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A PLEA FOR THE EXTENSION OF EQUITABLE PRINCIPLES AND REMEDIES

*Robert S. Stevens**

Austin has written:

It has been imagined by many, that the distinction between Law and Equity is necessary or essential; or, on the other hand, that every system of positive law is distinguished or distinguishable into Law and Equity. But, in truth, the distinction is merely historical and confined to the particular systems of some societies. . . . So far is the distinction from being universal and necessary, that I believe it is nearly confined to the Roman and English Law. . . .¹

It was, then, only an historical phenomenon of our Anglo-American law that the needed amelioration and improvement of the administration of law by the existing courts, through an application of the principles of equity, should have been entrusted to a new and independent court—the court of chancery. It is only natural that the development of the powers of this new tribunal, claiming independence and authority to operate upon men's consciences, should have been opposed and obstructed by the courts of law whose judgments and judge-made law the chancery court was attempting to correct. The latter was thrown upon the defensive and it was only natural that conflicts between law and equity should have arisen and that there should have been differences between law and equity as administered by the separate courts.

But today, where the two courts have been merged into one and where that one administers both law and equity, there are no longer two contestants to continue to wage that combat of our historical past. With reason, therefore, one may inquire why when hostilities have ended, any of the conflicts and distinctions between law and equity should be permitted to survive. But there are still some survivals of the old distinctions and the reason for this is that though there is today but one court, that court sits alternately as a court of law or a court of equity, following the historical pattern, depending upon whether the relief requested is of the traditional

* See Contributor's Section, Masthead, p. 436, for biographical data.

¹ 2 Austin, *Jurisprudence*, Lecture XXXVI, p. 86 (4th Ed. 1873).

legal or equitable character. One would think that it would not be so difficult to become freed from traditional habits and precedents that were applicable in the long period of contest between the independent courts. One would suppose that as a result of training and experience in practice under the merged system and as a judge sitting on a law case one day and on an equity case the next day, the modern judge would be tempted, as far as it is within his powers, to disregard the distinctions and limitations which developed during and because of the separateness of law and equity.

No one is unmindful of the influence which equity decisions had upon the law as decided by the courts of law long before the merger statutes were enacted. As only one example, we can recall the attitude of Lord Chief Justice Wilmot in *Collins v. Blantern*.² The suit was upon a bond. The plea was that the bond was founded upon an illegal consideration, namely, a promise to stifle a prosecution for perjury. In overruling the demurrer to the plea, the Lord Chief Justice said:

Equity has "a jurisdiction which never would have swelled to that enormous bulk we now see, if the judges of the courts of common law had been anciently as liberal as they have been in later times. . . . I have always thought that formerly there was too confined a way of thinking in the Judges of the common law courts, and that courts of equity have risen by the Judges not applying the principles of the common law, but being too narrowly governed by cases and maxims, which have too much prevented the public from having the benefit of the common law. . . . I am not for stirring a single pebble of the common law, and without altering the least tittle thereof, I think it [the plea] is competent. . . ."

No one is unmindful either of the gains resulting from the statutory merger of law and equity: creating one court with jurisdiction in law and equity; declaring that there is only one form of civil action and abolishing the distinction between actions at law and suits in equity; and permitting, in that one form of action, equitable defenses and replications. However, the abolition of the distinction between actions at law and suits in equity was not an abolition of all the distinctions between law and equity. The statute was not a mandate to the court that, when sitting as a law court, it should adopt the attitude and standards which it would employ when sitting as an equity court. Nor did the statute suggest that after this consolidation of jurisdiction in both law and equity in one court, that the court should be relentlessly restrictive in granting equitable relief and could not be generous in expanding it where possible, in taking for example, a liberal attitude toward the conception of "the inadequacy of the legal remedy." The discussion which follows will be concerned with these two points.

² 2 Wils. 341, 350-51, 95 Eng. Rep. 847, 852-53 (K.B. 1767).

- I. To what extent can and should the court, sitting as a court of law, adopt the same principles and attitude that have been and will be characteristic of it when sitting as an equity court?
- II. To what extent can and should the court, when sitting in equity, be more liberal in the granting of equitable remedies?

I

Laches as a Defense at Law

To quote Lord Chief Justice Wilmot again, one of the reasons for equity was that the judges of the common law courts were "too narrowly governed by cases and maxims, which have too much prevented the public from having the benefit of the common law." Equity sought to produce a more particularized justice, to relieve a party to litigation from hardship or prejudice that could result from a strict application of legal precedents, rules, or procedure. It upheld and applied ethical standards. It would not let an adversary take an unconscionable advantage of an equitable remedy or of a legal right, remedy, or defense. To this end, it established the power to exercise its discretion both in granting and denying equitable relief.

Thus, we have the practice of enjoining or ordering a restoration of equitable waste—waste for which the defendant was not punishable at law. Thus, we have the doctrines of laches and of clean hands, because it is unethical to seek relief when one's own delay in bringing suit has prejudiced the adversary or because it is unethical to enforce a claim arising out of or connected with one's own unethical conduct. On the other hand, ethical reasons were found for denying the defendant the advantage of a legal defense. For example, a defendant may not take advantage of the Statute of Frauds where he has done or permitted certain acts of part performance of an oral contract, or he may not take advantage of the plaintiff's default on the date set for performance when it is found that "time was not of the essence" and substantial performance can be assured by an appropriate adjustment of interest and rents. When a modern court sitting in equity applies these measures of fairness and justice, is there good reason why that same court sitting at law should not have the same power of discretion and follow the same ethical standards? There are some instances of this attitude and some methods of giving it effect.

It has been said that:

. . . while statutes of limitations were formerly regarded with little favor and courts devised numerous theories and expedients for their evasion, latterly they are considered as beneficial, as resting upon sound public policy, and as not to be evaded except by methods provided therein. . . . The exceptions

contained in statutes of limitations are strictly construed and are not enlarged by the courts upon considerations of apparent hardship.³

It is in line with this view and also in perpetuation of the separateness of law and equity that we find it stated that "laches and acquiescence as a bar to an action through lapse of time are only applicable to equitable rights, and, as to legal rights, mere lapse of time before an action to enforce them is barred, is of no moment."⁴ Even when there is a statute fixing the time within which an equity suit may be brought, a court sitting in equity has never concluded that a delay short of that period and amounting to laches could not be a bar to the suit. The doctrine of laches amounts to this—that from a moral standpoint, the plaintiff whose delay has prejudiced the defendant should not be permitted to recover. Should not ethical standards characterize the administration of legal as well as equitable remedies?

Happily, there are courts which have answered this question in the affirmative and they have found methods and reasoning to give effect to this view. The doctrine of estoppel is of equitable origin and yet it has been taken over by courts of law. There is a kinship between estoppel and laches. A delay sufficient to constitute laches might well be sufficient to form the basis of an estoppel. In a North Carolina case, even though the legal limitation had not run, it was held that the plaintiff was estopped from suing because of his acceptance of partial benefits under a disability policy, his continuance of premium payments and his delay.⁵ A United States circuit court, reversing a district court which had held that laches was not available in an action at law, said both that the plaintiff's delay estopped him from suing and that laches was available as a defense within the meaning of section 274b of the Judicial Code permitting equitable defenses.⁶ The Code was again used in the third circuit to permit laches to be used as an equitable defense.⁷

³ *Woodruff v. Shores*, 354 Mo. 742, 746, 190 S.W.2d 994, 996 (1945). Here, plaintiff had been committed to an institution for the insane. After establishing her sanity and securing a release from the institution, she sued defendant for malpractice for falsely certifying her as insane. It was held that she was not entitled to a tolling of the two year limitation for the disability of insanity because she had not been insane.

⁴ 1 Wood, *Limitations* 287 (4th ed. 1916) and cases cited therein.

⁵ *McLawhorn v. American Central Life Ins. Co.*, 208 N.C. 709, 182 S.E. 139 (1935). Disapproved in *Brenner v. Mutual Life Ins. Co.*, 146 N.Y.S.2d 58 (Sup. Ct. N.Y. County 1955).

⁶ *Ford v. Huff*, 296 Fed. 652 (5th Cir. 1924), cert. denied, 266 U.S. 602 (1924). See 25 Colum. L. Rev. 337 (1925), as to the meaning of an "equitable defense," whether it is limited to instances in which equity might have enjoined a suit at law or includes what would have been a defense in equity if plaintiff had sought equitable relief for a claimed legal right.

⁷ *Banker v. Ford Motor Co.*, 69 F.2d 665 (3d Cir. 1934), affirming 3 F. Supp. 737 (D.C. Pa. 1933), noted 18 Minn. L. Rev. 82 (1933).

Estoppel Against Pleading Statute of Limitations

As it may be unethical for a plaintiff to sue after a delay that has prejudiced the defendant, so it may be unethical for a defendant to defeat an honorable obligation by pleading that the statute of limitations has run. It is difficult to understand why, when formerly courts regarded statutes of limitations with little favor and devised numerous theories and expedients for evading them, courts of the present day should construe them strictly and regard themselves as powerless to make exceptions that would prevent hardship.⁸ Lord Sumner reviewed the decisions of three centuries as to the effect to be given an acknowledgment or promise to pay as estopping the defendant from pleading the statute and characterized these decisions as "directed to what is after all the task of decorously disregarding an Act of Parliament," and he concluded that "the decisions on the exact meaning and effect of the precise words, employed by generations of shifty debtors are, it is agreed on all hands, irreconcilable."⁹ If, by such an acknowledgment or promise, an obligor induces his obligee to delay suit, surely it is unethical for him then to plead that the statute has run. But it may also be unfair to the obligor to have the making of such an acknowledgment or promise established only by the oral testimony of the obligee. For this reason Lord Tenterden's Act was passed as a sort of Statute of Frauds requiring a writing signed by the obligor as proof of his acknowledgment or promise.¹⁰ Comparable statutes are found in most of our states today,¹¹ and a liberal interpretation of them or of the principle behind them would seem to be permissible, especially when it is remembered that a statute of limitations is a bar to a suit only if pleaded and that, if pleaded, it merely prevents the enforcement by court action and does not destroy the moral obligation.¹² Defendant's conduct which has lulled the plaintiff into a sense of security that he need not sue to collect should provide the plaintiff with the basis of an estoppel against

⁸ See note 3 supra.

⁹ *Spencer v. Hemmerde*, [1922] 2 A.C. 507, 519, 534.

¹⁰ 9 Geo. 4, c. 14 (1929).

¹¹ E.g., N.Y.C.P.A. § 59:

An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of the provisions of the articles relating to the limitations of time within which an action must be brought other than for the recovery of real property. But this section does not alter the effect of a payment of principal or interest.

Scheuer v. Scheuer, 308 N.Y. 447, 126 N.E.2d 555 (1955) (estoppel cannot be based on a parol representation).

¹² Cf. *Livesay v. First National Bank*, 57 S.W.2d 86 (Tex. App. 1933), and Note, 91 A.L.R. 876 (1934), to the effect that the mere fact that an obligation has become legally unenforceable by discharge in bankruptcy or the running of the statute of limitations does not destroy the creditor's insurable interest in the life of the debtor.

the plea of the statute of limitations or an equitable replication to such a plea.¹³ However, the attitude of courts is far from uniform. A few illustrations should be sufficient to demonstrate this.

