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THE RENAISSANCE OF GOOD FAITH IN CONTRACTING IN ANGLO-AMERICAN LAW

Ralph A. Newman†

Chafee has said that the law is from one point of view like a great, partially unexplored continent that judges are gradually mapping out by their decisions.¹ Sometimes the paths are marked out by judicial decisions in advance of social change; such advances are always tentative until they gain general acceptance. Sometimes the direction of new paths is determined by social changes. In either case, the decisions become established legal doctrine only when decisional advances and social approval are in approximate balance. When society delays its approval of judicial advances, further acceptance of new doctrine is retarded.

The tentative advances of decisional law beyond the traditional common law requirements of good faith in the negotiation and enforcement of contracts have encountered the not unusual reluctance of law to abandon its accustomed approaches. Advances in this area of law have also encountered an unusual kind of resistance which stems not from lack of recognition of the desirability of more elevated standards of good faith in contracting, but largely from the historical distinction between the ethical standards required at law and in equity. The English Court of Chancery was established because the common law courts administered law according to extremely low standards of moral values. Now that judges drawn from lay backgrounds have become as moral as those who wore ecclesiastical robes, the distinction has lost its significance.

It is difficult in a pluralistic legal system to pinpoint the time when change in judicial decision is to be equated with change in doctrine. When decisional change has taken place in some jurisdictions but acceptance of the change is still incomplete, it becomes especially hazardous, without assuming oracular powers, to describe the state of the general law. What can safely be said in connection with the prob-

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¹ See comments on the theory of law of C.J. Stonore, Blackstone, and Beale, in Chafee, *Do Judges Make or Discover Law?*, 91 *Proc. Am. Phil. Soc.* 405, 406 (1947). Cf. Devlin, L.J., dissenting, in *United Engineering Workers v. Devanayangam*, [1968] *A.C.* 356, 384, [1967] 2 *All E.R.* 367, 381 (P.C. 1967) (Ceylon) (equity is an illustration of making new law).

lem of good faith in the negotiation and enforcement of contracts is that the law, if it has not already changed, is at the point of change. The winds of change have at least raised a corner of the moral curtain that, heavy with the mold of centuries, still hangs across our law, cutting off from the main body of the law the benefit of the system of moral principles that we call equity.

If we begin our analysis by considering the traditional common law doctrine, the conclusion is unavoidable that the Anglo-American legal system is the only important system other than Islamic law incorporating the doctrine that contracts unfairly obtained or unfairly pressed for performance will be enforced in damages. Corbin said that in granting or refusing a decree in equity,

[A] greater variety of facts is to be taken into consideration than is the case in an action for damages for breach of contract. . . . Among these facts are the public interest, oppression and sharp practice in the formation of the contract, inadequacy of consideration, [and] mistake even though unilateral in character²

Dawson has expressed the opinion that "[i]n contract cases, as in other equity cases, higher standards of fairness and morality are regularly employed."³ In equity the duty to reveal information in the course of the bargaining process is recognized in a great many situations in which the failure to disclose would not require denial of damages for breach of contract. Traditional doctrine recognizes that a plaintiff will be allowed to recover damages even though the contract was obtained through means that would be deemed so unfair as to require a denial of specific performance.⁴ Kent in his *Commentaries* said:

There are many duties that belong to the class of imperfect obligations which are binding on conscience, but which human laws do not, and cannot undertake directly to enforce. But when the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway; and a purchase made with such a reservation of superior knowledge, would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery.⁵

Story has said that:

An agreement to be entitled to be carried into specific performance ought . . . to be certain, fair and just in all its parts. . . .

² 5A A. CORBIN, *CONTRACTS* § 1136, at 96 (1964).

³ Dawson, *Specific Performance in France and Germany*, 57 *MICH. L. REV.* 495, 535 (1959).

⁴ *Cuff v. Dorland*, 55 *Barb.* 481 (N.Y. Sup. Ct. 1870).

⁵ 2 J. KENT, *COMMENTARIES* 490 (12th ed. 1873).

Courts of Equity will not decree a specific performance in cases of fraud or mistake; . . . or of hard and unconscionable bargains⁶

Pomeroy wrote that:

If . . . the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature; or if its enforcement would be oppressive or hard on the defendant, . . . or if the plaintiff has obtained [the agreement] by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscientious means,—then a specific performance will be refused.⁷

Since the fourth century before the birth of Christ, when a Persian king could say that the Greek market was a place where men could cheat one another under oath, there has been a steady enlargement of relief for unfairness in contracting. Until the end of the classical period of Roman law, there was no relief for fraud except in special cases involving minors and wards. Relief was introduced into praetorian equity by the *actio exceptio doli*,⁸ and when the praetorian equity became integrated into the *jus civile* in the reign of Hadrian, the doctrine of good faith in contracting became a part of the general law. In early common law, fraudulent misrepresentations other than those going to the factum were not recognized as a defense at law.⁹ In 1804 a seller was not liable for misdescription unless the article was warranted.¹⁰ Rescission for innocent misrepresentations is a modern doctrine.¹¹ In English law innocent misrepresentations were recognized as a defense in equity in 1810,¹² and are now recognized as a defense at law in executory contracts,¹³ although they were not recognized as a defense in actions for damages after the contract had been executed¹⁴

⁶ 2 J. STORY, EQUITY JURISPRUDENCE § 769, at 90 (13th ed. 1886).

