1987

Equity and Equitable Remedies

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EQUITY is the system of justice that arose in the court of the lord chancellor of England in the late fourteenth or early fifteenth century. (In order to avoid confusion, this essay will not use the word *equity* to refer to the nontechnical concepts of fairness and justice.) Equitable remedies are those remedies granted by courts of equity as opposed to legal remedies, which are granted by courts of common law. The system of remedies we call equity arose to supplement and to complement, but not to supplant, the common law of England.

ENGLISH ANTECEDENTS TO MODERN EQUITY PRACTICE

The common law of England in the Middle Ages, whether administered in the royal courts or the county courts, was an unwritten system of law that was thought to be totally comprehensive; it governed all situations, and it was the duty of the courts to "discover" the law and to apply it to each particular case. In the thirteenth and fourteenth centuries, common-law remedies grew to combat all types of injuries; in some cases the royal courts were granting remedies to deal with problems formerly handled only in the county courts and, in other cases, to deal with newly invented injuries. This was a period of luxuriant growth for the English common law. However, the fourteenth century saw the rise of Parliament as a legislative body and, by midcentury, the development of a substantial body of judicial precedent stating the common law. The result was that common-law judges were becoming trapped by their own precedents and in time became unable to change the law without trespassing upon the legislative prerogative of Parliament. Judicial restraint is a good thing, but it can be carried too far, for there is no such thing as a general rule (or a statute) that cannot be avoided or perverted by persons of bad intentions. Furthermore, the medieval Parliament was not a very efficient legislature by modern standards; for one thing it met only irregularly, usually being called when the king needed more money.

As the common-law courts became unable to grant new types of remedies to deal with new types of problems, litigants turned to the king, and the king sent them to the lord chancellor, the head of the royal secretariat, for special aid. As these special petitions were regularly accepted and decided, the chancery developed into a law court, and the system of justice administered there became known as equity. Equity thus arose several centuries later than the common law and was that much more modern in terms of procedure and substantive law. It is to be remembered that chancery is a court that applies the system of law called equity. A chancellor is an official who is the keeper of someone's seal; the lord chancellor of Great Britain is only incidentally a judge. Thus, an equity judge is not usually a chancellor, though in the United States the term *chancellor* is sometimes used to refer to an equity judge and the term *chancery* is used loosely to refer to an equity court and equity jurisdiction. This article will use the word *chancery* to refer only to the court of the lord chancellor and not to any other court of equity.

Equity arose in the court of chancery in order to provide remedies when the common law proved inadequate to do justice in a particular case. (From the middle of the sixteenth century onward, the court of exchequer also granted equitable remedies.) Some of the substantive im-

provements of equity were the enforcement of trusts and the use of various defenses to contracts. A trust, or a use, was a type of contract, usually in reference to land, which was invented after the common-law writs (which controlled the jurisdiction and procedures of the common-law courts) had become fixed and unchangeable. A trust is the situation in which the common-law ownership of property is given to a person (the trustee) to hold and manage for the benefit of another person (the beneficiary of the trust). Since there was no common-law writ available to enforce a trust and since the chancery clerks and the common-law judges could not change the law by inventing a new one without unconstitutionally usurping the legislative power of Parliament, the chancellor enforced them. It was clear to the entire legal profession that justice required the enforcement of trusts and uses. Since the common-law courts could (or would) not, everyone agreed that equity should. Thus, the beneficiary of the trust is said to be the equitable owner of the property in question. The trust, which is completely unknown in European law, is a magnificent device for managing property or companies in both personal and commercial settings. This device has been steadily refined over the centuries to serve more and more needs of society.

In the area of contracts, justice required that each party receive "consideration"—that is, something of value for the performance of his part of the agreement. The common-law courts required proof of consideration "flowing" from the plaintiff to the defendant (the obligor) before a plaintiff (the obligee) could recover on an oral contract. However, if the contract was in writing and under the defendant's seal, the written and sealed instrument was sufficient proof for a common-law recovery, even though there was no consideration. A sharp dealer would be able to take advantage of others by always having such an unfair bargain reduced to writing with an eye to future litigation, relying on well-established common-law precedent. The common-law courts could not change their law, but the court of equity came to require the unconscionable obligee to forgo his unfair gain. The courts of equity required that all contracts be supported by consideration on both sides.

