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SOME ASPECTS OF THE MERGER OF LAW AND EQUITY*

By

JOHN L. GARVEY**

We often seem to think that God gave us feet simply to enable us to drive automobiles. Occasionally we have to be reminded that our legs can be used for a slower, though sometimes more reliable, means of transportation. We frequently confuse the true function of many things with which we have daily contact. Habit accustoms us to their use for some secondary end and tends to obscure their primary or original purpose. Such confusion seems to confront us when we think of the place of equity in our law. We tend to think of equity only as a means of enforcing a handful of well-established equitable institutions, such as mortgages, trusts, etc., or as a means of granting specific rather than substitutional relief, and forget that the Court of Chancery was originally established to assure a fair and just resolution of those controversies which the common-law judges could not, or would not, satisfactorily resolve.

A recent illustration of this confusion can be found in *Evans v. Mason*,¹ where the court refused to permit the recovery of damages for breach of an oral contract because of the Statute of Frauds. The court refused to consider whether or not the plaintiff had performed sufficient acts of part performance to take the contract out of the Statute. Concerning this point, the court said:

As a general proposition the doctrine of part performance is purely an equitable doctrine, and is not available to sustain an action at law on a contract within the Statute of Frauds. . . . This principle prevails notwithstanding that in this jurisdiction the distinction between law and equity has been abolished. . . . The merger of these divisions of jurisprudence is a procedural one, and the substantive distinctions between equitable and legal remedies remain substantially unchanged. . . . Therefore, the doctrine of part performance would have application in this case only if the facts were such as to warrant equitable relief.²

Conceding the possible accuracy of the court's argument that the statutory merger of law and equity was intended to be procedural only, we

* This paper is based upon a talk made at the equity round table of the annual meeting of the Association of American Law Schools in Philadelphia on December 29, 1960. Very recently, a thorough study of the whole field of the substantive merger of law and equity was published, *EQUITY AND LAW: A COMPARATIVE STUDY* by Ralph A. Newman. This paper does not include particular references to Professor Newman's excellent work. Instead, the reader is urged to consult it, not only on the matters mentioned here, but also on all the other phases of the merger as well.

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¹ 82 Ariz. 40, 308 P.2d 245 (1957).

² The actual outcome of the case was not as unfair as the quotation might indicate. The suit was brought to recover for services performed under a contract that merely provided that plaintiff would be paid "well." The court permitted recovery in quantum meruit. Thus by denying the plaintiff the right to sue on the contract, the court apparently deprived her only of whatever extra measure of compensation might have been found from the use of the word "well."

still must question the validity of a rule which makes the availability of the doctrine of part performance depend upon the particular type of remedy sought. Why should a plaintiff, who is entitled to specific performance of a contract, be denied damages for its breach if he chooses to pursue that remedy rather than the other? Suppose that A makes an oral contract to sell Blackacre to B. B immediately enters upon the land and makes improvements. When the time for performance comes, however, A refuses to execute a deed. Nothing else being shown, B is clearly entitled to a decree for specific performance of the contract in most states.³

But suppose B needed title to the land immediately and could not wait for a specific performance suit to run its course. Suppose that as soon as A breached, B was forced for some reason or another to purchase other property, less suited to his purpose, at a higher price. Should he not be able to maintain an action for damages? He no longer has any use for the land; to say that he is entitled to specific performance is to say that he is entitled to something that he neither needs nor wants. The only thing that will make him whole for his loss is money. Certainly there is nothing inherent in the facts of the case which makes it proper to grant specific performance but improper to award damages instead. Either B is entitled to the benefit of his bargain or he is not. If he is entitled to it specifically, it would seem that he should also be entitled to it substitutionally. Generally we feel that a decree of specific performance rests more heavily on a defendant than a judgment for damages; it is granted only after the plaintiff has made a stronger showing than is necessary in an action for damages.⁴ From this it would seem that if he is entitled to the benefit of his bargain specifically, then *a fortiori* he is also entitled to it substitutionally. Yet in this type of case, courts frequently deny a plaintiff's right to damages while conceding his right to specific performance. The development of the rule can be explained by the dichotomy of courts that existed for so many centuries in Anglo-American law and the fact that the two remedies were developed by the two different systems of courts. But the rule cannot be justified today without ignoring the reason our ancestors found it necessary to vest judicial power in the Chancellor in the first place and the role equity has played in the development of our legal system.

It is difficult to define precisely the nature of equity in Anglo-

³ See CHAFEE AND RE, CASES AND MATERIALS ON EQUITY 609 (4th ed. 1958), for an outline of the acts of part performance which are sufficient to take a contract out of the Statute of Frauds in the various states.

⁴ See 2 RESTATEMENT OF CONTRACTS § 358 (1932).