⁷ 4 J. POMEROY, EQUITY JURISPRUDENCE § 1405a (5th ed. 1941).

⁸ W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 415-16 (3d ed. 1963). See also P. STEIN, FAULT IN THE FORMATION OF CONTRACT IN ROMAN LAW AND SCOTS LAW 59 (1958). The reference to Cyrus' castigation of the morals of Greek merchants is taken from H. MULLER, THE LOOM OF HISTORY 15 (1958).

⁹ W. PROSSER, TORTS § 100, at 704 (3d ed. 1964).

¹⁰ *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804).

¹¹ See 5 S. WILLISTON, CONTRACTS § 1500 (rev. ed. 1937), and cases cited *id.* n.l. In *Smith v. Richards*, 38 U.S. (13 Pet.) 26 (1839) (Story, J., dissenting), rescission was allowed by treating mistaken representations as fraud and warranty. See also PROSSER, *supra* note 9, § 103, at 735-36.

¹² *Cadman v. Horner*, 18 Ves. Jr. 10, 34 Eng. Rep. 221 (Rolls Ct. 1810).

¹³ C. CHESHIRE & C. FIFOOT, LAW OF CONTRACT 238 (6th ed. 1964).

¹⁴ *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326, 333 (1904).

until 1967.¹⁵ Since 1817¹⁶ knowledge of material mistake has been accepted in the United States as a defense at law¹⁷ as well as in equity. In 1932 the doctrine was adopted in the Restatement of Contracts.¹⁸ Although the Restatement limits relief to mistake in basic assumptions, decisions both before and since the adoption of the doctrine in the Restatement have often granted relief even for collateral mistake.¹⁹ The acceptance of the equitable doctrine of good faith has been sporadic, and in 1857 Parsons could say truthfully that English law, although it forbade a man to cheat another, would let him cheat himself.²⁰ This is still true in England as to transactions concerning real property.²¹ In the United States unconscionable conduct short of fraud was seldom accepted as a defense to claims for damages until after 1930,²² and only in scattered instances until 1950.²³

In Kent's time the reception in common law of the equitable concept of good faith was still halting and imperfect. The distinction drawn by Kent between the moral standards of equity and common law expressed his disapproval of the rudimentary standards of good faith in contracting that still prevailed at common law. The same

¹⁵ Misrepresentation Act, 1967, c. 7, § 2.

¹⁶ Gillespie v. Moon, 2 Johns. Ch. 585 (N.Y. 1817).

¹⁷ Cohen v. Citizens' Bank, 143 Cal. App. 2d 480, 300 P.2d 14 (Ct. App. 1956) (action for deceit); R.O. Bromagin & Co. v. City of Bloomington, 234 Ill. 114, 84 N.E. 700 (1908); Baltimore v. DeLuca-Davis Constr. Co., 210 Md. 518, 124 A.2d 557 (1956); Scottsbluff School Dist. v. Olson, 153 Neb. 451, 45 N.W.2d 164 (1950); Margraf v. Muir, 57 N.Y. 155 (1874); Gillespie v. Moon, 2 Johns. Ch. 585 (N.Y. 1817) (Kent, C.); Rushlight Automatic Sprinkler Co. v. City of Portland, 189 Ore. 194, 219 P.2d 732 (1950).

¹⁸ RESTATEMENT OF CONTRACTS § 472(b) (1932).

¹⁹ Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373 (1900) (mistake in bid for public work); McCarty v. Anderson, 58 So. 2d 255 (La. Ct. App. 1952) (strip of dry land excluded by vendor, without purchaser's knowledge, from land sold which was, in general, swampy); Kutsche v. Ford, 222 Mich. 442, 192 N.W. 714 (1923) (mistake in bid for public work); Richardson Lumber Co. v. Hoey, 219 Mich. 643, 648-50, 189 N.W. 923, 925 (1922) (underground fires burning close to railroad ties sold; treated as mistake by purchaser as to safety of the ties); St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N.W. 500 (1916) (mistake in bid for private construction); O'Shea v. Morris, 112 Neb. 102, 104, 198 N.W. 866, 867 (1924) (vendor failed to inform purchaser that a driveway was not wholly on the property sold); Brown v. Lamphear, 35 Vt. 252 (1862) (land sold contained a spring, by mistake of the vendor, who needed the spring for his retained land); Donaldson v. Abraham, 68 Wash. 208, 122 P. 1003 (1912) (mistake in addition in bid for public work).

