such order can be so framed as to prevent the inquisitive but disinterested person, or any competitor, if there be one, from coming to knowledge of the company's affairs. In accordance with these views, an order for inspection may be entered.49

That the court appreciated the significance of its views is indicated by the cases cited in support. Madison Association v. Brittin was an option to purchase conditioned not only upon the payment of the price but the entering into of an agreement by the purchaser later to erect and maintain a building on the premises. The court felt itself competent to protect the seller in this connection and refused to dismiss the purchaser's bill for a conveyance on that account. And the court in the famous Lajoie Case found mutuality to exist in spite of the plaintiff's privilege to dismiss the ball player upon ten days notice.

Apparently the only case that might be construed as a holding contra, is the 1915 decision of the New York court of appeals in Mutual Life Insurance Co. v. Stephens. The insurance company, as the lessee of certain real estate, had an option to purchase at a value to be fixed by arbitrators to be appointed by the parties. This was to continue for six months after the completion of such a valuation. The court refused at the suit of the optionee to order the vendor to proceed to a valuation by the appointment of his arbitrator until the plaintiff had bound itself to purchase by an

49(1914) 83 N. J. Eq. 537, 91 Atl. 814; affirmed in memo. opinion in 84 N. J. Eq. 197, 93 Atl. 1086.
50(1900) 60 N. J. Eq. 160, 46 Atl. 652.
52(1915) 214 N. Y. 488, 108 N. E. 856.
acceptance of the offer. Four things should be noticed about this case.

(1) The holding of the lease was ultra vires on the part of the plaintiff corporation, but because improvements had been made in reliance upon its terms and because the vendor had recognized the plaintiff as tenant and had accepted its performance to date, the court was unwilling to allow the vendor to escape his obligations on that account. One wonders, however, if the court did not feel that partly because of this factor, the company was asking too much when, before exercising its option, it was calling upon the court for specific performance of the agreement to arbitrate the value. Putting it another way, if an ultra vires transaction was to be enforced at all, then the plaintiff ought to do everything within its power, even if that called for a waiver of some of its privileges under the contract, before asking the court to assume the considerable burden of providing a substitute method of arriving at the value in lieu of the method provided by the contract.

(2) The court was mainly balked by a feeling that to order the already resisting defendant to appoint an arbitrator, when it seemed more than likely that the nominee would refuse to act impartially, would constitute a futile gesture. Conceding that courts have sometimes, by a reference or otherwise, determined the value of property in actions for renewal of leases or for conveyances of property at a value to be fixed by arbitration, it pointed out that that had been done only where the arbitration provisions were incidental and subsidiary to the main purpose of the suit and the courts were able to take the view that the contract method of arriving at the value was a matter of form rather than of substance. The court then went on to say:

"The only reason that occurs to me for requiring an appraisal in advance of the determination by the plaintiff to purchase is that it is necessary to enable the plaintiff to make its decision. But if that be so, the provision for an appraisal must be such an essential part of the contract that it can be enforced, if at all, only in the manner agreed upon. . . . And yet courts will not compel parties to name appraisers who may nullify the decree by refusing to serve. . . . If it is a mere matter of form, the plaintiff can decide as well before as after an appraisal whether it desires to purchase."

(3) The court held that the outstanding privilege of the plaintiff to determine whether or not to buy deprived the case of necessary mutuality.

"The general rule is now thoroughly established in this state that a contract must be mutual in its remedy to warrant a decree for its specific performance. Wadick v. Mace, 191 N. Y. 1, 83 N. E. 571; Levin v. Diets, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251. . . . The defendants however, could not have the remedy of specific performance either to compel an appraisal or to compel the plaintiff, after an appraisal, to exercise its option to purchase. . . . However, it is not essential that the mutuality of remedy shall exist at the inception of the contract. Owing to the defendant's refusal to name an arbitrator, the plaintiff's time to exercise its option has not expired. It may still elect to purchase, and thus supply the missing quality of mutuality of remedy, which will entitle it to specific performance."\(^{54}\)

The court ignored the fact that by its payment of rent and making of improvements upon the strength of the lease, the plaintiff had given to the lessor exactly that which under the contract the latter was entitled to receive in exchange for his agreement to keep the offer open and to arbitrate the value. The cases relied upon and the form of the utterance just quoted have been adversely criticised, both by a federal court\(^{55}\) sitting in New York and by Dean (now Mr. Justice) Harlan F. Stone in his article, The "Mutuality" Rule in New York.\(^{56}\) And the New York law of mutuality has been changed by the now famous opinion of Judge (now Chief Judge) Cardozo in Epstein v. Gluckin,\(^{57}\) decided in 1922:

"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 to defendant. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end. The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle."

