DECREES FOR DAMAGES IN NEW JERSEY

It is not the purpose of this article to discuss all the situations in which damages are awarded by the New Jersey Court of Chancery, for all the decisions stem from one general rule, namely, that whenever a court of equity has once acquired jurisdiction of a cause, it will retain such cause in order to do full and complete justice between the parties with respect to the subject-matter.[1] This rule may, for the sake of convenience, be referred to as the "clean-up" principle of courts of equity. For the purpose of testing the application of this one general rule by the New Jersey courts it will be sufficient to analyze the cases falling within four headings:

1. Damages in Lieu of Specific Performance.
2. Damages in Addition to Specific Performance.
3. Damages in Addition to an Injunction against a Tort.
4. Damages in Lieu of an Injunction against a Tort.

I

Damages in Lieu of Specific Performance

There is one class of cases in which all courts are agreed that damages will be awarded in equity in place of specific performance, and that is the case in which at the time of the commencement of the suit by the vendee a specific performance is possible, but is made impossible during the pendency of the action by a conveyance of the subject-matter from the vendor to a bona fide purchaser for value.[2] All courts apparently

1. Pomeroy, Specific Performance (3rd ed. 1926) 956. "To this end, when jurisdiction has been obtained on other grounds, and for the purpose of administering an equitable remedy, damages may be assessed and adjudged in lieu of or as ancillary to the equitable relief, so that the plaintiff may not be put to the trouble, expense and delay of a second suit brought in another tribunal."

2. 1 Pomeroy, Equity Jurisprudence (4th ed. 1918) 375; Pomeroy, Specific Performance (3rd ed. 1926) 959.

recognize that the action of the defendant-vendor in rendering specific performance impossible by a conveyance while the suit is pending is clearly inequitable, and that the complainant should not thereby be prejudiced by being compelled to bring a second suit[3] Although no New Jersey case precisely in point has been found, it is clear that the courts in this state would follow this rule, in view of numerous holdings that, under certain circumstances, damages will be awarded in lieu of specific performance even where specific performance was impossible at the time the suit was begun.[4]

In the cases where specific performance was impossible at the time the complainant commenced his suit the courts generally will award or refuse to award damages depending upon the state of the complainant's mind at the time he began the suit.[5] If the vendee brings his suit in good faith and without knowledge of the existing impossibility, the New Jersey courts have held that although specific performance cannot be ordered, the cause will be retained for the purpose of ascertaining the damages suffered by the complainant and a pecuniary judgment will be decreed in place of the equitable relief prayed for in the bill.[6]

The leading American authority on the question of damages in lieu of specific performance is the case of *Milkman v. Ordway*,[7] decided by the Supreme Judicial Court of Massachusetts

3. McCormick v. Oklahoma City, 203 Fed. 921 (C.C.A. 8th, 1913); (Semble), Milkman v. Ordway, 106 Mass. 232, 253 (1870); (Semble); Barton v. Molin, 225 Mich. 8 (1923); Fleming v. Ellison, 124 Wis. 36 (1905).

4. Copper v. Wells, 1 N.J.Eq. 10 (Ch. 1830); Berry v. Van Winkle, 2 N.J.Eq. 269 (Ch. 1839); Borden v. Curtis, 48 N.J.Eq. 120, 21 Atl. 472 (Ch. 1891); Speer v. Erie R.R., 68 N.J.Eq. 615, 60 Atl. 197 (E. & A. 1905), reversing 64 N.J.Eq. 601, 54 Atl. 539 (Ch. 1903).

5. 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) 375; POMEROY, SPECIFIC PERFORMANCE (3rd ed. 1926) 957; (1916) 30 HARV. L. REV. 188.

6. Copper v. Wells, Berry v. Van Winkle, Borden v. Curtis, Speer v. Erie R.R., all *supra* note 4.

7. 106 Mass. 232 (1870).

case the court said,[17] "In actions for specific performance or kindred actions, a court of equity may always, when the compensation or damages can be ascertained by a simple calculation, give relief in that form, where such relief is indispensable to the working out, with completeness, of an equitable result, or the right to relief is a matter purely of equitable cognizance, or the remedy at law is precarious or extremely difficult." However, it was only with the decision in *Borden v. Curtis*.[18] decided nine years after the above dictum was handed down, that New Jersey associated itself with Massachusetts in the liberal exercise of equity jurisdiction to award damages in lieu of specific performance. Pitney, V. C., in an opinion in which he reviewed the authorities in New Jersey and elsewhere, goes beyond the confining limits of the earlier New Jersey cases[19] and accepts the rule which Pomeroy[20] states is applied in most jurisdictions.[21] From the decisions in *Borden v. Curtis* and in *Speer v. Erie R. R.*,[22] which applies the rule

v. Lobdell, 153 N.Y. 596, 603, 47 N.E. 783 (1897). *Contra* (granting damages in equity even where specific performance was denied on account of a defense): Leuschner v. Duff, 7 Cal. App. 721, 95 Pac. 914 (1908); Sanitary District v. Martin, 227 Ill. 260 (1907); Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691 (1892); see Restatement of the Law of Contracts, sec. 363 (1932).