²⁰ 1 T. PARSONS, CONTRACTS 461 (3d ed. 1857); see 5 WILLISTON, *supra* note 11, § 1497.

²¹ See A. GOODHART, ENGLISH LAW AND MORAL LAW 119 (1953).

²² See Annot., 65 A.L.R. 7, 86 (1930). United States v. Hume, 132 U.S. 406 (1889), reviews cases involving the effect of unconscionable contracts at law.

²³ See Comment, *Policing Contracts Under the Proposed Commercial Code*, 18 U. CHI. L. REV. 146, 149 (1950).

antithesis that was so sharply and uncritically drawn by Kent, Story, and Pomeroy is repeated in contemporary judicial opinions because of a failure to recognize the extent of the absorption of equitable concepts that has taken place since these jurists' time. A Michigan court has said that "a court of equity will not decree specific performance of a contract in favor of a party merely because he is not guilty of sufficient fraud or deceit to constitute a legal defense to the contract."²⁴ Transposed into a comparison which approaches the problem from the viewpoint of the effect of such conduct in an action for damages, we would find the court saying that although a party is guilty of sufficient fraud or deceit to constitute a defense to a suit for specific performance, he may nevertheless recover damages sufficient to place him in the same position as if the contract had been carried out. Refusal to so charge would constitute reversible error. No such explicit charge has been found in any book of instructions to juries, nor in any reported case, probably for the reason that any such charge would invite retaliation by an outraged jury in the form of a denial of substantial damages. A Pennsylvania court recently repeated the distinction, saying that "the chancellor may relegate a party to his remedy at law if in the exercise of a reasonable discretion the chancellor believes that specific performance of a contract is contrary to equity and justice."²⁵

Statements to this effect have been repeated for many years without speculation as to whether the same elevated moral standards that are enforced in equity might not be equally appropriate in actions for damages, so as to preclude recovery at law for breach of contracts obtained by unfair means. The Restatement of Contracts has uncritically accepted the distinction in the treatment of unfair conduct at law and in equity.²⁶

It seems probable that the doctrine that a plaintiff who seeks specific relief is held to a stricter standard of conduct than one who seeks damages no longer represents the actual state of Anglo-American law. The doctrine, formulated almost three hundred years ago, that specific performance may be denied for improper conduct that will not bar relief in damages,²⁷ has persisted only because of the major fault in the structure of Anglo-American law, the dichotomy between law

²⁴ *Wayne Woods Land Co. v. Beeman*, 211 Mich. 360, 364, 178 N.W. 696, 697 (1920).

²⁵ *Barr v. Deiter*, 190 Pa. Super. 454, 459, 154 A.2d 290, 293 (1959).

²⁶ *RESTATEMENT OF CONTRACTS* § 367, comment *a* (1932).

²⁷ *Anonymous*, 2 Ch. Cas. 17, 22 Eng. Rep. 825 (1679).

and equity. Since the contract, even though it is not enforceable specifically, is left unimpaired, the remedy of damages is still available, according to the traditional doctrine. But to deny specific performance and to allow damages is an inadequate solution of the problem, because in many cases the effect of a judgment for damages may cause equally extreme hardship to the defendant.²⁸ It may be that all that is necessary is for the courts to make explicit the integration of equitable doctrine that has already occurred.

There is a dearth of authority as to what happens when a plaintiff who has been denied specific performance seeks to recover damages. Unless the trial judge writes an opinion or unless an appeal is taken from his decision, the published reports will not disclose the result of the subsequent proceedings. The absence of authority may also be due to failure to prosecute the claim for damages. Many causes may have contributed to this lacuna in the law: apprehension that the claimant will fare no better at the hands of a judge or jury in his claim for damages than he did in his attempt to obtain a decree for specific performance; sheer emotional or financial exhaustion of the claimant; or the difficulty of proving damages. In land contracts the purchase price is generally equivalent to the market value, and no substantial damages can be proved. If, on the other hand, the disparity between purchase price and market value is great, which is usually the case in catching bargains, the inadequacy of the consideration might raise a presumption of fraud which would preclude relief in either specific performance or damages.²⁹ Modern restrictions on the permissible latitude for dealers' talk³⁰ and recognition of the right to rescission for innocent misrepresentations³¹ may have discouraged further litigation of the claim for damages. In cases of sharp practice, mistake so induced will of necessity be known or recognizable, and the doctrine that knowledge of a serious mistake makes the contract voidable,³² a doctrine that has been extended in many decisions to mistake in collateral matters,³³ may have an important influence on an evaluation

²⁸ See Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 26-27 (1950); Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U.L. REV. 59 (1961).

²⁹ Lord Eldon, in *Coles v. Trecothick*, 9 Ves. Jr. 234, 246, 32 Eng. Rep. 592, 597 (Ch. 1804); Lord Hardwicke, in *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750); McClintock, *Mistake and the Contractual Interests*, 28 MINN. L. REV. 460 (1944).