Judge Cardozo concurred, it is true, in the decision of Mutual Life Insurance Co. v. Stephens. It is believed, however, that, applying the attitude just expressed to the facts of that case today, he would have found "the needs of equal justice" satisfied by the same considerations which led the court largely to ignore the ultra vires aspect of the lease. Since he also concurred in In re Fletcher,\(^{58}\)

\(^{56}\)16 Col. L. R. 443.
\(^{58}\)(1924) 237 N. Y. 440, 143 N. E. 248, noted in 34 Yale L. J. 98, holding the New York Arbitration Law inapplicable to this situation.
it is probable that he would again reach the same result but mainly because of the administrative impracticability of handling the defendant's nominee upon the board of arbitrators.

It is also true that in Epstein v. Gluckin, the plaintiff assignee of the vendee had done just what the court wanted the plaintiff optionee in the Mutual Case to do: he had bound himself to take the land and to pay for it by bringing his bill for a conveyance. Literally, therefore, it might be said that the utterance of Judge Cardozo has no effect upon the present significance of the "mutuality" notions expressed in the Mutual Case. There are two answers to that. One is that Judge Cardozo, although agreeing with the Mutual Case that "mutuality" did not have to exist at the time and by virtue of the terms of the contract, disagreed with the earlier pronouncement by refusing to state the principle in terms of what would have happened if the facts had been reversed and the defendant had been trying to get relief against the plaintiff. Instead, he gave voice to an administrative policy to be applied in the face of what has actually happened, a policy that gives much greater promise of adequate consideration to what the plaintiff has actually done and is likely to do than was ever possible under the earlier approach. The other answer, closely allied to the first, is that until the assignee in the Epstein Case had become bound to take and pay for the land he had given nothing to the vendor for his obligation to sell, whereas in the Mutual Case, the plaintiff, who was not asking for the land but only for the valuation, had already, in his occupancy of the premises, his improvements in reliance upon the lease, and his payments of rent, fully compensated the vendor for the requested preliminary performance.

(4) In any event, it is clear that the doctrine of the case of Mutual Life Insurance Co. v. Stephens is without any prohibitive effect upon the specific performance of informational privileges antecedent to the exercise of plaintiff's option where no mental hazards such as those derived from the elements of ultra vires and arbitration are present.

Add, now, a single element, or, preferably, substitute for the unconditional bilateral contract and the option to buy previously discussed, a bilateral contract in which the buyer reserves the

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69 As was said in Electric Management & Engineering Corporation v. United Power & Light Corporation (of Kansas) et al., (C.C.A. 8th Cir. 1927) 19 F. (2d) 311.  
60 Gibson v. Richie, (1914) 26 Col. App. 127, 140 Pac. 933, is subject to the same distinction. So also, is Kennerly v. Simonds, (D.C. N.Y. 1917) 247 Fed. 822.
power to withdraw, and what difference does it make? The seller has the buyer tied up far more definitely than in the option but not quite so definitely as in the absolute contract to buy. The withdrawal privilege, as we saw at the beginning of the paper, no matter how sweepingly phrased, is to be exercised not upon the basis of sheer whim but of a bona fide use of the material sought to be obtained. The buyer may be compelled, regardless of the allegations or prayer for relief in his bill,61 to go through with the ultimate purchase if the results of a proper test ought to satisfy him even if he insists that they do not, should the court's discretion demand this condition as the only fair correlative of the seller's performance. The court need not go that far, however, especially where the terminable promise to buy was not the sole consideration given for the right of inspection, when the court can see from the fact that the possessor of the power to quit has gone to expense and this litigation to obtain the information that he is not likely to exercise his power lightly and without adequate cause, and where, because verification of the seller's representations is so much the primary purpose in view, nearly everything will depend upon whether the seller was truthful and accurate at the time and has not wrongfully changed conditions since. By the hypothesis, the seller does not have to divest himself of his property and then wonder if the buyer will take and pay for it; he has been and is about to be furnished that which at the time of the contract's execution he apparently thought was an adequate exchange for his undertakings in respect to information. His is the only executory aspect of this part of the transaction, precisely as in the option case. Everything that has heretofore been said applies again with equal force here. We need only consider one new phase of the stock contention.

