

THE RESURGENCE OF EQUITY*

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THE occasion for this article was the clarification in the writer's mind of that interpenetration of underlying ideas which has been going on from the first between law and equity in the field of property. Sometimes the interpenetration has been by *brutum fulmen* as in the case of the Statute of Uses,¹ sometimes by Royal Commission as in the case of the Commissioners on Real Property who were largely equity conveyancers,² sometimes it has been by conscious imitation under the maxim that equity follows the law. More often, perhaps, it has come without observation, especially under new conditions and in a new country.

This interpenetration is much less controversial than the "fusion of law and equity" under the modern procedure acts or the related "conflict between law and equity" or the question of the nature of equitable interests, or even the place of equity in the law school curriculum, but the controversy over these matters a decade and more ago sheds much light on the more extensive fusion already referred to and presents a useful point of attack. That controversy started with the reading of a paper by Professor Cook in 1912³ urging the elimination of equity as a separate law school course and took a wide range. The controversy marked the passing of the historical attitude of Langdell and Ames as the prevalent attitude in law school thought. It was not, however, a new controversy but a continuation in the academic field of the struggle that had gone on, particularly in England, between the common law and equity judges⁴ in the half century preceding the Judicature Acts of 1873⁵ and 1875,⁶ which, of itself was merely a manifestation of that conflict between law and equity,

* This paper was read before the Equity Round Table at the Association of American Law Schools at Chicago in December, 1933.

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¹ 27 Hen. VIII, c. 10.

² Campbell, afterwards Lord Campbell, headed the Commission and was "the only Common lawyer selected." 1 Life of Lord Campbell (1st ed. 1881) 457.

³ Proceedings of the Association of American Law Schools (1912), 77; 3 Am. Law School Rev. 173 (1912).

⁴ See 1 Warren, Introduction to Law Studies (3d ed. 1863), 537-567; Finlason, Our New Judicial System (1877), 118-125.

⁵ 36 and 37 Vict. c. 66.

⁶ 38 and 39 Vict. c. 77.

which had existed from the beginning. The equity judges insisted there was no conflict, the common law judges insisted there was, and although equity triumphed in the form the Judicature Acts took, that of the consolidation of the judiciary,⁷ a concession was made to the common law judges⁸ of possible "conflict or variance between the rules of equity and the rules of the common law with reference to the same subject matter,"⁹ though here, as in the past, the equity rule was to prevail.

Opinions have differed as to the importance, as well as to the accuracy, of these words of the Judicature Act. Pomeroy¹⁰ thought them of great importance and hoped for their adoption in other American legislation than that of Connecticut; Dean Clark¹¹ is inclined to think they are implied in all codes; Maitland¹² urged that this provision had been law for thirty years and had "produced very little fruit." It was not as to the importance but as to the accuracy of these words, however, that real heat was engendered. Maitland¹³ denied there was any conflict between law and equity. Hohfeld¹⁴ characterized this as a "venerable fiction." Maitland's view had been the accepted formula under which equity had grown and flourished. It was based on the notion that equity acted only on the person and did not affect the right. As a working formula, therefore, it explained much that was otherwise inexplicable, but that Maitland should have exalted this formula as he did is understandable only from his desire to stress the essential harmony of law and equity. It was the historian and equity practitioner speaking, rather than the jurist or layman.

The controversy as to "conflict" or "no conflict" between law and equity seems largely to have been one of words and may be considered to have been laid to rest by the dictum of one not disinclined to the historical point of view, Dean (now Mr. Justice) Stone. He says:

... the statement that equity and law do not conflict is a statement often made correctly with reference to the law administrative agencies of the two systems rather than to their conflicting doctrines. Equity did not restrain a judge or officer of the law courts, nor, after the subsidence of the famous controversy between Coke and Lord Ellesmere, did the law courts attempt to interfere with suitors in equity. Nor, indeed, did equity deny the operation of rules of law. It sought only to counteract them by compelling the defendant to relinquish the benefits of those rules in accordance with its decree. Until this decree became operative neither courts of law nor equity denied the operation of

⁷ Finlason, *supra* note 4, 133.

⁸ Finlason, *supra* note 4, 122.

⁹ 36 and 37 Vict. c. 66, s. 25, ss. 11.