American law. Probably no other term has so consistently evaded definition by legal writers. Professor Chaffee, however, gave us a good starting point when he said: "Equity is a way of looking at the administration of justice; it is a set of effective and flexible remedies . . . ; it is a body of substantive rules."⁵ As this statement indicates, equity is complex; it is a combination of several different things, which have been blended so well through the course of time that it is now difficult to analyse it and establish the true proportion of each ingredient.

Equity is a way of looking at the administration of justice. It is a recognition that there is more to the administration of justice than the impartial application of previously announced rules to the facts of individual cases as they arise. When speaking of equity in general, many writers refer to Aristotle's definition of *epikeia*, "the correction of law where it is defective owing to its universality."⁶ Because of its nature, law must be made for the general case. But human conduct is so varied and its nuances so infinite that few general rules can be formulated that can be applied fairly to all fact situations that might come within their scope. Some allowance must be made for the unusual combination of circumstances which individually are ignored in the formulation of the rule but which in the aggregate demand modification of it. Moreover, times change. Factors that might have been irrelevant in the resolution of a problem in the past become critical today. The law must respond to this change and progress with society. The spirit of equity must be present to some extent in every judicial system to accomplish the ends of individualization and progress.

Legislation obviously can accomplish little toward the individualization of justice. It is, however, generally thought of as the normal mode of legal reform today. Yet even in this respect, it leaves much to be desired. The need of reform is seldom noticed by the legislature until many litigants have been oppressed by an out-moded rule. And even after the need is recognized, legislators frequently cannot take the time to supply it; they are too busy with matters of public law, which concern all citizens, to devote their attention to matters of private law, which concern only comparatively few.⁷ The spirit of equity can be found to some extent in our judicial system. Historically, it was lodged primarily

⁵ RE, SELECTED ESSAYS ON EQUITY Foreword, (iii) (1955).

⁶ ETHICA NICOMACHEA, Book V, Chap. 10 Ross's translation, (1931).

⁷ "Legislators are properly preoccupied with public affairs; they have little time to spend on curing defects in private law." Chaffee's foreword in RE, SELECTED ESSAYS ON EQUITY (iv) (1955).

in the Court of Chancery. But clearly it is not exercised *in its full vigor* by any court in the United States today.⁸ Extoll as we might the advantages of justice without law in the theoretical realm, we are skeptical of achieving it in the practical world in which we live and have demanded, for the most part, justice according to law.

When we speak of equity in particular, we generally refer to the separate Court of Chancery that existed for so many centuries in our legal history, or its modern successor—wherever that may be found—or the principles and rules developed and applied therein.⁹ We know that in the very early days of our legal history the common-law courts exercised powers which we now call equitable. Maitland, writing of the age of Henry III, said:

Our King's court is according to very ancient tradition a court that can do whatever equity may require. Long ago this principle was asserted by the court of Frankish Kings and, at all events since the Conquest, it has been bearing fruit in England. It means that the royal tribunal is not so strictly bound by rules that it cannot defeat the devices of those who would use legal forms for the purpose of chicane; it means also that the justices are in some degree free to consider all the circumstances of those cases that come before them and to adapt the means to the end.¹⁰

Soon, however, a hardening process set in and the King's courts were no longer able to boast that they provided a remedy for all wrongs. The writ system became closed and a man had to be able to bring his complaint against his neighbor within one of the well-recognized writs or he could expect no relief from the judges.¹¹

The ingenuity of man did not fail him. He was able to devise many schemes for imposing upon his neighbor in a manner that could not be redressed by one of the writs. In such cases, justice was administered through the grace of the sovereign. The injured party would petition the King to exercise his prerogative of interfering with the normal processes of the law and grant him relief in this unique case.¹² In the time of Edward III, it was ordered that all such matters were to be determined by the Chancellor who was to base his decision on "Honesty, Equity, and

⁸ It would be inaccurate to think that the remnants of this spirit that remain in our judicial system today can be found only in that part of our law we call equity jurisprudence. It is frequently found under a variety of guises in "common law actions"—the most common probably being "public policy."

⁹ This, of course, is based upon Maitland's definition of equity. Of it, he said: "This, you may well say, is but a poor thing to call a definition. . . . Still I fear that nothing better than this is possible." MAITLAND, *EQUITY* 1 (1909).

¹⁰ 1 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* 168 (1895).

¹¹ See WALSH, *TREATISE ON EQUITY* § 2 (1930); Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87 (1916).

¹² PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 168 ff. (4th ed. 1948).

Conscience."¹³ The Chancellor was the natural recipient of this task; he was in charge of the issuance of the common-law writs and thus familiar with the work of the judges; he was also an ecclesiastic,¹⁴ trained in the Canon and moral law, and thus familiar with the dictates of Honesty, Equity, and Conscience. As time passed, the Chancellor developed a regular procedure for the handling of this business and emerged, in this capacity, as a separate court.

