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Equity--1959 Tennessee Survey

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EQUITY—1959 TENNESSEE SURVEY

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The amazing versatility of the chancery courts in Tennessee has been demonstrated again in two decisions handed down during the past year; but on the other hand, two cases decided in this interval disclosed evidence of the regrettable "decadence of equity" which Dean Pound deplored more than half a century ago.[1] In most of the other decisions which may be classified under the ambiguous heading of "Equity," only normal application of established principles to routine situations seems to have been involved.

I. PUNITIVE DAMAGES

One of the decisions demonstrating a venturesome spirit in Tennessee chancery jurisprudence is *Bryson v. Bramlett*,[2] which apparently presented an issue of first impression to the state supreme court. The case originated in a bill filed by a borrower to recover from the lenders the usurious interest he had paid[3] and also damages for the malicious issuance of multiple garnishments on a void judgment. The chancellor found in favor of complainant on the merits, but since the bill asked for both actual and punitive damages, the case presented the rather unusual issue of whether an equity court will award exemplary damages. Finding that the borrower had been "hounded, humiliated, embarrassed and inconvenienced by a series of eleven [illegal] garnishments," the chancellor awarded actual damages, attorneys fees, and $500 punitive damages. The court of appeals, however, ruled out all but the actual damages on the reasoning that if equity were "to impose

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1. Pound, *The Decadence of Equity*, 5 COL. L. REV. 20 (1905).
2. 321 S.W.2d 555 (Tenn. 1958).
3. See TENN. CODE ANN. § 16-611 (1955). "The court of chancery has jurisdiction, concurrent with courts of law, for the abatement and recovery of usury."

penalties by way of punitive damages . . . it would destroy the ancient concept of courts of equity being courts of conscience and opposed to the infliction of penalties."[4] The supreme court, granting that the appellate court's ruling was in accord with the weight of authority, decided that the law of Tennessee is to the contrary and therefore restored the punitive damages to complainant's award.

The question of whether equity courts will award punitive damages seems not to have aroused the interest of the equity textwriters,[5] but an extensive and heavily documented annotation in 48 *A.L.R.*2d 947 (1956) indicates that the decisions in most courts which have passed on the question strongly oppose the rule adopted in the *Bryson* case.[6] Apparently it is only in California, Missouri and perhaps Texas that the propriety of a punitive damages award in equity is recognized.[7]

The numerous cases supporting the majority rule tend to state the rule with greater positiveness than seems to be justified by the reasons given to support it. There is general agreement, of course, in the proposition that once a case is properly before an equity court that court may grant the complete relief to which plaintiff is legally entitled even though this relief includes an award of damages which could have been obtained in an action at law.[8] However, most of the

4. 321 S.W.2d 555, 556 (Tenn. 1958).

5. Examination of the leading general equity textbooks has disclosed no discussion of this subject. Even in *Gibson's Suits in Chancery* only a passing reference to one phase of the question has been found. In discussing the measure of damages on injunction bonds, it is said: "If good faith and probable cause appear, compensatory damages only will be allowed; if, on the other hand, there appears bad faith, fraud, malice, or oppression as a motive for the suit, or a reckless disregard of the defendant's rights and interests, or an utter absence of probable cause for bringing the suit, vindictive damages may be allowed." 2 GIBSON'S SUITS IN CHANCERY § 909 (5th ed. Crownover 1956).

1 SEDGWICK, DAMAGES 727 (9th ed. 1920) deals with the subject in a one-sentence section, affirming the majority view. See also 19 AM. JUR. *Equity* § 125 (1939): "Exemplary or punitive damages will never be awarded, it seems [in equity] . . . ." (citing one case as authority).

6. See also Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581, 586 (1954); 19 AM. JUR. *Equity* § 125 (1939); 30 C.J.S. *Equity* § 72 (1942); and 25 C.J.S. *Damages* § 117 (1941). In Annot., 48 A.L.R.2d 947 (1956) cases from eleven states and the federal courts are cited in support of the majority rule. California and Tennessee cases (the latter all being court of appeals decisions) are cited for the minority view. Seven states are cited as doubtful, but among these, Missouri and Texas seem to favor the minority view in their later cases while Mississippi and Oklahoma seem to support the majority. Indiana, Montana and New Jersey cases referring to the problem fail to establish either view in those states.

7. The law is not clear in Missouri and Texas because there are conflicting statements or inferences in the decisions; however, the more authoritative and more recent cases support the granting of punitive damages. In California the decisions generally adhere to this view, but the rule there may be based on a statute. See CAL. CIV. CODE § 3294 (Deering 1949); Annot., 48 A.L.R.2d 947, 957, 959, 962-64 (1956).

8. Mortgage Loan Co. v. Townsend, 156 S.C. 203, 152 S.E. 878, 883 (1930); MCCLINTOCK, EQUITY § 52 (2d ed. 1948); POMEROY, EQUITY JURISPRUDENCE §§ 237 (d)-(f) (5th ed. 1941); 1 GIBSON'S SUITS IN CHANCERY § 45 (5th ed. Crownover 1955).

courts have declared that this phase of equity's jurisdiction does not include the *power* to award punitive damages.[9] Plaintiffs may contend in vain that an equity court, when granting damages, is really acting as a court of law and therefore has power to grant whatever kind and measure of damages a law court could grant. The refutation advanced is that "when equity follows the law or avoids a multiplicity of suits by awarding damages, it is applying a permissive, not a mandatory, rule, one of convenience, which will be followed only as long as it is consistent with the underlying and fundamental principles of equity."[10] Such denial of the power of equity to grant punitive damages does not seem to be a reason for, but rather merely a restatement of, the general rule against punitive damage awards in equity proceedings.[11] The same is true of the further assertion, offered by several courts, that plaintiff by choosing to pursue his remedies in equity rather than in a law court thereby waives any claim he may have had for punitive damages.[12] It appears that such a waiver is implied only on the basis of a previously assumed rule that equity does not grant punitive damages—the very point in issue.

Of somewhat more substance is the reasoning advanced by the court of appeals in the *Bryson* case that the awarding of punitive damages would be incompatible with general equitable principles. The Supreme Court of the United States is credited with having adopted, and perhaps originated, this view over a century ago in *Livingston v. Woodworth.* Though the statement was not necessary to support the decision, the court there observed:

> [In a law court plaintiffs might] have claimed not compensation merely, but vengeance, for such injury as they could show that they had sustained. But before a tribunal which refuses to listen even to any, save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal.
>
> There they will be allowed to claim that which, *ex aequo et bono,* is theirs, and nothing beyond this.[13]

9. United States v. Hart, 86 F. Supp. 787 (E.D. Va. 1949); Dunkel v. McDonald, 272 App. Div. 267, 70 N.Y.S.2d 653 (1947); Mortgage Loan Co. v. Townsend, note 8 *supra*; Karns v. Allen, 135 Wis. 48, 115 N.W. 357 (1908).

10. Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581, 585 (1954).

11. See plaintiff's contention in the *Elmo* case, 204 Md. 1, 104 A.2d 581, 584 (1954).

12. United States v. Bernard, 202 Fed. 728 (9th Cir. 1913); Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581 (1954); Wilborn v. Balfour, 218 Miss. 791, 67 So. 2d 857 (1953); Bird v. Wilmington & M. Ry., 29 S.C. Eq. 46, 64 Am. Dec. 739 (1855).

13. 56 U.S. (15 How.) 546, 559-60 (1853). Viewed narrowly, the holding of this case does not stand for the general rule that equity will not award punitive damages. The suit was for an injunction and damages against a patent infringer, and when the proof established that defendants were actually infringing plaintiff's patent, they consented to be enjoined from further using the machine in question and to account for any profits they

To allow more than actual compensation, the court asserted, would be "to convert a court of equity into an instrument for the punishment of simple torts."