³⁰ *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 103 N.E.2d 692 (1952).

³¹ See authorities cited note 11 *supra*.

³² See cases cited note 17 *supra*.

³³ See cases cited note 19 *supra*.

of the prospects for success in recovering damages. It is not unlikely that the modern practice in most jurisdictions of allowing the same judge who denied specific performance to pass upon the subsequent claim for damages may discourage the hope for a favorable result at law more than did the former practice of holding another trial for this determination before a different judge.³⁴

Since the traditional doctrine was first announced nearly three hundred years ago, only two cases have been found in which damages have actually been awarded after a denial of specific performance for unconscionable conduct short of fraud. In one of these cases, decided in 1874, the judgment was set aside on appeal on the ground that damages had been calculated on the wrong basis.³⁵ The other case was an action for specific performance brought by a vendor who had failed to reveal the presence of an underground watercourse which, since it was a natural right and not an easement, did not make the title unmarketable. The court refused specific performance but also held that the purchaser was not entitled to the return of his down payment, since the contract was enforceable at law.³⁶ Of forty-one cases that have been found in which specific performance was denied for sharp practice without rescinding the contract,³⁷ only seven were decided within the

³⁴ See 30 YALE L.J. 506, 509 & n.11 (1920). A questionnaire circulated at the request of the writer among state trial judges who attended sessions of the National College of State Trial Judges in July and August 1968 produced the following information concerning the views and experience of the Judges on the question whether or not a court should grant damages for breach of a contract obtained by such sharp practices as to preclude granting specific performance:

Jurisdictions represented	44
Replies received	176
Preference expressed for refusing damages	163
Preference expressed for granting damages	10
Unreported cases raising the problem	187
Cases in which damages were refused	187
Cases in which damages were granted	0

³⁵ *Margraf v. Muir*, 57 N.Y. 155, 159 (1874). The proper measure of damages in the case of an executory contract in New York was return of the down payment. When the seller of land is suing, the measure of damages is the full purchase price, a result which, as Chafee pointed out in his *Cooley Lectures* (see note 28 *supra*), gives the vendor exactly the relief he would be denied in equity.

³⁶ *Kleinberg v. Ratett*, 252 N.Y. 236, 169 N.E. 289 (1929).

³⁷ *Anonymous*, 2 Ch. Cas. 17, 22 Eng. Rep. 825 (1679); *Chesterfield v. Janssen*, 2 Ves. Sr. 125, 28 Eng. Rep. 82 (Ch. 1750); *How v. Weldon*, 2 Ves. Sr. 516, 28 Eng. Rep. 330 (Rolls Ct. 1754); *Day v. Newman*, 2 Cox Ch. 77, 30 Eng. Rep. 36 (Rolls Ct. 1788); *Campbell v. Spencer*, 11 Pa. 129, 133 (1809); *Gillespie v. Moon*, 2 Johns. Ch. 585 (N.Y. 1817); *Bean v. Valle*, 2 Mo. 103 (1829) (dicta); *Myers v. Watson*, 1 Sim. N.S. 523, 61 Eng. Rep. 202 (Ch. 1851); *Falcke v. Gray*, 4 Drew. 651, 62 Eng. Rep. 250 (Ch. 1859); *Peters v. Delaplaine*, 49 N.Y. 362 (1872); *Fish v. Leser*, 69 Ill. 394 (1873); *Sternberger v. McGovern*, 56 N.Y. 12

past thirty years.³⁸ During the same thirty-year period rescission was granted in two cases on the ground of sharp practice;³⁹ of these two cases, one was decided in 1959.⁴⁰ The traditional distinction was reiterated in a hard bargain case decided in 1967,⁴¹ and, although the defense of unclean hands is a general principle running through damage actions as well as suits for specific relief,⁴² there are still cases of this kind in which the distinction has been repeated during the past decade.⁴³ It should be remembered, however, in evaluating these cases, that in the hard bargain situation there is no deception of the defendant, and in the unclean hands situation the unfairness is directed