17. 35 N.J.Eq. 71, 83 (Ch. 1882).

18. 48 N.J.Eq. 120 (Ch. 1891) (Compensation granted if defendant failed to perform).

19. Copper v. Wells, Berry v. Van Winkle, Welsh v. Bayaud, Peeler v. Levy, Iszard v. Mays Landing Water Power Co., *supra* notes 10, 11, and 12.

20. 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) 375; POMEROY, SPECIFIC PERFORMANCE (3rd ed. 1926) 957.

21. 48 N.J.Eq. at 128. "[I]t seems equally clear that where a vendee, who has entered into a contract in good faith for the purchase of a complete title, comes into equity for a specific performance of it, and discovers after coming there that the vendor cannot make a complete title, the vendee may, at his option, have such title as the vendor can give with an abatement of price proportionate to the part of the title not conveyed."

22. 68 N.J.Eq. 615, 60 Atl. 197 (E. & A. 1905), reversing 64 N.J.Eq. 601, 54 Atl. 539 (Ch. 1903). Bill for specific performance of a covenant, in a deed of a railroad right of way, to maintain a grade crossing. Held, the bill would not

laid down by Pitney, V. C., it seems clear that where complainant brings a bill for specific performance of a land contract, reasonably believing at the time of commencing the suit that a specific performance is possible, the New Jersey Court of Chancery, upon discovering that the contract is not capable of being specifically enforced, will retain the cause for the purpose of awarding compensation, regardless of whether the complainant could sue at law for damages.

A rule almost as clear upon the authorities as the one discussed above is that, if the complainant, at the time he starts suit, knows that a specific performance is impossible, the court of equity will not assess damages in lieu of a specific performance, but will dismiss the suit and leave the complainant to his legal remedy. According to Pomeroy[23] the reason given by the courts in support of this rule is that, "At the very commencement of the proceeding the court has no jurisdiction to grant the specific remedy, and, therefore, the case does not stand within the general principle stated above[24] as the foundation of all relief of damages granted by courts of equity." This reasoning is confusing, for it is difficult to understand how the jurisdiction of a court of equity can depend upon the state of mind of the complainant; but that seems to be the result of the cases which hold that where complainant did not know of the impossibility of a specific performance at the time he commenced his suit, equity will award damages, whereas if he had or is chargeable with such knowledge, the equity court is without jurisdiction to award damages. Pomeroy criticizes this latter rule as based upon "an entire misconception of the meaning of 'jurisdiction,' "[25] but he also points out that it is

lie because of impossibility of performance, but complainant may retain the bill in order that damages sustained by the destruction of the crossing might be ascertained.

23. POMEROY, SPECIFIC PERFORMANCE (3rd ed. 1926) 958.

24. POMEROY, SPECIFIC PERFORMANCE (3rd ed. 1926) 956, quoted *supra* note 1.

25. *Id.*, at 959.

so firmly entrenched that even courts in states which have the new procedure statutes have not altered their reasoning in this situation.

The New Jersey cases are almost unanimous in holding that complainant's knowledge, before commencing suit, of the impossibility of a decree of specific performance, will bar the assessment of damages by the equity court.[26] In one case[27] constructive notice of the impossibility of the specific remedy was held to be enough to compel the complainant to recover his damages at law instead of in equity. However, judges and text-writers alike apparently have overlooked strong language by Pitney, V. C., in *Borden v. Curtis*,[28] which would seem to support the awarding of damages in equity, in certain cases, in spite of complainant's knowledge. The facts of that case were these: In consideration of C accepting a parcel of real estate as her share of her deceased father's estate, D, C's brother, orally agreed to execute a release of a lease of that land, which was held by a partnership consisting of D and X, and to induce X also to execute a release. C believed D legally could surrender the lease for the partnership, and also relied upon D's promise to induce X to agree to the surrender. In fact, D could not bind the partnership by a surrender executed by him alone, and X refused to execute a surrender. Since X had not been a party to the agreement, a specific performance could not be decreed. In the first portion of his opinion, Pitney, V. C., treats the case as one in which the complainant had no knowledge of the impossibility at the time she brought her bill, and on that assumption he supports a decree of damages

26. Peeler v. Levy, 26 N.J.Eq. 330 (Ch. 1875); Public Service Corp. v. Hackensack Meadows Co., 72 N.J.Eq. 285, 64 Atl. 976 (Ch. 1906); Logan v. Flattau, 73 N.J.Eq. 222, 67 Atl. 1007 (Ch. 1907); Van Keuran v. Siedler, 73 N.J.Eq. 239, 66 Atl. 920 (Ch. 1907).