The House of Lords, reversing the Court of Appeal, found the following letter from debtor to creditor sufficient to take the case out of the operation of the statute:

It is not that I won't pay you, but that I can't do so. It is important that I should see you and explain the situation, and I shall therefore ring you up tomorrow to make an appointment.

What I wrote you was not that I saw no prospect at present of being able to pay the capital, but that I saw no prospect of being able to repay the capital at present. The condition of things at the Bar is such that the vast majority of us will be getting into debt rather than out of it.

I have a good deal to talk to you about, and nothing can be gained by flying to solicitors.¹⁴

On the other hand, the Supreme Court of Georgia found the following facts insufficient to estop the defendant from pleading the statute.¹⁵ A director of a bank had given it his notes. From time to time after he was in default, he told his associate directors that he would pay the debt. After his death, his executors found writings stating that he desired them to pay these notes from his estate, referring to them as notes "outlawed" by the statute of limitations. The court felt bound to apply the statute strictly and not create exceptions to it even though "[a]dherence to them [statutes of limitations] sometimes brings harsh and what may seem to be inequitable results." It said:

His associates in dealing with him with reference to his own obligations were dealing at arms length as if he were a stranger to the board [citations omitted], and while they may, as alleged, have had confidence in his integrity and have believed that he would pay them, yet they, as he, knew the statute was running. They allowed it to run. They could easily have secured a promise not to plead the statute, or a new written promise to pay. It was their duty to collect the note as well as his duty to pay it.¹⁶

In a New York case, it was held that letters signed by the obligor's attorneys offering a compromise settlement of the claim were acknowledgments sufficient to toll the statute, and it was said that evidence is

¹³ *Holloway v. Appelget*, 55 N.J. Eq. 584, 585, 40 Atl. 27, 28 (Ct. Err. & App. 1897) (injunction granted against defendant pleading the statute of limitations in an action brought at law by plaintiff against defendant, the court saying: "There, however, is no reason why a court of equity should not, by the use of its injunctive power, disarm a defendant from using the statute fraudulently in an action at law.")

¹⁴ *Spencer v. Hemmerde*, [1922] 2 A.C. 507.

¹⁵ *Bank of Jonesboro v. Carnes*, 187 Ga. 795, 2 S.E.2d 495 (1939).

¹⁶ *Id.* at 802, 2 S.E.2d at 499. The court added:

What we now hold is that neither the conduct nor the relationship out of which it grew is sufficient in law to set up such an estoppel, and that the statute must be applied, because we do not believe that courts of law are justified in reading into the law exceptions not contained in it, nor do we think they may nullify the statute simply because they think it inequitable to apply it in a given case.

admissible to identify the indebtedness referred to in the writings.¹⁷ But a Delaware court attributed this decision to the existence of section 59 of the New York Civil Practice Act¹⁸ and held that a letter from the debtor's attorney requesting a compromise offer of settlement was not a sufficient acknowledgment of an alleged debt, implying a promise to pay, to remove the bar of the statute. The letter was admitted to be an indication of some business transaction between the parties but could not be construed, the court said, to constitute an unqualified and direct admission of a previous subsisting debt.¹⁹ In another Delaware case, plaintiff bought from defendant a truck crane warranted to lift twenty tons. After using it for a year and a half he found it would not lift twenty tons and then complained to the defendant. It was held that the defendant by sending a representative to attempt to repair the crane so that it would have the warranted capacity did not thereby admit that the warranty had been broken so as to toll the statute.²⁰

In cases of this type, the courts which have decided in favor of the plaintiffs have demonstrated that there is valid legal reasoning that escapes insistence on rigid formalism and avoids results that are harsh and inequitable. Courts imbued with the spirit of equity can and should, when sitting on a law case, measure justice by the same ethical standards that have characterized their administration of equity.

The Doctrine of Balancing Interests

Another example of the perpetuation of the separateness of law and equity is found in connection with the defense of the balance of interests which a court sitting in equity will weigh when determining whether, in its discretion, an injunction or some alternative relief should be granted. The New York Court of Appeals had before it an ejectment suit in which the defendant set up what was styled an equitable defense supported by the following facts. The defendant had evicted the plaintiff by summary proceedings and, before it could be decided by the Court of Appeals that the eviction was wrongful, tore down the building and upon that site and the

¹⁷ Brill v. Brandt, 176 Misc. 580, 26 N.Y.S.2d 477 (Sup. Ct. N.Y. County), aff'd, 263 App. Div. 811, 31 N.Y.S.2d 674 (1st Dep't 1941), aff'd, 289 N.Y. 581, 43 N.E.2d 718 (1942).

¹⁸ See note 11 supra.

¹⁹ Pilch v. Gray, 111 A.2d 835 (Del. Super. Ct. 1955).

²⁰ Gaffney v. Unit Crane and Shovel Corp., 117 A.2d 237 (Del. Super. Ct. 1955). Note on estoppel to rely on the statute of limitations, 130 A.L.R. 8 (1941). Similar problems as to whether there is an acknowledgement of the obligation sufficient to toll the statute arise when the obligor furnishes his creditor with room and board, gasoline, services, or the like, the value of which is to be credited on the debt. See Note, 139 A.L.R. 1378 (1942). In MacKeen v. Kasinskas, — Mass. —, 132 N.E.2d 732 (1956) (representations of Insurance Adjuster as to settlement estopped insurer and insured from pleading the statute in a personal injury action).

adjoining lot built a theatre at a cost of over \$100,000. The defendant said it was solvent and ready to pay any loss sustained by the plaintiff. In reversing the lower courts which had held the defense to be good, the court said:

The plaintiff does not sue in equity, and is not asking for relief which the court is free in its discretion to concede or to withhold. Such cases as *McCann v. Chasm Power Co.* (211 N. Y. 301), where the relief demanded was the discretionary remedy of injunction, are thus beside the point. . . . The defendant does not make out an equitable defense unless upon the same facts, in the days when equitable defenses were unknown in actions of ejectment (*Jackson v. Pierce*, 2 Johns. 221), it might have maintained a suit in equity to enjoin the prosecution of the remedy at law (*Dyke v. Spargur*, 143 N.Y. 651).²¹

Even if a court sitting at law has no discretion to grant or withhold relief, it can give effect to valid defenses and there are ample precedents for the power to recognize new defenses. For example, the law took over the equitable view that fraud in inducement and payment should constitute good defenses to actions upon sealed instruments. The equitable invention of estoppel may be interposed as a legal defense. And we have already seen that, under the Federal Judicial Code, laches may be used as an "equitable defense." It is true that the doctrine of balancing interests is, like laches, set up as a defense to a suit for equitable relief. But the court's statement that the statutory authority for equitable defenses permits such defenses only when upon the same facts the defendant might have maintained a suit in equity to enjoin the prosecution of the remedy at law, is certainly open to question.²² But even if the statute were so restrictively construed, in New Jersey, at the time when courts of law and equity were separate, an injunction was granted restraining the defendant from the prosecution of an ejectment suit to recover land upon which the plaintiff had mistakenly encroached.²³ In addition to enjoining the prosecution of the ejectment suit, the defendant was ordered to release to complainant the land in dispute on payment of the market value by complainant.

It is the statements quoted from the opinion of the New York Court of Appeals that are subject to question rather than the decision itself because there are indications in the opinion that even if the defense had been held good, the balance of interests would have been found to weigh in favor of the plaintiff and against the defendant.

²¹ *Golde Clothes Shop, Inc. v. Loew's Buffalo Theatres, Inc.*, 236 N.Y. 465, 469, 141 N.E. 917, 918 (1923), Notes, 25 Colum. L. Rev. 337, 342 (1925); 24 Colum. L. Rev. 428 (1924); 33 Yale L.J. 660 (1924).

²² Note, 25 Colum. L. Rev. 337 (1925).

²³ *Magnolia Construction Co. v. McQuillan*, 94 N.J. Eq. 736, 121 Atl. 734 (Ct. Err. & App. 1923). In *Dorfman v. Lieb*, 102 N.J. Eq. 492, 141 Atl. 581 (Ch. 1928), an injunction was granted against the execution of a judgment in an ejectment suit.

Part Performance and the Statute of Frauds

Another doctrine which, because it was of purely equitable origin, is said to have no place in an action for damages, is the doctrine that part performance of an oral contract will estop the defendant from pleading the Statute of Frauds. The purpose of the doctrine is to keep the statute, designed to prevent fraud, from being used as an instrument of fraud. Pomeroy said in his second edition of Equity Jurisprudence, section 2240:

The doctrine of part performance is purely a creation of equity and is not recognized at law. Hence it follows that no distinctively legal action can be maintained upon an oral contract within the Statute of Frauds.

The Supreme Court of Errors of Connecticut cited this statement with approval in an action brought to recover damages for the loss of an equity of redemption.²⁴ Plaintiff, as executrix, had given a mortgage to the defendant bank. Subsequently, it was orally agreed that the bank would foreclose, buy in the property, convey it to plaintiff who would then give the bank a new mortgage in her individual capacity. After thus acquiring title, the bank sold it to other parties for prices alleged to be less than the real value. Plaintiff relied upon the fact that she had remained in possession and, with the knowledge and consent of defendant, had made improvements. The defendant pleaded the Statute of Frauds and moved for a non-suit on the ground that the doctrine of part performance was unavailing to take the contract out of the statute. With this the court agreed even though it said: "We are disposed to share the evident view of the trial court and jury that the plaintiffs have been hardly dealt with by the defendant."²⁵ Nevertheless, the court saw a way to give effect to the principles of equity and dropped the suggestion that "had the plaintiffs claimed that the defendants were estopped to take advantage of the Statute of Frauds . . . a different question would be presented."²⁶ Thereupon, the plaintiff came back with a complaint appropriately amended to raise the estoppel and the court this time upheld a denial of defendant's motion to set aside the verdict and judgment in favor of the plaintiff, saying that "while there is a conflict of authority, a number of well considered cases hold that where a plaintiff has acted solely in reliance on the oral agreement an estoppel may be raised to defeat the statute."²⁷ The court was cautious to suggest that "the determination of

²⁴ Wolfe v. Wallingford Bank & Trust Co., 122 Conn. 507, 191 Atl. 88 (1937).

²⁵ Id. at 513, 191 Atl. at 90.

²⁶ Id. at 513, 191 Atl. at 91.