(1874); *Fitzpatrick v. Dorland*, 27 Hun 291 (N.Y. Sup. Ct. 1882); *Hetfield v. Willey*, 105 Ill. 286 (1883); *Byars v. Stubbs*, 85 Ala. 256, 4 So. 755 (1888); *Mansfield v. Sherman*, 81 Me. 365, 17 A. 300 (1889); *Chute v. Quincy*, 156 Mass. 189, 30 N.E. 550 (1892); *Wollums v. Horsley*, 93 Ky. 582, 20 S.W. 781 (1892); *Kelley v. York Cliffs Improvement Co.*, 94 Me. 374, 47 A. 898 (1900); *Moetzel & Muttera v. Koch*, 122 Iowa 196, 97 N.W. 1079 (1904); *Miller v. Tjexhus*, 20 S.D. 12, 104 N.W. 519 (1905); *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908); *Koch v. Streuter*, 232 Ill. 594, 83 N.E. 1072 (1908); *Loosing v. Loosing*, 85 Neb. 66, 122 N.W. 707 (1909); *Bartley v. Lindebury*, 89 N.J. Eq. 8, 104 A. 333 (Ch. 1918); *Costello v. Sykes*, 143 Minn. 109, 172 N.W. 907 (1919); *McDermott v. Lindquist*, 66 Colo. 88, 179 P. 147 (1919); *Wayne Woods Land Co. v. Beeman*, 211 Mich. 360, 178 N.W. 696 (1920); *Gabrielson v. Hogan*, 298 F. 722 (8th Cir. 1924); *Wilson v. Bergmann*, 112 Neb. 145, 198 N.W. 671 (1924); *Dysarz v. Janczarek*, 238 Mich. 529, 213 N.W. 694 (1927); *Kleinberg v. Ratett*, 252 N.Y. 236, 169 N.E. 289 (1929); *Dunlop v. Wever*, 209 Iowa 590, 228 N.W. 562 (1930); *Hemhauser v. Hemhauser*, 110 N.J. Eq. 77, 158 A. 762 (Ch. 1932); *Favata v. Mercer*, 409 Ill. 271, 99 N.E.2d 116 (1951); *Panco v. Rogers*, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952); *Kukulski v. Bolda*, 2 Ill. 2d 11, 116 N.E.2d 384 (1954); *Miller v. Coffeen*, 365 Mo. 204, 210, 280 S.W.2d 100, 103 (1955); *Schiff v. Breitenbach*, 14 Ill. 2d 611, 153 N.E.2d 549 (1958); *Maryland City Realty, Inc. v. Vogts*, 238 Md. 290, 208 A.2d 701 (1965); *Public Water Supply Dept. v. Fowlkes*, 407 S.W.2d 642 (Mo. Ct. App. 1966).

³⁸ *Schiff v. Breitenbach*, 14 Ill. 2d 611, 153 N.E.2d 549 (1958); *Kukulski v. Bolda*, 2 Ill. 2d 11, 116 N.E.2d 384 (1954); *Favata v. Mercer*, 409 Ill. 271, 99 N.E.2d 116 (1951); *Maryland City Realty, Inc. v. Vogts*, 238 Md. 290, 208 A.2d 701 (1965); *Miller v. Coffeen*, 365 Mo. 204, 210, 280 S.W.2d 100, 103 (1955); *Public Water Supply Dept. v. Fowlkes*, 407 S.W.2d 642 (Mo. Ct. App. 1966); *Panco v. Rogers*, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952).

³⁹ *Straus v. Madden*, 219 Md. 535, 543, 150 A.2d 230, 235 (1950) (the court found bad faith, but not amounting to fraud); *Van Looyengoe v. Allencrest Gardens Corp.*, 265 Mich. 182, 251 N.W. 317 (1933).

⁴⁰ *Straus v. Madden*, 219 Md. 535, 150 A.2d 230 (1959).

⁴¹ *Frostifresh Corp. v. Reynoso*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

⁴² *Chafee, Coming into Equity with Clean Hands*, 47 MICH. L. REV. 1065, 1091-92 (1949). "[T]he clean hands maxim is not peculiar to equity . . ." Z. CHAFEE, SOME PROBLEMS OF EQUITY 94 (1950).

⁴³ *Faber v. Landman*, 123 So. 2d 405 (Fla. Ct. App. 1960); *Spector v. Ahrenholz*, 107 So. 2d 34 (Fla. Ct. App. 1958); *Feldman v. Urban Commercial Co.*, 78 N.J. Super. 520, 525, 189 A.2d 467, 470 (Ch. 1963), *aff'd*, 87 N.J. Super. 391, 209 A.2d 640 (App. Div. 1965); *Leathers v. Commercial Nat'l Bank*, 410 P.2d 541 (Okla. 1965).

against persons who are not parties to the litigation. Even though the decisions in these two kinds of cases should on principle reach the same result as in the sharp practice cases, it cannot be contended that the decisions refusing rescission in the hard bargain and unclean hands situations are controlling in situations in which the plaintiff has deceived the defendant. Since 1958 rescission has been granted in three cases of hard bargains.⁴⁴

A parallel development has taken place in the law of sales of goods through the enactment in almost all states of section 2-302 of the Uniform Commercial Code,⁴⁵ which authorizes the court to refuse to enforce unconscionable contracts.⁴⁶ The enactment of this provision constitutes a legislative adoption of the doctrine that the equitable criterion of fairness in contracting applies to sales of goods whatever method of enforcement is sought. The extension of the equity of the statute to all contracts seems inevitable.⁴⁷ Another parallel development is the doctrine of relief for frustration, in force in many jurisdictions.⁴⁸ Whether the failure of the contractual purpose occurs immediately when a contract induced by sharp practice is made, or later

⁴⁴ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Lucientes v. Bliss*, 157 Cal. App. 2d 565, 321 P.2d 526 (Ct. App. 1958); *American Home Improvement Co. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964).