27. Van Keuran v. Siedler, 73 N.J.Eq. 239, 66 Atl. 920 (Ch. 1907).

28. 48 N.J.Eq. 120, 134, 21 Atl. 472 (Ch. 1891).

by the Court of Chancery.[29] However, the evidence in the case apparently was conflicting on the question of complainant's knowledge, for the Vice-Chancellor then regards the case on the assumption that complainant had knowledge, and even on that assumption he holds that a decree of damages will be awarded. He stated,[30] "[The rule that a complainant cannot be awarded damages in equity where he knew, at the time he began suit, that a specific performance was impossible] does not properly apply, and in fact has not been applied, unless through oversight in some exceptional instance, to cases where the complainant has a clear equity and no adequate remedy at law."[31] Further,[32] the Vice-Chancellor makes it clear that in his mind the rule as to damages in equity in lieu of specific performance consists of two parts:

1. If the complainant brings his bill "in the honest hope and expectation" that he will succeed in getting specific performance, the court, 'according to all the cases, will give [him] relief, even if [he] have a remedy at law."

2. If the complainant at the start expected to fail in obtaining specific performance, and then to fall back on compensation, the court will not give relief, "if [he] has an adequate remedy at law." This statement can only mean that if the complainant has no adequate remedy at law, equity will award damages in spite of his knowledge that a specific performance would not be decreed.

In *Brookings v. Cooper*,[33] the Supreme Judicial Court of Massachusetts announced a doctrine similar to the second part of the rule declared by Vice-Chancellor Pitney, *supra*.

29. 48 N.J.Eq. 120, at 128, 134, 21 Atl. 472 (Ch. 1891).
30. 48 N.J.Eq. 120, 134, 21 Atl. 472 (Ch. 1891).
31. In the principal case an action at law was barred by the Statute of Frauds.
32. 48 N.J.Eq. 120 at p. 135.
33. 256 Mass. 121, 152 N.E. 243 (1906), criticized in (1926) 25 MICH. L. REV. 75.

However, apart from these two cases the authorities are uniform in automatically barring a complainant with knowledge from a decree of damages, without any inquiry into the adequacy or inadequacy of the remedy at law.[34] In three cases[35] decided after *Borden v. Curtis*, the New Jersey court has manifested complete unfamiliarity with the language and alternative holding in that case to the effect that, if the complainant's remedy at law is inadequate, damages will be awarded in equity although at the time he brought his bill the complainant knew he could not obtain a specific performance. Thus, the state of the law on this question in New Jersey is uncertain, and it cannot be predicted whether, when a case arises which will require a square decision on the question, the New Jersey court will adopt the sensible approach outlined by Vice-Chancellor Pitney, or whether it will apply the blind generalization that knowledge on the part of the complainant, of the impossibility of decreeing specific relief, will stand in the way of a decree for damages.

It is somewhat incongruous for a court of equity to assess damages in lieu of specific performance in a case where the complainant brought his bill in the bona fide expectation of obtaining specific relief, in spite of the adequacy of the remedy at law, and on the other hand to leave remediless a complainant who has no remedy at law, but who had no expectation of obtaining specific performance and who brought his bill because it was his only opportunity of getting any relief at all. In the one case the court exercises its jurisdiction in the interest of convenience, although the complainant would not be left without a remedy if jurisdiction were not exercised, whereas in the other case, although the complainant's only hope for relief lies

34. POMEROY, SPECIFIC PERFORMANCE (3rd ed. 1926) 957; 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) 375.

35. Public Service Corp. v. Hackensack Meadows Co., Logan v. Flattau, Van Keuran v. Siedler, all *supra* note 26.

in equity, the court refuses to exercise its jurisdiction This is too harsh a distinction to turn on the relatively unimportant factor of the state of the complainant's mind. The courts of equity would be better advised if they were to hearken to the statement of Wells, J.,[36] in *Milkman v. Ordway*,[37] and to give relief to a bona fide claimant in spite of his inability to bring himself within some rigid rule of equitable remedies. In a case where the complainant brought his bill in ignorance of the impossibility of specific performance, relief by way of damages should be awarded if the ends of convenience and good sense will be served thereby, and not otherwise. It is to be feared that in such a case the courts will blindly adhere to the rules they have wrought for themselves and will award damages even in situations where the parties would best be left to an action at law. And in a case where complainant brought his bill with knowledge that a specific performance could not be decreed, his prayer for relief by way of damages should not be dismissed cursorily, but the granting or denying of such relief should be made to depend upon the bona fides of his claim and upon the adequacy of his remedy at law.

II

Damages in Addition to Specific Performance

In not a few cases in which specific performance is prayed for and will be granted, a decree of specific performance alone will not provide complete relief for the complainant.[38] The

36. Quoted *supra* p. 3.

37. 106 Mass. 232, 254 (1870).