Although this approach to the matter has been adopted in a number of states, the opinions in the cases rarely demonstrate how "general equitable principles" are contravened by a grant of punitive damages.[14] The Maryland court has declared broadly that "a court of equity is a court of conscience which will not enforce penalties or forfeitures," and "equity will permit only what is just and right with no element of vengeance."[15] A Texas intermediate court found relevance in the maxim that one who seeks equity must do equity and must come into equity with clean hands, and concluded: "It would ill comport with the principles of equity for the court to visit upon the defendants a sort of punishment to the pecuniary profit of the complainant and consequent loss of the defendants."[16] Such references as these gratuitously assume that the granting of punitive damages is not "fair," "just" or "right" and that a plaintiff is guilty of inequitable conduct by seeking them, despite the fact that the law of nearly all of the states recognizes the propriety and social utility of such awards in actions at law.[17] They also tend to expand the usual concept of "forfeitures and penalties" by overlooking the fact that equity's refusal to enforce these sanctions traditionally refers to a forfeiture or penalty provision included in a contract through unfair imposition on the party against whom the enforcement is sought.[18] Applying this principle to immunize a wrongdoer from a payment of damages approved generally in the law is quite a different matter.

The decisions sustaining the power of equity to award punitive

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had received from its use. The court entered such a decree and referred the case to a master for determination of the amount of money to be awarded. The master recommended a sum not representing the amount of profits defendants had made, but the greater amount of profits plaintiffs might have made had there been no infringement, because the master deemed the award to be for damages to plaintiff caused by defendants' wrongdoing. Since this award was not consistent with the terms of the consent decree, it was held to be improper. Thus, no "punitive" damages were in fact under consideration in this case, but only different measures of compensatory damages. Only the language at the conclusion of the opinion relates to the general issue of the *Bryson* case.

14. Typically vague is the statement in Mid-Continent Petroleum Co. v. Bettis, 180 Okla. 193, 69 P.2d 346, 348 (1937): "Damages for punishment are inconsistent with traditional equitable relief."

15. Superior Constr. Co. v. Elmo, 4 Md. 1, 104 A.2d at 585. See also Given v. United Fuel Gas Co., 84 W. Va. 301, 99 S.E. 476 (1919), classing punitive damages as a forfeiture.

16. Bush v. Gaffney, 84 S.W.2d 759, 764 (Tex. Civ. App. 1935). Notwithstanding this decision, the current view in Texas seems to support the power of equity to grant punitive damages. Annot., 48 A.L.R.2d 947, 962-64 (1956).

17. See McCORMICK, DAMAGES § 78 (1935).

18. See CLARK, EQUITY § 379 (1954); McCLINTOCK, EQUITY §§ 32, 33 (2d ed. 1948).

damages provide relatively little affirmative reasoning to support their rulings on this point. Either the power of equity to grant such damages is assumed on the basis of the general proposition that when a case is properly in equity the court may grant complete relief to the plaintiff,[19] or the awarding of damages is treated as granting incidental legal relief in which function the equity court recognizes whatever damages rules would have been in effect in a separate action at law.[20] In some cases, the issue turns on the state's reformed procedural system which recognizes only one form of civil action, both legal and equitable remedies being dispensed therein.[21]

Though in the *Bryson* case the supreme court assumed that it was applying an established rule in Tennessee rather than creating a new rule for this state, no compelling authority was cited. The only three decisions which have been found expressly asserting that punitive damages are recoverable in equity are from the court of appeals, and in two of these the issue was clearly different from that of the *Bryson* case. In *Nashville Union Stockyards v. Grissim*,[22] the question was the amount of damages which the defendant could recover from the plaintiff under an injunction bond after the issuance of a preliminary injunction was found to have been unjustified. There it was stated: "The Chancery Court has jurisdiction to award vindictive damages for malicious prosecution of an injunction suit without probable cause."[23] *South Penn Oil Co. v. Stone*[24] was also a suit for damages on an injunction bond in which it was proved that the injunction-plaintiff had knowingly made false allegations of facts in order to obtain a temporary injunction and thus gain immediate possession of the property under dispute in wanton disregard of the rights of the other party. The court concluded: "Obtaining an injunction under these circumstances was an abuse of the process of the court, for which punitive damages should be allowed."[25] Thus, in neither of these cases was a traditional equitable cause of action in-

19. Bellerive Country Club v. McVey, 365 Mo. 477, 284 S.W.2d 492 (1955); Cirese v. Spitcaufsky, 265 S.W.2d 753 (Mo. App. 1954); Briggs v. Rodriguez, 236 S.W.2d 510, 516 (Tex. Civ. App. 1951).

20. Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App. 2d 170, 66 P.2d 1215, 1222 (1937): "[T]he award of damages incidental to the equitable remedy of injunction was a legal remedy and legal rules appropriate to the measurement of damages were applicable to this phase of the case." This same rule is enunciated in Nashville Union Stockyards v. Grissim, 13 Tenn. App. 115 (1930).

21. Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App. 2d 170, 66 P.2d 1215 (1937). Subsequent California decisions also point to CAL. CIV. CODE § 3294 (Deering 1949) as at least impliedly authorizing equity to award punitive damages.

22. 13 Tenn. App. 115 (1930).

23. *Id.* at 123.

24. 57 S.W. 374 (Tenn. App. 1900).

25. *Id.* at 381.

volved, and in both the damages may be regarded as based on a deliberate wrong done to the court as well as to the individual litigant.[26]

The third case in point, *Lichter v. Fulcher*,[27] was a suit for damages for conspiracy to interfere with plaintiff's contract relations and thus was similar to the *Bryson* case in that both involved causes of actions which traditionally would have been sued upon in law courts and which were tried in the chancery court only because of the greatly expanded jurisdiction of equity in Tennessee. The language employed and the authority cited in the *Lichter* case in approving the chancellor's award of punitive damages suggests that the court of appeals assumed that the regular rules applicable in common law damages actions were controlling. "The allowance of punitive damages in a proper case is a matter largely within the discretion of the trial court, and will not be disturbed on appeal except in case of abuse of the discretion."[28]

In view of the fact that the *Bryson* case involved a legal cause of action and that the court relied on the authority of a case of the same nature and on a suit for damages on an injunction bond, there is still no decision in Tennessee approving the granting of punitive damages in a case arising on a traditional equitable cause of action. When a Tennessee chancellor is trying an ordinary common law case under equity's statutorily expanded jurisdiction, the supreme court seems to be on firm ground in concluding that no reasonable basis exists for denying the chancery court power to act like a law court in awarding damages. Whether the presently announced rule will be applied to a request for punitive damages as supplementary legal relief in a typical equity suit remains to be seen. Certainly the rule in the *Bryson* case was stated without restricting it to the type of case at bar. In any event, the Tennessee Supreme Court by its decision in the *Bryson* case has struck another blow in favor of the complete abolition of the distinction between actions at law and in equity in this state.[29]

26. The Tennessee Supreme Court has recognized in several cases that punitive damages can be granted where malice and want of probable cause is proved in an action for wrongful suing out of an injunction: Hawkins v. Hubbell, 127 Tenn. 312, 154 S.W. 1146 (1913); or in an action on an injunction bond, Phillips v. Landess, 152 Tenn. 682, 280 S.W. 694 (1926). On one occasion the court stated that this rule was established "by the clear weight of authority" in other jurisdictions. Pyott Land & Mining Co. v. Tarwater, 126 Tenn. 601, 605-06, 150 S.W. 539, 540 (1912). In none of these cases did the court even mention the matter of whether punitive damages can be recovered in equity.