It seems clear that the early Chancellors did not consider themselves as developing or administering a legal system. They were merely seeking to compel the litigants before them to do whatever conscience required in view of the facts of each individual case presented to them.¹⁵ In this task, they were not embarrassed by rules that might have been inaccurately formulated on a previous day to resolve a somewhat similar controversy.¹⁶ They insisted merely that right be done; they were thus able to give legal recognition to moral values that had escaped the common-law.

As time passed, equity itself began to become systematized. The advent of lawyers to the woolsack, improved methods for the collection and distribution of precedents, the establishment of limitations upon sovereign power, all played their part in this. The application of equitable principles to certain fact patterns was more or less set and rules of decision began to appear. In some cases, equity became just as legal, just as strict, as the common-law itself.¹⁷ Thus in *Paine v. Meller*,¹⁸

¹³ The action of Edward III was merely confirmatory of a procedure which had been followed for many years. The referral of these petitions to the Chancellor was common in the reign of Edward I, but the practice of selecting him alone had not then been established. 1 POMEROY, EQUITY JURISPRUDENCE §§ 33-35 (5th ed. 1941).

¹⁴ The first lawyer to be Lord Chancellor was St. Thomas More in 1529. Prior to him, there was a long line of bishops and archbishops. See Glenn and Redden, *Equity, A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 779 (1945); 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 557 (1927).

¹⁵ 1 SCOTT, TRUSTS § 1.1. (2d ed. 1956).

¹⁶ See 5 HOLDSWORTH, 262, HISTORY OF ENGLISH LAW (1927).

¹⁷ The principles of equity started to become quite fixed in the seventeenth century. The change was almost completed by the time of Lord Eldon, who in *Gee v. Pritchard*, 2 Swanst. 402, 414 (1818), said: "The doctrines of this court ought to be as well settled, and make as uniform, almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case."

Our skepticism of achieving justice without positive law compels us to approve of most of this systematization. However, in some areas it went too far and led to an "over-righteousness," e.g., in raising trusts out of precatory language. See ALLEN, LAW IN THE MAKING 400 (6th ed. 1958). In other areas, it went too far in the other direction and led to a fossilization which deprives us of many sound equitable principles, e.g., today we frequently use the trust—one of the Chancellor's greatest contributions to our law—to evade the equity of redemption—another of his contributions. See OSBORNE, MORTGAGES § 17 (1951). We lament the "decadence of equity" but that is not our purpose here.

¹⁸ 6 Vesey 349 (1801).

Lord Eldon concluded that the vendee of land must bear the risk of loss from the date the contract was entered into. No other conclusion was logically possible once his premise that a vendee's claim to the land was based upon some form of ownership was conceded. Generally, however, there were marked differences between decisions in equity and those at law. In the first place, the rules developed and applied in equity had more of a moral content than those at law. Thus, the Chancellor spoke of good faith, unconscionable conduct, unjust enrichment. And secondly, the rules which were developed were not applied as mechanically as those of the common-law. Relief in equity was not viewed as a matter of right but was deemed as subject to the discretion of the court. Not a personal discretion of the individual judge, not caprice, not sympathy,¹⁹ but a judicial discretion—one based upon the principles which had activated the Chancellors of the past—which enabled the court to consider a variety of factors that might be involved in the particular case and evaluate them, weighing one against the other, before coming to its conclusion. A third distinguishing feature can also be noted; it probably is only a result of the prior two: equitable rules were not generally formulated in the categorical manner which is typical of legal rules. The resistance of equitable doctrines to black-letter formulation was recognized by an American court at the beginning of this century when it concluded an opinion²⁰ by saying:

Manifestly it is just and equitable and will thwart a fraud now to decree specific performance in the plaintiff's favor, and manifestly it would be unjust and inequitable and would allow the perpetration of a fraud not to do so. That is sufficient. If scientific or other considerations demand a formula governing the subject, whoever needs can phrase one on that basis."

In distinguishing between law and equity today, we tend to stress their procedural and remedial aspects. Certainly this is an important point of distinction. The willingness of the Chancellor to direct orders to the litigants themselves was a source of much of his power and enables courts of today to deal effectively with the multitude of problems which cannot be resolved by common-law procedures. This aspect of the distinction, however, should not be overemphasized. The Chancellor ap-

¹⁹ "The exercise of sound judicial discretion is something other than decision by arbitrary whim or by emotional desire or as a personal favor." 2 RESTATEMENT CONTRACTS § 359 *Com. a.* (1932).

"[T]he equity administered in the English Court of Chancery was not emotion, nor the changing moral conscience of the time and place, nor the caprice of the Chancellor, but rather that body of transcendental principals of right and wrong, existing in the metaphysical order, which may be identified as natural law." Brown, *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System*, 4 CATH. U. L. REV. 3, 15 (1954).