The mortgage is a common-law conveyance of land to secure a loan; the mortgage contract is written so that if the loan is repaid, the debtor gets his land back; if it is not repaid in full, the creditor keeps the land, even if only one payment is not made or if payment is made only one day late. In many cases a debtor may be in technical default only, but the common-law courts must enforce the contract that was freely entered into by the debtor. To prevent such harsh results, penalties, and forfeitures, the courts of equity allow the debtor to redeem his land by making the payments late (with appropriate additional interest); thus, the equity courts have created what is called an equity of redemption. (To protect fair-minded creditors, the courts of equity allow a creditor to come into the equity court and prove the hopeless insolvency of his debtor, and the equity judge will foreclose the debtor's equity of redemption; this will give the creditor clear title to the land being held as security so that he can sell it and recoup the amount of the defaulted loan.) Although the general common-law rule that contracts should be kept is well respected by society, everyone's sense of justice will acknowledge that the equity of redemption is a fine tuning by the courts of equity that results in substantial justice in the individual case where the debtor is acting in good faith but has had a bit of bad luck.

In more recent times the courts of equity have evolved a law of fiduciary responsibility, which did not exist in medieval England. Thus, administrators of estates, guardians of mental incompetents, and trustees are held to higher standards of loyalty than are ordinary businessmen.

The equity jurisdiction of the chancellor's court grew in the fifteenth century also to cure problems in the administration of justice caused by various defects in the procedures of the old common-law courts. One common-law rule of evidence was that a party could not testify in court as a witness. Much has been written about the aspect of this rule that a person cannot testify against himself, but we will consider here that a person also could not testify for himself. Thus, where the only witnesses to a transaction or occurrence were the parties thereto, the person injured could not prove his case in a court of common law, because there was no admissible evidence; and since the plaintiff always has the burden of persuasion, the defendant would win

by default. Thus, if one were assaulted in a dark alley, one had no practical remedy at common law. To aid the injured party, the courts of equity, where the defendant was required to plead under oath, would allow a person with a common-law grievance to sue in equity in order to force the defendant to respond under oath and "discover" (make known) the truth, and then this sworn statement would constitute a binding admission for use in the common-law court. In time, the courts of equity, where discovery was needed, began to retain the case and to decide the common-law dispute in order to avoid the multiplicity of litigation that would have been involved by sending the plaintiff back to the court of law. This was the origin of the bill of discovery.

One of the most glaring archaic features of the medieval common law was trial by jury. Although the criminal jury was usually up to its task, life was too complicated for the civil jury; civil juries were seldom sufficiently educated or experienced to understand complex issues of financial importance. But regardless of how good the jurors might have been, the jury system required a single verdict of liability or not and, if so, what damages. Thus, where there were multiple plaintiffs or defendants, the common-law jury was inadequate to sort out issues of, for example, which of the defendants might be liable for what proportion of the damages. In the courts of equity, which arose long after the common-law courts had settled upon the use of the jury as the trier of the facts of the case, the judge heard all of the issues of the case and, being an educated and highly competent person, was able to determine complicated issues.

Another jury-related problem was the common-law action of account. When the parties presented an accounting dispute to the court, the jury was required to render a separate verdict on each line in the account; this clumsy procedure was beyond the abilities of a jury of ploughmen, and the courts of equity took over accounting litigation to remedy this deficiency in the common law.

If two different persons claimed an object or a fund in the hands of a third party, problems could arise in the common-law courts. For example, if an expensive diamond necklace had been given to a jeweler to be repaired, the owner had died, and the jeweler had then been sued at common law for the necklace by both the heir and the widow, there would have been a very real danger that the different juries in the two common-law cases would both find against the jeweler. To prevent the likelihood of inconsistent jury verdicts and double liability, the courts of equity would allow the defendant jeweler to come into equity and to bring both common-law plaintiffs into the case, thus forcing them to litigate in equity their competing common-law claims.