Namely, that the outstanding power in the plaintiff to withdraw robs the case of some supposed mutuality. This aspect of the "lack of mutuality" doctrine has been so elaborately worked out in the treatises62 and in this63 as well as other periodicals,64 that

623 Williston, Contracts, sec. 1442; Pomeroy, Specific Performance of Contracts, 3rd ed., sec. 169, note (e) at p. 438; Summers, Oil and Gas 241-271, 628-634.
63Note in 10 MINNESOTA LAW REVIEW 169.
64Articles and notes in 49 Am. L. Reg. 327, 334, 460; 3 Ill. L. Rev. 601-615; 58 U. Pa. L. Rev. 16; 27 Yale L. J. 261; 11 Ia. L. Rev. 69; 34 Yale L. J. 385, 371, 583-589.
it would be presumptuous indeed to go over the ground in detail again. The whittling down\(^65\) and final albeit indirect repudiation\(^66\) by the Supreme Court of its dictum in Rutland Marble Company v. Ripley,\(^67\) which started all the trouble, and the quick legislative nullification of Rust v. Conrad,\(^68\) because of its adverse effect upon the mineral development of Michigan, are well known. It has often been demonstrated that the courts which have sustained the contention have been misled by the mechanistic statement of the principle of mutuality which makes relief depend upon what would have happened if the situation had been exactly the opposite of what it actually is; that partly because in that event the power to quit in the hands of a then (as assumed) recalcitrant party would have rendered a decree futile, these same courts have confused the effect of a termination privilege in the plaintiff’s hands with that of one in the defendant; that they have sometimes been moved by considerations of hardship and unfairness; that they have failed to distinguish cases where the plaintiff agreed to buy only what he should want to buy\(^69\) without any possible basis for determining the amount; and that they have mistakenly relied upon cases where the plaintiff was suffering from the disability of coverture\(^70\) or infancy\(^71\) or where the rendition of purely personal services by the plaintiff, still executory and uncompleted, was to constitute the consideration for the defendant’s obligations.\(^72\) With


\(^67\)1870) 10 Wall. (U.S) 339, 359, 19 L. Ed. 955.


\(^69\)E. g., Hutchinson Gas and Fuel Co. v. Wichita Natural Gas Co., (C.C.A. 8th Cir. 1920) 267 Fed. 35. At p. 43, Sanborn, J., distinguishes the problem here being discussed: “Counsel cite cases in which suits for specific performance brought by holders of options to discontinue their performance at will . . . were sustained by the court; but in those cases neither the continuance of performance by the optionee for a fixed term nor their covenant so to continue was any part of the consideration of the agreements by the defendants to continue performance.” And see note 77, post.


absolute unanimity the writers agree (the problem has not arisen in English law, but the broad statements of Fry and Halsbury with respect to mutuality might be understood by some to point in a contrary direction) that the objection of "lack of mutuality" is without foundation while the contract lasts, especially where there is reason to believe the plaintiff's privilege will not be exercised without reasonable cause. The courts, however, with sometimes surprisingly uncritical adherence to supposed authority in ignorance of the latter's present significance, continue to disagree.73

None of the cases, on the other hand, deals with a situation precisely or even approximately resembling that under consideration in this paper. That is to say, they do not deal with informational privileges, or with interim protection; most if not all have to do directly with the specific performance of the ultimate transaction. They are concerned with oil and gas leases terminable by the lessee, similar instruments relating to mining operations, contracts for continuous furnishing of power, personal service or supplies which could be cancelled by the plaintiff, and purchase and sale contracts where the plaintiff lacked statutory authority to proceed.

Because cases of this latter type have heretofore been overlooked, they will be noticed briefly. The remainder of the general discussion will be confined to two important cases in New York and the Supreme Court.

Manchester Ship Canal Co. v. Manchester Racecourse Co.,74 previously discussed, is one. The optionee was granted relief against a sale until the property had been properly offered to it in spite of a showing that the optionee could not actually buy "without taking fresh statutory powers," this having been known to both parties from the beginning. Similarly, in Devenish v. Brown,75 a vendor was granted specific performance against the vendee although the plaintiff was incapacitated to sell until authority had


74[1901] 2 Ch. D. 37.