²⁰ *Zelleken v. Lynch*, 80 Kan. 746, 104 Pac. 563 (1909).

plied different rules and principles from those applied by the judge. The procedure used, the particular remedy given, in many instances was largely accidental—compelled in some measure²¹ by the necessity of avoiding that "conflict in form"²² which would have doomed the new court from its inception. To be sure, some cases did require specific rather than substitutional relief. Landed estates and Pussey horns²³ being what they were, no amount of money could make their owners whole for their loss, and thus, justice required specific rather than substitutional relief. But not all of the Chancellor's cases were of this type. When he required the surrender of a bond procured by fraud, when he called the unfaithful feoffee to task, when he created the equity of redemption, the Chancellor was primarily interested in vindicating a substantive right and the particular remedy given in these cases seems to have been mostly accidental.

The rights vindicated by the Chancellor in these cases had their basis in the moral order. It was because the strictness of the common-law had prevented the judges from recognizing these rights that the Chancellor was called upon. Generally we concede the desirability of the reception of moral principles into the civil law. Yet we are rightfully reluctant to do it in any wholesale manner. In our diverse society it is frequently difficult to achieve agreement on matters moral. Undoubtedly, there is a large core of principles on which substantial agreement can be obtained; but there is also a sizeable outer layer which is productive of sparks in any widespread discussion. Even among the principles on which agreement can be obtained, there are many which are not suited to administration by human institutions. Dean Pound said that one of the effects of the attempt to make law coincide with morals is "to make legal duties out of moral duties which are not sufficiently tangible to be made effective by the machinery of the legal order."²⁴ He illustrates his point with the difficulty the Roman Law encountered in attempting to enforce the obligation of gratitude.²⁵ And even with tangible moral principles on

²¹ There is no doubt that in developing their procedure, the Chancellors relied heavily on that used in the ecclesiastical courts. MCCLINTOCK, *EQUITY* § 8 (2d ed. 1948); Glenn and Redden, *Equity, A Visit to the Founding Fathers*, 31 VA. L. REV. 753 (1945).

²² After referring to Maitland's statement that there would be "civil war and utter anarchy" if law and equity should conflict, Scott says: "There is no conflict in form . . . there is only a conflict in substance." 1 SCOTT, *TRUSTS* § 1 (2d ed. 1956).

²³ See *Pusey v. Pusey*, 1 Vern. 273 (1684).

²⁴ 1 POUND, *JURISPRUDENCE* 416 (1959).

²⁵ The Code of Justinian, Book VII, Title LVI, provided for the revocation of a gift if the donee proved to be ungrateful. The difficulty of administering such a provision is obvious. The French Civil Code Art. 955 (1803) contains a similar provision but there the circumstances of ingratitude are defined and limited to cases 1) where the donee attempts to take the life of the donor, 2) where the donee is guilty of cruelty, crimes, or heinous injury towards him, and 3) where the donee refuses him subsistence.

which there is general agreement, our courts frequently have trouble. A modern illustration is the current discussion of the wisdom of continuing to attach criminal sanctions to certain forms of sodomy. Most of this discussion concedes that such conduct violates moral standards; the principal argument made is simply that human tribunals cannot enforce such statutes.²⁶ Whatever we might think of the argument in this case, most of us will agree that there are certain moral duties that cannot be enforced by our courts.

For these reasons, the law has in the past, and will probably continue in the future, to move carefully in the reception of moral principles. But such caution cannot justify the law's refusal in one part of its judicial system to receive those moral principles which through the course of centuries have been received, tried, and proved in another part of the system. When law and equity were administered by separate and distinct tribunals, many equitable principles were able to travel the gulf and find their way into legal rules. Now that we have the one court, the trip is shorter and should be easier; but such has not proven to be the case. While conceding the validity of equitable principles when specific relief is sought, most courts deny the applicability of these principles when the same plaintiff seeks substitutional relief. Indeed, they deny the applicability of even those principles which have been reduced to more or less concrete rules. Our courts are so enamored with the accident of history which truncated our judicial system and entrusted the two remedies to the different courts that they fail to see the propriety of questioning whether there is anything inherently different about the two remedies which demands the application of different rules to each.

The propriety of applying the equitable doctrine of part performance in suits for damages for breach of contract seems clear.²⁷ More difficult problems, however, involve the propriety of applying the "discretionary defenses"²⁸ in legal actions. When a plaintiff sued in equity, he knew that the remedy might be denied him for a variety of reasons which would not have been material if he had sued at law. Thus, if he had been guilty of laches, concealment, if there had been misrepresentation, unilateral mistake, if the contract was oppressive, or if the decree would result in undue hardship, specific relief would be denied.²⁹ Clearly the

²⁶ Concerning the argument that centered around this part of the American Law Institute's proposed Criminal Code, see 8 J. LEG. ED. 319, 469 (1956).