27. 22 Tenn. App. 670, 125 S.W.2d 501 (1939).

28. 22 Tenn. App. 670, 678, 125 S.W.2d 501, 506 (1939). The court cited Sampson v. Markwood, 65 Tenn. 271 (1873), which was an action at law for damages for trespass.

29. See Morgan, *Procedure and Evidence — 1954 Tennessee Survey*, 7 VAND.

II. EJECTMENT

Further demonstrating the extent to which jurisdiction and procedure in the law and chancery courts of Tennessee coincide is the case of *Kirkpatrick v. Roberts*,[30] in which plaintiffs sought to be decreed owner of certain realty, to be put in possession of the premises and to obtain damages for defendants' removal of timber from the land and an injnnction to restrain further cuttmg of timber. Though injunctive relief was incidentally requested, the purpose of the suit was obviously to gain possession of the land, and the opinion recognizes the action as "an ejectment case." Nevertheless, the propriety of trying this common law cause of action in equity was not questioned since the chancery court clearly had jurisdiction of the ejectment phase of the case under section 16-602 of the Tennessee Code.[31] However, since the damages sought were "unliquidated damages for injuries to property," the chancery court's jurisdiction over this phase of the case rested not on the statute but rather on the traditional authority of equity to give supplemental legal relief as an incident to the injunction proceedings.[32] Thus, contrary to the usual situations, an equity court in providing plaintiffs with the primary remedy sought tried a legal cause of action, while in granting an incidental remedy, it carried out a customary function of equity.

In the trial of the case, defendants demanded a jury, but ultimately the jurors were unable to agree in regard to the issues of fact submitted to them, and so a mistrial was declared. Subsequently, after due notice to defendants and further hearings, the chancellor granted plaintiffs' motion to set aside the order of mistrial and to withdraw the issues from the jury and enter a decree for plaintiffs. The court of appeals, while expressing satisfaction with the chancellor's decision on the merits of the case, placed its dismissal of defendants' appeal on procedural ground: defendants had failed to file a motion for a new trial which is a prerequisite to the right to appeal on the basis of errors committed by the trial court. At this stage of the case also, the similarity between proceedings at law and in equity is indicated by the court's citation of rulings made in appeals from circuit court

L. REV. 895, 912-13 (1954).

30. 315 S.W.2d 532 (Tenn. App. 1958), *cert. denied*, June 6, 1958.

31. 4 TENN. CODE ANN. § 16-602 (1955) confers on the chancery courts concurrent jurisdiction with the circuit courts "of all civil causes of action . . . except for unliquidated damages for injuries to person or character, and except for unliquidated damages for injuries to property not resulting from a breach of oral or written contract . . . ." That this section authorizes the chancery courts to take jurisdiction of an ejectment case, see Frazier v. Browning, 79 Tenn. 253 (1883); Greeneville Cabinet Co. v. Hauff, 197 Tenn. 321, 273 S.W.2d 9 (1954).

32. See Griffith v. Hurt, 200 Tenn. 133, 136, 291 S.W.2d 271, 272 (1956); Union Planters' Bank & Trust Co. v. Memphis Hotel Co., 124 Tenn. 649, 664-65, 139 S.W. 715, 719-20 (1911); Horton v. Mayor, 72 Tenn. 39, 50 (1879).

judgments as controlling in this case[33] and in the court's observation that "under our statutes a jury trial in the chancery court is subject to the same rules of procedure as a jury trial in a court of law."[34]

III. GOVERNMENTAL IMMUNITY FROM INJUNCTION

In sharp contrast to these demonstrations of the versatility and virility of equity in Tennessee are two other 1958 decisions in which Tennessee chancery courts meekly disclaimed the power to grant what appeared to be needed and appropriate relief. One of these cases in which equity seems to have failed to serve its traditional function is *Wright v. Roane County*.[35] In a joint county-state-federal project, two federal highways had been reconstructed in the vicinity of complainants' property. The bill alleged that this property was being damaged by repeated flooding because of the faulty channelling of increased quantities of surface waters through a drain under the highway, and an injunction to restrain the county from continuing to flood the property was sought. However, the chancellor ruled that the chancery court had no jurisdiction and dismissed the bill. This action was affirmed by the Tennessee Supreme Court.

The exact basis for the decision is not clearly disclosed by the court's opinion. In the first place, the county argued that since it had no part in the construction of the highway but merely acquired the needed rights of way for use by the state and federal highway authorities, it was not responsible for any defective construction. In its opinion, the court showed little interest in this contention, except to purport to distinguish a case cited by complainants in opposition to the county's argument[36] and to observe in closing that the chancellor was not in error in holding that he was "without jurisdiction to enjoin Roane County to go upon the rights of way of the State, and Federal Government and to change the construction thereon . . . ."[37] Most of the court's attention was devoted to demonstrating that the decision in *Buckholtz v. Hamilton County*[38] controlled the present case. In the *Buckholtz* case, a county was held not liable in damages for plaintiff's personal injuries suffered in an automobile accident caused by the

33. *E.g.*, Jackson v. Old Colony Ins. Co., 31 Tenn. App. 424, 216 S.W.2d 354 (1948); Memphis Street Ry. v. Johnson, 114 Tenn. 632, 88 S.W. 169 (1905).
34. Kirkpatrick v. Roberts, 315 S.W.2d 532, 535 (Tenn. App. 1958).
35. 315 S.W.2d 97 (Tenn. 1958).
36. Marion County v. Tydings, 169 Tenn. 286, 86 S.W.2d 565 (1935), in which the property owner recovered from the county the value of the land taken for the improvement of a U.S. highway, even though the state had taken the land and the county had had no part in the project. In the *Wright* case, the court dismissed the *Tydings* case as authority in one sentence: "It appears in the present case that complainants' property was not condemned." 315 S.W.2d 97, 98 (Tenn. 1958).
37. 315 S.W.2d 97, 98 (Tenn. 1958).
38. 180 Tenn. 263, 174 S.W.2d 455 (1943).

county's wrongful maintenance of a ditch across an open roadway. The basis for the decision was that the county in the maintenance of roads "was acting in its governmental and not in its corporate capacity"[39] and was therefore serving as an arm of the state government and was immune from liability.

If the denial of the injunction in the *Wright* case was based on the governmental immunity rule, this decision may well serve to bring further confusion into an already confusing phase of Tennessee law and also to add one more chapter in the history of the unfortunate contraction of the protection which the law accords property owners against wrongs committed by counties.

It has long been understood, of course, that a county when engaged in the performance of a governmental duty is acting as an agency of the state and so enjoys the sovereign's immunity from liability for damages caused by the negligence of its employees.[40] But a number of the earlier Tennessee cases observed a sharp distinction between negligence and nuisance situations on the reasoning that the perpetration of a nuisance is not a function of sovereignty.[41] This view was summed up succinctly in 1935 in *Davidson County v. Blackwell,* as follows:

> The general rule of nonliability of a county for damages while engaged in the exercise of a governmental function is subject to an exception where the county creates a nuisance to the special injury of the citizens; and for such act the county is liable as a private individual in damages. . . . The creation of a nuisance is not an attribute of sovereignty.[42]

Only four years later, however, the Supreme Court of Tennessee brushed this distinction aside somewhat casually in *Odil v. Maury County.*[43] There, a county was held not to be liable in damages for injuries to a child suffered as a consequence of an alleged nuisance being maintained on public school grounds. The court found that the operation of schools is a governmental function, quoted broad pronouncements from *Corpus Juris* and *American Jurisprudence* to establish the general rule of county immunity from liability, and then declared: "This general rule applies to acts constituting nuisances."[44] Of the three Tennessee cases cited for this latter proposition,