¹⁰ Pomeroy, *Code Remedies* (4th ed. 1904), §§ 13-14.

¹¹ Clark, *Code Pleading* (1928), 65, § 16.

¹² Maitland, *Equity* (1909), 162.

¹³ Maitland, *supra* note 12, 16-20, 152-155, 203.

¹⁴ Hohfeld, *Fundamental Legal Conceptions* (1923), 159; see *The Relations between Equity and Law*, 115-154, and *Supplemental Note on the Conflict of Law and Equity*, 155-159.

rules of law to define the substantive rights of the parties. In this narrow sense law and equity did not conflict; but that in a broader sense there was a conflict in that equity often adopted a different doctrine than that of the law courts and based its action upon it, does not now seem fairly open to question.¹⁵

If, as urged by Professor Cook,¹⁶ the old formula of "no conflict" still stands in the way of the simplification of procedure which the procedure acts of the last century tried to bring about, it is a great pity.

A matter of much more difficulty is as to the nature of equitable rights affecting property. The questions of "conflict between law and equity," and of "fusion of law and equity," gained prominence in the realm of statutory reform. On the other hand, the question of the nature of an equity, whether a mere right *in personam*, or a right *in rem* in the obligation, or a right *in rem* in the property itself, would seem to be getting pretty far into the realm of analytical jurisprudence, and might be thought to be of little but speculative interest. But anyone conversant with the property reform in England in the last decade would know otherwise. To the writer, such underlying assumptions in that reform as that an equity was quite inferior to a legal right,¹⁷ that to turn legal rights into equities was half the battle in getting rid of them,¹⁸ that equities in land should, for purposes of transfer, be treated like *choses in action* and the rule in *Dearle v. Hall*¹⁹ applied to them,²⁰ that the doctrine of notice had been carried altogether too far,²¹ came as a surprise, so accustomed was he to think of equities as practically on the same plane with legal rights. Much of this difference in the legal atmosphere of the two countries is due no doubt to the universality of the recording acts in the United States,

¹⁵ 18 Col. L. Rev. 97-8 (1918). The "quasi-administrative" character of equity covered up the fact that it was in conflict with the common law. The common law as such remained formally untouched but the law as a whole was vitally affected. When the superiority of equity was established there was no longer an open clash, for where there was conflict equity prevailed. The wisdom of a few great chancellors and the inadequacy of the common law gained for equity a well-marked jurisdiction which was accepted without cavil by law and equity practitioners alike. As long as equity keeps within these well-marked bounds there is no real clash with law but the minute equity shows the reforming tendencies of its pre-Eldon days the clash is apparent and some such cry as government by injunction is heard. But such clashes would seem to be inevitable if we are to have an evolutionary development of the law and not be entirely dependent on cataclysmic progress by legislation. Maitland's great contribution to this discussion would seem to have been that equity was not a self-contained system clashing with the law but a series of glosses supplementing and enriching the law.

¹⁶ Cook, Equitable Defenses, 32 Yale L. Jour. 645, 649 (1923).

¹⁷ Bordwell, Property Reform in England, 11 Iowa L. Rev. 1, 11-14 (1925).

¹⁸ Bordwell, *supra* note 17, 14-15.

¹⁹ 3 Russell 1 (1823), affirmed *id.* 55 (1828).

²⁰ Bordwell, English Property Reform, 37 Yale L. Jour. 179, 199-201 (1927).

²¹ Bordwell, *supra* note 20, 203-204.

with their very great extension of the equitable doctrine of notice, but the different attitude towards equities has found expression in other ways such as in the early rejection in the United States of the doctrine of tacking mortgages,²² to which Maitland, for instance, seemed to see no objection.²³

Notwithstanding the different place in the law an equity has in the United States from what it has in England, the traditional English view found perhaps its most vigorous expression in the writings of Langdell²⁴ and Ames.²⁵ The protagonists in the assault on their views were Cook²⁶ and Hohfeld,²⁷ but perhaps the simplest way or presenting the more modern American viewpoint is by a consideration of the discussion between Professor Scott²⁸ and Dean Stone²⁹ on the nature of the rights of the *cestui que trust*.