²⁷ Corbin says that the combined courts of law and equity "should now be ready to award damages either as supplementary to specific performance or in lieu of it." 2 CORBIN, CONTRACTS § 422 (1950).

²⁸ This term is used loosely throughout to signify all those doctrines which moved the Chancellor to deny specific relief.

²⁹ See 2 RESTATEMENT, CONTRACTS § 358-380 (1932).

Chancellor exacted a higher degree of ethical conduct from his suitors than the judge did of his. If the Chancellor's values were proper, should we not now import them into suits for substitutional redress? In a very cogent and enlightening article,³⁰ Professor Stevens makes a strong plea that we should. And while discussing this problem, Professor Chafee questioned how the same judges could "be very moral in a specific performance suit and brutally mathematical in a damage suit?"³¹

Recently several courts have permitted "discretionary defenses" to bar legal relief.³² *Miller v. Siwicki*³³ was an action of ejectment. Long before the suit was brought, the defendant had purchased the property at public sale on a levy against plaintiff's predecessor in title and had gone into possession under the sheriff's deed. Plaintiff claimed that the deed was void because of defective service of notice of intent to levy. Defendant had made extensive improvements on the land but the records thereof had been lost; moreover, the person who had managed the property for the defendant and who would have been in the best position to testify concerning the improvements had died. The court denied relief to the plaintiff because of laches. And in *McMorrine v. Blackwell*,³⁴ the court applied the doctrine of laches to bar recovery of damages for the faulty construction of a house under a contract.

The problem of applying the "discretionary defenses" to suits for damages is more difficult than that encountered in applying the doctrine of part performance because here the Chancellor denied, rather than granted, the equitable remedy. We generally believe that the equitable remedy rests more heavily on the defendant than the legal one. If this is so, then it is possible that facts that might properly bar the severer remedy would not be sufficient to affect the granting of the other. Though it is conceded that this objection may be valid in some cases, it is submitted that it is not in most. In most modern contract cases, the premise seems to be open to question. Assuming that the damages assessed for the breach are compensatory, it seems likely that in most cases the defendant would just as soon suffer a decree for specific relief as a judgment for damages. To be sure, the widow who has contracted to sell the old homestead might prefer to pay damages rather than part with the property to which she has become sentimentally attached. But this is the unusual

³⁰ Stevens, *A Plea for the Extension of Equitable Principles and Remedies*, 41 CORN. L. Q. 351 (1956). See also Stevens, *A Brief on Behalf of a Course in Equity*, 8 J. L. ED. 422 (1956).

³¹ CHAFEE, SOME PROBLEMS OF EQUITY 28 (1950).

³² See cases mentioned in Stevens' articles cited in note 30 *supra*.

³³ 8 Ill. 2d 362, 134 N.E.2d 321 (1956).

³⁴ 132 Colo. 45, 284 P.2d 1060 (1955).

case. In the United States today, it is indeed an extremely rare piece of land which has no other substantial equivalent. When we require the defendant to give the plaintiff the benefit of his bargain by paying damages, we in effect require him to buy his own property back from the vendor. And when we require him to perform the contract specifically, we require him to buy an equivalent piece of property from some third person. The net difference to the defendant in most cases seems to be only the cost of moving his property. A recent demonstration of the fact that some defendants would rather suffer a decree of specific performance than a judgment for damages can be found in *Miller v. Miller*,⁸⁵ where upon an appeal by the defendant the court set aside a money judgment and entered a decree for specific performance.

Even if we concede, however, that the equitable remedy does deal more severely with the defendant than the legal one, the argument cannot justify the law's ignoring completely the principles embodied in most of the "discretionary defenses." To say that these defenses need not be a complete bar to the legal remedy is one thing; to say that the facts that constitute them are entirely immaterial in the proceeding at law is another. If unconscionable behavior is determinative of the outcome of one proceeding, then it should also be at least material in the other.

It is possible to rest the argument here and be content with a reception of these principles that gives them some effect in legal actions even though it does not elevate them to the position of absolute defenses. Such a partial reception might be proper in some cases. It is possible to conceive of a laches case in which it would be proper to award plaintiff damages—reduced, however, in a sum equal to the harm suffered by the defendant by the delay. It is submitted, however, that few such cases will be found; most of us will not argue with the court's disposition of *Miller v. Miller*. Generally speaking, the things that motivated the Chancellor to deny equitable relief are of such a character that they should preclude all relief. Concerning this matter, Professor Chafee said: "For the most part, if a contract is too unfair to be specifically performed, then it is too unfair for damages."⁸⁶ And concerning the very troublesome problem of unilateral mistake, Professor Corbin argues that "a just and reasonable man will not insist upon profiting by the other's mistakes."⁸⁷

⁸⁵ 335 S.W.2d 884 (Ky. 1960).