⁴⁵ Except North Carolina, California, and Louisiana. The section was rejected in California on the ground that it "could result in the renegotiation of contracts in every case of disagreement." See 37 CAL. B.J. 119, 135-36 (1962). For a refutation of this argument see 63 YALE L.J. 560 (1954). Note that a proposal of some of the drafters of the Uniform Commercial Code to limit the effect of § 2-302 to denial of specific performance was defeated. See UNIFORM COMMERCIAL CODE, REVISIONS TO PROPOSED FINAL DRAFT No. 2 (May 1951).

⁴⁶ The statute has already been before the courts. In *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), the court stated its complete agreement with the section and reached the same result at common law, although the Code had not been adopted in the District of Columbia when the contract in suit was made. The statute was applied in *American Home Improvement Co. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); *Frostifresh Corp. v. Reynoso*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967); *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (N.Y.C. Civ. Ct. 1967); *Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

⁴⁷ 1 CORBIN, *supra* note 2, § 128 n.94: "In any jurisdiction enacting this provision as to all contracts for the sale of goods, the courts will certainly be influenced by it in dealing with other contracts."

⁴⁸ *Griel Bros. v. Mabson*, 179 Ala. 444, 60 So. 876 (1912); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916); *Dailey v. Clark Can Co.*, 128 Mich. 591, 87 N.W. 761 (1901); *Kinzer Constr. Co. v. State*, 125 N.Y.S. 46 (Ct. Cl. 1910), *aff'd*, 204 N.Y. 381, 97 N.E. 871 (1912); *Bergstedt v. Bender*, 222 S.W. 547 (Tex. Comm'n App. 1920); *St. Louis S.W. Ry. v. Johnston*, 58 Tex. Civ. App. 639, 125 S.W. 61 (1910). See 6 CORBIN, *supra* note 2, § 1353.

due to unforeseeable future events, would seem to make no significant difference in determining whether or not relief should be granted, as long as there has been no serious change in position of the other party. Insistence on enforcing a contract that has been frustrated by subsequent events is no less selfish than enforcement of a contract that was made by mistake. Since taking advantage of a known mistake is fraud, it is impossible logically to deny relief for any mistake, intrinsic or collateral, as long as the mistake induced the making of the contract and was known to the other party. Finally, wide acceptance of the doctrine that a defendant is entitled to relief for mistake even in collateral matters and even in the absence of knowledge⁴⁹ makes it equally impossible logically to refuse to grant rescission for mistake induced by sharp practice.⁵⁰ In cases of mistake even unknown to the other party, rescission has been granted in the past ten years in three jurisdictions,⁵¹ and during this period no case has denied rescission for such a mistake. If the enforcement of contracts made by mistake is disallowed, it should logically follow that it will no longer be possible to refuse rescission when the contract, and therefore the mistake, was induced by sharp practice.

In England the traditional doctrine seems to have been repudiated by the Law of Property Act of 1925, which provides in section 49(2) that where specific performance is denied the court may authorize return of the deposit. This provision constitutes a denial of what had been assumed for nearly two hundred and fifty years to be the right to recover whatever damages might be proved, in cases in which a request for specific performance had been denied upon grounds of unfair conduct less than actual fraud. There would obviously be no reason to return the deposit unless the contract was terminated by the decree. The editors of the 1952 edition of Kerr on *Fraud and Mistake* consider

⁴⁹ See cases cited note 19 *supra*.

⁵⁰ A recent case emphasizes the similarity between seeking enforcement of a contract made by mistake and of one induced by sharp practice in the contractual negotiations. *Elsinore Union Elem. School Dist. v. Kastorff*, 54 Cal. 2d 380, 389, 353 P.2d 713, 718-19, 6 Cal. Rptr. 1, 6-7 (1960) (denying enforcement at law or in equity). In *Townshend v. Stangroom*, 6 Ves. Jr. 329, 31 Eng. Rep. 1076 (Ch. 1801), Lord Eldon said:

[I]n a moral view there is very little difference between calling for the execution of an agreement obtained by fraud, which creates a surprise upon the other party, and desiring the execution of an agreement, which can be demonstrated to have been obtained by surprise.

Id. at 337, 31 Eng. Rep. at 1079.

