Court of Nebraska in commenting on the question said, "The federal equity rule, while designed in part to prevent collusive proceedings in fraud of jurisdiction of those courts, goes far beyond the requirements of such a purpose. If that were the sole purpose of the rule, it should go on further than to prevent such suits where the vendor of the stock was a citizen of the same state as the corporation. If the vendor and purchaser were citizens of the same state, and the vendor an original stockholder, had never had the same citizenship as the corporation, no fraud on the jurisdiction of the court would be possible, and in such case, if recovery were proper and the purchaser's cause were meritorious, it would be highly unjust for the court to abrogate its jurisdiction. This consideration alone dispenses of the criticism. The rule has its foundation in a sound wholesome principle of equity."[9]

For the foregoing reasons we submit that the right to sue is substantive and suggest that the Court should have permitted the petitioners to intervene.

Personal Services Contract—Specific Performance—Mutuality of Remedy—One Kasdin, through the Kasdin Realty Company, a corporation owned and controlled by him, contracted to purchase stock in a theater corporation. He agreed with the complainant to advance the entire purchase price, less the complainant's commission as broker in negotiating the sale, and also to transfer to his name five of the ten shares purchased in consideration of successful management of the theater by him. These five shares were to be held in escrow, and transferred to complainant's name when the defendant would receive his total amount of investment in the form of profits from the enterprise. Defendant refused to transfer the shares and terminated complainant's employment. *Held,* that the shares be transferred in complainant's name as per contract. *Steinberg v. Kasdin,* 128 N.J.Eq. 503, 17 A. 2d 284 (E.&A. 1941).

While the contract in the instant case specifically stated that the complainant was to render services in consideration for the shares, the

9. Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N.W. 1024 (1903).

decree of the court in nowise seems to take cognizance of this. That the court ordered the defendant to perform his part of the contract in consideration for services only partly performed by complainant, thus recognizing the termination of services, seems a highly inequitable result to reach.

On the other hand, if a consequence of the decree is that the defendant should employ the complainant, and thus avoid the problem of consideration, the result will still be inequitable. The great weight of American authority is to the effect that a contract to employ will not be specifically enforced at the suit of the employee.[1] The general rationale of this rule is that if the relation of employer and employee is to be of value or profit to either, it must be marked by some degree of mutual confidence and satisfaction, and when these are gone and their places usurped by dislike and distrust, it is to the advantage of all concerned that their relations be severed. Thus in cases where suits were instituted by a theater manager,[2] a superintendent,[3] and a school teacher,[4] a decree for specific performance was denied. That animosity or dislike exists between the parties in the principal case was obviously shown by the attempted termination of the contract to employ by the theater owner. The result of the decree is one in which the comfort of the defendant is to be destroyed for a period of time by compelling him to have constantly about him in a confidential situation one to whom he objects.

An harassing point which may arise in this line of reasoning is that since the defendant is a corporation, a personal relationship cannot exist between the parties and thus all fear of animosity arising between the parties should be dispelled. This contention is often raised in cases involving suits by labor unions where the employees, through the medium of a collective organization, are granted legal relief.[5] In these cases a possible justification for specifically enforcing labor contracts may be for reasons of a commercial nature and for public policy. But the case

1. CHAFEE and SIMPSON, CASES ON EQUITY (1934) 413.
2. Shubert v. Woodward, 167 F. 47 (C.C.A. 8th 1909).
3. Hewitt v. Magic City Furniture & Mfg. Co., 214 Ala. 265, 107 S. 745 (1926).
4. Hall v. Delphi-Deer Creek Tp. School Corp., 98 Ind. App. 409, 189 N.E. 527 (1934).
5. Weber v. Nasser, 61 Cal. App. 1259, 286 P. 1074 (1930).

here is different. Closely analagous to the labor union and its members, the defendant corporation and defendant, its president, are for all practical purposes one. However no great labor problem or social issue of momentous importance seems present in this situation.