⁸⁶ CHAFEE, *op. cit. supra* note 31, at 29.

⁸⁷ 3 CORBIN, CONTRACTS § 609 (1960).

It can be conceded, however, that there are some cases in which the "discretionary defenses" should not bar, or even affect, the legal remedy. This is particularly true where the basis of the defense is the right of the public or some third person rather than the conduct of the parties themselves. In *Rockhill Tennis Club of Kansas City v. Volker*,³⁸ the court denied the purchaser specific performance of a contract for the sale of land. The land was a small part of a larger tract owned by a charitable trust. The original trustee of the charity had given the plaintiff an option to buy the land some thirteen years earlier. During the intervening years, the trust estate grew as a result of various gifts and extensive plans were made by the present trustees, who knew nothing of the option, and the city officials for the erection of an art museum and park. The optioned land was essential to the plan. The court denied specific performance because of the public's interest in the proposed project. Clearly, under these facts, the public interest should not bar the recovery of damages from the defendants. Their generosity to the public is commendable. But they must be just before they are charitable. The plaintiff's contract was valid; he had been damaged by the breach; he should be made whole for his loss.

In *Greeley and Loveland Irrigation Co. v. McCloughan*,³⁹ the court denied equitable relief because of its possible effect upon the interests of innocent third persons. Forty-five years before this suit was brought, the defendant irrigation company had agreed to furnish plaintiff with such water as he might need, up to a maximum of 140 inches. During these forty-five years, however, defendant had never delivered more than 100 inches of water to the plaintiff under the terms of the agreement. During this period of time, the difference of forty inches had been distributed by the company in unknown amounts to its other customers. Plaintiff brought suit to compel the company to deliver the full 140 inches. Since the irrigation system was operating at full capacity, such a decree would jeopardize the interests of the other users of the system. The court denied specific relief. Other facts in the case indicate that probably damages should also be denied plaintiff. But if we consider only the facts recited above, it would seem that plaintiff should be permitted to recover damages for the breach of the original agreement. Specific relief was denied

³⁸ 331 Mo. 947, 56 S.W.2d 9 (1933).

³⁹ 140 Colo. 173, 342 P.2d 1045 (1959).

simply because it would jeopardize the rights of innocent third parties, not because of anything in the transaction or the conduct of the parties which indicated that the bargain should not be effective.

As indicated above, there are some cases in which the equitable remedy does rest more heavily upon the defendant than the legal remedy. This will principally be in tort cases where the doctrine of the balance of the hardship is applied. Concerning this defense, McClintock said:

[P]ractical experience has shown that in the administration of specific relief there must be more discretion vested in the judge than in the allowance of money damages for the injury suffered. In the latter there can never be any greater injury inflicted on defendant by allowing recovery than would be inflicted on plaintiff by denying it. But it very often happens that the award of specific relief would inflict a hardship on the defendant which is out of all proportion to the injury its refusal would cause to plaintiff.⁴⁰

Clearly in such cases the equitable principle should not prejudice legal relief. Indeed, in many such cases we have grown accustomed to the court's granting substitutional redress when specific relief is denied, e.g., in suits to compel the removal of encroaching structures. In these cases, it is important to notice that it is the difference in the nature of the two remedies which justifies the application of the different rules. The justification does not lie in the accident of history whereby the two remedies were administered by separate courts. Thus we can concede that sometimes these equitable rules should not be determinative of the outcome of legal actions, even that sometimes they may be wholly immaterial, without detracting from our thesis that their applicability should be determined, not arbitrarily by the accident of history, but rather by an examination of the nature of the principle and the different effects the two remedies may produce in the particular case.

It might be objected that the argument that some "discretionary defenses" should be adopted as absolute defenses to legal relief goes too far. According to classical equity theory, these defenses were merely defenses to equitable relief; of themselves, they were not the basis for affirmative equitable relief. If the party wanted to enjoin the prosecution of an action for damages, or if he wanted to have the contract rescinded (thus precluding an action for damages for its breach), the Chancellor required that he prove more than the facts that would amount to an equitable defense. Thus in *Wood v. Fenwick*,⁴¹ the plaintiffs had been "inveigled" to sell an inn. The Chancellor refused to set the transaction aside, finding "that though the purchase was not a fair bargain,

⁴⁰ McCLINTOCK, *op. cit. supra* note 21, sec. 23.