²⁷ Wolfe v. Wallingford Bank & Trust Co., 124 Conn. 507, 513, 1 A.2d 146, 149 (1938). Accord, Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88 (1909). See Summers, "The Doctrine of Estoppel as Applied to Statute of Frauds," 79 U. Pa. L. Rev. 440 (1931); Notes, 36 Calif. L. Rev. 138 (1948); 20 Calif. L. Rev. 663 (1932); 44 Harv. L. Rev. 1147 (1931); 11 Okla. B.A.J. 1319 (1940).

the case as now presented requires no recognition of a right in the plaintiffs to relief by estoppel beyond one coextensive with that available to her under the doctrine of partial performance had she proceeded in equity instead of law, and our decision is restricted accordingly."²⁸

However, there are decisions which have gone beyond the limitations indicated by the Connecticut court. Thus, in a New York case, three promoters, of whom the defendant was one, orally agreed to organize the plaintiff corporation, to invest equally in its stock and to convey a hotel property to it. In an action for damages, the complaint alleged complete performance of this agreement except that the defendant refused to make his investment or to convey his interest in the property and repudiated his stock subscription after the shares had been delivered to and accepted by him. In upholding a denial of a motion to dismiss the complaint, the court said that the facts alleged disclosed a situation where the protection of the Statute of Frauds would work a fraud upon the plaintiff, its creditors and its incorporators.

True the action is one at law for damages proximately arising out of defendant's failure to honor his oral engagements. But it is also true that the doctrine of estoppel *in pais*, although of equitable origin, is available at law. [Citing authorities]. Here facts capable of constituting the estoppel are pleaded and may be regarded as an element of the cause of action. It was permissible to plead them to preclude the defense (*Feinberg v. Allen*, 143 App. Div. 866, *affd.* 208 N. Y. 215), and in many jurisdictions it has been held that to serve that end it is necessary to do so. (120 A. L. R. 9-33).²⁹

A wrongfully discharged employee was permitted to recover an orally agreed bonus on the ground that, having given up his former position and accepted employment with the defendant in reliance upon the oral

²⁸ 124 Conn. at 515, 1 A.2d at 150.

²⁹ *Wikosco, Inc. v. Proller*, 276 App. Div. 239, 241, 94 N.Y.S.2d 645, 648 (3d Dep't 1950). It was said that the pertinent statute was N.Y. Real Prop. Law § 259, which requires a signed memorandum of a contract to sell real property. It is to be noted that § 270 provides: "Nothing contained in this article abridges the power of courts of equity to compel the specific performance of agreements in cases of part performance." The wording of the exception in the Iowa statute seems broad enough to cover both suits in equity and actions at law. Iowa Code § 622.32 (1954):

Except when otherwise specifically provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or his authorized agent:

3. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year. . . .

Section 622.33:

The provisions of subsection 3 of section 622.32 do not apply where the purchase money or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession of the premises under and by virtue of the contract, or when there is any other circumstance which, by the law heretofore in force, would have taken the case out of the statute of frauds.

promise, it would be unconscionable to apply the statute.³⁰ And damages have been recovered for breach of an oral contract for the purchase and sale of livestock of a value of over \$500 for the reason that the expenditure of large sums of money by the plaintiff in the course of executing the contract raised an estoppel against the defense of the statute.³¹

Conditional Performances: Time as of the Essence

When we come to equity's practice of looking at the substance rather than the letter of a contract and considering whether a time set for performance was really of the essence, we find again adequate grounds for departing from the time-honored principle that time is always of the essence in an action at law.

Pomeroy wrote:

The ground of the rule concerning time and the effect of delay is often said to be the principle that time in equity is not generally material. At law it is otherwise; for the plaintiff suing upon a contract, must show that he has done all the acts on his part within the prescribed time where such period is fixed by stipulation, and within a reasonable time, where there is no stipulation upon the subject.³²

In England, with respect to land contracts, section 41 of the 1925 Law of Property Act provides:

Stipulations in a contract as to time or otherwise, which according to rules of equity are not deemed to be of the essence of the contract, are also construed and have effect at law in accordance with the same rules.³³

Section 10 of the 1893 English Sale of Goods Act reads:

(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.³⁴

³⁰ *Montgomery v. Moreland*, 205 F.2d 865 (9th Cir. 1953).

³¹ *Union Packing Co. v. Cariboo Land & Cattle Co.*, 191 F.2d 814 (9th Cir. 1951), cert. denied, 342 U.S. 909 (1952).

³² Pomeroy, *Specific Performance* § 371 (3d ed. 1926). See dictum of Lord Romilly in *Parkin v. Thorold*, 16 Beav. 59, 65, 51 Eng. Rep. 698, 701 (Ch. 1852):

At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not the decision of a court of equity. . . .

Professor Corbin suggests that:

The idea that time is of the essence at common law, and that at law a contractor cannot maintain suit for the price or for damages unless he has rendered full performance of his own part in every detail may have originated in erroneous statements by the chancellors, who felt strongly the injustice of denying recovery to a contractor who has rendered substantial performance and who assumed that the more tough-minded common law judges would fail to see the injustice.

³ Corbin, *Contracts* § 713, at 798-99 (1951).

³³ 20 *Halsbury's Statutes of England* 510 (2d ed. 1950). This supersedes the *Judicature Act, 1873*, § 25(7).

³⁴ 22 *Halsbury's Statutes of England* 991 (2d ed. 1950).

In some of our states, statutes dealing with the interpretations of contracts generally, provide that: "Time is never to be considered of the essence of the contract unless by its terms expressly so provided."³⁵

But are these enabling statutes necessary to empower a judge sitting at law to interpret a contract, and contract obligations, in the same manner that he would if the plaintiff had asked for equitable rather than legal relief?³⁶ Whether the action is brought at law or in equity, the plaintiff will allege performance of all conditions on his part, or his readiness to perform them. The defendant's answer will then raise the issue whether the plaintiff's late performance, or tender, or technical breach is not fatal to the maintenance of his suit, *i.e.*, does not establish a failure of performance of conditions to be performed by the plaintiff. The court then, to produce a result that will be fair to the parties, looks behind the letter of the contract to the real meaning of the parties. If it finds that neither the language used nor the surrounding circumstances make the stated time for performance essential within the contemplation of the parties, it may rightly conclude that the plaintiff has made or tendered substantial performance of what was intended and that, as a consequence, the defendant has not been released from his obligation to perform. To give the plaintiff relief is fair especially if the judgment allows the defendant damages, compensation or abatement for whatever slight loss he has been caused by plaintiff's delay or technical default. A law court has the same power.³⁷ When specific performance of a land contract is required and the court finds that the time stated for the performance is not of the essence, the court is not remaking the contract, it is only doing justice in

³⁵ 2 Mont. Rev. Codes Ann. § 13-724 (1947); Okla. Stat. Ann. tit. 15, § 174 (1937); S.D. Code § 10.0107 (1937). Cf. N.D. Rev. Code § 9-0723 (1943): "Time is of the essence of a contract if it is provided expressly by the terms of the contract or if such was the intent of the parties as disclosed thereby." In a dictum in *Sunshine Cloak & Suit Co. v. Roquette Bros.*, 30 N.D. 143, 148, 152 N.W. 359, 361 (1915), the court said:

It is doubtless true, as applicant contends, that time is never considered as of the essence of a contract, unless by its terms it is expressly so provided; in fact this is a statutory provision in this state.

It may be questioned whether provisions contained in the Uniform Commercial Code do not exclude the possibility of finding time not of the essence. See p. 364 *infra*.

³⁶ 3 Corbin, *Contracts* § 715, at 804-05 (1951), referring to these state statutes, says:

The statute makes it clear that merely promising to ship by a named date is not per se sufficient to make that time of the essence; this should be clear without the statute, but the contrary is often stated as a rule at law.

³⁷ The damages can be awarded if defendant amends his pleadings to counterclaim for them or if granted as part of a conditional judgment. Cf. *Fairlawn Heights Co., Inc. v. Theis*, 133 Ohio St. 387, 14 N.E.2d 1 (1938), where it was held that a vendor can maintain an action at law for the recovery of the purchase price if he tenders a deed and keeps that tender good. The court cited precedents from 13 states and reasoned that the abolition of the distinction between actions at law and suits in equity justified its holding. But the Ohio court held for the defendant on the ground that the title tendered was questionable.

accordance with the real intention of the parties. There can be only one true intention and, therefore, it should be found to be the same if plaintiff asks for damages rather than specific performance. The fact that we are now operating under a merged system of law and equity furnishes another reason for having but one interpretation. The aim should be justice with fairness.

An effective and authoritative repudiation of the notion that "at law, time is always of the essence of a contract" will be found in Corbin on Contracts, chapter 34.

By the blind eye of the common law, it would seem, "time" is read as a master word in the contract jungle, absolute and uncompromising in its significance and power. It can be asserted with confidence that never were the common law judges so blind as this. . . . They stated no such dogmatic and almost meaningless rule of thumb as that "time is always of the essence of a contract at common law." Here, as in other connections, much confusion is due to the very common failure to distinguish (1) between a promise and a condition, and (2) between an express condition and a constructive condition.³⁸

Professor Corbin reminds us of the historical evolution. When contracts were first enforced at common law, the mutual promises were regarded as independent and plaintiff might maintain an action against the defendant without having to allege performance on his side. To overcome this condition of unfairness, it was eventually held that the promises should be regarded as mutually dependent.³⁹ Williston points out that this is a "constructive dependency" imputed to achieve justice and is not always dependent upon or consistent with actual intention.⁴⁰ In a bilateral contract it is only fair, and it is intended that there be a reciprocal exchange of performances. But the rule of constructive dependence does not exclude the possibility of substantial, if not literal, performance by the plaintiff. As Corbin says:

[The rule that mutual promises were independent] was not displaced by a rule that a promisor who had failed in the least degree, or for the least time to perform his promise cannot maintain suit. Instead, it was laid down that the defendant is not discharged unless the plaintiff's failure goes to the whole consideration and is not compensable in damages.⁴¹

³⁸ 3 Corbin, Contracts § 713 (1951).

³⁹ *Id.* §§ 709, 713.

⁴⁰ 3 Williston, Contracts § 827 (Williston & Thompson rev. ed. 1936):

But the theory of mutual dependency of the promises in a bilateral contract is based on fundamental principles of justice, and if the court conceives of its action in enforcing such dependency as due not to the will of the parties but to the inherent justice of the situation, there is no difficulty in so applying and molding the principle of failure of consideration as to protect the defendant without subjecting the plaintiff to the risk of unjust forfeiture. Therefore, promises will be regarded as constructively dependent whenever it is possible to do so.

⁴¹ 3 Corbin, Contracts § 713 (1951).