39. 180 Tenn. 263, 267, 174 S.W.2d 455, 457 (1943).
40. Unicoi County v. Barnett, 181 Tenn. 565, 182 S.W.2d 865 (1944); Vance v. Shelby County, 152 Tenn. 141, 273 S.W. 557 (1925); McAndrews v. Hamilton County, 105 Tenn. 399, 58 S.W. 483 (1900); Wood v. Tipton County, 66 Tenn. 112 (1874).
41. Weakley County v. Carney, 14 Tenn. App. 688 (1932); Chandler v. Davidson County, 142 Tenn. 265, 218 S.W. 222 (1919); Pierce v. Gibson County, 107 Tenn. 224, 64 S.W. 33 (1901).
42. 19 Tenn. App. 47, 49, 82 S.W.2d 872, 873 (1934).
43. 175 Tenn. 550, 136 S.W.2d 500 (1940).
44. 175 Tenn. 550, 552, 136 S.W.2d 500, 501 (1940).

two appear actually to endorse the distinction made in *Chandler v. Davidson County*[45] between immunity from liability for negligent wrongs and liability for nuisances,[46] and in all three the court apparently treated the causes of action before it as based on negligence.[47] But four years later in the *Buckholtz* case, the court relied upon the *Odil* case as gospel, overruled the troublesome *Chandler* case and thus consummated an almost completely unreasoned shift in Tennessee law.

Now comes the *Wright* case to overthrow, or perhaps to overlook, an even more significant distinction. Though this was a suit for an *injunction* to restrain the county from perpetrating a nuisance, the only authority cited by the court in support of its decision was the *Buckholtz* case, an action for *damages* for injuries suffered; but the *Buckholtz* case had built its rule of nonliability of the county for nuisances solely on *damages* cases. In this whole chain of authority, no injunction case was cited except in one instance when the purpose was to distinguish a case on the very ground that it involved injunctive relief rather than damages. In fact that decision, *Pierce v. Gibson County*,[48] upheld an injunction restraining the county from operating a sewer system so as to dump sewage from the court house onto plaintiff's land. In so doing, the court noted the general rule that courts will not interfere with the exercise by a county of a governmental power, but concluded:

> But it is well settled that a municipality or county, in the construction of a public work, is not privileged to commit a nuisance, to the special

45. 142 Tenn. 265, 273, 218 S.W. 222, 224, (1919): "The distinction between the act of the county in failing to keep the roads in proper repair and its act in constructing a new road, or remodeling an old one so as to create a nuisance, is perfectly plain. In constructing the new road the county acts for the sovereign, for the reason that the State has delegated its sovereignty to the county for the purpose of constructing the road; but the State has not authorized it to commit a nuisance, because such an act is not an attribute of sovereignty. The sovereign can do no wrong, and it is unthinkable that it could commit or maintain a nuisance. We think this is the theory of the distinction between the two acts. The practical justice of it we think is equally plain. It is not within the power of a citizen to prevent the county from deciding to construct a road at any time or place it may think the public welfare requires . . . . The law would be inadequate in this situation to permit the county to construct the road and hold it immune for responsibility for creating and maintaining a nuisance. It cannot erect a nuisance upon the property of a citizen so as to deprive or impair the use of such property."

46. Vance v. Shelby County, 152 Tenn. 141, 146, 273 S.W. 557, 558 (1925); Carothers v. Shelby County, 148 Tenn. 185, 186, 253 S.W. 708 (1922).

47. Tyler v. Obion County, 171 Tenn. 550, 555, 106 S.W.2d 548, 549 (1937); Vance v. Shelby County, 152 Tenn. 141, 147, 273 S.W. 557, 558 (1925); Carothers v. Shelby County, 148 Tenn. 185, 187, 253 S.W. 708 (1922). Plaintiffs' allegations in the *Vance* and *Tyler* cases included charges based on the nuisance theory, but the court's reasoning in support of nonliability refers to negligence.

48. 107 Tenn. 224, 64 S.W. 33 (1901).

> injury of the citizens and for such act is liable as a private individual in damages, or it may be restrained by the writ of injunction.[49]

No subsequent case has been found in which a county has actually been enjoined under such circumstances, but the *Pierce* case has been repeatedly cited with approval in damages cases;[50] and in the *Odil* case the court referred to the *Pierce* case as applying "the universal rule that a court of chancery has authority to enjoin a nuisance."[51] In at least three instances, Tennessee courts have cited the rule that counties can be enjoined from perpetrating nuisances in suits to enjoin parties other than a county from continuing to maintain nuisances.[52] This rule is also recognized in various other jurisdictions.[53]

Turning from authority to reason, it seems that the usual points advanced in support of governmental immunity from liability for damages for torts, even if accepted as appropriate in damages cases, do not justify the extension of the immunity to bar injunctions to restrain the maintenance of nuisances. In the ordinary prohibitory injunction case, no substantial diversion of public funds would be necessary to enable the county to submit to the restraint decreed. As the court has observed in a related situation: "No principle involved in the trust fund doctrine can justify the continued maintenance by a charitable corporation of a nuisance working injury to another's property."[54] Some expenditures may be required to conform to a mandatory decree, such as would have been involved in the *Wright* case; but it seems difficult to excuse the county's deliberate

49. 107 Tenn. 224, 233, 64 S.W. 33, 36 (1901).

50. Davidson County v. Blackwell, 19 Tenn. App. 47, 82 S.W.2d 872 (1934); Weakley County v. Carney, 14 Tenn. App. 688 (1932); Chandler v. Davidson County, 142 Tenn. 265, 218 S.W. 222 (1919); Mayor of Knoxville v. Klasing, 111 Tenn. 134, 76 S.W. 814 (1903). After this discussion was already set in type, the opinion in Jones v. Knox County, 327 S.W.2d 473 (Tenn. 1959) was published. There an injunction was issued to restrain the county from maintaining a nuisance in the operation of a sewage treatment plant in connection with a public school. In affirming this action, the supreme court observed the general rule that a county, though acting in a governmental capacity, cannot maintain a public nuisance; and the *Pierce* case was cited as the prime authority for this rule in Tennessee. Defendant's reliance on the *Odil* and *Buckholtz* cases was rejected in one sentence: "However, these cases involve tort actions for damages and have no application in the present case." The *Wright* case is not mentioned, and the court gives no indication that it is reaching a conclusion inconsistent with a prior decision of less than one year's standing.

51. 175 Tenn. 550, 553, 136 S.W.2d 500, 501 (1940).

52. Love v. Nashville Agricultural and Normal Institute, 146 Tenn. 550, 570, 243 S.W. 304, 310 (1921): "Even the arm of the government, such as a county, in the exercise of public and governmental functions, is not entitled to erect or maintain a nuisance, and is subject to restraint by injunction"; City of Murfreesboro v. Haynes, 18 Tenn. App. 653, 657, 82 S.W.2d 236, 238 (1935); Collier v. City of Memphis, 4 Tenn. App. 322, 333 (1927).

53. Bemmerly v. Lake County, 55 Cal. App. 2d 829, 132 P.2d 249 (1942); Hunter v. Cleveland, C. C. & St. L. Ry., 176 N.E. 710 (Ind. App. 1931).

54. Love v. Nashville Agricultural and Normal Institute, 146 Tenn. 550,

continuation of a positive wrongdoing on any such general proposition as "it is better that an individual should suffer than that the public should sustain an inconvenience."[55]

One further comment on the *Wright* opinion: As a final reason for refusing relief, the court approved the proposition that "if complainants had any claim against Roane County . . . they had a plain and adequate remedy at law." The basis for this conclusion is not set out, but it seems to ignore at least two generally accepted principles of equity applicable to this case: (1) that damages are not regarded as adequate compensation for injuries to interests in realty and (2) that the prospect of having to bring multiple actions for damages renders the remedy at law inadequate.