38. The most typical case of this kind is a suit for specific performance of a contract to issue an insurance policy, where a loss or death has already occurred. In such a case the court usually will retain jurisdiction of the cause for the purpose of adjusting the loss and assessing damages. 36 Cyc. 753 (1910); 58 C. J. 1054 (1932).

courts do not display undue reluctance to apply the "clean-up" principle in these cases. These cases are to be distinguished from cases in which damages are asked for in lieu of specific performance, on the ground that here the courts do not merely decree an award of damages, but are granting the damages ancillary to the specific equitable remedy. For this reason the courts will exercise their jurisdiction over the entire controversy, and if an award of damages is essential to the granting of complete relief, such an award will be made.[39]

In New Jersey the courts have not bound themselves by a hard and fast rule as to when damages will be awarded as incidental to the remedy in equity, but have invested the Chancellor with a broad discretion in each case.[40] This procedure commends itself as in accord with the desirable flexibility of courts of equity.

A leading case in New Jersey is *Llye v. Addicks*,[41] in which, in addition to granting specific performance of a contract to purchase outstanding shares and claims, the court awarded damages for the failure to give promissory notes in payment for such shares and claims. The specified dates of maturity of the notes which were to have been given, had already passed, and since the promise to give the notes was part of the same contract as the promise to buy up the claims, the court exercised its jurisdiction to grant full and complete relief by decreeing a specific performance of so much of the contract as was still capable of being performed, and assessed damages for the failure to perform the remaining obligations of the contract. Similarly, where defendant contracted to convey land

39. Dunn v. Hastings, 54 N.J.Eq. 503, 508-511, 34 Atl. 256 (Ch. 1896).

40. Lodor v. McGovern, 48 N.J.Eq. 275, 22 Atl. 199 (1891); Shaw v. Beaumont Co., 88 N.J.Eq. 333, 336, 102 Atl. 151 (1917). In the latter case the complainant sued for an accounting under a contract, and the court held the Advisory-Master correctly had excluded from the accounting two prior contracts which had been entered into by the parties.

41. 62 N.J.Eq. 123, 49 Atl. 1121 (Ch. 1901).

subject to a mortgage of $2500, knowing that the land was encumbered by a prior unrecorded mortgage of $2000, in a suit for specific performance brought by the vendee the court held that if defendant failed to remove the mortgage of $2000, a decree against him for that amount, in addition to the decree for specific performance, would be rendered.[42]

The leading case of *Kuntz v. Tonnele*[43] is an illustration of a good chancery court operating at its best. Defendant had agreed with the complainant's agent to sell certain real estate for $14,000, but in pursuance of an arrangement with the agent the contract was drawn up for $15,000, the defendant having agreed to pay the additional $1000 to the agent. After paying part of the purchase price complainant discovered the fraud and sued for specific performance of the contract to convey. Instead of leaving the complainant to an action at law to recover the $1000 of which he had been defrauded, the New Jersey court gave complete relief by taking into account the damages of $1000 to which complainant was entitled, subtracted that amount from the contract price, and ordered defendant to convey the land to complainant upon the payment by the latter of an amount which, added to the previous payments would total $14,000. However, if the amount of damages had not been liquidated the court would not have granted this complete relief.[44]

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42. Roche v. Osborne, 69 Atl. 176 (N.J. Ch. 1908).

43. 80 N.J.Eq. 373, 84 Atl. 624 (Ch. 1912).

44. Collins v. Leary, 77 N.J.Eq. 529, 532 (1910). In consideration of the right to use a patented dredging bucket, defendant agreed to convey certain real estate to complainant and to pay a sum of money, the amount later to be agreed upon. No agreement was reached as to the amount defendant should pay. In a suit for specific performance the court ordered defendant to convey the real estate but refused to assess damages saying, that since no agreement had been reached, the money due to complainant is not due out of the agreement to pay, but out of an implied agreement to pay a reasonable amount for the use of the bucket, and "the ascertainment of that amount is not within the province of a court of equity, but is to be decided at law by a jury."

A decree for damages in addition to specific performance is not so far removed from specific equitable remedies as is a decree for damages in lieu of specific performance. Therefore, it is not surprising to find an equity court which in many situations awards damages alone, willing to add to a decree of the specific relief an award of damages ancillary to such relief. The New Jersey Chancery Court, if it has jurisdiction to decree and enforce a specific performance, may be expected to be liberal in adding to such decree an award of damages, where the specific performance alone does not constitute a full and adequate remedy for the complainant.

III

Damages in Addition to an Injunction Against a Tort

In cases where equity is called upon to enjoin a tort (such as the tort of unfair competition), it has long been recognized that the court has jurisdiction to order an account of profits in addition to the injunction.[45] A question frequently raised in the cases is whether, in addition to an accounting, the equity court may or should award a decree for damages.