Professor Corbin believes that in most cases where it is stated that time is always of the essence at law, the plaintiff's failure to perform was actually a substantial failure.⁴² In actions for damages for the breach of contracts for the sale of goods, custom or particular facts may be grounds for insisting upon prompt and literal performance, for interpreting the time set as of the essence. But this may not always be so and does not justify an arbitrary and general rule that time is always of the essence in such contracts.⁴³

One wonders whether the Uniform Commercial Code does not classify all commercial contracts for the sale of goods as belonging to a single category in which the reciprocal promises and performances are presumed to have been intended to be dependent and conditional, leaving no alternative but to find that time is always intended to be of the essence.⁴⁴ If so, the Code seems to contemplate a commercial usage that is different from the one regulated by the English Sale of Goods Act which provides that stipulations as to time of payment are not deemed to be of the essence unless a different intention appears in the contract and that whether any other

⁴² *Ibid.*

⁴³ 2 Williston, Sales §§ 451-53 (rev. ed. 1948). In § 453 it is said:

It is obvious that in any contract one party may make his promise expressly conditional on the exact performance of any agreed condition, and therefore performance on a specified day or hour, or before a specified day may be made such a condition. So that the first point to be determined in an inquiry whether time is of the essence in a particular case, is whether the parties have in terms made it so. And it is only when this question has been decided in the negative that any rule of law other than one of interpretation is called into play. Often the defendant has not made his promise to perform expressly conditional on the plaintiff's performance not later than the fixed day or within a fixed period; he may have contented himself with exacting from the plaintiff a promise or performance not later than a fixed day or within a fixed period. Neither the parties themselves nor the courts always pay much attention to this distinction between a condition and a promise, because performance by one party of his promise is so often an implied condition of the duty of the other.

⁴⁴ Uniform Commercial Code art. 2, Sales, pt. 3, §§ 2-301, 2-507, and 2-511. Note that § 2-508 permits a seller who has made a non-conforming tender to make a conforming delivery if he does so within the contract time for performance, and that under § 2-605, which provides that a buyer is regarded as waiving an ascertainable "defect" unless his rejection is accompanied by a particularization of the defects, the word "defect" seems not intended to include a delay in tender beyond the contract time. Section 2-615 gives the seller an excuse for delay in delivery "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by the compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be valid." Section 1-204(3) provides: "An action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time," and § 1 of this section reads: "Wherever this Act requires any action to be taken within a reasonable time, the agreement may fix any time which is not manifestly unreasonable." As bearing further upon the conditional aspect of the obligations it may be noted that § 2-601 gives the buyer the right to accept or reject "if the goods or the tender of delivery fail in any respect to conform to the contract." This would include default in performing at the agreed time.

stipulation as to time is of the essence will depend on the terms of the contract.⁴⁵

Section 2-301 of the Uniform Commercial Code provides:

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the terms of the Contract.

In explanation of this section, the comment reads in part:

This section uses the term "obligation" in contrast to the term "duty" in order to provide for the "condition" aspects of delivery and payment insofar as they are not modified by other sections of this Article such as those on cure of tender.

There is this added comment:

In order to determine what is "in accordance with contract" under this Article usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words to define the scope of the conditions and duties.

Section 2-507 reads:

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

It is explained in the Comment that:

The "unless otherwise agreed" provision of subsection (1) is directed primarily to cases in which payment in advance has been promised or a letter of credit term has been included. Payment "according to the contract" contemplates immediate payment, payment at the end of an agreed credit term, payment by a time acceptance or the like.

As to subsection (2), it:

. . . deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's "right as against the seller" conditional upon payment.

The converse situation is covered by section 2-511(1):

Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

Of course, under the principles applied where time is found not to be of the essence, a plaintiff who is slightly in default must tender substantial performance as a condition of the defendant's obligation to perform. But the problem which seems to be presented by these sections of the Com-

⁴⁵ 22 Halsbury's Statutes of England 991 (2d ed. 1950).

mercial Code is whether these sections do not make performances expressly rather than constructively⁴⁶ conditional. If so, all agreements for the purchase and sale of goods made pursuant to the Code and impliedly incorporating these provisions, will be regarded as expressly making time of the essence. This interpretation would bar a plaintiff, both at law and in equity, from enforcing any agreement governed by the Code by tendering substantial performance. The defendant would always have available the defense that plaintiff's performance had not been precisely according to the letter of the contract.

Relieving against Hard Bargains and Forfeitures

In a suit for specific performance of a contract, equity will listen to the defense that, because of the terms of the contract itself or because of subsequent events, specific execution would result in hardship and oppression to the defendant. Sometimes, but not always, such cases present concomitant facts of overreaching, mistake or non-disclosure of material facts. In denying specific relief, the court may indicate that it is not questioning the validity of the contract or the availability of plaintiff's legal remedy,⁴⁷ assuming "that the more toughminded common law judges would fail to see the injustice."⁴⁸ But even centuries ago, the common law judges were not that toughminded. Professor Corbin cites two early cases.⁴⁹ In one, the defendant had agreed to pay for a horse at the rate of "a barley corn a nail, doubling it every nail." The 32 nails in the horses hoofs, when doubled with each nail, came to 500 quarters of barley. The jury was instructed to bring in a verdict for the value of the horse. Their verdict was for £8.⁵⁰ In the second case, the verdict was for the reasonable value although the price, if calculated as the contract required, would have been 524,288 quarters of rye.⁵¹

Long ago, equity amended the law of mortgages. Finding that the real purpose of the mortgage was to obtain security against a possible default, it overrode the express provision for forfeiture in the event of default and

⁴⁶ See notes 40, 43 supra. 3 Corbin, Contracts § 715 (1951):

But the vendor can make his duty to convey expressly conditional upon a payment on or before a specified day or hour; and the purchaser can make his duty to pay expressly conditional upon conveyance by a specific time. Such a result is not achieved by merely promising to pay or to convey on a stated day; either party can achieve it by making his own promise expressly conditional upon such an exact performance by the other.

⁴⁷ *Mark v. Gates*, 154 Fed. 481 (9th Cir. 1907); *Koch v. Streuter*, 232 Ill. 594, 83 N.E. 1072 (1908); *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908); 5 Corbin, Contracts § 1162 (1951).

⁴⁸ See quotation from Corbin, note 32 supra.

⁴⁹ 3 Corbin, Contracts 156 n. 18 (1951).

⁵⁰ *James v. Morgan*, 1 Lev. 111, 83 Eng. Rep. 323 (K.B. 1675).

⁵¹ *Thornborough v. Whiteacre*, 2 Ld. Reym. 1164, 6 Mod. 305, 91 Eng. Rep. 715 (K.B. 1706).

created and protected the debtor's equity of redemption. A comparable situation exists when a land contract provides for payment of the price in installments, for retention of the title by the vendor until the last installment has been paid, stipulates that time is of the essence and that, in the event of default in any payment, the vendor shall be discharged and entitled to retain all payments made and to re-enter possession if it has been given to the purchaser. Usually, equity will relieve against such forfeitures by permitting specific performance at the suit of the purchaser,⁵² or by denying the vendor's petition for cancellation of the contract for default in the installment payments, if, when the suit was commenced, the buyer tendered payment of all installments due, with interest.⁵³

Courts of law have to pass on the question of forfeiture under such contracts when the purchaser seeks to recover his down payments and thus prevent a forfeiture. The majority rule has been against the purchaser.⁵⁴ It is reasoned that he is the wrongdoer, the seller is the injured party. Why, therefore, should one who has freely entered a contract be permitted it ignore its terms when he is in default? No one questions the vendor's right to compensatory or even to liquidated damages in a reasonable amount, and that, in any event, the purchaser should be able to recover no more than the excess over such damages.⁵⁵ The issue is with respect to that excess only. "Where the transaction is in its essence a mortgage, agreements for forfeiture and provisions that time is of the essence should be given no more weight than similar provisions in a mortgage,"⁵⁶ and "the buyer's right of return, if he ever has such a right, is given him by law necessarily in opposition to the terms of the contract."⁵⁷ Some jurisdictions have upheld this view,⁵⁸ one court saying,

⁵² *Edgerton v. Peckham*, 11 Paige 352 (N.Y. Ch. 1844) (two-thirds of the price had been paid and the purchaser had made extensive improvements); *Richmond v. Robinson*, 12 Mich. 193 (1864). The rule is otherwise in some states, *Heckard v. Sayre*, 34 Ill. 142 (1864). *Simpson*, "Legislative Changes in the Law of Equitable Conversion," 44 Yale L.J. 754, 774-79 (1935); 3 Williston, *Contracts* § 791 n. 14, 15 (Williston & Thompson rev. ed. 1936).

⁵³ *Dependability Homes, Inc. v. White*, 161 Ohio App. 118, 117 N.E.2d 706 (1951).

⁵⁴ Extensive annotation in 31 A.L.R.2d 8 (1953).

⁵⁵ 5 Corbin, *Contracts* §§ 1132-35 (1951).

⁵⁶ 3 Williston, *Contracts* 2229 (Williston & Thompson rev. ed. 1936).

⁵⁷ *Id.* at 2226.

⁵⁸ Cases collected 31 A.L.R.2d 19 (1953).

Restatement, *Contracts* § 357 (1932):

Restitution in favor of plaintiff who is himself in default.

(1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment except as stated in Sub-section (2), for the amount of such benefit in excess of the harm that he caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if

(a) the plaintiff's breach or non-performance is not wilfull or deliberate; or

Whatever reason may be alleged the desirability and fairness of the result are clear. There is an instinctive revolt against making the vendor more than whole as a result of vendee's misfortune in being unable to complete his contract.⁵⁹

This is an attitude consistent with the long established rule and understanding as to the effect of a bond or mortgage. There are precedents for the refusal of courts of law to give effect to contractual provisions that are illegal or contrary to good policy, for example, with respect to provisions for penalties, as distinguished from liquidated damages.⁶⁰

The Uniform Commercial Code has an interesting section 2-302, which as amended reads:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties may be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.⁶¹

The Commercial Code also provides specifically in section 2-718 that a contract term fixing unreasonably large liquidated damages is void as a penalty, and that "a 'deposit' or 'down' or part payment of more than 20 per cent of the price or \$500, whichever is smaller, to be forfeited on breach, is so forfeited only to the extent that it is a reasonable liquidation of the damages. . . ."

As the above discussion indicates, justice can sometimes be done by

(b) the defendant, with knowledge that the plaintiff's breach of duty or non-performance of condition has occurred or will thereafter occur, assents to the rendition of the part performance, or accepts the benefit of it, or retains property received although its return in specie is still not unreasonably difficult or injurious.

(2) The plaintiff has no right to compensation for his part performance if it is merely a payment of earned money, or if the contract provides that it may be retained and it is not so greatly in excess of the defendant's harm that the provision is rejected as imposing a penalty.

(3) The measure of the defendant's benefit from the plaintiff's part performance is the amount by which he has been enriched as a result of such performance unless the facts are those stated in Sub-section (1b), in which case it is the price fixed by the contractor for such part performance, or, if no price is so fixed, a ratable proportion of the total contract price.

⁵⁹ *Dooley v. Stillson*, 46 R.I. 332, 340, 128 Atl. 217, 220 (1925).

⁶⁰ 3 Williston, *Contracts* §§ 776-80 (Williston & Thompson rev. ed. 1936). In a few states, there are statutes compelling the vendor to give the purchaser a period of grace after his default before terminating the contract. Iowa Code §§ 656.1-656.6 (1954); Minn. Stat. Ann. § 559.21 (1947); N.D. Rev. Code §§ 9-0803, 32-1802-06 (1943); S.D. Code § 37.3103 (1939). Simpson, "Legislative Changes in the Law of Equitable Conversion," 44 *Yale L.J.* 754, 777-78 (1935).