75(1856) 26 L. J. Ch. 23.
been obtained from Parliament. In *Alabama Water Co. v. Anniston*,\(^7^0\) a city which had exercised an option to purchase a waterworks was given specific performance although it had not as yet obtained the requisite permission from the voters through a referendum for the issuance of the necessary bonds. And in *City of Saginaw v. Consumer's Power Co.*,\(^7^7\) although the city was denied specific performance of an electric service contract because it had failed to live up to mandatory requirements of its charter respecting competitive bidding, it was allowed relief as the representative of its inhabitants. None of the bills was held demurrable, but in each of the first three cases relief was made dependent upon the subsequent acquisition by the plaintiff of the necessary authority. Mutuality was not mentioned in the first two cases, and in the last two only in the sense of whether there was any contract. The illegality prevented the creation of one with the city in the last case but the city’s acceptance of the offer in the Alabama case was sufficient. These are not option problems, it is true, but they are referred to here as illustrating a wholesome flexibility of decrees in cases where in spite of everything the respective plaintiffs might do they might never obtain from the legislature or the electorate the requisite capacity to complete the contemplated deal. Yet they are of one accord free from any dogma dependent upon what might have happened if the case had been reversed and the defendant had sought relief against the plaintiff as a test in the present instance. It proved to be enough that the plaintiff was not likely without cause to withdraw and that it would in good faith seek the requisite authority. The defendant was not to be excused from his own performance merely because of the present uncertainty of what the parliament or the voters might do.

*McCall Co. v. Wright*,\(^7^8\) decided by the New York court of appeals in 1910, enjoined an employe from violating a part of his contract of hiring which was designed to prevent his entering the

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\(^7^0\)( Ala. 1926) 110 So. 36.

\(^7^7\) (1921) 213 Mich. 460, 182 N. W. 446. Compare with Incorporated Town of Laurens v. Gas & Elec. Co., (C.C.A. 8th Cir. 1922) 282 Fed. 432, which was a case of the type cited in note 69, supra, the Michigan court’s suggestion in the principal case to the effect that a public utility may not escape specific performance by a plea of lack of mutuality based upon the fact that the inhabitants of a city have contracted to buy only what they will need during a given period, the utility’s legal obligation irrespective of contract being to supply actual needs.

service of a competing concern and imparting there the plaintiff employer's trade secrets, in spite of a provision in the contract entitling the plaintiff to terminate the contract of hiring upon notice. Hiscock, J., said for a majority of the court (the dissent was on other grounds):

"A court of equity does not refuse under otherwise proper circumstances to restrain a continuing violation of a valid subsisting obligation not to injure another, simply because that other has the option to cancel the obligation by terminating the agreement which creates it. It seems to me that no element of mutual obligation is involved. One party has furnished a good consideration for which the other has agreed to refrain from doing certain things, and it is no excuse for a violation of the agreement while it lasts that the beneficiary may at some time terminate it. . . . But again, considering the precise object of this action, I see no principle making in favor of defendant in this case where the plaintiff has performed and is anxious to execute the contract. The defendant ought not to be allowed to urge as a defense that this is not an executed contract, when it is his repudiation which, alone, so far as now appears, prevents it from being fully executed."

Finally, although the court consciously refrained from passing upon the exact question, it is submitted that the decision of the Supreme Court in Guffey v. Smith, decided in 1915, actually established, or at least laid the basis for a later explicit establishment of, the same doctrine for the federal courts. The court held that an oil and gas lessee's surrender clause did not prevent him from having an injunction against the violation of his rights by the lessor and a subsequent lessee of the same premises. Under the law of Illinois, whence the case came, the lessee's surrender clause had been held to deprive the case of mutuality. The decision and language of the Supreme Court is therefore especially significant. A part of the opinion follows:

"It next is insisted that, according to the general principles and rules of equity administered in the Federal courts [which 'are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting'] the surrender clause constitutes an insuperable obstacle to granting the relief sought, the argument being that, as the complainants have a reserved option to surrender the lease at any time, it cannot be specifically enforced in their favor. The rule intended to be invoked has to do with the specific performance of executory contracts, is restrained by many excep-

tions, and has been the subject of divergent opinions on the part of jurists and textwriters. Without considering it in other aspects, we think it is without present application. Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from a continuing irreparable injury calculated to accomplish its practical destruction. . . . It comes with ill grace for the defendants to say that they ought not to be restrained because, perchance, the complainants may sometime exercise their option to surrender the lease. We think this option, which has not been exercised, and may never be, is not an obstacle to the relief sought."