Although the New Jersey courts have not drawn the distinction, it will be helpful to distinguish between cases of unfair competition and cases of infringement of a trade-name or trade-mark. Such a distinction is rendered desirable by the statute in New Jersey which authorizes the court of chancery, in suits to enjoin the infringement of a trade-name or trade-mark, to order an accounting of profits and to assess damages for the infringement.[46]

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45. See Tilghman v. Proctor, 125 U.S. 136, 31 L. Ed. 664 (1888); Allison's App., 77 Pa. 221 (1874); Tyler v. Wilkinson, 4 Mass. 397 (R.I., 1827).

46. N. J. Rev. St., 56:3-10, " * * * The court of chancery shall award to the complainant or complainants in any such suit [to enjoin infringement of a trade-mark or trade-name which has been registered] any and all damages result-

In 1908 the Court of Errors and Appeals decided the case of *L. Martin Co. v. L. Martin and Wilckes Co.*,[47] which arose out of a bill to enjoin unfair competition, and therefore was not within the terms of the statute. In that case the court stated that it was following the rule pronounced by the United States Supreme Court in *Tilghman v. Proctor*,[48] and held that, in addition to the injunction the complainant was entitled to an accounting for profits by the defendant, but not also to an accounting for damages suffered by the complainant.[49] The

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ing from any such wrongful use of any such label, trade-mark, term or design by any defendant or defendants, or for any violation of any of the provisions of this article; and shall require any such defendant or defendants to pay to such complainants any and all such damages, together with all such costs and expenses incurred by any such complainant in any such suit or proceeding.

"The court of chancery shall also order and decree that the defendants pay to the complainant or complainants any and all profits obtained, received or derived from any such wrongful use, or any violation of the provisions of this article; or both profits and any such damages, and that [all labels, etc., in the possession of the defendants shall be delivered up to an officer of the court]." This statute originally was enacted in P. L. 1898, c. 50, s. 9, p. 87; Comp. St. of N. J., p. 5644, s. 9.

47. 75 N.J.Eq. 39, 71 Atl. 409 (Ch. 1908), *reversed* 75 N.J.Eq. 257, 72 Atl. 294 (E. & A. 1908).

48. 125 U.S. 136, 148, 31 L. Ed. 664 (1888). It is somewhat doubtful whether the Supreme Court really laid down the rule for which it is cited by Swayze, J., in the Martin case. In Tilghman v. Proctor the Supreme Court was concerned with the question whether profits should be awarded, and it may therefore be queried whether the problem of the measure of compensation was before the court and passed on by it. The doctrine which the New Jersey court alleges was enunciated by the Supreme Court is not followed by the lower federal courts, which on the contrary apply an opposite doctrine. Baker v. Slack, 130 Fed. 514 (C.C.A. 7th, 1904); Salton Sea Cases, 172 Fed. 792, 801 (C.C.A. 9th, 1909); Sharpless v. Lawrence, 213 Fed. 423 (C.C.A. 3rd, 1914); Carmen v. Fox Film Corp., 258 Fed. 703 (N.Y., 1919). In view of the unlikelihood of these courts acting in defiance of the Supreme Court it seems quite possible that the ruling in Tilghman v. Proctor is not so broad as the New Jersey court believed it to be

49. The same rule obtained in England until the enactment of the Chancery Amendment Act, St. 21 and 22 Vict., c. 27, s. 2 (1858), which authorized the English Chancery Courts to award damages when there is jurisdiction to entertain an application for an injunction against a breach of covenant, contract or

theory upon which this limitation is based is that the accounting for profits is the equitable equivalent of or substitute for legal damages. In addition, the court feared that an accounting for profits and the assessment of damages, if both were allowed, would result in duplication and overlapping, and that the complainant would be getting double compensation. The decision of the court is summarized in its enunciation of the rule that unliquidated damages for a tort cannot be recovered in equity.[50]

It should be noted that the complainant's bill in the *L. Martin Co.* case requested only an injunction and an accounting for profits, and the court could have refused to assess damages in addition to the award of profits on the ground that the additional relief had not been applied for.[51] Although the case could have been disposed of on this narrow ground, the court did not so limit its holding, and therefore the refusal to award damages in addition to an accounting for profits cannot be dismissed as *obiter dictum*. However, because of the existence of this alternative ground of decision, the authority of the case for the proposition it lays down is weakened, and in a future case the court ought not to feel itself conclusively bound to follow the decision in the *L. Martin Co.* case.

The complainant is not foreclosed from an action at law for damages under the rule of the *L. Martin Co.* case, for that question was explicitly left open by the court but in view of the reasoning employed by the court to the effect that damages will not be awarded because there would be an overlapping of

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agreement, or against the commission or continuance of any wrongful act, or for specific performance. However, it has been held, under this act, that the plaintiff must elect whether he will have an accounting for profits or an award of damages. Neilson v. Betts, [1871] L.R. 5 H.L. 1, 22.