⁶¹ Uniform Commercial Code, Supp. No. 1 (1955). This section seems intended to apply whether a suit is brought at law or in equity.

ignoring the harsh features of the contract. At other times, it is done by searching for the real intent of the parties and giving the words used a liberal interpretation. Thus, when a lease provided for a rent to be computed at a specific percentage of the department store business done by the lessee "in said building," and the lessee moved a part of his business to an adjoining building owned by another but reached through the lessor's building or to which customers were diverted from the lessor's building, the lessor was allowed to recover a rental on the basis of the business done outside as well as inside said building.⁶²

In denying specific performance of a contract for the sale of a crop of tomatoes because the court regarded the terms of the contract as too one-sided and harsh, Judge Goodrich expressed the difference usually supposed to exist between law and equity: "As already said, we do not suggest that the contract is illegal. All we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist."⁶³ Cannot the court sitting at law be a court of conscience? If the buyer sued the seller for damages for a breach of this same contract, could not the court suggest that the harshness of the bargain could be raised by an equitable defense? Judge Frank, dissenting in another case, taking issue with the quoted statement of Judge Goodrich, wrote:

. . . the court refused to grant specific performance of an unfair contract of "adhesion" but indicated that it would rule differently in a suit "at law." It is difficult to see why such a ruling should be thus restricted. Our legal history discloses numerous instances in which "equitable" doctrines as to unfairness or the like have been adapted at "law." [Citing precedents.]⁶⁴

SUMMARY

The examples which have been used here to illustrate how principles of equity can be and, by some courts, have been applied in actions for legal relief are not to be regarded as the only ones that could have been advanced for this purpose. They show merely the possibilities and some precedents for the adoption of the equitable attitude by courts sitting at law. The decisions, even when reflecting only a minority point of view, and their results deserve to be highlighted to emphasize how easily and how soundly the practice of adopting the equitable attitude in actions at law can be more generally followed in these and other instances,⁶⁵ and

⁶² *Cissna Loan Co. v. Barron*, 149 Wash. 386, 270 Pac. 1002 (1928). See also *Gamble-Skogmo, Inc. v. McNair Realty Co.*, 98 F. Supp. 440 (D. Mont. 1951), *aff'd*, 193 F.2d 876 (9th Cir. 1952); *Mutual Life Ins. Co. v. Tailored Woman, Inc.*, 309 N.Y. 248, 128 N.E.2d 401 (1955).

⁶³ *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 84 (3d Cir. 1948).

⁶⁴ *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189, 206 n. 20 (2d Cir. 1955).

⁶⁵ 3 *Williston, Contracts* § 844 (*Williston & Thompson rev. ed. 1936*), after discussing

how easily and soundly the present-day bench and bar can release themselves from the strait-jacketed thinking of former times.

II

Inadequacy of the Legal Remedy

We turn now from a consideration of what a court sitting at law may do to adapt and apply principles of equity to a consideration of what the court sitting in equity may do to extend equitable remedies.

At the beginning of the exercise of equity jurisdiction, one of the chief reasons for applying to the Chancellor and one of the chief reasons for his interference was the inadequacy of the legal remedy. In the ensuing struggle between the common law and the equity judges, this became the established boundary of the activity of equity within its so-called concurrent jurisdiction. So, today, one seeking equitable relief must first establish his legal right, the infringement or threatened infringement of it and the inadequacy of his legal remedy.

It is not here being suggested that modern courts can or should completely ignore the limitations placed by the requirement of the inadequacy of the legal remedy. A system of law which provided for specific relief, specific performance, or injunction, as the normal procedure and the substitution of damages as the abnormal might be a more perfect system,⁶⁶

the equity practice of granting specific performance with compensation or abatement for slight and immaterial defects in quantity, quality, or title, says:

It is not improbable that the rule in actions at law may become somewhat ameliorated, and though one who still can make accurate performance will not be allowed to recover without tender of such performance, one who has already committed a breach in limine making exact performance impossible, but who can and does tender performance varying but slightly from his agreement will be allowed to enforce the agreement at law, the defendant's right to recoupment or counterclaim being regarded as equivalent to the compensation which equity requires.

But see *Smyth v. Sturges*, 108 N.Y. 495, 15 N.E. 544 (1887), purchaser having refused conveyance with compensation for fixtures which had been removed, vendor sued for damages, but it was held that the vendor, being unable to deliver what was promised, could not recover.

⁶⁶ In a sense, specific relief is the normal form of relief in the civil law system. Neitzel, "Specific Performance, Injunctions and Damages in German Law," 22 *Harv. L. Rev.* 161, 162 (1909). After referring to the fact that a claim for damages is the normal remedy in some systems, the author says:

The conception of the modern German law is quite different. The two leading principles of it are that every right may be enforced by the courts, and that the purpose of such enforcement is the creation of the condition which would exist if the right was complied with voluntarily and without judicial help. In other words, a person has as many actions as he has rights recognized by the law; the right to sue is nothing else than the formal aspect of the right itself. Furthermore, the purpose of a lawsuit is to create a situation or condition which would exist if no violation or infringement of a right had arisen at all. For instance, a person has hired a horse which is not delivered to him and he sues for delivery; or, he has entered into a partnership, his partner does not fulfill his part of the agreement and he sues for specific performance; or, an employee has bound himself not to compete with his master, he breaks his contract, and his master seeks to enjoin him; or, finally some one by trespassing on my property has injured it and I sue him to repair the damage.

Under French law, a contract to convey realty or personalty is, as between the parties,

but it is not our Anglo-American system. Indeed, the adoption of it would lead to constitutional objections that the defendant is being deprived of his right to a jury trial in an action at law for damages or that the equity powers of the court as established by the state constitution can be altered only by a constitutional amendment.

An incident in history bears upon the nature of our problem. In 1616, when the contest between law and equity was being waged by Lord Coke and Lord Ellesmere, Coke granted a writ of prohibition against the maintenance of a suit for specific performance of a contract for a lease. The report reads:

Without doubt a court of equity ought not to do so, for then to what purpose is the action on the case and covenant; and Coke said that this would subvert the intent of the covenantor since he intended to have his election to pay damages or to make the lease, and they would compel him to make the lease against his will; and so it is if a man binds himself in an obligation to enfeoff another, he cannot be compelled to make the feoffment.⁶⁷

Of course, a promisor does not, in a proper sense, have a privilege of electing between performing and paying damages. His honorable obligation is to perform. He does have a power to do wrong and, if Coke had succeeded in suppressing equity, his wrongdoing would have subjected him only to a liability for damages. In fact, it was because the only means the common law judges had for inducing a compliance with obligations was the threat of liability for damages resulting from non-compliance that equity stepped in to order performance with the sanction of contempt proceedings for those who disobeyed.

equivalent to an actual conveyance. As to obligations to do or not to do something, performance is enforced by imposing progressively increasing penal damages (*astreintes*) until the defendant complies with his duty. Thus, an electric light company which wrongfully terminated its service to plaintiff had damages assessed against it at the rate of 10,000 francs a day until it restored the service. Upon compliance, the damages may be reduced to a compensatory measure. This is enforcement in *rem* rather than in *personam*. Schlesinger, *Comparative Law Cases and Materials* 262 n. (1950); Amos, "Specific Performance in French Law," 17 *L.Q. Rev.* 372 (1901); Walton, "Specific Performance in France, *Astreintes*," 14 *J. Comp. Leg. & Int'l L.* (3d ser.) 130 (1937); Krassa, "Interaction of Common Law and Latin Law: Enforcement of Specific Performance in Louisiana and Quebec," 21 *Can. B. Rev.* 337 (1943). Pound, "The Theory of Judicial Decision," 36 *Harv. L. Rev.* 641, 647 (1953) writes:

With us substituted redress is the normal type; specific redress is exceptional and reserved for cases for which the former is not adequate. To the civilian, specific redress is the normal type; substituted redress is to be used only in cases in which specific redress is not practicable or would operate inequitably. Again, to us these two types of remedy are so distinct that we think of them commonly as calling for distinct types of proceeding. But the civilian conceives of the proceeding in the terms of the right asserted, not of the remedy sought, and so thinks only of what is the practical means of giving effect to that right. In other words, we think procedurally in terms of the remedy; the civilian thinks in terms of the asserted right.

⁶⁷ *Bromage v. Genning*, 1 Roll. R. 368, 81 Eng. Rep. 540 (K.B. 1616). Translation is by Ames, see Ames, *Equity Jurisdiction*, pts. I-VI, 38 n. (1904).

Story favored liberality in the granting of specific performance, and the same reasoning would carry with it liberality in the granting of injunctive relief.

The truth is, that upon the principles of natural justice Courts of Equity might proceed much farther and might insist upon decreeing a specific performance of all bona fide contracts, since that is a remedy to which Courts of Law are inadequate. There is no pretence for the complaints sometimes made by the common lawyers, that such relief in equity would wholly subvert the remedies by actions of the case and actions of covenant; for it is against conscience that a party should have a right of election whether he would perform his covenant or only pay damages for the breach of it. But on the other hand there is no reasonable objection to allowing the other party who is injured by the breach to have an election either to take damages at law or to have a specific performance in equity, the remedies being concurrent but not coextensive with each other. The restriction stands therefore not so much upon any general principle *ex aequo et bono* as upon the general convenience of leaving the party to his remedy in damages at law, where that will give him a clear and full compensation.⁶⁸

What is being suggested now is that when we have one court administering both legal and equitable remedies there is every reason why that court should permit a plaintiff to have his requested specific relief, rather than the substitute of damages, whenever this can be constitutionally done. It is not unconstitutional to give a liberal rather than a narrow interpretation of "the inadequacy of the legal remedy."

Consider, for example, the automobile market immediately after World War II. Manufacturers were reconverting from war production to automobile production. The output had to be parceled to dealers throughout the land. A particular dealer received only a few deliveries and those were spread over a period of time. In August, 1945, when the dealers had as yet no cars, a dealer accepted plaintiff's written order for a "new Plymouth Club Coupe" at list price at time of delivery, and delivery to be as soon as possible. Within the ensuing year, the dealer received, sold, and delivered two other cars of the type contracted for by plaintiff, ignored plaintiff's repeated demands for delivery to him, and finally informed him that he could not have a car. Several courts held that the plaintiff could not have specific performance and would have to be content with damages.⁶⁹ The adequacy of the remedy of damages is certainly ques-

⁶⁸ 2 Story, *Equity Jurisprudence* § 994 (14th ed. 1918).