⁴¹ *Prec. in Chan.* 206, 24 *Eng. Rep.* 100 (1702).

yet no such fraud appeared as to set it aside." And in *Attorney General v. Sothom*,⁴² the Chancellor refused to either enforce a bond or set it aside because though the defendant had given it under pressure, yet it had not been procured by duress. If we now convert these "discretionary defenses" into defenses to actions for damages, we are going further than the Chancellor thought proper under the facts of these cases. It is submitted, however, that this conclusion does not necessarily follow. One of the primary reasons why the Chancellor refrained from recognizing this conduct as the basis for affirmative relief was his desire to minimize friction with the common-law court. Plucknett tells us that in the fifteenth and sixteenth centuries "the chancellors . . . made every endeavour to conciliate the common law courts."⁴³ The thorn in the side of the common-law judges was the presumption of the Chancellor in daring to enjoin the prosecution of actions at common-law. This was one of the grounds mentioned in the impeachment of Wolsey.⁴⁴ It was the source of continued friction during the chancellorship of St. Thomas More.⁴⁵ It was the basis of a complaint to the Council during the reign of Edward VI.⁴⁶ And the related problem of the Chancellor's enjoining the enforcement of common-law judgments precipitated the great fight between Coke and Ellesmere.⁴⁷ No wonder the Chancellor required proof of an extremely grievous wrong before taking such action! He was identified with the royal power during the political struggle between Parliament and the King. His position was sometimes precarious and he did not wish to jeopardize it further by unduly antagonizing the judges who had championed the side of Parliament. But within his own realm, when the only issue involved was the propriety of granting his own remedy, he acted freely—recognizing basic moral standards and compelling his suitors to comply with them.

The thought is frequently expressed that though these equitable considerations are not recognized in the theory of the law, they are in

⁴² 2 Vern. 497, 23 Eng. Rep. 918 (1705). Modern cases denying specific relief but also refusing to relieve the defendant from liability at law are not uncommon. See *Kukulski v. Bolda*, 2 Ill. 2d 11; 116 N.E.2d 384 (1954); *Kleinberg v. Ratett*, 252 N.Y. 236, 169 N.E. 289 (1929); *Margraf v. Muir*, 57 N.Y. 155 (1874). These cases seem to be the product of the fossilization of equity mentioned above, which we lament but which we promised not to bemoan here.

⁴³ PLUCKNETT, *op. cit. supra* note 12, at 649.

⁴⁴ The charges can be found in 4 CO. INST. 91, 92.

⁴⁵ More offered to cease issuing such injunctions if the judges would alleviate the rigor of their rules, especially in cases of fraud. MCCLINTOCK, *op. cit. supra* note 21, sec. 4.

⁴⁶ 1 HOLDSWORTH, *op. cit. supra* note 14, at 460.

⁴⁷ HOLDSWORTH, *id.* at 461.

its practice; though they are ignored in the legal rules which determine liability, they are weighed by the jury in its assessment of damages. Apparently, the judges used this argument centuries ago when More suggested that they alleviate the rigor of their rules.⁴⁸ And in *Hixt v. Goats*,⁴⁹ Coke recognized, and apparently approved, this aspect of the jury system. In this case, the defendant had sold a large tract of land to the plaintiff, representing that it contained a certain number of acres and covenanting to pay 11 (10?) pounds for each acre short thereof. The plaintiff had the land surveyed and found that it contained seventy acres less than the represented amount. He thereupon brought suit on the covenant for 700 pounds. The jury returned a verdict in favor of the plaintiff for 400 pounds. It was argued that the verdict was "repugnant"; for if the land was seventy acres short, the verdict should be for the full 700 pounds and if that many acres were not missing, then the verdict should be for the defendant. But the judgment was affirmed. In his opinion, Coke said that there were various reasons why the plaintiff was not equitably entitled to the full amount and that the jury was apparently affected by them "for it seems that here the jurors are chancellors, and it seems that such a verdict is good in an action on the case for him who seeks to recover damages only, but it is otherwise for one trying to recover a debt." Though Coke thus recognized that juries are sometimes influenced by equitable consideration, his qualification points up one of the difficulties of relying too heavily on the jury to implement these factors. There are certain rules of law which might frustrate the work of a jury that did act as chancellors. If the provision in the covenant in *Hixt v. Goats* were construed as one for liquidated damages, it seems likely that the verdict would not be allowed to stand today.⁵⁰ Moreover, any verdict which is clearly contrary to the law of damages can be set aside.⁵¹ Undoubtedly, this latter rule allows considerable latitude in a verdict but it obviously could thwart the efforts of a jury which had considered, and was moved by, equitable principles which in legal theory were immaterial in the determination of the case.

There is no doubt that jurors are frequently influenced by a variety of factors which in strict legal theory they should not be. Undoubtedly, moral considerations are high on the list of such factors. But if we rely

⁴⁸ PLUCKNETT, *op. cit. supra* note 12, at 649.

⁴⁹ 1 Roll. Rep. 357, 81 Eng. Rep. 472 (1616); parts of the case are also reported in English *sub nom.* Hicks v. Goates, Cro. Jac. 390, 79 Eng. Rep. 334 (1616).

⁵⁰ See 5 CORBIN, CONTRACTS § 1061 (1951).