50. But see Gray *ex rel.* Simmons v. Paterson, 60 N.J.Eq. 385, 45 Atl. 995 (E. & A. 1899), where the same court stated, 60 N.J.Eq. 385, 393, "A court of equity will, to effectuate justice, settle unliquidated damages."

51. Vulcan Detinning Co. v. American Can Co., 69 Atl. 1103 (N.J. Ch., 1908), order modified 75 N.J.Eq. 542, 73 Atl. 603 (E. & A. 1909).

damages and profits, it seems reasonably clear that the same court would not agree to an action for damages after an injunction and an account of profits had been ordered in equity. A *fortiori* the same court would not give damages in the injunction suit, even if damages were expressly asked in addition to an accounting for profits.

The soundness of the court's reasoning is open to serious questioning. The effect of the unfair competition engaged in by the defendant was both to obtain for itself profits which it otherwise would not have received, and also to injure the complainant's business, not only by causing a loss of profits to the complainant in the past, but also by causing a possible injury to complainant's reputation and the possibility of a loss of profits in the future. Clearly, the defendant should be liable for the profits he appropriated to himself by his inequitable conduct, and the New Jersey court so holds.[52] However, the fact that, in attempting to ascertain the damages suffered by the complainant, it will be difficult to apportion and deduct the profits obtained by the defendant and for which the defendant has already been ordered to account, is not enough reason for casting a wind-fall to the wrong-doing defendant by refusing to assess any damages. A hypothetical case may better illustrate the hardship upon the complainant, which is brought about by the result achieved in the *L. Martin Co.* case. A, by the fraudulent use of a name similar to that of B, reaps a profit of $10,000 which otherwise would have been received by B; B is thereby damaged to the extent of $10,000. However, consumers who used A's product, believing it was made by B, are now dissatisfied and purchase their goods from C. B is damaged to an additional extent, equal to the amount of profits lost by B to C; but if A is ordered only to account for his profits, B will not

52. L. Martin Co. v. L. Martin and Wilkes Co., *supra* note 47; see A. Hollander and Son, Inc. v. Philip A. Singer and Brother, Inc., 119 N.J.Eq. 52, 180 Atl. 671 (Ch. 1935), *aff'd* 120 N.J.Eq. 76, 183 Atl. 296 (E. & A. 1935).

be indemnified for the latter loss. The possibility of a partial duplication of damages assessed against a wrongdoing defendant should not outweigh the necessity and desirability of affording complete relief to an innocent complainant.

In all fairness to the court in the *L. Martin Co.* case it must be pointed out that the question of the nature of the compensation which will be awarded by the New Jersey chancery court is far from settled. On the whole the New Jersey court draws a distinction between damages at law and compensation in equity, and although a plaintiff at law is given damages which represent the value of what he has lost, such as the loss of a bargain, in most cases the Chancery Court has restricted compensation in equity by measuring it with reference to the defendant's benefit and the complainant's actual outlay. In the specific performance cases most jurisdictions measure the damages granted in equity on the same basis as at law, ordinarily by the plaintiff's loss.[53] The New Jersey cases on damages in lieu of specific performance, however, almost uniformly hold that only "compensation" will be awarded,[54] and in only one case of that kind has the court apparently awarded legal damages in equity.[55] In *Lyle v. Addicks*[56] the complainant was given, in addition to specific performance of so much of the contract as still was capable of performance, damages for defendant's refusal to

53. For authorities outside of New Jersey, see 1 CHAFEE AND SIMPSON, CASES ON EQUITY (1934) 597. The cases are also collected in 58 C.J. 1239 ff.

54. Copper v. Wells, 1 N.J.Eq. 10 (1830); Iszard v. Mays Landing Water Power Co., 31 N.J.Eq. 511, 523 (1879) (semble); "[Compensation] must not, and will not, be in the nature of damages, but be confined to the difference in value between the complainant's lot subject to the encumbrance of the lease and free from it. The distinction between such compensation and damages in the strict sense of the word is clear. * * *" Pitney, V.C., in Borden v. Curtis, 48 N.J.Eq. 120, 135 (Ch. 1891).

55. "The only way in which the complainant can be made whole is by the payment to him of the value of what he has lost." Speer v. Erie R.R., 68 N.J.Eq. 615, 621, 60 Atl. 197 (1905).