⁶⁹ *McAllister v. Patton*, 214 Ark. 293, 215 S.W.2d 701 (1948); *Poltorak v. Jackson Chevrolet Co.*, 322 Mass. 699, 79 N.E.2d 285 (1948); *Kirsch v. Zubalsky*, 139 N.J. Eq. 22, 49 A.2d 773 (Ch. 1946); *Gellis v. Falcon Buick Co.*, 191 Misc. 566, 76 N.Y.S.2d 94 (Sup. Ct. Kings County 1948); *Cohen v. Rosenstock Motors Co.*, 188 Misc. 426, 65 N.Y.S.2d 481 (Sup. Ct. Bronx County 1946); *Goodman v. Henry Caplan, Inc.*, 188 Misc. 242, 65 N.Y.S.2d 576 (Sup. Ct. Kings County 1946); *Kaliski v. Grole Motors, Inc.*, 69 N.Y.S.2d 645 (Sup. Ct. Queens County 1946); *Fortner v. Wilson*, 202 Okla. 563, 216 P.2d 299 (1950). Cf. *Kelley v.*

tionable when the dealer has a virtual monopoly in an under-supplied market. At least three jurisdictions thought the inadequacy sufficient to justify granting specific performance.⁷⁰

The New York decisions cited based the denial of specific performance upon a construction of section 68 of the Uniform Sales Act.⁷¹

Where the seller has broken a contract to deliver specific or ascertained goods, a court having the power of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or otherwise, as to the court may seem just.⁷²

Professor Williston, the draftsman of the Uniform Act, has said:

Courts of equity have very closely restricted their jurisdiction in regard to contracts for the sale of personal property. It would sometimes promote justice if the courts were somewhat more ready to allow specific performance of contracts to sell goods in cases where for any reason damages did not seem adequate. This section of the act will perhaps dispose courts to enlarge somewhat the number of cases where specific performance is allowed.⁷³

In spite of the purpose of the act to induce courts to be more liberal in the granting of specific performance, the New York courts were impressed with the words "specific or ascertained goods" and held that a contract for "one new car [to be manufactured], Make Plymouth, Type Sedan, Year 1946, Color Open," was not a contract for a specific car identified and agreed upon at the time the contract to sell was made. When the thing contracted for is to be manufactured or grown, it is, of course, not a specific and ascertained thing when the contract is made, but surely it becomes specific and ascertained, when, after being produced, it is delivered into the dealer's hands. At that point, he is under a contractual obligation to appropriate it to the plaintiff's order of purchase. If the legal remedy is inadequate because of the inability to procure the same article

Creston Buick Sales Co., 239 Iowa 1236, 34 N.W.2d 299 (1950) (specific performance denied because price uncertain, date of delivery was in the judgment of defendant, and buyer's privilege to cancel created lack of mutuality).

⁷⁰ *Heidner v. Hewitt Chevrolet Co.*, 166 Kan. 11, 199 P.2d 481 (1948) (plaintiff had made a deposit and was given number 66 on defendant's list; a year and a half later his number came up but defendant refused to deliver unless plaintiff would turn in a used car as part payment); *Boeving v. Vandover*, 240 Mo. App. 117, 218 S.W.2d 175 (1949); *De Moss v. Conart Motor Sales, Inc.*, 72 N.E.2d 158 (Ohio C.P. 1947), *aff'd*, 149 Ohio St. 299, 78 N.E.2d 675 (1948).

⁷¹ N.Y. Pers. Prop. Law § 149.

⁷² This section follows, with slight changes in wording, § 52 of the English Sale of Goods Act, 22 Halsbury's Statutes of England 1014 (2d ed. 1950). The latter section was, in turn, derived from the Common Law Procedure Act of 1854. In an action of detinue defendant could substitute damages rather than deliver the chattel. The Common Law Procedure Act deprived him of that alternative upon application of the plaintiff and in the discretion of the court.

⁷³ 3 Williston, Sales § 601 (rev. ed. 1948).

elsewhere, should not the vendor be compelled to deliver the identified article to the buyer?

But more than that, even before the Sales Act, equity granted specific performance of a contract to sell "all the coal tar that might be produced at the defendant's gas works at Baltimore, for and during a term of five years," on the ground that defendant was in a monopoly position and that damages would be inadequate because speculative.⁷⁴ The Uniform Act was not intended to restrict the granting of specific performance where it had been appropriately granted theretofore, and there have been decisions since the act where specific performance has been granted of contracts for the sale of crops to be grown or goods to be manufactured.⁷⁵

The corresponding section of the Uniform Commercial Code reads "specific performance may be decreed where the goods are unique or in other proper circumstances" and the complicating words "specific or ascertained" were omitted.⁷⁶ But the draftsmen continue to express the hope that the section will be given a liberal interpretation:

The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with specific performance of contracts of sale.

⁷⁴ *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md. 285 (1884); *Curtice Brothers Co. v. Catts*, 72 N.J. Eq. 831, 66 Atl. 935 (Ch. 1907) (acreage of tomatoes). Though the Uniform Act was adopted by New Jersey in 1907, it was not mentioned in the opinion.

⁷⁵ *Campbell Soup Co. v. Diehm*, 111 F. Supp. 211 (E.D. Pa. 1952) (acreage of tomatoes), appeal dismissed sub nom. *Campbell Soup Co. v. Martin*, 202 F.2d 398 (3d Cir. 1953); *Hunt Foods, Inc. v. O'Disho*, 98 F. Supp. 267, 270 (N.D. Cal. 1951) (five year contract for peaches, and the court said that by the enactment of the Uniform Act "the State of California unquestionably had in mind the liberalization of the law regarding the specific performance of contracts for the sale of chattels"); *Eastern Rolling Mill Co. v. Michlovitz*, 157 Md. 51, 145 Atl. 378 (1929) (steel scrap accumulating during a period of five years). Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 82 (3d Cir. 1949), where the court denied specific performance because of the unfairness of the contract but stated that otherwise it would have been specifically enforceable, saying:

Judged by the general standards applicable to determining the adequacy of the legal remedy we think that on this point the case is a proper one for equitable relief. We see no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time-consuming processes against one who has deliberately broken his contract. [Citing authorities].

See Masterson, "Specific Performance of Contracts to Deliver Specific or Ascertained Goods under the English Sale of Goods Act and the American Sales Act," *Legal Essays in Tribute to Orrin Kip McMurray* (1935), and cases collected 152 A.L.R. 4, 44 (1944); Note, 100 U. Pa. L. Rev. 769 (1952).

⁷⁶ Section 2-716:

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances. (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just. (3) The buyer has the right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

Political Interests

Equitable relief is sometimes said to be denied on the ground that what is requested is beyond the authority, the power, or the jurisdiction of an equity court to grant. It is not a denial based upon the adequacy of an alternative legal remedy or upon a discretionary decision to withhold the exercise of a conceded authority to grant relief. It is a denial based upon a supposed lack of power.

Thus, within the past year, one Illinois court has said that equity's jurisdiction pertains only to questions of the maintenance of civil rights—property rights, as distinguished from political rights,⁷⁷ and another has said that the scope of equity jurisdiction is to enforce or protect civil rights and property interests and that a court of equity has no jurisdiction to interfere merely for the prevention of crimes.⁷⁸ But in both of these instances, as in most of the decisions refusing enforcement of political rights or the prevention of crimes, these statements as to the limitations on equity jurisdiction were not the only grounds for denying relief.

The first of these cases was a suit by a police officer to compel selection of police captains from a "Police Captains' Eligible" list. In addition to saying that equity has no jurisdiction over political questions, the court said that the plaintiff had not shown special injury, that a public office is not property and the prospective fees of an officer are not the property of the incumbent, and that the civil service commission was vested with discretion to cancel this list after the expiration of two years.

The second Illinois case cited was an application by licensed chiropractors to enjoin competition by unlicensed practitioners. In addition to saying that unlicensed practice was a crime which equity had no jurisdiction to enjoin, the court said that injury to property was the basis of jurisdiction in this case and that licensing was merely protective regulation and did not vest any property right in those licensed to practice.⁷⁹

Rights that are political are of various types and not all of them may be feasibly adjudicated in a civil action. But in *Nixon v. Herndon*,⁸⁰ plaintiff sued for \$5,000 damages for being denied permission to vote at a primary election. The defendant had moved to dismiss on the ground that the subject matter of the suit was political and not within the jurisdiction of the court. Mr. Justice Holmes, speaking for the Supreme Court, said:

⁷⁷ *Malkin v. City of Chicago*, 6 Ill. App. 2d 151, 127 N.E.2d 145 (1955).

⁷⁸ *Burden v. Hoover*, 7 Ill. App. 2d 296, 129 N.E.2d 463 (1955).

⁷⁹ In accord on this point is *Mossig v. New Jersey Chiropractors, Inc.*, 122 N.J. Eq. 382, 194 Atl. 248 (Ch. 1937). In the majority of jurisdictions, the unlicensed practice of a profession may be enjoined at the suit of either licensed practitioners or the state. See Notes, 92 A.L.R. 173 (1934); 81 A.L.R. 292 (1932).

⁸⁰ 273 U.S. 536, 540 (1927).

The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court. [Citing cases].

If, as was held, a court has jurisdiction to award damages for a lost right to vote, it is self-evident that damages, in whatever amount, is a remedy sufficiently inadequate to justify the exercise of that court's equitable power to enjoin a threatened refusal of the right to vote. And it has been so held by the United States Court of Appeals for the Fourth Circuit, which said:

There can be no question, therefore, as to the jurisdiction of the court to grant injunctive relief, whether the suit be viewed as one under the general provision of 28 U.S.C.A. § 41(1) to protect rights guaranteed by the Constitution, or under 28 U.S.C.A. § 41(11) to protect the rights of citizens of the United States to vote, or under 28 U.S.C.A. § 41(14) to redress the deprivation of civil rights.⁸¹

It cannot be successfully maintained that this decision is dependent upon these code provisions conferring upon federal courts an equitable jurisdiction that would not exist without them. Section 41 provides that the district courts shall have original jurisdiction:

- (1) Of all suits of a civil nature, at common law or equity. . . .
- (14) Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law . . . of any State, of any right . . . secured by the Constitution of the United States, or of any right secured by any law of the United States. . . .⁸²

Mr. Justice Holmes, referring to a predecessor of 42 U.S.C. § 1983,⁸³ said:

It will be observed, in the first place, that the language of § 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are, "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." They allow a suit in equity only when that is a proper proceeding for redress, and they refer to existing standards to

⁸¹ *Rice v. Elmore*, 165 F.2d 387, 392 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948); *Terry v. Adams*, 345 U.S. 461 (1953). Notes, "Equity Jurisdiction over Political Rights," 13 Cornell L.Q. 287 (1928); 7 Texas L. Rev. 430 (1929).

⁸² Under the 1948 revision, § 41(14) has become 28 U.S.C. § 1343 (1952), and has been revised to read: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . ." 42 U.S.C. § 1983 (1952) reads:

Every person who, under color of any statute . . . of any State or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

⁸³ See note 82 supra.

determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs.⁸⁴

But the grounds assigned for his decision were: a) that, since the complaint alleged that the state registration system was a fraud on the United States Constitution, the court should not grant the plaintiff's request that his name be enrolled on this fraudulent list of voters, and b) that it would be impracticable to enforce the decree, if granted, and to supervise an election.⁸⁵

Even though the courts say that it is beyond the competence of equity to protect political rights, their opinions usually indicate that in reality they are exercising discretion against the use of a power that exists. But when citizens of a state sought to enjoin an election under what was alleged to be an illegal system of districting of voters for a congressional election, it was held that the Constitution conferred authority to insure fair districting exclusively upon the Congress and the courts may not intervene because Congress may have been in default in exacting from the states obedience to its mandate.⁸⁶ Thus, there may be a type of political action with which the Constitution has barred the courts from interfering and there may be types with respect to which the Congress has expressed the expectation that courts will give protection to individuals. In the latter field, there is the usual latitude of judicial discretion which has always characterized the administration of equitable remedies.