A more serious defect of the common-law procedure was that when any party died, the lawsuit died, and the plaintiff had to restart his suit from scratch. Where there were many parties, it was frequently the case, particularly where a whole family was involved, as in litigation over a family inheritance, that parties would die and new parties be born, so that the case could never be brought to a conclusion. This problem was remedied by the courts of equity, because there a case could be easily revived when there was a change in parties and the litigation would not be frustrated by such accidents.

The fifteenth century in England was a period of political weakness as a result of the drawn-out Wars of the Roses; even during periods of peace, the authority of the crown was weak. England was at the mercy of private armies; the county administrators, the sheriffs, were usually either powerless or beyond the control of the courts. It was a period during which the rich and the powerful of the county could manipulate or intimidate juries and thus pervert the course of justice. Frequently weak and poor litigants had to resort to the court of the lord chancellor, the most powerful political figure in the country, to obtain justice against their strong neighbors. The chancellor was the king's prime minister in fact, though not in name, and he could do justice and enforce his orders without fear or favor. Many common-law disputes were therefore heard in the court of chancery in the fifteenth century.

Thus did equity come into existence to supplement and complement the common law. Equity does not compete with the common law but tunes it more finely. The common law is, in theory, a complete system; equity is not a system within itself but rather relates to the common law and aids the common law. Justice came to consist of both common law and equity; English justice

would be defective without both. This was recognized as early as the fifteenth century, and so lawyers and judges had to work out in the pleading stage of the litigation whether justice in a particular case was to be served in a court of common law or a court of equity.

Equity does not deny the validity of the common law but rather recognizes it and fulfills it. Equity does not change the common law, but where a person is using the common law to an unjust purpose, the equity judge will order that person not to sue in the common-law court or not to enforce a common-law judgment. The court of equity does not change the common law or reverse, overrule, or annul any common-law judgment, for to do so would be an unconstitutional usurpation of legislative power and an illegal appellate power over the common-law courts. But all disinterested persons would agree that the common-law courts should not be used in an unjust manner, and thus, the equity court orders that person not to do it. It is against good conscience to do injustice. Equity courts simply force defendants to act according to conscience; consequently, they have frequently been called courts of conscience.

St. German was the first scholar to attempt to explain the activities and jurisdiction of the chancellor's court. He spoke in terms of *epikeia* and conscience. The former concept is that, although all law must be framed in general terms, it should be applied to individual cases with flexibility and mitigation. The concept of conscience is the same today as it was in the sixteenth century, a sense of absolute right versus wrong. A party should not be allowed to use the common law to perpetrate a wrong. For example, if a person made a written contract under seal, an agreement to pay money for an assignment of contract rights, and then it turned out that the assignment was invalid and worthless, the general common-law rules allowed the enforcement of the written contract. However, the injustice of enforcing this contract was obvious, because while contracts should be kept as a general rule, where one party did not get what he thought he was getting, he should not have to give up what he promised to pay. The remedy for the mistaken person is to sue in equity for an order to the other party not to sue on the contract and to return the written agreement to him or, if he had already been sued, not to ask the sheriff to execute the common-law judgment. Thus, the contract and the common-law judgment remain in force, but if they are taken advantage of, the obligee will be put in prison for contempt of the equity court's order.

Since the courts of equity grant remedies only when the ordinary common-law remedies are inadequate, the jurisdiction of the equity courts is said to be extraordinary. The term *extraordinary* is used here in the sense of going beyond the basic rather than in the sense of unusual; equity is both extraordinary and quite usual and frequent.

One aspect of extraordinary equity powers involves the personal order. A personal order does not change the law or the parties' strict common-law rights and is enforced by the court's holding the defendant in contempt and keeping him in prison until he obeys. Thus, equity is said to act in personam. A common-law court acts in rem (that is, on the property of the defendant), declaring the money or land in dispute to belong to the successful plaintiff. The common-law court thus changes ownership and orders the sheriff to take the money or land from the defendant and to give it to the plaintiff. It should be noted, however, that in modern practice, statutes have given the courts of equity power to act in rem so that, for example, a sheriff can execute an equity order or a commissioner can be appointed to make a common-law conveyance or release in the defendant's name.