Yet the purchaser in a specifically enforceable executory contract for the purchase and sale of land or other property has an equitable fee therein, and if he has an option to withdraw has in equity just what that lessee had at law, a defeasible estate no less entitled to protection against a "practical destruction" by a sale to others or a withholding of determinative information. Further, in the *McCall Case* just referred to, after the quotation made, the court went on to say:

"A perfectly familiar illustration of this class of actions is the one brought by a vendor of real estate to restrain a violation by the vendee of a restrictive covenant in the deed. There is at the time no mutual obligation resting on the vendor. But the vendee for a good consideration has agreed not to do certain things and I apprehend it would not be a good defense to an action to restrain his violation that the vendor might in the future do something which would terminate the obligation."\(^{83}\)

There the court in a case involving a purely executory contract for personal service resorted for an illustration to a situation which it is the fashion today to describe in terms of equitable property interests.\(^{84}\) In effect, the New York court might as well have said:

"Because the vendor, having an equitable estate in the land of the covenator may some day see fit to extinguish that is no reason for denying an injunction against a practical demolition thereof by the wrongful conduct of the owner of the servient tenement."\(^{91}\)

Calling the oil and gas lessee's interest a freehold estate in land does divert the problem into a category where our traditional ways

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\(^{83}\) (1910) 198 N. Y. 154, 91 N. E. 516, 31 L. R. A. (N.S.) 249.

\(^{84}\) Riverbank Improvement Co. v. Chadwick, (1917) 228 Mass. 242, 117 N. E. 244; 31 Harv. L. Rev. 879.
of thinking about injuries to the use of land insulate the case against defenses similarly confined to executory contracts. Nevertheless, the point is that everything the court said about not crossing the bridge created by the plaintiff's option to terminate until it seemed likely that that would be necessary, applies with equal force to the protection of validly subsisting executory contracts so long as they last. The plaintiff's power to extinguish that which is thus temporarily protected stands in exactly the same light in both instances. The conditions upon which it depends, the actual likelihood of its exercise in view of its possessor's demonstrated attitude, and its effect if resorted to in fact, are the same. The Supreme Court's view that the lease created a determinable freehold was a boon to the oil and gas industry, partly for the reason suggested at the beginning of this paragraph. The reasons given for that view are, it is submitted, equally applicable to similarly conditioned specifically enforceable contracts of every sort.

In the light of the foregoing survey of the state of the law, one cannot refrain from expressing disappointment at the decision of the United States circuit court of appeals for the eighth circuit, filed on April 21, 1927, in Electric Management and Engineering Corporation v. United Power and Light Corporation (of Kansas) et al. Without any dissent, the court, through Van Valkenburgh, J., affirmed the decree of the district court for Kansas, sustaining motions to dismiss for want of equity and denying leave to amend the plaintiff's bill for specific performance. The allegations admitted by the motions to dismiss were substantially these.

The contract was in writing, dated and entered into on November 12, 1925, and provided for the purchase and sale of approximately 97% of the common stock of the corporate appellee, a Kansas public service corporation owning and operating various electric light, heat and power, gas, water and ice plants, and street and interurban railway systems within the State of Kansas.

The party designated in the contract as the purchaser, and the appellant herein, is the Electric Management and Engineering Corporation, a Delaware corporation, duly admitted to transact business in the state of Kansas, and authorized by its charter to acquire, own, hold, maintain, operate and manage electric light and power, gas, water and ice plants and street and interurban railway

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85(1927) 19 F. (2d.) 311.
86This statement of facts is based upon the transcript of record, the statement in both parties' briefs, and that made by the court.
systems, as well as to purchase, acquire, own, hold and sell the
stocks and securities of corporations engaged in the operation of
such plants and systems.