IV. JURISDICTION TO ENJOIN CRIMINAL ACTS

In the second instance of withholding salutary injunctive relief, *York v. American Service Co.*,[56] the courts relied on the time-honored principle that equity has no jurisdiction to enjoin criminal acts. Complainants, Nashville grocers, brought suit to enjoin defendants from operating their retail grocery businesses on Sunday in violation of the state Sunday-closing statute.[57] The bill alleged that defendants attracted the patronage of some of complainants' customers by keeping their stores open on Sunday while complainants remained closed in compliance with the law and that complainants would suffer further loss of anticipated profits if defendants continued their illegal action. The chancellor sustained defendant's demurrer on the ground that equity has no jurisdiction to enjoin the commission of crimes where the criminal activity causes no injury to the legal or equitable rights of the complainants. The Supreme Court of Tennessee affirmed, with a very brief opinion which consisted mainly of a discussion of a Washington case[58] reaching the same result.

It must be conceded that the weight of authority is against the issuance of injunctions to restrain violation of Sunday-closing laws.[59]

570, 243 S.W. 304, 310 (1921).

55. Vance v. Shelby County, 152 Tenn. 141, 146, 273 S.W. 557, 558 (1925). This case set out five reasons for the rule of county immunity from damages. The first two relate to the prevention of diversion of public funds to compensate private individuals for injuries; the other three are not "reasons" for the rule but rather are merely reassertions of the rule.

56. 319 S.W.2d 76 (Tenn. 1958).

57. TENN. CODE ANN. § 39-4001 (1956): "If any person shall be guilty of exercising any of the common vocations of life, or of causing or permitting the same to be done by his children or servants, acts of real necessity or charity excepted, on Sunday, he shall, on due conviction thereof before any justice of the peace of the county, forfeit and pay ten dollars ($10.00), one-half (½) to the person who will sue for the same, the other half (½) for the use of the county."

58. See note 81 *infra*.

59. See Annot., 9 A.L.R. 925 (1920), Annot., 36 A.L.R. 499 (1925), and cases cited in note 67, 70, 71 *infra*.

However, in most of the cases, the suits were instituted by public officials rather than by business competitors of the offenders, and the former type of case often turns on issues different from those raised by the latter.[60] Further, in the most recent previous case found between business competitors an injunction was granted;[61] and since there was no prior Tennessee decision in point,[62] the court was free to reach its own conclusion on the circumstances of the case before it. If the reasoning of the decisions denying injunctive relief had been more closely evaluated, the court might well have found that the situation was one in which equity could appropriately grant the injunction requested.

The adverse authority is based primarily on the rule that "an injunction is never granted merely to restrain criminal acts."[63] But this rule, however widely accepted, is everywhere subject to immediate qualifications such as "in proper cases an equity court will interpose for the protection of property rights although the injurious acts constitute violations of the criminal law."[64] Thus, the most accurate statement of the principle perhaps is: "The mere fact that an act was a crime . . . has not ordinarily prevented equity from giving an injunction if there are other well-recognized grounds for exercising jurisdiction."[65] Or as the Arkansas court has recently declared: " 'The criminality of the act will neither give nor oust jurisdiction in chancery.' "[66] Moreover, the reasons commonly advanced for the general rule against enjoining criminal acts are not entirely convincing, especially in respect to the Sunday-closing law situation.

The most frequently stated reason is that the remedy of criminal prosecution for the unlawful act is complete and adequate.[67] One may

60. The public official usually seeks to enjoin the Sunday activity as a public nuisance, and therefore the matter of protecting the rights of private individuals from injury is not involved. Further, in such cases, the probability that the law will be enforced by criminal prosecutions is greater since the public authorities are evidencing concern in the situation.

61. Hickinbotham v. Corder, 227 Ark. 713, 301 S.W.2d 30 (1957).

62. The court referred to State *ex rel.* Pitts v. Nashville Baseball Club, 127 Tenn. 292, 154 S.W. 1151 (1912), but there the suit was filed in the name of the state for the purpose of having defendant's corporation charter forfeited because of the violation of a statute against Sunday baseball, and the injunction was denied because the statute was held not to have been validly enacted. In dictum, the court added that if defendants' acts violated laws prohibiting Sunday work and sport, the only punishment which could be imposed for the violation were the fines provided for in the statutes.

63. DE FUNIAK, EQUITY 73, 78 (2d ed. 1956); MCCLINTOCK, EQUITY § 164 (2d ed. 1948); 4 POMEROY, EQUITY JURISPRUDENCE § 1347 (5th ed. 1941); WALSH, EQUITY 201-02 (1930).

64. 4 POMEROY, EQUITY JURISPRUDENCE § 1347 (5th ed. 1941).

65. CLARK, EQUITY 363 (1954).

66. Hickinbotham v. Corder, 227 Ark. 713, 301 S.W.2d 30, 32 (1957), quoting from Meyer v. Seifert, 216 Ark. 293, 225 S.W.2d 4, 7 (1949).

67. Sparhawk v. Union Passenger Ry., 54 Pa. 401 (1867); York v. Yzaguairre, 31 Tex. Civ. App. 26, 71 S.W. 563 (1902); Motor Car Dealers Ass'n v. Fred S. Haines Co., 128 Wash. 267, 222 Pac. 611 (1924) (relied on by the

well ask how it can sensibly be contended that punishment of the offender by fine and/or imprisonment after the harm has already been done constitutes as good a remedy for the victim as would prevention of the commission of the act—and disappointed complainants in injunction suits regularly do ask this question without receiving any persuasive answer. Further, because of the apathy of public prosecutors, the influence of the offender, the difficulties of gathering sufficient proof, and so on, it cannot always be safely assumed that a successful criminal prosecution will be forthcoming.[68] This point is particularly relevant in the Sunday-closing situation since prosecutors commonly show little interest in enforcing the law against persons who pursue their Sunday businesses peacefully and without protest from the general public. And even if the offender is prosecuted, he need not be greatly troubled since a conviction will result only in a nominal fine under the statute, e.g., ten dollars in Tennessee. This is a small price to pay for the extra profits he presumably makes by serving the customers of other dealers who are closed on Sunday. Thus, the criminal remedy does not furnish the needed protection to law-abiding competitors since the offender is not likely to be deterred from continuing his violations of the statute.[69] How persistently the courts ignore this obvious factor while reciting the old refrain that injunctive relief is unnecessary because the criminal law provides an adequate remedy is demonstrated by a Texas case in which an injunction was denied even though the district attorney joined in the suit brought by competitors of the offender and indorsed their allegation of the inadequacy of the law remedy.[70]

A second basis for denying injunctive relief against the commission of a crime is the absence of threat of injury to a property interest, reliance being placed on the traditional rule that equity's jurisdiction only extends to the protection of property rights.[71] Aside from the fact that the rule itself is of doubtful validity,[72] its application, while appropriate in cases of threats of personal injury, seems unwarranted

Tennessee court in the *York* case); 4 POMEROY, EQUITY JURISPRUDENCE § 1347 (5th ed. 1941).

68. See Maloney, *Injunctive Law Enforcement: Leaven or Secret Weapon*, 1 MERCER L. REV. 1, 4 (1949), reprinted in SELECTED ESSAYS ON EQUITY 432, 435 (1955).