Finally, a question which the court left moot was that pertaining to the defense of lack of mutuality of remedy which the defendant may have raised. The old rule, which is generally discredited today, refused specific performance of a contract where mutuality of obligation and remedy did not exist.[6] The principal reason for the rule, was that equity would not compel specific performance by the defendant if after performance the common law remedy of damages would be his sole security for the performance of plaintiff's part of the contract.[7] In the present case if the employer is ordered to transfer the shares and employ the complainant, and he does so, but after a period of time the employee decides to leave, the employer is then left with the consolation remedy of going to a court of law to seek money damages, since he cannot enforce a personal services contract.[8] It is such a set of circumstances which the mutuality rule attempted to obviate by refusing a decree in the first instance.

The new mutuality doctrine, or as some writers contend a better interpretation of the old rule, lays down as the real test the question as to whether the defendant is reasonably assured that after his performance he will receive what he contracted for.[9] The only assurance the defendant may have that the complainant will perform his services is his present willingness. But this willingness is subject to the whims and changes of mind common to most persons. It is too tenuous a ground for basing future conformity to a contract on present intention as it

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6. Ten Eyck v. Manning, 52 N.J.Eq. 47, 28 A. 15 (Ch. 1893); Richard v. Green, 23 N.J.Eq. 536 (E. & A. 1872); Freeman v. Anders, 103 N.J.Eq. 430, 143 A. 550 (1928).

7. Ames, *Lectures on Legal History*, 3 COL. L. REV. 1 (1903). In this article the author also lists the eight general exceptions to the mutuality doctrine.

8. POMEROY, SPECIFIC PERFORMANCE (3d ed. 1926) 310, n. (a).

9. Zellekin v. Lynch, 80 Kan. 746, 104 P. 563, 46 L.R.A. (N.S.) 659 (1909). In this case defendant agreed to execute a lease of the land in controversy for a term of years. Plaintiff had agreed to develop the property for mining purposes in good faith and in miner-like manner. He had expended a large sum of money

exists in this case. And finally, the complainant fails to come within any of the exceptions to the mutuality doctrine.[10]

It is submitted that the decree for the transfer of the shares should have been denied.

Restrictive Covenants—Injunctions Against Third Parties—Complainant, a laundry operator, seeks an injunction against the three defendants, his former route men, who formed a rival laundry corporation, and are soliciting his customers. All three had made restrictive covenants not to compete with the complainant for one year after the termination of their employment. Two of the defendants, Vander Sluys and Vanderweert, were still bound by their covenants when they entered into the competing business, but the covenant of the third defendant, Schoone-Jongen, had expired. *Held,* injunction granted as to all three defendants. *Vander May v. Schoone-Jongen,* 128 N.J.Eq. 338, 16 A. 2d 138 (Ch. 1940).

In so far as the defendants Vander Sluys and Vanderweert are concerned, the case presents no difficulty. It is elementary that, if a negative covenant made by an employee is fair and reasonable in the protection it affords the employer, equity will enforce it by injunction.[1] But when it is sought to restrain Schoone-Jongen from pirating the customers of the petitioner a different question arises. As noted above, the negative covenant made by him had expired before he entered into

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in developing the mine. The court rendered a decree for specific performance against the defendant. In an article entitled "'Lack of Mutuality' Rule" by W. Cook in 36 YALE L. JOURNAL 897-913 (1927), the author points out that the result is justified if we can find that it was factually not probable that the plaintiff would abandon his mining operations after the decree was entered. In the principal case, complainant did not expend huge sums of money nor did he do anything which would indicate he would always be willing to perform his services.

10. Hoppes v. Hoppes, 190 Indiana 166, 129 N.E. 629 (1921). In this case the court pointed out that had the complainant already performed his part of the contract, it would have granted relief.

1. Owl Laundry Co. v. Banks, 83 N.J.Eq. 230, 89 A. 1055 (Ch. 1914).