The appellees are the Kansas corporation previously mentioned,
and five individuals, all citizens of the state of Kansas. The indi-
vidual appellees, at all of the dates mentioned in the bill, were
stockholders of the corporate appellee owning not less than 77%
of its issued and outstanding common stock and were directors
of said corporation, and three were, at all of said times, the presi-
dent, vice president and general manager, and secretary and gen-
eral counsel of said corporation, respectively. Two of them were
designated in the contract as the sellers of the common stock in-
volved, and acted both for themselves and in behalf of all of the
other common stockholders of the corporate appellee.

The principal features of the contract were these: It recited
that "in consideration of the mutual promises, covenants and agree-
ments herein contained and the sum of ten dollars and other good
and valuable considerations paid by the purchaser to the sellers, the
receipt whereof is hereby acknowledged," the sellers agreed to sell
and the purchaser agreed to buy the shares of stock heretofore
described, upon the terms previously summarized. The contract
contained eleven paragraphs of detailed representations, warran-
ties and statements regarding the legal, engineering, physical and
financial condition of the corporation, and agreements as to the
administration and operation of its properties prior to the closing
date of December 2, 1925, these being uttered "to induce the pur-
chaser to enter into this contract and to assume the expense of said
legal, engineering and auditing examinations above provided for
(the sellers in no event to be liable for the expense of said examina-
tion)." In addition there were attached to the contract a certain
balance sheet and condensed income account of the corporate ap-
pellee, similarly represented and warranted by the sellers to be true
and accurate.

Moreover, the sellers agreed to have a certain audit made by a
designated firm of accountants and to furnish this audit and a
twelve-months earnings statement to the purchaser (at the latter's
expense in the sum of not to exceed $2,500.00) on or before Decem-
ber 19, 1925; to deliver without expense to the purchaser certain
legal opinions rendered by a designated firm of attorneys regarding
real estate titles, franchises, contracts and other corporate matters,
for the use of the legal counsel of the purchaser; and to submit
for the inspection of the representatives of the purchaser all
records, books, accounts, contracts, franchises, abstracts of title and other papers of the corporation. The engineers or other representatives of the purchaser were assured free access to the power plants, buildings and structures of the corporation, with means of transportation furnished by the sellers, and in every way the sellers were to assist in facilitating the examination contemplated.

The purchaser agreed "at the earliest date possible to cause to be made a legal, engineering and auditing examination of the status and properties and books of the said United Power and Light Corporation (of Kansas), and to verify the representations herein made, and in the event that either said legal, engineering or auditing report be considered unsatisfactory by the purchaser (in its sole discretion) the purchaser shall have the right to withdraw from this contract and shall be under no obligations hereunder and this contract shall be deemed to be null and void". Notice was to be given by the purchaser to the sellers either of its willingness to complete the purchase or its election to withdraw from the contract, on or before December 23, 1925. Detailed arrangements were provided for closing in the event of acceptance.

During the month of November, 1925, the appellant sent its agents to the City of Abilene, Kansas, to make, at its own expense, such examinations as were reasonably necessary. Nevertheless, without legal excuse, and in violation of their obligations under the agreement, the sellers repudiated the contract in all of its terms and refused to permit the proposed investigations and inspections to be made; refused to furnish any audit or earnings statements, any legal opinions, or any corporate books or records whatever, and in every way possible denied to appellant the privilege which it had under the contract of reasonably informing itself before completing the purchase of the stock.

Appellant, therefore, on December 3, 1925, filed its bill of complaint with attached copies of the contract, balance sheet and income account hereinabove referred to in the district court for Kansas, setting out the above facts and others not now material, and praying particularly (a) that the individual appellees be enjoined from disposing of any of their stock, (b) that the corporate appellee be enjoined from transferring on its books any of the stock in question and from issuing any new stock therefor, (c) that the appellees be enjoined from preventing appellant's agents from making the legal, engineering and auditing examinations of the corporation's properties and affairs contemplated by the contract, (d) that the appellees be compelled to furnish the appellant
with the audit, earnings-statement, legal opinions, and corporate books and papers called for by the agreement, (e) for specific performance of the contract according to its terms; and (f) for general relief.