⁵¹ *Board of Educ. v. Hooper*, 350 S.W.2d 629 (Ky. 1961); *Brooks v. Towson Realty, Inc.*, 223 Md. 61, 162 A.2d 431 (1960); *McClure v. Rignanese*, 25 App. Div. 2d 565, 267 N.Y.S.2d 940 (2d Dep't 1966).

the effect of the statute to be the elimination of any practical difference between refusal of specific performance and rescission.⁵² The traditional distinction, despite its frequent repetition by judges in earlier times and by Commonwealth decisions and English textwriters down to contemporary times,⁵³ has received in recent years little judicial support in England. Since 1788 there have been many instances of decrees

⁵² W. KERR, *FRAUD AND MISTAKE* 582 (7th ed. 1952). It seems probable that § 49(2) of the Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, was merely declaratory of a doctrine that had long been recognized at common law. There is no evidence that the distinction between denial of specific performance because of unfair conduct of the plaintiff and rescission had ever been law in England. Since 1751 the courts have set aside deeds and have rescinded contracts, subject to equitable restitution of benefits, for unconscionable conduct falling short of actual fraud. In *Chesterfield v. Janssen*, 2 Ves. Sr. 125, 156, 28 Eng. Rep. 82, 100 (Ch. 1751), Lord Hardwicke annulled a bond which had been delivered in settlement of a catching bargain with an heir, which the court described as "taking surreptitious advantage of the weakness or necessity of another." Other decisions to the same effect are *Talbot v. Staniforth*, 1 J. & H. 484, 70 Eng. Rep. 837 (Ch. 1861); *St. Albyn v. Harding*, 27 Beav. 11, 54 Eng. Rep. 5 (Rolls Ct. 1857); *Evans v. Llewellyn*, 1 Cox 333, 29 Eng. Rep. 1191 (Ch. 1787); *Gwynne v. Heaton*, 1 Bro. C.C. 1, 28 Eng. Rep. 949 (Ch. 1778). See also *O'Rorke v. Bolingbroke*, 2 App. Cas. 814 (1877) (dicta); *Shelly v. Nash*, 3 Madd. 232, 56 Eng. Rep. 494 (Ch. 1818) (dicta). It is stated in *R. GOFF & G. JONES, RESTITUTION* 169 (1966), that "[i]f the court decides that a bargain is unconscionable, it will be set aside only on equitable terms." E. SNELL, *PRINCIPLES OF EQUITY* 614 (26th ed. 1966), says that unfair bargains "made by poor and ignorant persons acting without independent advice will be set aside in equity . . ." The statement in the same edition, at 664, to the effect that equity will in such cases deny specific performance without rescinding the contract, a statement which is precisely to the contrary, has been supported by only a single case. *McCull-Fontenac Oil Co. v. Saulnier*, [1949] 3 D.L.R. 208. Lord Eldon's remark in *Townshend v. Stangroom*, 6 Ves. Jr. 328, 31 Eng. Rep. 1076 (Ch. 1801), that a court of equity will sometimes deny specific performance under circumstances in which damages may be granted, was made in a case in which the plaintiff requested specific performance and the defendant successfully pleaded, as a defense, that he had made the contract under a mistake as to the quantity of land to be included in a lease. No sharp practice in obtaining the contract was alleged or proved. The same failure to distinguish between denial of specific performance and damages, which has been preserved by the editors of the twenty-sixth edition of SNELL, *supra*, was present in the fourth edition, published in 1878, several years after Snell's death. In the fourth edition, at 453, the statement appears that in unfair practice cases involving persons under undue lethargy or excitement from liquor, specific performance will be denied but the parties will be left to their remedies at law. In the paragraph immediately preceding, at 452, the statement is made that wherever there is not entire good faith, the contract will be set aside in equity in contracts with persons *non compos mentis*. In another contemporary English textbook, J. SMITH, *EQUITY JURISPRUDENCE* 73 (13th ed. 1880), published only two years later, situations in which one party has dealt unfairly with the other are included in the author's treatment of actual fraud, which is ground for avoidance of the contract. There is no reference in Smith's treatise to leaving the parties to their remedy at law.

⁵³ *McCull-Fontenac Oil Co. v. Saulnier*, [1949] 3 D.L.R. 208; *Jericho v. Guglielmin*, [1938] S. Austl. 292 (misunderstanding of agreement); *Richardson v. Otto*, 31 Queensl. 15 (1936); *Summers v. Cocks*, 40 Commw. L.R. 321 (1927) (Austl.); *Vivers v. Tuck*, 4 N.S.W. 14 (1863) (defendant illiterate and had been drinking); SNELL, *supra* note 52, at 664.

for rescission of contracts induced by unfair means falling short of actual fraud.⁵⁴ In a recent Irish case⁵⁵ specific performance was denied on the ground of the plaintiff's unconscionable conduct. The court did not grant rescission because such relief had not been requested, but refused damages to the plaintiff even though, as the court expressly pointed out, there had been no proof of actual fraud. It is stated in the twenty-sixth edition of Snell's *Principles of Equity* that unfair bargains "made by poor and ignorant persons acting without independent advice will be set aside in equity . . ."⁵⁶

The abolition of the distinction has been urged by high authority. Lord Denning has said that "[i]f good faith is required in a person who gives a promise, so it should be in a person who takes the benefit of it. He should not enforce it in circumstances which it was never intended to cover."⁵⁷ Dawson has expressed the view:

This double standard of morality is a clumsy and ineffective way of alleviating hardship or discouraging sharp bargainers, if the contract whose enforcement in equity is refused is left open for enforcement by way of damage remedy. It is in fact surprising that the special scruples shown in administering equitable relief should have lasted so long after our chancellors had laid aside their ecclesiastical robes. . . .