The procedure of the equity courts, sometimes referred to as English bill procedure, which was developed in the fifteenth-century chancery, was clearly more modern and much more efficient than the common-law procedure, with its forms of action and trial by jury. Every court that was set up by act of Parliament or evolved on its own in England from the fifteenth century onward used this English bill procedure rather than the procedure of the common-law courts.

It has been argued that the origin of equity procedure and substantive law is to be found in the procedure of the canon-law courts. Most of the medieval English chancellors were bishops in whose courts the canon law was used. It is my opinion that equity was an evolution native to England and that the bill grew out of an ordinary petition or request, that depositions grew out of administrative inquisitions, and so on. The fact

that the chancellors were bishops does not mean that they could not keep their courts entirely separate. Indeed, many common-law judges were bishops. Furthermore, many leading medieval politicians were given bishoprics so that the king could have administrators without having to pay them salaries; the bishops could do the king's work in person and their ecclesiastical work by deputy. Most ecclesiastical courts were presided over by the bishop's official or deputy anyway. There are similarities and dissimilarities between the canon law and equity.

The peaceful coexistence of law and equity continued until the chancellorship of Cardinal Wolsey during the early reign of Henry VIII. Thomas Wolsey, a person of modest social background, came to the notice of Henry VIII, who recognized in him a competent administrator and so put him into the highest seats of power in the kingdom, civic and ecclesiastical. As lord chancellor, archbishop of York, cardinal, and papal legate, he was exalted over all men in England except only the king himself and the pope. The power went to Wolsey's head, and he alienated people. The odium that became attached to Wolsey personally spilled over onto his court of chancery and from there to the rules of equity that were administered in chancery courts.

In 1529, Cardinal Wolsey, having failed to get Henry VIII's divorce from Queen Catherine, was stripped of all his offices and wealth. He died shortly thereafter of a broken heart, having lost his power, his only love. He was succeeded in the office of lord chancellor by the common lawyer Sir Thomas More. This was an interesting succession in that More was the first layman to be appointed chancellor since 1454; he had not been, and was not to become, the king's prime political adviser; and he was a well-known practicing lawyer. It was believed that he would restore the proper relationship between common law and equity. Soon after his appointment, he called the judges together to settle this relationship. He proposed not to enjoin common-law litigation if the judges would reform the common law, but the judges said that they did not have the power to change the law, and this forced More to continue to grant injunctions, in personam orders, as Wolsey and all earlier chancellors had done. Thus, More's appointment did not change or restore anything; but because he was a courteous man, the antagonisms between common law and equity were quickly forgotten, and equanimity prevailed until the reign of James I.

In the first decade of the seventeenth century, two very ambitious and aggressive men began to compete over personal dominance of the English legal system. The two were Thomas Egerton, Lord Ellesmere, who became lord chancellor, and Sir Edward Coke (pronounced "Cook"), a common-law judge who became lord chief justice of England. The chancellor has always been the administrative head on the English judiciary, but tradition was for Coke a servant, not a master. When Coke became lord chief justice of England, he began a systematic attack on every court and legal system but his own.

In the early seventeenth century, the concept of res judicata—the doctrine that once a court has decided a matter, it cannot be litigated again—had not been worked out between the courts of law and courts of equity. Therefore, if a person was sued at common law on a contract to which he had a defense in equity, he could sue in equity at once to stop the plaintiff (the obligee) from suing at common law, or he could wait and, if the common-law result was against him, sue to prevent the enforcement of the judgment. Thus, the defendant (the obligor) had two chances of success. Today, the defendant at common law must resort to equity at once or lose his equitable defense.