56. 62 N.J.Eq. 123, 49 Atl. 1121 (Ch. 1901).

make and deliver certain promissory notes to complainant, in accordance with the contract. Such damages appear to be clearly legal in nature and this case serves only further to confuse the question of the nature of the compensation equity will grant. Thus the court's refusal to give damages in addition to profits in the *L. Martin Co.* case is based not only upon the court's fear of the danger of overlapping,[57] but upon the absence of any clearly formulated answer in the cases to the question of the nature of the compensation which will be awarded by the New Jersey Court of Chancery. The result reached in that case seems to be in accord with the general practice of the New Jersey court, whether it be a case of specific performance or tort, to limit complainant to compensation measured by profit to the defendant, rather than to give him the value of what he has lost.

Even if the law courts in New Jersey were to reject the reasoning of the Court of Chancery as to overlapping, and permit a recovery of damages after an injunction and an account of profits have been ordered in equity, that ought not to cause the equity court to refuse to assess damages. Although the amount of damages is unliquidated it may be ascertained by the special master who must be appointed for the accounting of profits;[58] and the fact that equity would be granting a legal remedy is not a weighty objection, for the New Jersey court may award dam-

57. This danger is capable of being avoided or at least reduced if the master, to whom the question of the amount of compensation to which complainant is entitled is referred, is warned against it and is instructed by the court upon the distribution between damages lost by the complainant on sales made by the defendant and damages lost from sales made by third parties. The lower court in the L. Martin Co. case, however, did not take this precautionary measure in its reference to the master.

58. That the New Jersey court does not shy away from imposing upon the special master difficult tasks, is demonstrated by the decree in the Hollander case, *supra* note 52. In that case the court ordered that the complainant was entitled only to the profits attributable to the use of the infringing trade-mark itself, but that if that cannot be determined exactly, then the complianant shall

troversy is in equity anyway, however, it seems that there would be no infringement of the constitutional provision if the damages were assessed in equity without a jury. This view is buttressed by the statute which provides that, if a question ordinarily requiring a jury trial, arises in an equity suit, trial by jury will be deemed to be waived unless it is demanded in the pleadings.[66] Such a procedure is commendable as faciliating the easy and swift adjudication of causes in a single suit.

The question of whether complainant's compensation in addition to a tort injunction should be limited to the defendant's profits, or whether damages should be awarded, has not been much mooted in the New Jersey courts, but in other jurisdictions it has arisen with some frequency, and in many of the cases a position opposite from that adopted by the New Jersey court has been taken, and damages have been awarded in addition to the injunction.[67]

IV

Damages in Lieu of an Injunction Against a Tort

Where equity has jurisdiction to enjoin a tort it also has jurisdiction to permit the offender to escape an injunction by voluntarily paying the complainant for the injury the latter has suffered.[68] Jurisdiction of this kind has been exercised by the New Jersey court in several cases where complaint sought

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254 (1905); see Basey v. Gallagher, 20 Wall. (U.S.) 670, 22 L. Ed. 452 (1874). But see *infra* note 67.

66. N. J. Rev. St., 2:29-9.

67. Baker v. Slack, 130 Fed. 514 (C.C.A. 7th, 1904), trade name; Salton Sea Cases, 172 Fed. 792, 801 (C.C.A. 9th, 1909), nuisance; Whaley v. Wilson, 112 Ala. 627, 20 So. 922 (1896), obstruction of easement; Winslow v. Nayson, 113 Mass. 411, 421 (1873), trespass; Keppel v. Lehigh Coal & Navig. Co., 200 Pa. 649, 50 Atl. 302 (1901), nuisance.

68. Sparks Manufacturing Co. v. Newton, 57 N.J.Eq. 367, 393, 41 Atl. 385 (Ch. 1898), *aff'd* on this point, 60 N.J.Eq. 399, 45 Atl. 596 (E. & A. 1899).

ages in lieu of a specific performance, and it has been pointed out that such an award is the giving of a legal remedy.[59] The Court of Chancery has jurisdiction of the cause, and since the claim for damages arises out of the same controversy as does the prayer for an injunction and an accounting, the court ought to exercise its jurisdiction to do full and complete justice between the parties with respect to the subject matter.[60]

The New Jersey statute in regard to suits for infringement of a trade-mark authorizes the Court of Chancery to issue an injunction and order both an accounting for profits and an award of damages,[61] but under the authorities it is not to be expected that such relief will be given unless it is specifically prayed for in the bill.[62] Thus, in *A. Hollander and Son, Inc. v. Philip A. Singer and Brothers, Inc.*,[63] where the bill asked for an injunction against infringement of a trade-mark and for an accounting for profits, the court made no mention of the statute and did not discuss the possibility of granting additional relief by awarding a decree for damages. It is quite possible that even if such additional relief were prayed for in the bill, the court would refuse to grant it, for in the *L. Martin Co.* case[64] it was indicated that a constitutional amendment might be held necessary to empower the Court of Chancery to award unliquidated damages for a tort, because of the provision in the constitution guaranteeing trial by jury.[65] In view of the fact that the con-

receive all of the profits made by the defendant from the sale of the particular article.