Criminal Jurisdiction of Equity

The New York Court of Appeals has said: "That a court of equity will not undertake the enforcement of the criminal law, and will not enjoin the commission of a crime, is a principle of equity jurisdiction that is settled beyond any question."⁸⁷ It is, of course, equally well settled that this proposition does not exclude equitable protection of an individual's rights even though the threatened invasion of those rights may be by acts that are criminal as well as tortious.⁸⁸ It requires but little reflection to become convinced of the vulnerability of the main proposition that equity does not undertake the enforcement of the criminal law. One has only to recall the growing list of federal and state statutes which proscribe conduct as

⁸⁴ *Giles v. Harris*, 189 U.S. 475, 486 (1903).

⁸⁵ See Justice Frankfurter in *Lane v. Wilson*, 307 U.S. 268, 272 (1939).

⁸⁶ *Colegrove v. Green*, 328 U.S. 549 (1946). Note, "Judicial Interference with Political Parties," 38 Harv. L. Rev. 92 (1924).

⁸⁷ *People ex rel. Bennett, Attorney General v. Laman*, 277 N.Y. 368, 376, 14 N.E.2d 439, 442 (1938).

⁸⁸ *Burden v. Hoover*, 7 Ill. App. 2d 296, 129 N.E.2d 463, 465 (1955) "the fact that a misdemeanor or crime may be involved would not deprive the Court of jurisdiction to protect the property right," if plaintiff had established one.

criminal and then provide for enforcement by injunction as well as by criminal prosecution. This practice and the justification for it are founded in the ancient law which provided these dual remedies for the abatement of public nuisances.⁸⁹ However, the practice of enforcement by injunction has gone beyond the limits of the traditional definition of a public nuisance, that is, a use of real property that is detrimental to public interests. This led Pomeroy in his second edition to say:

While the right of the government to obtain an injunction to restrain criminal acts is not confined strictly to cases of nuisance, it would seem that it should be limited to *cases closely analogous*. Such relief, if applied to criminal acts in general, would supersede the criminal law and deprive parties of the right to a jury trial. (Emphasis added.)⁹⁰

A more satisfactory rationalization would seem to be this: the state has an obligation to protect the health and welfare of its citizens; the precedents for an injunction against a public nuisance furnish only one example of the protection of public health and welfare but do not restrict the exercise of the general power to public injuries resulting from nuisances only; the state's obligation to the public calls for the same equitable relief as a means of enforcing any regulatory statute which has for its purpose the protection of public health and welfare, even though the violation of the statute is also made a crime. This generalization seems warranted by the decisions upholding the enforcement by injunction of such typical statutes as the Interstate Commerce Act,⁹¹ the Sherman Act,⁹² the Volstead Act,⁹³ the Fair Labor Standards Act of 1938,⁹⁴ the Emergency Price Control Act of 1942,⁹⁵ statutes prohibiting usury,⁹⁶ and statutes prohibiting the unlicensed practice of medicine.⁹⁷ The early

⁸⁹ 2 Story, *Equity Jurisprudence* §§ 1247-50 (14th ed. 1918); 4 Pomeroy, *Equity Jurisprudence* § 1349 (5th ed. 1941).

⁹⁰ 5 Pomeroy, *Equity Jurisprudence* § 1894 (2d ed. 1919).

⁹¹ 34 Stat. 929 (1940), 49 U.S.C. § 901 (1952). *Texas & Pacific Ry. v. Interstate Commerce Comm'n*, 162 U.S. 197 (1896).

⁹² 26 Stat. 209 (1890), 15 U.S.C. § 1 (1952). *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290 (1897).

⁹³ *United States v. Lockhart*, 33 F.2d 597 (D. Neb. 1929).

⁹⁴ 52 Stat. 1060 (1938), 29 U.S.C. § 201 (1952). *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949).

⁹⁵ 56 Stat. 23 (1942), 50 U.S.C. § 901 (1952). *Hecht Co. v. Bowles*, 321 U.S. 321 (1944).

⁹⁶ *State ex rel. Smith v. McMahan*, 128 Kan. 772, 280 Pac. 906 (1929); *State ex rel. Goff v. O'Neill*, 205 Minn. 366, 286 N.W. 316 (1939). No criminal penalty was provided in these cases but the court said that such "a grievous anti-social iniquity" fell within the definition of a public nuisance. *Contra*, *People v. Seecombe*, 103 Cal. App. 306, 284 Pac. 725 (1920) (no nuisance). Notes, 15 *Cornell L.Q.* 476 (1930); 30 *Colum. L. Rev.* 125 (1930); 43 *Harv. L. Rev.* 499 (1930); 39 *Yale L.J.* 590 (1930).

⁹⁷ *People ex rel. Bennett, Attorney General v. Laman*, 277 N.Y. 368, 384, 14 N.E.2d 439, 446 (1930):

The power of the court to restrain acts which are dangerous to human life, detrimental to

nuisance cases established that there were the alternative possibilities of enforcement by injunction or by indictment, and that there was no impairment of the right to trial by jury if the proceeding was in equity where trial was by the court and not by jury. It follows that the same is true when the state is exercising its prerogative to enforce by injunction regulatory statutes designed for the protection of public health and welfare.⁹⁸

A different problem which may be associated with "the criminal jurisdiction of equity" is whether equity has power to enjoin a criminal prosecution under an unconstitutional statute. A New York court said:

It is elementary that "equity will not interfere to prevent the enforcement of the criminal law." That rule has never been departed from in a case in this state, where a person has been indicted and seeks to avoid a trial on the indictment by bringing an action in a court of equity to restrain the enforcement of the statute under which he was indicted, on the ground that it was void. There are at least three ways in which the plaintiffs could raise the question that the statute for the violation of which they have been indicted is unconstitutional and void—either by motion to dismiss, by habeas corpus, or by plea. Those are the methods which always have been followed in this state. They afford the plaintiff and all others full protection and ample opportunity to raise the question which it is sought to raise in this action.⁹⁹

This is a holding only that equity will not enjoin if there is another adequate remedy, and that there is another adequate remedy if the plaintiff in the equity suit has already been indicted. In a dramatically cogent article criticizing this point of view, Simon Fleischmann demonstrated that the other remedies available after indictment were not adequate: that, for practical reasons, it would be difficult for a court to hold a statute unconstitutional in a habeas corpus proceeding or upon a motion to dismiss an indictment; that there was no appeal from a denial of such a motion and that, consequently, the constitutional question can only be determined after the ordeal of a trial and upon an appeal from a judgment of conviction.¹⁰⁰ This being the situation, an injunction should be granted as a means of settling the constitutional question at the outset and saving the accused from the ordeal, the obloquy, the damage, and expense that

the public health, and the occasion of great public inconvenience and damage is one that is possessed by all courts of equity.

⁹⁸ Cf. *Murphy v. United States*, 272 U.S. 630 (1926) (acquittal on charge of maintaining a nuisance in violation of the Volstead Act was not a bar to a subsequent equity proceeding to abate the same nuisance; no double jeopardy).

⁹⁹ *Buffalo Gravel Corp. v. Moore*, 201 App. Div. 242, 246, 194 N.Y. Supp. 225, 228 (4th Dep't), aff'd, 234 N.Y. 542, 138 N.E. 439 (1922). The appellate division held that if this conclusion were erroneous, still the statute was constitutional. The Court of Appeals affirmed on the ground that equity will not enjoin prosecution of an indictment and did not discuss the constitutional question.

¹⁰⁰ Fleischmann, "Injunctions Restraining Prosecutions under Unconstitutional Statutes," 9 A.B.A.J. 169 (1923).

would result from a trial and conviction under an unconstitutional statute.

The Supreme Judicial Court of Massachusetts held that, where there had been several arrests, convictions, and successful appeals from the judgments of conviction and yet further arrests were being made and threatened for subsequent violations of an unconstitutional ordinance: "It is plain that the legal remedies by defending against repeated complaints and bringing successive actions for malicious prosecution or false arrest are not adequate," and that the granting of an injunction should be upheld.¹⁰¹

Of course, the legal remedies enumerated by the New York court will not exist if there has been no indictment. The courts generally say that equity will not normally interfere because an arrest or indictment is threatened but will enjoin when the plaintiff can establish threatened irreparable injury for which there is no other adequate remedy. The Supreme Court's decision in *Ex parte Young*¹⁰² is repeatedly cited in support of the latter view and practice. That was a habeas corpus proceeding to test the validity of an injunction granted to stay the enforcement of alleged confiscatory rates established by a state Railroad Commission, non-compliance with which would, upon conviction, subject the offenders to fines and imprisonment. The Court said:

It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

Another obstacle to making the test on the part of the company might be to find an agent or employee who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. . . .

Similar reasoning was employed by the Supreme Court in granting an

¹⁰¹ *Kenyon v. City of Chicopee*, 320 Mass. 528, 534, 70 N.E.2d 241, 245 (1946). But see *Douglas v. City of Jeanette*, 319 U.S. 157 (1943), where the court had before it appeals from both the judgment of conviction and the order granting the injunction against further arrests and it said that its decision upon the first of these appeals, that the ordinance was unconstitutional, made the injunction unnecessary.

¹⁰² 209 U.S. 123 (1908).

injunction against the enforcement of a regulation of the Secretary of Interior which prohibited fishing in coastal waters adjacent to an Indian reservation without license from the inhabitants of the reservation. Affirming the propriety of an injunction where there is no adequate legal remedy for irreparable injury, the Court found that petitioners would risk drastic penalties, including forfeiture of boats and equipment, if they violated the regulation, and yet to stay out of the reserved waters would entail the loss of profitable operations.¹⁰³

In addition to these situations in which, because of the penal risk involved, the plaintiffs are reluctant to furnish cause for prosecution by violating the void law, instances arise when the plaintiffs are threatened with prosecution for what they have done and are continuing to do, allegedly in violation of a statute, ordinance, or regulation. Here, too, injunctions have been granted against what would be illegal and irreparable interference with plaintiff's business if the statute, ordinance, or regulation is void.¹⁰⁴

Property Rights and Personal Rights

Many of the cases cited in the previous sections, dealing with political rights and criminal jurisdiction, refer to a supposed rule which limits equity to the protection of property rights and denies it jurisdiction to protect personal rights. In fact, some of the opinions mention this as one ground for the decisions. For example, in the Illinois decision denying protection to a claim to a political office, the court belabored the point that a public office is not property,¹⁰⁵ and in the other Illinois case, it was said that the plaintiff's license to practice a profession was not property.¹⁰⁶

As typical of the view that has been parroted and applied to restrict equity jurisdiction since Lord Eldon's colloquy with counsel in *Gee v. Pritchard*¹⁰⁷ one hundred and forty years ago, we may quote the Maryland court in *Chappell v. Stewart*:

They [injuries to the person] have always been considered beyond the scope of the powers of a court of equity. In *Gee v. Pritchard*, 2 Swanst. 402, Lord Eldon said: "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect." In Bisp. Eq. 5th ed., p. 584, note 2, it is said: "But it is

¹⁰³ *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). *Accord*, *B. F. Goodrich Co. v. Federal Trade Commission*, 208 F.2d 829 (D.C. Cir. 1953); *Diggs v. State Board of Embalmers and Funeral Directors*, 321 Mich. 508, 32 N.W.2d 728 (1948).