. . . .

The interesting question is whether we . . . have become prisoners of our own system—or, more accurately, whether we have become confused by our lack of system.⁵⁸

One of the most forceful criticisms of the historic distinction was advanced by Chafee in 1950:

⁵⁴ *M'Diarmid v. M'Diarmid*, 3 Bli. N.S. 374, 4 Eng. Rep. 1373 (H.L. 1828) (man 83 years old); *Dunnage v. White*, 1 Swan. 137, 36 Eng. Rep. 329 (Ch. 1818) (person was not drunk but was addicted to liquor); *Mortlock v. Buller*, 10 Ves. Jr. 292, 32 Eng. Rep. 857 (Ch. 1804) (intoxication); *Townshend v. Stangroom*, 6 Ves. Jr. 328, 28 Eng. Rep. 82 (Ch. 1801); *Twining v. Morrice*, 2 Bro. C.C. 326, 29 Eng. Rep. 182 (Ch. 1788); *Evans v. Llewellyn*, 1 Cox 333, 29 Eng. Rep. 1191 (Ch. 1787) (sale set aside; the vendor was poor and ignorant, and taken by surprise with no time for deliberation); *Cory v. Cory*, 1 Ves. Sr. 19, 27 Eng. Rep. 864 (Ch. 1747) (drunkenness); *Ellard v. Lord Llandaff*, 1 Ball & B. 241 (Ir. Ch. 1810) (ignorance).

In *Popham v. Brooke*, 5 Russ. 8, 38 Eng. Rep. 930 (Rolls Ct. 1828), an annuity for life was offered to a surgeon on condition that he would live with grantor for remainder of grantor's life. The surgeon knew grantor had only a few weeks to live. He died within three months. The contract was rescinded.

⁵⁵ *Buckley v. Irwin*, [1960] N. Ir. L.R. 98, 105 (Ch.).

⁵⁶ E. SNELL, *PRINCIPLES OF EQUITY* 614 (26th ed. 1966); cf. *id.* at 664.

⁵⁷ A. DENNING, *THE CHANGING LAW* 105 (1953).

⁵⁸ Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 535-37 (1959) (footnotes omitted).

Now that law and equity are merged, has not the time come to abandon this double standard for land contracts? Why should the same judges be very moral in a specific performance suit and brutally mathematical in a damage suit? . . .

For the most part, if a contract is too unfair to be specifically performed, then it is too unfair for damages. At least, the single court of today ought to take the facts which bar specific performance and ask whether they do not also render damages unjust. . . . [T]he main point [is] that, when unfairness is imputed to an agreement, judges ought to do plenty of thinking before they allow damages to be awarded.

No doubt there will still be a few situations where unfairness ought to prevent specific performance without preventing damages. The distinction, however, ought not to depend on the old line between law and equity or on varying degrees of morality. . . .

. . . Suits for breach of contract involve morality, within the proper limits of its application in a courthouse, just as much as suits for specific performance.⁵⁹

Throughout the civil law and in the Scandinavian and Hungarian legal systems, the contract is rescinded whenever it was obtained by unfair means.⁶⁰

The doctrine that draws a distinction between standards of proper conduct at law and in equity is an invitation to engage in sharp practices under a guaranty of immunity from judicial interference if the scoundrel confines his request for enforcement to damages. It is to repeat a commonplace to state that legal standards establish criteria of proper conduct even outside the law. An insidious by-product of the traditional distinction is that it encourages, in the multitude of transactions that never reach the courts, practices that are condemned in all systems of ethics and morals, and in almost all legal systems except our own, and in some areas of our own legal system.⁶¹ If the dual standard has ceased to exist, we are doing the law and society a disservice by refusing to recognize its demise.

⁵⁹ Z. CHAFFEE, *SOME PROBLEMS OF EQUITY* 28-30 (1950).

⁶⁰ R. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 97-107 (1961).

⁶¹ Of course, sharp practices are condemned in some areas of our common law system; e.g., actions for breach of trust, violation of fiduciary and confidential relationships, quasi contractual obligations, and such special relationships as in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (admiralty claims); *Columbia Nat'l Life Ins. Co. v. Black*, 35 F.2d 571 (10th Cir. 1929) (insurance contracts); *Marks v. Gates*, 154 F. 481 (9th Cir. 1907) (compromise settlements); *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966) (bankruptcy).