⁵¹ MCCORMICK, DAMAGES § 18 (1935).

solely on the jury to implement these factors, what assurance do we have that they will not be crowded out of the panel's deliberations by the other non-legal considerations? In 1917, while she was a minor, Jewel Carmen entered into a contract with the Fox Film Corporation whereby she agreed to act exclusively for Fox for a period of four years. Jewel achieved her majority in 1918 and promptly disaffirmed her contract with Fox. Shortly before achieving her majority, she had entered into a contract with Keeney Picture Corporation whereby she agreed to star exclusively for them for a period of two years, beginning in July 1918. While this contract was being negotiated, Jewel told Keeney nothing of the Fox contract; in fact, she told him that she was free to accept employment from him. Had Keeney known of the other contract, he would not have signed Jewel. Fox brought pressure to bear upon Keeney and induced him to breach his contract with Jewel, agreeing to indemnify him for any loss he might suffer. Jewel sued Fox for an injunction and damages. The lower court issued the injunction and the jury assessed the damages at \$43,721—a sum almost equal to the total salary she would have received under the Keeney contract if she had worked the full two years. This was reversed on appeal,⁵² however, the court saying that Jewel's conduct while negotiating the Keeney contract precluded her from obtaining relief in the equitable action. The appellate court recognized her inequitable conduct for what it was. But did the jury? Did the jurors take it into consideration while assessing the damages or were they primarily affected by other factors in returning the verdict for so substantial a sum?⁵³

Even if we assume that the jury will be properly motivated, and even if we also assume that no rule of law will upset the verdict, nevertheless we must rely on the ability and resourcefulness of counsel to get evidence of these matters before the jury, over the possible objections of opposing counsel, when we insist that these equitable considerations be excluded from the legal rule. All together, this seems to be too much happenstance to rely on.

Some argue that the importation of these equitable principles into legal actions would leave the law too uncertain. This, of course, is the basic conflict between the legal and the equitable, between stability and progress. The conflict can only be resolved by a compromise for both values are important in our legal system. It is submitted, however, that

⁵² *Carmen v. Fox Film Corp.*, 269 Fed. 928 (2d Cir. 1920), reversing 258 Fed. 703 (S.D.N.Y. 1919).

⁵³ Carmen subsequently sued Fox at law for damages. It was held that the disposition of the equity proceeding did not bar the action. *Carmen v. Fox Film Corp.*, 204 App. Div. 776, 198 N.Y.S. 766 (1923).

the reception of the "discretionary defenses" would cause less difficulty than anticipated. They are not general principles; they are rules which have been tested and refined by repeated application in suits before the Chancellor through the centuries. Lawyers have been compelled to evaluate their applicability to concrete factual situations every time they considered filing an equitable action. Moreover, it is submitted that we have far less certainty in the law than we often recognize. The numerous volumes of the National Reporter System which are published each year bear mute testimony to this fact. Coke's argument, that jurors are chancellors, points up another element of great uncertainty in our legal system. The hornbook rule of law establishing liability might be ever so simple and unequivocal; but the client is not interested merely in liability; he wants to know how much money he will recover. And this, of course, is frequently a very uncertain and unpredictable matter. Even if we concede, however, that the reception of these rules would render the law more uncertain than it presently is, we must still question whether this consideration is sufficient to justify their exclusion. Are we really so interested in assuring certainty to those who walk upon the fringe of legal rules that we are willing to sacrifice these ideals which centuries of adjudications in chancery have proven to be valid?⁵⁴

The strongest argument in favor of the substantive merger of law and equity—i.e., the reception and application of equitable principles in all claims for relief, whether specific or substitutional—is the fear that without it we will lose most of the Chancellor's ideals. Without denying that there are still some cases in which justice demands specific relief, they seem to be less common today than they were in Elizabethan England. The award of damages today frequently gives the plaintiff all that he really desires even though, under the equitable considerations of the Chancellor, he is not entitled to it. It is submitted that we have been so preoccupied with the thought of the inadequacy of the legal remedy being a basis for equitable relief that we have ignored the possibility that the substantial equality of the two remedies might be a proper basis for denying all relief.

⁵⁴ "[C]ertainty in the law is largely an illusion at best, and altogether too high a price may be paid in the effort to attain it. Inflexible and mechanical rules lead to their own avoidance by fiction and camouflage." 3 CORBIN, CONTRACTS § 609 (1960).

"The system which is most certain is the system which is completely static. It is still possible for men to plan their affairs with adequate certainty, even though they are subject to review by courts anxious to do the most perfect justice according to the present state of moral knowledge. Further, knowledge of such review would cause increased speculation and awareness as to what is right and what is wrong under given circumstances." RYAN, EQUITY: SYSTEM OR PROCESS?, 45 GEO. L. J. 213, 219 (1956).