This situation was galling to Coke because the equity order, the injunction, appeared to be an appeal to his rival, the lord chancellor. Coke therefore let it be known that he was prepared to stop this practice. Soon a most unworthy plaintiff, Richard Glanvill, appeared in Coke's court to sue on a contract that was the result of his gross fraud and deceit. (He had sold a topaz, representing it to be a diamond.) He got judgment; the court of chancery issued an injunction to stop enforcement of the common-law judgement; the injunction was disobeyed; Egerton put Glanvill in prison for contempt of court; and Coke ordered him released on a writ of habeas corpus. This matter ended inconclusively, but this case and several others made a public issue of this problem of the practice of law and the administration of justice. The whole matter of the boundaries between common law and equity were then referred to the king's counsel for full debate and resolution. The result was in favor of the courts of equity, as should have been ex-

pected. Even though equity practice was not perfect, it was more modern and more flexible than the common law. The old rule was thus reestablished in 1616 without any further serious dispute. Simply stated, the rule was that where the results of an equity order and a common-law order were in disagreement, the equity rule and decree would prevail. Otherwise, equity would have been unable to perform its function of seeing justice done in the individual case. Shortly thereafter, Coke was removed from his judgeship and Egerton died, and things returned to normal in the English courts. A generation later, personalities and politics, rather than jurisprudence, again impinged on the relationship between common law and equity. Soon after his accession to the throne in 1625, Charles I decided to follow the French theories and methods of government and to rule England without the interference of Parliament. When Parliament was removed as a political forum, the opponents of the king's policies took their fights to the area of the law courts. Lord Coventry, the lord chancellor, was identified with the king and his policies. And again the dislike of the chancellor resulted in dislike of his court and of its jurisprudence.

It was during this period that John Selden, the famous legal scholar and antiroyalist, published his famous jibe at equity: "Equity is a roguish thing; for [in] law we have a measure [we can] know what to trust to. Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot to be the chancellor's foot; what an uncertain measure this would be."

The political, military, and personal defeats of Charles I are well known. As the king, the bishops, and the aristocracy were one by one removed from power, the radicals turned against Oliver Cromwell and the moderate Puritans, and in their zeal and ignorance they attacked the law itself. One of their proposals was to abolish the court of chancery. This attack was the low point of equity. This ill-conceived move was referred to a commission set up under Sir Matthew Hale to study the issue of law reform in general, and nothing more was heard of the taking-away of the chancery. During the interregnum, the court of chancery was presided over by a committee of three commissioners, and this assured that it would have no political power. The normal course of equity jurisprudence in the courts of chancery and exchequer continued unabated during the time of Cromwell.

After the Restoration, the commercial empire of England began to grow by leaps and bounds. As English wealth became more and more based on commerce, the patronage of the lord treasurer became greater than that of the lord chancellor, and so the politician closest to the king sought to be appointed the former rather than the latter. The result was that the chancellor became less important politically than he had been in the past and thus had more time for the performance of his judicial duties. Furthermore, the legal ability of the candidate for the position of lord chancellor became more important than his political connections. Thus, the period extending from the Restoration into the middle of the nineteenth century produced a series of scholarly and legally adept chancellors whose opinions were systematically reported.

First and foremost was Heneage Finch, earl of Nottingham, a lawyer and a judge without equal. Since the Middle Ages, the court of chancery had been loosely called a court of conscience. Lord Nottingham put the theory of conscience into its proper perspective when, in *Cook* v. *Fountain* (1676), he stated that he was not ruling according to the personal conscience of any particular party litigant, himself, or the king but according to the civic conscience of the English legal system. The concept of conscience as administered in the courts of equity is general and institutional; it is to be found in the established practices and precedents of the courts of equity; it applies equally to all persons. Since Nottingham expounded equity doctrine in lucid and rational opinions based on precedent and since his opinions were the first to be systematically published, he has been called "the father of equity."

Equity jurisprudence was developed throughout the eighteenth century by a series of most excellent jurists: Charles Talbot, Lord Talbot; Philip Yorke, Lord Hardwicke; Charles Pratt, Lord Camden; and Edward Thurlow, Lord Thurlow, among others. The lord chancellor during the long and difficult later years of George III was John Scott, earl of Eldon. We must pause to consider Lord Eldon as lord chancellor.

Lord Eldon, who was as politically and per-

sonally traditional as the king, was a brilliant equity judge, but there were problems. Eldon was pilloried by the novelist Charles Dickens in *Bleak House* as being the perpetrator of endless judicial delay, and the bar agreed with Dickens; Eldon blamed the truly excessive delays in his court on the bar and on the litigants themselves. (The true villain in *Bleak House* was a testator who made a series of wills without destroying the earlier ones.) However, frequently Eldon would hear the evidence in a case, take it under advisement, and then two years later, when he was ready to render an opinion, have to have the case reargued. (If these delays were really so irksome to the legal profession, they could have divided their equity practice between the chancery and the exchequer, but they for some reason preferred the delays of the chancery to quick results in the exchequer.)