Appellant averred that it stood ready, willing and able to make the examinations, investigations and audits provided for by the contract for the purpose of verifying the representations therein made by the sellers, and in the event the results and reports of said examinations, investigations and audits were satisfactory, it stood ready, able and willing to complete the purchase of the stock subject to all of the other terms of the contract; that the individual appellees were threatening to and were about to dispose of the stock in question to persons other than the appellant, and to put it beyond their power to comply with the provisions of this contract; and that the object and purpose of this contract was that of enabling appellant to acquire the control of The United Power and Light Corporation (of Kansas) and of its various business enterprises, and to operate and manage the same, through the purchase of more than a majority of its voting stock. A majority of this stock could not be obtained in the open market, but was closely held. It could only be had from these five individual appellees and its pecuniary value per share was not readily ascertainable.

On December 18, 1925, the several appellees filed separate motions to dismiss the bill of complaint for want of equity. These six motions save for one averment in that of the corporate appellee, not material here, were identical in terms. They urged that the action should be dismissed because the complaint with its exhibits showed on its face (a) that the appellant was not entitled to the relief sought or to any other relief as against any of the appellees, (b) that the bill was without equity in that it did not state a cause of action cognizable in a court of equity, (c) that the alleged contract was a mere option contract, without mutuality and without sufficient consideration, and that the option had never been exercised, (d) that the alleged contract was a mere offer which had never been accepted and which could not then be accepted (or the option exercised) for the reason that before the offeree (appellant herein) had done anything under the contract and before the bill of complaint had been filed, the offer had been revoked and withdrawn, (e) that no binding contract for the sale of corporate stock had been created that might be subject to specific performance, (f) that the appellant had never agreed to perform or
accept the contract as a whole, and was under no obligation to purchase or to pay for the stock, (g) that the appellant sought performance of only a part of the contract, and that the court, since it could not decree performance of the whole contract, should not interfere to enforce any part thereof, and (h) that the appellant could render any decree nugatory by exercising the privilege reserved in the contract, in its sole discretion, to withdraw from the contract and to render it thereby null and void, after the performance by the appellees of the things prayed for in the complaint.

On December 23, 1925, these motions were called up for argument before the district court for Kansas, Hon. John C. Pollock, judge presiding. The court having, immediately after the conclusion of the argument, indicated what its ruling would be, appellant moved for leave to amend its bill of complaint. This motion was overruled. The respective motions were then by the court sustained and the bill dismissed, “without prejudice to any right plaintiff may have if any to proceed at law.” This decree was affirmed.

The court’s statement of facts inadvertently fails to make note of two allegations. One, as italicized above, was that the purchaser undertook to stand the entire expense of its own inspections and the expense of the proposed audit by an outside accountant up to $2,500. The other, similarly emphasized above, was that the seller’s representations were, as the contract recited, made in order to induce the purchaser to enter into the contract and to assume the expense of the inspections and audits mentioned. This indication that the sellers had taken the initiative in endeavoring to sell the property to the purchaser, was significant. Both factors were important as bearing upon the matter of consideration, the purpose of the inspection clause, and the actual probabilities as to the exercise of the withdrawal privilege. Especially, they served to indicate the necessity for the case going to a full hearing as contrasted with a virtual demurrer to the bill, before final judicial action.

Gaining support from a statement in an encyclopedia relative to fancy, taste or judgment based upon cases involving portraits, plays, designs, clothing, etc., and from the literal words of the contract, “in its sole discretion,” and without analysis of the situation as a whole, the court finds the conditions governing the exercise of the optional power to withdraw subjective only, so as to enable the purchaser to escape if it so desired irrespective of the
facts or the reasonableness of its action, and free from any power of the court to say that it should have been satisfied (if the facts should warrant that view) even if it asserted that it was not.

Apparently unaware of McCall Co. v. Wright,87 and refusing to recognize the significance of Epstein v. Gluckin88 and Guffey v. Smith89 except as confined to the facts there involved, the court lifts Mutual Life Ins. Co. v. Stephens90 out of its setting to emphasize the supposed fatal effect of this outstanding termination privilege.