69. Hickinbotham v. Corder, 227 Ark. 713, 301 S.W.2d 30, 32-33 (1957). See Maloney, *supra* note 68 at 12, 443-44.

70. Corchine v. Henderson, 70 S.W.2d 766, 767 (Tex. Civ. App. 1934). The court almost seems to regard complainants as the culprits for asking for equitable relief: "The mere fact that [defendant] conducts his business at a time when, because of conscientious scruples or fear of the penal law, [complainants] are constrained not to do so, does not give rise to a court of equity's invasion of the province of a court of criminal jurisdiction."

71. Green v. Piper, 80 N.J. Eq. 288, 84 Atl. 194 (1912); Sparhawk v. Union Passenger Ry., 54 Pa. 401 (1867); MCCLINTOCK, EQUITY 426 (2d ed. 1948).

72. CLARK, EQUITY 354 (1954); MCCLINTOCK, EQUITY 427 (2d ed. 1948).

when a merchant seeks to prevent his competitors from violating the Sunday-closing law. The merchant who keeps his business open on Sunday obviously does so to make a larger profit, and he must surely expect the extra profits to be derived from sales to the customers of other merchants since his own regular customers would presumably buy from him on weekdays if there were no opportunity for them to buy on Sunday. Thus, in *Hickinbotham v. Corder*,[73] the Arkansas court enjoined the operation of a grocery store in violation of the Sunday-closing law, declaring that equity had jurisdiction in the case because complainants showed that reliance on the criminal law alone will not deter violation and that their personal property rights were being injured.[74] Sufficient evidence of the latter was found in the unrefuted testimony of the complaining grocerymen that their businesses were being adversely affected by the illegal Sunday operation of defendant's stores. Certainly, in other types of cases, unlawful acts which divert customers and result in loss of anticipated profits are regarded by equity courts as causing injury to the proprietor's property interests and are therefore enjoinable.[75] Yet in Sunday-closing cases, courts have denied categorically that such customer diversion causes damage to property rights,[76] and the Tennessee court adopted this position in the *York* case even though affidavits were filed showing two specific Sunday sales by defendants to regular customers of complainants.

The assertion is frequently made that equity has no jurisdiction to enjoin criminal acts unless they also constitute a public nuisance.[77] However, this rule, even if it is appropriate for some cases, should not control in the situation represented by the *York* case. In the first place, it appears to be designed for the cases in which a public official is attempting to enjoin the illegal act; and, of course, the public's right to preventive relief would be conditioned on a showing of injury to the public. Moreover, since the public official could ordinarily in-

73. Note 61 *supra*.

74. Paramount-Richards Theatres v. City of Hattiesburg, 210 Miss. 271, 49 So.2d 574, 579 (1950): " '[I]f the wrong complained of is injurious to property interests or civil rights . . . the fact that it is also a violation of a criminal statute or ordinance does not take away the authority of a court of civil jurisdiction to prevent the injury . . . .' "

75. Carter v. Knapp Motor Co., 343 Ala. 600, 11 So. 2d 383, 384 (1943): "[T]he right to conduct one's business without wrongful interference of others is a valuable property right which will be protected, if necessary, by injunctive process." Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937). See DE FUNIAK, EQUITY §§ 41, 54 (2d ed. 1956); WALSH, EQUITY §§ 41, 44 (1930).

76. York v. Yzaguairre, *supra* note 67; Corchine v. Henderson, *supra* note 70; Motor Car Dealers Ass'n v. Fred S. Haines Co., *supra* note 67.

77. Forehand v. Moody, 200 Ga. 166, 36 S.E.2d 321 (1945); Paramount-Richards Theatres v. City of Hattiesburg, 210 Miss. 271, 49 So. 2d 574, 579 (1950); DE FUNIAK, EQUITY 73 (2d ed. 1956); Maloney, *Injunctive Law Enforcement: Leaven or Secret Weapon*, 1 MERCER L. REV. 1, 4 (1949).

stitute criminal prosecution for the unlawful acts, there may be no need for civil relief. By contrast, the private individual who is adversely affected cannot himself enforce the criminal remedy and should only be required to show injury to his own interests since he is acting to protect himself, not the public. The nuisance concept has clouded the issue in another respect. Even courts which recognize that an individual may enjoin a Sunday-closing law violation have sometimes declared that this right arises only where the Sunday operation constitutes a *nuisance*.[78] The inference is that the only type of property right infringement which will justify an injunction is the perpetration of a nuisance, but there is no explanation why relief from other types of injuries to property should not also be afforded. However, this restrictive point of view should not hamper the merchant from enjoining his competitor in Tennessee because the continued operation of a business in violation of the Sunday-closing law has been declared to be a public nuisance,[79] and such operation surely seems to cause "special damage to the individual [merchant], in which the public do not participate."[80]

Yet another reason sometimes advanced for refusing injunctive relief against Sunday-closing law violations is that the application to this equitable remedy would deprive the alleged offender of his right to a trial by jury.[81] It may be noted, however, that in the *York* case, as in Sunday-closing law cases generally, there was no doubt about the fact of defendant's Sunday operation of his grocery in violation of the statute; and so there was no issue of fact to be resolved by a jury.[82] Moreover, the constitutional guaranties of jury trial were not intended to apply to cases within the traditional jurisdiction of equity since the right of jury trial did not exist in such cases when our constitutions were adopted.[83] This is true, for

78. Warren Co. v. Dickson, 185 Ga. 481, 195 S.E. 568, 571 (1938): "A violation of criminal law such as the pursuit of a business on Sunday in contravention of [a statute] will not be enjoined on the petition of an individual unless it amounts to a nuisance. . . . Nor will such a public nuisance, as distinguished from a private nuisance, be so enjoined, unless it causes special damage to the individual, in which the public do not participate."

79. Graham v. State, 134 Tenn. 285, 183 S.W. 983 (1916); Parker v. State, 84 Tenn. 476, 1 S.W. 202 (1886). See also Forehand v. Moody, *supra* note 77.

80. Warren Co. v. Dickson, *supra* note 78.

81. Motor Car Dealers Ass'n v. Fred S. Haines Co., 128 Wash. 267, 222 Pac. 611 (1924). The Tennessee court in the *York* case fortunately avoided entangling itself in this line of reasoning by omitting the reference to jury trial when quoting the *Motor Car Dealers* case.

82. See Bonnard v. Perryman, [1891] 2 Ch. 269. The jury trial right does not prevent equity from enjoining a criminal act where the facts so clearly sustain plaintiff's case that a jury could not find to the contrary without having the verdict subject to being set aside as unreasonable.

83. State *ex rel.* Orr v. Kearns, 304 Mo. 685, 264 S.W. 775 (1924); State *ex rel.* Burns v. Shain, 297 Mo. 369, 248 S.W. 591 (1923); Hunt v. Hunt, 169 Tenn. 1, 80 S.W.2d 666 (1935); Trigally v. Memphis, 46 Tenn. 382 (1869); WALSH, EQUITY 165-68 (1930).

example, where the complaint is based on injury to a property right for which there is no adequate remedy at law. It is significant that the courts have been almost unanimous in upholding statutes authorizing the issuance of injunctions to restrain acts violative of the criminal law notwithstanding the argument that such statutes deprive the accused of his constitutional right to trial by jury.[84] Further, this writer has never been able to acquiesce in the proposition that a person has a right to commit a crime in order that he may have a jury adjudge him guilty. The Constitution guarantees to one who has been charged with criminal liability for an act allegedly already committed the right to have a jury determine whether he committed the act and whether it violated the criminal law. To say that this right precludes the law from preventing him from carrying out a threatened course of criminal conduct is obviously a different matter,[85] and no such right is proclaimed on the face of the jury trial provisions in either the federal or Teunessee constitutions.[86]