Lord Eldon's opinions were carefully reasoned and drafted; many are still cited today. Eldon was judicially conservative, and he felt bound to follow the traditional practices and the established law. Thus, when justice required him to grant a mandatory injunction in the case of *Lane* v. *Newdigate* (1804), even though no such order had ever been granted before, he felt obliged to disguise it as a prohibitory injunction by phrasing the order as a double negative. Perhaps Eldon's judicial philosophy was caused by Selden's jibe of 150 years before. In *Gee* v. *Pritchard* (1818), Eldon said, "Nothing would inflict on me greater pain . . . than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot." And thus, by the conclusion of Eldon's influential chancellorship, equity had become as rigidly bound by precedent as was the common law. And indeed ever since, equitable remedies have been dispensed with the same understanding of precedent and stare decisis as have common-law remedies. This will vary according to the judicial philosophy of a particular judge or generation of judges; history shows that the pendulum is always in motion.

EQUITY IN THE UNITED STATES

By the time of the first English settlements in America, equity was an integral part of English law. The "Articles, Instructions and Orders" dated 20 November 1606 for the government of Virginia required that litigation be determined "as near to the common laws of England and the equity thereof as may be." Once the Virginia courts and an educated legal community was established, which happened sometime before the mid-1640s, equitable remedies were fully available. In Virginia, equity was administered by the same courts that heard the common-law cases. In some of the New England colonies, equity was resisted. The probable reason for this was the identification of equity and arbitrary royal power in the minds of nonlawyers. In eighteenth-century New York, an attempt was made to set up a court of chancery to administer equity; this was strenuously opposed because the governor was to be the sole chancellor and this was not politically desirable.

The substantive doctrines of equity can be administered in separate courts, as in England the court of chancery had only equity jurisdiction whereas the court of common pleas and the court of king's bench had only common-law jurisdiction. In 1826 there were separate courts for law and equity in Delaware, New Jersey, South Carolina, and Mississippi. Today there are separate courts in Arkansas, Delaware, Mississippi, and Tennessee.

An alternative is the system of fused courts, in which common-law and equity cases are administered by the same court but common-law cases are tried by common-law procedures and equity cases by equity procedure. Here the courts are said to have a common-law side and an equity side. Although the same judge hears both types of cases, a case must be brought as either one or the other; the court sitting as a common-law court cannot grant an equitable remedy, but if the case is transferred to the court's equity side, it can. The courts of Virginia from 1607 to the present, except for the period 1776–1831, have been thus fused. In 1826 the lower courts of New York, Maryland, Virginia, Missouri, North Carolina, and Kentucky were examples of this type of judicial organization, as were the federal courts before 1938. Today this system of justice exists in Iowa, Maryland, New Jersey, Pennsylvania, and Virginia.

In the 1820s many equitable doctrines were being administered in the common-law courts of Pennsylvania, and a limited amount of equity had slipped into the common-law practice in New

England. It was against this background that Joseph Story of Massachusetts published his encyclopedic treatises on equity practice and equity jurisprudence. In the southern states, equity was freely available. (It is to be recalled that the first reports published in Virginia were a selection of equity opinions of George Wythe, which were collected for publication in 1795, and the second volume of Conway Robinson's *The Practice in the Courts of Law and Equity in Virginia* was published in 1835.) On the other hand, in the northern states, a general undercurrent of skepticism of equity remained.

In the 1840s a movement for law reform through codification was initiated in New York by David Dudley Field. His most notable achievement involved civil procedure, including the abolition of the common-law forms of action and the merger of the procedures of common law and equity. The most remarkable aspect of the New York "Field Code" of 1848 was that the substantive doctrines and remedies of common law and equity could be freely combined in the same lawsuit; this was the first procedural system in Anglo-American jurisprudence to provide a merged system of law and equity. The substantive rules were not altered, but the old procedures of judicial administration were merged into one. It is to be noted that Field's new statutory procedure was a modernized and streamlined one based on equity procedure; the common-law procedures, with the exception of trial by jury, were discarded. The success of the merger of law and equity procedure in New York was followed by its successful adoption in most states, in England (in 1873), and in federal practice (in 1938).