Without reference to any of the interim informational decrees discussed in the earlier parts of this paper, and relying upon decisions dealing with entirely distinct questions, the court feels itself unable to grant specific performance of the inspections alone for the suggested reasons that to do so would be useless if plaintiff should later decide to withdraw and that these provisions were an integral and inseparable part of the contract as a whole. Yet the court evidently conceives of the contract as divisible in another direction for purposes of allocation of consideration. It says91 “The sum of $10, though nominal, was sufficient to support the contract and every stipulation favorable to the buyer, including the option to withdraw in its discretion.” This is limited by the statement:92 “The payment of $10 was a consideration merely for the optional privilege.” The parties do not seem to have regarded the contract as a unit. The examinations were thought to be sufficiently useful and separable to furnish a basis for the ultimate decision as to withdrawal and to warrant promise to inspect, the initial payment of ten dollars and the undertaking to spend several thousand, not to mention the actual spending of several hundred dollars, in attempting to make them. They dealt with the provisions, for inspection and those for the ultimate sale very differently, when they required the purchaser to make the inspection but left the final purchase to a limited extent optional. And all of the cases on interim informational problems, even the court’s bellwether of Mutual Life Ins. Co. v. Stephens, viewed the production of the data that was to serve as a basis for final action as deserving of independent enforcement. The principal reason this was not ac-

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92Ibid. at p. 315.
tually done in the case mentioned was because in view of the defendant's probable conduct the provisions for arbitration by nominees were practically unenforceable.

Although the immediate issue before the court was clearly limited to the production of information alone, both by the bill and the briefs, the court seems to think the purchaser was asking for a conveyance of the stock while insisting upon the continuance of its withdrawal power, and that the only consideration therefor was the terminable promise to buy over which the court had no control. Its inability to find the requirement of mutuality satisfied is due mainly to that misunderstanding. The court is not unsympathetic with the requirements of what might perhaps be described as the modern mutuality technique. If it had realized that what was mainly wanted was the enforcement of the clause providing for the inspections, examinations and audits, it might then have found in the initial payment of the ten dollars, in the purchaser's promise to make the investigation at its own expense, and in the actual expenditure of several hundred, an adequate exchange for the defendant's production of data, without worrying about the outstanding power to withdraw. Obviously, the parties could never have contemplated a final election to complete the purchase as any part of the price for the sellers' undertakings as to the inspections alone.

Assuming, however, that adequate protection to the sellers would necessarily include an assurance that the purchaser would buy if the results of the inspection, tested objectively, reasonably warranted it, the court seems strangely impotent. The bill, as the portion quoted by the court shows, asked for the inspection for the purpose of verifying the representations made by the sellers in the contract. The whole theory of the plaintiff's case as developed in the briefs was that the exercise of the power to withdraw was to depend upon whether the results of the examinations would satisfy a reasonable person that these representations had been substantiated. Nevertheless, the court deemed itself powerless to deal with the ultimate purchase by a conditional decree. This stands in curious contrast to the confidence in the judicial initiative in this respect expressed by judges whose language has been quoted elsewhere in this paper. It would seem that assuming the sellers had

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94And see the "continuous supervision of plaintiff" cases: H. L. Doherty & Co. v. Rice (C.C. Ala. 1910) 186 Fed. 204, 213; Zelleken v. Lynch, (1909) 80 Kan. 746, 750, 104 Pac. 563, noted in 20 Mich. L. Rev. 289,
needed protection in this connection, the court might reasonably have viewed the plaintiff's assertions in its bill and briefs as waiving any privilege it might originally have had under the contract arbitrarily to cancel if it so desired even if something turned up on the inspection to be unsatisfactory that was not related to any of the representations, and even if the mere filing of the bill did not automatically work to submit the plaintiff to any equitable decree binding it that the court might find necessary for the protection of the sellers. In effect, the court here unconsciously measures mutuality by the terms of the contract as written, when it throws up its hands because in terms there found as distinguished from the situation on the hearing, the plaintiff's undertakings were to make an examination and to verify the representations and its satisfaction was a matter for "its sole discretion" with respect to the result of either test.

The hearing in the district court was had on the last day of the plaintiff's optional period. It was clear that only the sellers' breach had caused the delay. It is true the record did not disclose the ground of the motion. Nevertheless, the nature and importance of the only possible ground for leave to amend, namely, the unexpired privilege to buy the stock sight unseen, seems sufficiently obvious. It would have been fairer practice to have allowed the plaintiff a reasonable time in which to determine whether or not to exercise its option favorably to the defendants, and thus "supply the missing quality of lack of mutuality of remedy," as the court thought necessary.


See the cases collected in 21 Corpus Juris, Equity, secs. 849, 859, and in the article referred to in note 61, supra.

Compare the materials referred to in notes 2, 25 and 54, supra.