In the *York* case, the Tennessee court declared, apparently to complement its reliance on the adequacy of the criminal remedy, that "the penalty provided by the [Sunday-closing] Act . . . is the exclusive punishment for violation of the Section."[87] However, this observation does not seem relevant to the case at hand since the suit for an injunction was not prosecuted to invoke a penalty for violation of the criminal statute, and complainants were not seeking to punish defendant for his past actions but rather to prevent injury to their businesses which would result from his future actions. Neither of the decisions cited by the court in this connection seem to bear materially on the issues of the *York* case.[88]

84. WALSH, EQUITY 205 (1930); Simpson, *Fifty Years of American Equity,* 50 HARV. L. REV. 171, 226-27 (1936).

85. State *ex rel.* Attorney General v. Canty, 207 Mo. 439, 105 S.W. 1078, 1085 (1907): "A man charged with the commission of a crime has a constitutional right to a trial by jury, hut a man who has not yet acted, but who merely proposes to commit an act which is not only criminal in its character, but also flagrantly offensive as a public nuisance, has no constitutional right to commit the act in order that he may thereafter enjoy the constitutional right of trial by jury." See generally DE FUNIAK, EQUITY 117-18 (2d ed. 1956).

86. U. S. CONST. amend. VI; TENN. CONST. art. I, § 6. In Tennessee, the right to a jury trial in chancery cases is governed by TENN. CODE ANN. §§ 21-1011 to 21-1016 (1955).

87. York v. American Service Co., 319 S.W.2d 76, 77 (Tenn. 1958).

88. State *ex rel.* Pitts v. Nashville Baseball Club, 127 Tenn. 292, 154 S.W. 1151 (1912). Since this was in the nature of a criminal prosecution for the purpose of punishing the defendant by forfeiting its corporation charter for violations of the Sunday-closing law, the court understandably ruled that the provision of the statute concerning penalty for violation was controlling. Davis v. Swift & Co., 175 Tenn. 210, 133 S.W.2d 483 (1939). This was a workmen's compensation case in which neither the facts nor the law relate to those of the *York* case, and the ruling referred to was that where a statutory provision creating a civil liability is coupled with another provision in the statute for a specific remedy to enforce that liability, only the expressed remedy may be employed.

In some situations a court may well be justified in refusing to issue an injunction against the commission of a criminal act because of doubt as to whether the order could be enforced. Especially in cases of threatened physical violence, the offender who is not deterred by the prospect of civil liability and criminal prosecution will often give no greater heed to the prospect of punishment for contempt.[89] If so, equity's attempt to prevent the crime would be futile, and the prestige of the court might suffer. However, this factor seems to have no significance in the *York* case type of situation since reputable businessmen would be likely to obey the injunction and since violations could be readily detected and the violators promptly subjected to penalties which would generally deter further defiance of the order.[90]

In summary, the affirmative bases for the injunctive relief sought in the *York* case seem sufficient: complainants' property interests in the profitable operation of their businesses in compliance with law were being injured by defendant's act of conducting Sunday business in violation of the law. The remedy of criminal prosecution is inadequate to protect complainants because such prosecutions may not be forthcoming and the penalties which would result from convictions are not sufficient to deter continued violations of the law. Furthermore, resort by one businessman to the harsh remedy of criminal prosecution against another will surely engender resentment and ill will between the competitors which may well lead to later hostile actions and further litigation. Thus, it seems that both equitable jurisdiction and the need for equitable intervention exists in such situations.

V. MUTUALITY OF REMEDY

A confusion of terms, harmless in this instance but potentially troublesome, appeared in the opinion of another equity case decided during the year. In *Gulf Refining Co. v. Belz*[91] the plaintiff company had leased a filling station from defendants, with an option to purchase the premises under specified terms, including the promise of defendants to convey "upon written notice to First Party by Second Party that the latter will exercise its option to purchase subject to good and marketable title and the ability of Second Party to obtain all desired building or construction permits." Plaintiff gave notice

89. MCCLINTOCK, EQUITY 429 (1930).

90. If the denial of injunctive relief in such cases is prompted by doubt as to the wisdom of Sunday-closing laws, the decisions probably have the support of current popular dislike of the restrictive effect of these laws on personal freedom. However, the wisdom of a statutory regulation and its fate in the face of popular opposition are, of course, matters for the legislatures rather than the courts.

91. 315 S.W.2d 403 (Tenn. 1958).

of exercise of the option to purchase, but defendant refused to convey the property. Plaintiff therefore brought suit for specific performance. Rejecting defendants' arguments on the point, the chancellor ruled that plaintiff had given sufficient notice of its exercise of the option and so decreed specific performance of the resultant contract to convey the property. On appeal, the supreme court sustained the ruling that plaintiff had given timely notice and also rejected defendants' argument that the contract was "void because it lacks mutuality of remedy."[92]

The basis for the lack of "mutuality of remedy" contention was that under the agreement plaintiff could not have been compelled to take the property because its promise to purchase was conditioned on its ability to obtain desired building permits and on its satisfaction with defendants' title. Defendants argued that by the arbitrary exercise of its individual judgment or whim as to what building permits were desired or whether the title was satisfactory, plaintiff could justify nonperformance if it desired to avoid performing the agreement. However, the court pointed out that the law would impose on plaintiff the duty to act reasonably and in good faith in this regard, and would not allow it to evade its obligations by frivolous or captious demands. Construing the undertakings of the parties in that light, the court concluded that "there is mutuality of remedy in the agreement involved here."[93]

While no fault is to be found with the result reached, it seems apparent that the court employed the term "mutuality of remedy" when the real issue was the existence of "mutuality of obligation." Defendants' view of the situation must have been that while they had bound themselves absolutely to convey if plaintiff performed his part of the agreement, plaintiff had not actually bound itself to accept and pay for the property. Plaintiff's promises to do so were illusory because these promises were so qualified as to give it complete freedom to refuse to perform them. This approach is disclosed by the statement in the opinion that "appellants insist that . . . the bilateral agreement . . . is *void* because it lacks mutuality of remedy."[94] Lack of mutuality of *obligation* results in the supposed contract being *void*—at least while executory. Lack of mutuality of *remedy* does *not render a contract void* but instead may lead equity to refuse to grant specific performance of a contract admittedly valid at law.[95]

92. 315 S.W.2d at 406.

93. *Ibid.*

94. *Ibid* (Emphasis added).

95. McCLINTOCK, EQUITY § 68 (2d ed. 1948); WILLISTON, CONTRACTS § 141 (Thompson ed. 1936); Note, 17 TENN. L. REV. 257 (1942). The question of whether mutuality of remedy exists does not become pertinent until a valid

Further, defendants' argument that plaintiff's performance of its part of the agreement depended solely on the exercise of its "own individual judgment and whim" reflects the theory that the plaintiff's promises were illusory, *i.e.*, the supposed bilateral contract was void for lack of consideration running from plaintiff since plaintiff could perform its promise or not, as it pleased.[96] And illusory promises point to lack of mutuality of obligation.

Actually, the court recognized the true nature of defendants' contention and met it squarely in spite of the inappropriate choice of terminology. Though lack of mutuality of remedy was posed as the issue, the opinion contains no discussion of the factor on which a finding as to mutuality of remedy would theoretically turn—the availability of the specific performance remedy in favor of defendants had plaintiff refused to perform. Instead, the court's reasoning is directed toward demonstrating that both parties were bound by their promises[97] and that plaintiff did not have uncontrolled power to decide whether to perform or not[98] because the law would apply the tests of reasonableness and good faith in determining whether the conditions attached to plaintiff's promise to purchase had in fact been satisfied.