Equity procedures and practices, then, have come to dominate American civil procedure through the influence of Field. In particular, masters and receivers and the equity devices of pleading by petition and answer, discovery, interpleader, class actions, third-party practice, injunctions, and contempt-of-court proceedings have all taken their place in all courts in the United States.

Masters (also known as commissioners) in chancery are officers of the court appointed on an ad hoc basis to aid the equity judge in performing some routine but time-consuming task. The most frequent use of masters is to take complicated accountings and to conduct judicial sales of property. But a master can also be appointed to hear evidence on some part of the case or to draft and execute a conveyance or other document.

Receivers are officers of the court who are appointed to take possession of property that is the subject of litigation. Such a seizure of property may be necessary to prevent its being hidden, destroyed, or lost during the course of the judicial proceedings. The receiver, at the direction of the judge, takes possession of the property and holds it safely until further order of the court. A receiver may be appointed simply to hold an object or a fund, or he may even run a corporation to preserve it as a going concern, pending its sale or reorganization. Receivers are appointed to sell off the assets of a bankrupt business.

Equity has also had a deep and lasting impact on the content of American law, as well as on its procedure. In the area of contracts law, the equitable remedy of specific performance is vital. In some cases the ancient common-law remedy of money damages as compensation for the wrongful breach of a contract is not adequate to satisfy a person; where it is not, a court will exercise its equity powers and force the defaulting party to do what he contracted to do. Thus, where there is a contract to sell a unique object, the seller will not be allowed to back out and pay damages for his breach, but he will be compelled specifically to deliver the item sold. Note that the equitable remedy is granted only where the common-law remedy will not do complete justice; the ancient relationships survive in a merged system of administration.

Contracts for the sale of agricultural land will be thus "specifically enforced," as the expression goes. No farm is like any other one, and thus, the disappointed buyer cannot go and buy another farm to replace his lost bargain, as can the purchaser of a ton of gravel. In agricultural England, the specific enforcement of land sales contracts became so much the normal remedy that all land is now considered unique as a matter of law and the remedy of specific performance is always available, no matter how indistinguishable one unit of a condominium may be from another.

As to suits to enforce contracts, there are many defenses that are of equitable origin, such as dishonest conduct that does not involve a di-

rect lie or dilatory conduct that harms another. An unforeseeable accident or a catastrophe of nature may relieve a person from a contractual obligation. A grossly unfair and harsh bargain that "shocks the conscience" will be set aside by principles of equity, even though the common-law rules of making the contract were followed.

Equity has also created a means for assuring the adequate supervision of the actions of fiduciaries. Thus, the executor of a will may ask an equity judge to interpret the will, and the administrator of a dead person's estate may ask him for advice and guidance as to the accounting for, and distribution of, the assets. Directors and officers of corporations have fiduciary duties to their corporations, and therefore, most of the problems of corporations and corporation law are solved by equitable principles. Trustees and guardians are also fiduciaries and are supervised by the equity courts.

The courts of equity also have the power to issue orders to forbid the commission of future torts where the threatened wrongful act is likely to occur in the near future and common-law damages will not afford adequate compensation. This is known as the court's *quia timet* jurisdiction; the suit is brought by a person "because he fears" that a tort will be committed against him. For example, if your next door neighbor threatens to cut down an ornamental tree that is on your land or to throw poisoned meat onto your land so that your dog will eat it, you can get an injunction to forbid such acts. Usually the likelihood of imprisonment for contempt of the injunction is a sufficient deterrent to the threatened tort.

Thus, equity has become an integral part of American law. The major misconception about equity—that it is administered at the whim or caprice of the judge—is not, and never has been, true. The "discretion" exercised by the equity judge is a sound judicial discretion regulated by the established principles of equity that have, over time, come to play an invaluable role in American legal practice.

CASES

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[*See also* DISCOVERY.]