59. (1916) 16 COL. L. REV. 326.

60. See opinion of Stevenson, V.C., in L. Martin Co. v. L. Martin and Wilckes Co., 75 N.J.Eq. 39, 71 Atl. 409 (Ch. 1908). See also POMEROY, SPECIFIC PERFORMANCE (3d ed. 1926) 956.

61. *Supra* note 46.

62. Vulcan Detinning Co. v. American Can Co., *supra* note 51.

63. 119 N.J.Eq. 52, 180 Atl. 671 (Ch. 1935), *aff'd* 120 N.J.Eq. 76, 183 Atl. 296 (E. & A. 1935).

64. 75 N.J.Eq. 257, 259, 72 Atl. 294 (E. & A. 1908).

65. N. J. Const., Art. I, pl. 7. *Cf.* Chessman v. Hale, 31 Mont. 577, 79 Pac.

an injunction against unauthorized taking. The decree is worded in the alternative, ordering the injunction unless defendant makes compensation to the complainant in an amount to be agreed upon as fair and proper.[69] The court has limited this unusual remedy, in instances where complainant was unwilling to accept compensation and demanded the injunction, to cases where the defendant had power of eminent domain and therefore could have condemned the premises upon payment of compensation.[70]

The distinction made by the court is understandable but difficult to justify, since compensation is awarded in lieu of an injunction in order to protect the public interest against the inconvenience which would result from enjoining the operations of a public utility,[71] and the same public interest is present in some cases where defendant has no power of eminent domain, as exists in the cases where defendant has such power. If it is against public policy to enjoin a defendant which is engaged in supplying necessary services to the public, all such injunctions ought to be denied and all claimants left to the satisfaction derived from receipt of compensation, regardless of whether or not the defendant possesses the power of eminent domain.[72] The East Jersey Water Company performed a necessary function in supplying water to a large portion of the community, but since it lacked power of eminent domain an injunction against it for unauthorized taking was issued in spite of its willingness

69. Sparks Manufacturing Co. v. Newton, *supra* note 58; Gray *ex rel.* Simmons v. Paterson, 60 N.J.Eq. 385, 45 Atl. 995 (1899); Weidmann Silk Dyeing Co., v. E. Jersey Water Co., 88 N.J.Eq. 397, 413, 102 Atl. 858 (Ch. 1918), *aff'd* 89 N.J.Eq. 541, 105 Atl. 194 (E. & A. 1918).

70. Paterson v. E. Jersey Water Co., 74 N.J.Eq. 49, 98, 70 Atl. 472 (Ch. 1908), *aff'd* 77 N.J.Eq. 588, 105 Atl. 194 (E. & A. 1910).

71. Gray *ex rel.* Simmons v. Paterson, 60 N.J.Eq. 385, 392, 45 Atl. 995 (1899).

72. Compare the universally recognized rule that a libel will not be enjoined but plaintiff will be left to an action at law for damages, because to enjoin the libel would be against public policy as a deprivation of the right of free speech.

to make compensation.[73]

Of course, the legal reasoning underlying the distinction is clear: The defendant with power of eminent domain had power to condemn the property on making compensation. Where such a defendant takes possession without proceedings for compensation and the landowner brings a bill for an injunction, the injunction proceedings will be regarded as a substitute for the condemnation proceedings and the defendant will be given his previously existing right to take the property upon making compensation. However, it may be asked whether the court ought not to shift its emphasis from this basis of the distinction and look more closely to the question of how public policy can best be served, which question ought to be answered in a manner which would protect persons depending upon utilities without power of eminent domain for their water, etc., to the same extent as they would be protected if those utilities had the power of eminent domain.

It seems that in the cases awarding compensation in lieu of an injunction against unauthorized taking, the court measures the compensation in the manner in which damages are assessed at law. In *Sparks Manufacturing Co. v. Newton*[74] the complainant was given by way of compensation the value of what he had lost, including the depreciation in value of his riparian land due to the diversion of a certain quantity of water. It was also in one of these cases[75] that the New Jersey court apparently contradicted a rule held sacred, before and since, by the same court, by stating,[76] "A court of equity will, to effectuate justice, settle unliquidated damages." The cases on damages in lieu of a tort injunction shed no real light on the general question of the nature of compensation which should be awarded by

73. Paterson v. E. Jersey Watch Co., *supra* note 60.
74. 57 N.J.Eq. 367, 395 (Ch. 1898).
75. Gray *ex rel.* Simmons v. Paterson, *supra* note 71. See *supra* note 50.
76. 60 N.J.Eq. at 393.

the New Jersey Chancery Court, but rather only add to the confusion in which this question rests. It is to be hoped that the Court of Chancery will establish a uniform rule which will permit a deserving complainant to recover his actual damages and not only the defendant's gain, and that such a rule will be applied in specific performance and injunction cases alike.

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