Surely this case demonstrates the several dangers inherent in the use of the "mutuality" terms in passing on the enforceability of contracts. In the first place, the two concepts, mutuality of obligation and mutuality of remedy, are too often confused; or the terms are used as being synonymous or used without any clear meaning being given to them.[99] Secondly, each term is of questionable validity even when the two are properly distinguished. As Professor Williston has long contended, the statement that mutuality of obligation is a requisite to the formation of a valid contract is not true as regards unilateral

legal contract is found to exist because if there is no such contract then equity will refuse specific performance on that ground alone.

96. WILLISTON, CONTRACTS § 43 (Thompson ed. 1936): "This unlimited choice [of one party to decide the nature and extent of his performance] in effect destroys the promise and makes it illusory." "[I]f one party to an agreement preserves an unqualified right to cancel the bargain, no legal rights can arise from it while it remains executory." See also *Id.* at § 104.

97. Compare the language in earlier cases in which the court talked in terms of mutuality of obligation: McRae v. Smart, 120 Tenn. 413, 428, 114 S.W. 729, 733 (1908) (Mutuality not lacking in contract because parties assumed "reciprocal obligations"); Dark Tobacco Growers' Co-op Ass'n v. Mason, 150 Tenn. 228, 250, 263 S.W. 60, 67 (1924) (Mutuality of obligation not lacking where both parties "undertake to do something").

98. See Big Cola Corp. v. World Bottling Co., 134 F.2d 718, 721-22 (6th Cir. 1943): Mutuality of obligation is lacking when the contract provides for "performance conditioned only upon the wish or convenience of one party," or when one party is "completely left to the caprice of the [other party]," or when one party "alone has the right to decide whether the contract was to be abandoned."

99. See WILLISTON, CONTRACTS § 1433 (Thompson ed. 1936); Note, 17 TENN. L. REV. 257 (1942).

contracts; and even if the term is limited to bilateral contracts, it is "at best an unnecessary way of stating that there must be valid consideration."[100] The use of the ambiguous phrase tends to cloud the specific issue of the existence of valid consideration in the form of a binding promise for a binding promise.[101] Further, as sometimes employed in the opinions, "mutuality of obligation" seems to refer to the matter of whether the obligation undertaken by one party is commensurate with that undertaken by the other party.[102] The concept of "mutuality of remedy," as promoted by Fry and too eagerly embraced by a number of courts during the latter nineteenth century, never accurately reflected actual equity practice. During the past half century it has been severely attacked and rather generally repudiated both by courts and text writers.[103] Even in the jurisdictions in which it is still declared that mutuality of remedy is a prerequisite to specific enforcement of a contract, the term no longer means that the specific performance remedy must have been available to either party as of the time the contract was executed.[104] In Tennessee, the courts have continued to repeat the "fundamental principle in the law of specific performance that for relief to be granted mutuality of remedy must exist."[105] But in the only modern cases found which purport to apply this principle as a basis for denying specific performance, the court in each instance found, either expressly or by obvious implication, that no valid contract at law existed; and for this reason, the plaintiff could not enforce performance by the defendant.[106] No modern Tennessee case has been found in which a plaintiff was denied specific performance on the sole ground that the defendant could not have obtained specific performance relief against

100. WILLISTON, CONTRACTS §§ 141, 1433 (Thompson ed. 1936).
101. CLARK, EQUITY § 173 (1954).
102. CLARK, EQUITY § 173 (1954); WILLISTON, CONTRACTS § 141 (Thompson ed. 1936).
103. Montgomery Traction Co. v. Montgomery Light and Water Co., 229 Fed. 622 (5th Cir. 1916); Eckstein v. Downing, 64 N.H. 248, 9 Atl. 626 (1887); Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861 (1922); RESTATEMENT, CONTRACTS § 372(1) (1932); DE FUNIAK, EQUITY § 79 (2d ed. 1956); MCCLINTOCK, EQUITY § 68 (2d ed. 1948); WALSH, EQUITY § 69 (1930); WILLISTON, CONTRACTS § 1433 (Thompson ed. 1936).
104. For example, see Major v. Price, 196 Va. 526, 84 S.E.2d 445 (1954) in which the court declared that mutuality of remedy is a prerequisite to a specific performance decree but granted the decree in a case in which plaintiff could not have been forced to perform specifically until he filed his suit in equity. The court cited § 372 of the *Restatement of Contracts* as representing the "modern view" of the mutuality requirement, though that section declares: "The fact that the remedy of specific enforcement is not available to one party is not sufficient reason for refusing it to the other party."
105. Schultz v. Anderson, 177 Tenn. 533, 536, 151 S.W.2d 1068, 1070 (1941). *Corpus Juris* is the only authority cited for this proposition.
106. Schultz v. Anderson, *supra* note 105; Leathers v. DeLoach, 140 Tenn. 259, 204 S.W. 633 (1918); Carr v. Ott, 38 Tenn. App. 585, 277 S.W.2d 419 (1954). See generally Note, 17 TENN. L. REV. 257 (1942).

the plaintiff had he refused to perform. Thus, the very existence of the rule of mutuality of remedy in Tennessee may be questioned; but if such a rule there be, it was not the principle which controlled the decision in the *Belz* case.

Inasmuch as the correct result was reached in that case, the use of inappropriate terminology in defining the issues has done no direct harm. But the more the courts persist in mentioning the mutuality of remedy rule, even inadvertently, the longer it will be before that ill-conceived rule can be relegated to the legal oblivion which it so richly deserves.

VI. OTHER CASES

In several other decisions handed down during the past year, the courts have had occasion to reiterate some significant but uncontroverted principles of Tennessee equity. For example, in *Conner v. Holbert,* defendant's contention that plaintiff's right to equitable relief was barred by laches was rejected under the rule that "mere delay or laches alone is never sufficient to cause a court of equity to penalize on account of same unless some deleterious result flows from that delay"[107] And in *Aladdin Industries v. Associated Transport,*[108] a noteworthy case in the labor law field, the court of appeals applied the rule regarding the contempt power of equity which was accorded much public attention in the *United Mine Workers*[109] case in 1947. In sustaining a conviction for contempt for the violation of the chancellor's preliminary injunction, the Tennessee court declared:

> [I]rrespective of whether [the chancellor] had jurisdiction in the sense that he could have entered final decrees that would have ultimately been held free from error, he had jurisdiction to determine all the issues, including his own jurisdiction, and to grant a temporary injunction to preserve the *status quo* pending such determination. And pending such determination no person was at liberty to defy the court or to aid any party defendant in a breach of the injunction. Such an injunction, however erroneous, must be obeyed until set aside by the court granting it or by an appellate court.[110]

107. 319 S.W.2d 72, 75 (Tenn. 1958). This proposition is regularly affirmed by the courts. See, *e.g.,* Despain v. Despain, 78 Idaho 185, 300 P.2d 500, 503 (1956), and many other cases listed at 24 WORDS and PHRASES 96-99 (1940). One textwriter, however, ventures the opinion that equity will refuse specific performance on the ground of laches "though no important change of position has taken place, if the delay on the plaintiff's part has been very extended." WALSH, EQUITY 473 (1930).

108. 323 S.W.2d 222 (Tenn. 1958).

109. United States v. United Mine Workers of America, 330 U.S. 258, 289-95 (1947).

110. 323 S.W.2d 222, 228 (Tenn. 1958). *Accord:* Bullock v. United States, 265 F.2d 683 (6th Cir. 1959); Hickinbotham v. Williams, 227 Ark. 126, 296 S.W.2d 897 (1956); State v. Ragghianti, 129 Tenn. 560, 167 S.W. 689 (1914). See generally MCCLINTOCK, EQUITY § 40 (2d ed. 1948).