¹⁰⁴ *Roadway Transit Co. v. Buffalo*, 279 App. Div. 705, 108 N.Y.S.2d 425 (4th Dep't 1951); *Schrager v. Albany*, 197 Misc. 903, 99 N.Y.S.2d 697 (Sup. Ct. Albany County 1950).

¹⁰⁵ *Malkin v. City of Chicago*, 6 Ill. App. 2d 151, 127 N.E.2d 145 (1955).

¹⁰⁶ *Burden v. Hoover*, 7 Ill. App. 2d 296, 129 N.E.2d 463 (1955).

¹⁰⁷ 2 Swans. 402, 36 Eng. Rep. 670 (Ch. 1818).

the rights of property, or, rather, rights in property, that equity interferes to protect. A party is not entitled to a writ of injunction for a matter affecting his person." In Kerr, *Inj.*, pp. 1, 2, it is said: "A court of equity is conversant only with questions of property and the maintenance of civil rights. Injury to property whether actual or prospective is the foundation on which its jurisdiction rests. . . ." ¹⁰⁸

There are few statements regarding equity jurisdiction that have less foundation in history, that have been more carefully analyzed and refuted, and yet, until recently, slavishly accepted by the courts as controlling. ¹⁰⁹

From an historical standpoint, it is not unworthy of note that applications for protection from personal torts occupied much of the Chancellor's attention in the formative stage of equity from the reign of Richard II to that of Queen Elizabeth. In a review of *A Calendar of the Proceedings in Chancery in the reign of Queen Elizabeth; to which are prefixed Examples of earlier Proceedings in that Court, viz. from the reign of Richard II to that of Queen Elizabeth inclusive—From the Originals in the Tower, Vol. I, 1827*, we read:

From those proceedings it appears that the chief business of the Court of Chancery in those early times did not arise from the uses of land, according to the opinion of most writers on the subject; very few instances of applications to the Chancellor on such grounds occurring among the proceedings of the Chancery, during the four or five first reigns after the equitable jurisdiction of the court seems to have been fully established. Most of these ancient petitions appear to have been presented in consequence of assaults and trespasses, and a variety of outrages which were cognizable at common law, but for which the party complaining was unable to obtain redress, in consequence of the maintenance or protection afforded to his adversary by some powerful baron, or by the sheriff or other officer of the county in which they occurred. ¹¹⁰

When equity became more established as a system and its procedure more formal, a reluctance to entertain tort actions may have been due to an appreciation that, since the equity court sat at Westminster and did not go on circuit and since proof in equity was made by deposition and not through the oral testimony of witnesses, a court of law was the more efficient place to try a tort case. Dean Pound has emphasized that: "We must remember that in 1818 [the date of the decision in *Gee v. Pritchard*] the jurisdiction of equity to enjoin trespasses on land was not yet well developed and the whole subject of equity jurisdiction over torts was backward

¹⁰⁸ 82 Md. 323, 325, 33 Atl. 542, 543 (1896).

¹⁰⁹ Annot., 37 L.R.A. 783 (1897); Bennett, "Injunctive Protection of Personal Interests," 1 La. L. Rev. 665 (1939); Long, "Equitable Jurisdiction to Protect Personal Rights," 33 Yale L.J. 115 (1923); Ponnard, "Equitable Relief against Defamation and Injuries to Personality," 29 Harv. L. Rev. 640 (1916); Note, "A Re-interpretation of *Gee v. Pritchard*," 25 Mich. L. Rev. 889 (1927).

¹¹⁰ 1 The Jurist 327, 328 (1828).

because of the unsatisfactory mode of trial."¹¹¹ Today, when the mode of trial is the same at law and in equity, there is not the same reason for withholding equity jurisdiction, and the fact that cases of trespass to land were turned out of equity as late as the first half of the nineteenth century is no longer permitted to cast doubt upon the fact that equity always had a potential jurisdiction in this field.

With regard to the belief that the protection of personal rights is beyond the scope of the powers of equity, it has been charged that:

... a declaration of this sort taken literally and in its full meaning would make the system of equity suitable only to a semi-savage society which has much respect for property but little for human life. Our equity jurisprudence does not deserve so severe a reproach. It does, indeed, do much for the protection of personal rights, although it has not been willing to acknowledge the fact but has persisted in declaring the contrary.¹¹²

Doubtless Lord Eldon was conscious of this same belief. In 1818, it would have been difficult to find that a publication by the receiver of confidential and non-libelous letters constituted a personal tort. But Lord Eldon held that the writer had a property right in such letters which justified an injunction against the threatened unauthorized publication of them and he said:

I do not say that I am to interfere because the letters are written in confidence, or because the publication of them would wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.¹¹³

Because his decision was that there was a property right which he would protect, any suggestion that he could not protect personal rights was dictum.

Many other courts have sensed the backwardness of a system of equity that lacked power to protect personal rights in appropriate instances. The usual course has been to bow to the influence of previous pronouncements of the false doctrine and then ingeniously find a property interest of some sort sufficient to warrant the granting of relief. Professor Bennett, in an interesting review of decisions, suggests that the existence or non-existence of a property right has seldom been a controlling consideration in the judicial process; that where the court thinks relief should not be granted:

... it is very convenient and legalistically convincing to state, "Relief denied because no property interest is involved." On the other hand, where relief is expedient the court may fashion the necessary property right, and

¹¹¹ Pound, *supra* note 109, at 643.

¹¹² 37 L.R.A. 783 (1897).

¹¹³ 2 Swans. 402, 36 Eng. Rep. 670 (Ch. 1818).

the technical or unsubstantial nature of that right is apparently of little or no importance.¹¹⁴

The achievement of progress in the law by indirection is not uncommon, but here, the method tends to perpetuate a false premise. The more forthright method of meeting the issue head-on would remove an error that has persisted too long. It would be sounder, if relief is to be denied, to assign the real reason, as, for example, that the law has not recognized the claimed interest, that there is an adequate legal remedy or that to grant relief would be impractical or futile,¹¹⁵ and, if the claim merits equity, to grant relief whether the interest to be protected relates to the plaintiff's person or his property.

The Supreme Judicial Court of Massachusetts met the issue head-on in *Kenyon v. City of Chicopee*,¹¹⁶ where the plaintiff sought to enjoin arrest for alleged violations of an unconstitutional ordinance, and said:

In reading the decisions holding or stating that equity will protect only property rights, one is struck by the absence of any convincing reason for such a sweeping generalization. We are by no means satisfied that property rights and personal rights are always as distinct and readily separable as much of the public discussion in recent years would have them. But in so far as the distinction exists we cannot believe that personal rights recognized by law are in general less important to the individual or less vital to society or less worthy of protection by the peculiar remedies equity can afford than are property rights. . . . We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. In general, these conditions are, that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its processes into disrepute. A number of courts have tended toward this view. Legal writers support it. There is no such body of authority opposed to it in this Commonwealth as to preclude its adoption here.

This position was adopted a year later by the Court of Appeals for the District of Columbia, the court emphasizing that . . . "invasion of personal interests are accordingly *less* capable of translation into money terms than invasions of property interests."¹¹⁷ The Supreme Court did

¹¹⁴ Bennett, *supra* note 109, at 668, 694.

¹¹⁵ *Baumann v. Baumann*, 250 N.Y. 382, 389, 165 N.E. 819, 822 (1929): "It is not the province of courts of equity to administer paternal relief in domestic affairs. As a matter of practical fact, such decrees cannot be enforced."

¹¹⁶ 320 Mass. 528, 533, 70 N.E.2d 241, 244 (1946). An exhaustive annotation on this point will be found in 175 A.L.R. 438-523 (1948).

¹¹⁷ *Berrien v. Pollitzer*, 165 F.2d 21, 22 (D.C. Cir. 1947) (restraining expulsion from a political society). When the club was incorporated, mandamus rather than injunction was held to be the proper remedy in *Mitchell v. Jewish Progressive Club*, 253 Ala. 195, 43 So. 2d 529 (1949). For exhaustive note on relief from expulsion from clubs, religious bodies, and professional associations, see Note 20 A.L.R.2d 344-590 (1951).

not question the propriety of injunctive relief in the school segregation cases.¹¹⁸ Other courts in protecting against racial discrimination, have approved the use of the injunction, sometimes repudiating the notion that equity protects only property rights,¹¹⁹ and sometimes without reference to this dispute.¹²⁰ The error attributable to Lord Eldon's unfortunate dictum is at last being authoritatively corrected and plaintiffs can now expect with more confidence to obtain injunctive relief against threatened irreparable injury to personal rights.

SUMMARY

This plea for a more general adoption of the equitable attitude and equitable principles by courts sitting at law and for a more general extension of equitable remedies by courts sitting in equity might alternatively have been entitled the "Progress of Equity." With one exception, the adoption of the balance of interests doctrine by courts sitting at law, there is not one of the suggestions or examples set forth here that has not been found acceptable and given effect by the courts of one or more of our American jurisdictions. Their decisions were not shockingly revolutionary and not so unsupportable that they cannot be approved and followed. They were rather the happy result of an understanding of the history of our Anglo-American law and of an appreciation of the desirable consequences of a transition from a period of competing courts of law and equity to a new era in which we have a single court administering both law and equity. This understanding and appreciation is all that is needed for a more complete and perfect merger of law and equity and for the further Progress of Equity.¹²¹

¹¹⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

¹¹⁹ *Colbert v. Coney Island, Inc.*, 97 Ohio App. 311, 121 N.E.2d 911 (1954) (restraining a denial of admission to defendant's amusement park. A demurrer was sustained because of misjoinder of plaintiffs but without prejudice to the maintenance of separate actions).

¹²⁰ *Whitmore v. Stillwell*, 227 F.2d 187 (5th Cir. 1955) (restraining denial of admission to college because of race); *Dawson v. Mayor and City Council of Baltimore*, 220 F.2d 386 (4th Cir. 1955) (restraining discrimination at the public beaches); *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Simmons v. Skinner*, 108 A.2d 173 (Del. Ch. 1954) (enjoining cancellation of registration in high school); plaintiff's right was characterized as a personal one but there was no further discussion of the distinction between personal and property interests.

¹²¹ In a companion article, "A Brief on Behalf of a Course in Equity," which will appear in *The Journal of Legal Education*, it is urged that unless law schools continue to teach a general course in Equity, the desired further progress in the real, as distinguished from the formal merger of law and equity may, in time, be halted. Some of the examples used in this article are sketched more briefly there in support of that thesis.