The position of the historical jurists, as outlined by Professor Scott, was that the *cestui que trust* was the owner of an obligation but that to call him "equitable owner" of the property itself was fundamentally wrong. They regarded ownership as one and indivisible and the ascription of ownership to more than one person as a contradiction in terms. They saw in the maxim that equity acts *in personam* a fundamental principle that doomed an equity to be a right *in personam*. They preferred to think of an equity as enforceable against determinate persons although the class was very large, rather than against the world at large subject to such exceptions as the purchaser in good faith.³⁰ If against determinate persons, an equity would come within the generally accepted definition of a right *in personam* rather than of a right *in rem*.³¹ Finally, it had been urged that many of the duties of the trustee are positive while duties that correlate with rights *in rem* are negative.

With none of the positions of the historical jurists did Professor Scott agree. To use his language, Professor Cook had already shown "in a clear

²² Ames, Lectures on Legal History (1913), 268.

²³ Maitland, *supra* note 12, 135.

²⁴ Langdell, A Brief Survey of Equity Jurisdiction (2d ed. 1908), 4-6; Summary of Equity Pleading (2d ed. 1883), 210-211.

²⁵ Ames, *supra* note 22, 262, 289.

²⁶ Cook, The Powers of Courts of Equity, 15 Col. L. Rev. 37, 106, 228 (1915).

²⁷ Hohfeld, *supra* note 14, 120 *et seq.*

²⁸ Scott, The Nature of the Rights of the *Cestui Que Trust*, 17 Col. L. Rev. 269 (1917).

²⁹ Stone, The Nature of the Rights of the *Cestui Que Trust*, 17 Col. L. Rev. 467 (1917), see also 18 *id.* 99-101 (1918).

³⁰ This point is made in this form by Maitland, *supra* note 12, 120.

³¹ See Hohfeld, *supra* note 14, 72.

and convincing way, that the nature of the right is not determined by the nature of the action by which the right is vindicated; nor by the nature of the judgment or decree."³² Furthermore, while it was true that the right of the *cestui* was not seisin, nor any part of it, yet that was merely to say that it was equitable and not legal. In ascribing equitable seisin and equitable estates to the *cestui*, equity was only carrying one step further the doctrine of the law courts with regard to land that ownership was not one and indivisible but could be split into many parts. "Equitable ownership" was a logical outcome of the law of estates.³³ Nor is the fact that the trustee has active duties inconsistent with the fact that he has negative duties in common with the "world at large." The argument that an equity is only a right against a limited number of persons was not so easy to meet. But it was not the case of the purchaser in good faith that made the difficulty so much as the case of the disseisor and trespasser. There are many examples of legal owners whose rights may be cut off by the sale of the property to a purchaser in good faith, and yet no one would deny them the character of owners in the meantime. But as against adverse possessors and trespassers, the trustee is the representative of the property, and when the statute of limitations has run against him it has run against the *cestui*, notwithstanding the disability of the latter.³⁴ The equitable restriction, however, has been enforced against an adverse possessor,³⁵ and Professor Scott's answer to the general argument was that the disability of the *cestui* as against the adverse possessor was due, not to the weakness of equities in general, but to the fact that in some respects the *cestui* is more fortunate than the holder of other equities in having some one to look out for his interests, and that in this case the representation of the trustee has been unfortunately allowed to the *cestui's* disadvantage.³⁶

Dean Stone's answer³⁷ to Professor Scott was a masterly argument that while the right of the *cestui* might properly be considered a right *in rem* in the obligation, it could not properly be considered a right *in rem* in the

³² Scott, *supra* note 28, 277.

³³ The views expressed on this point are the writer's. They are, however, in line with Professor Scott's position.

³⁴ Scott, *supra* note 28, 286 n. 59.

³⁵ *In re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, affirmed [1906] 1 Ch. 386. This case is a stumbling-block to those who would make an equity primarily an obligation.

³⁶ The most important differences between equitable and legal interests are admirably summed up in Comment b, § 10 of Tentative Draft No. 1 of The Restatement of the Law of Property by The American Law Institute.

³⁷ See *supra* note 29.

property itself. He made the liability of third persons depend upon notice and the ethical consequences of such notice, rather than on the protection of a property right in the *cestui*. He made the most of the case of the disseisor and trespasser and of the right of the *cestui* to follow newly acquired property.³⁸ He demonstrated that the emphasis of equity on duty, and the fact that equity had acted on the person, had been real forces and had left their mark. He left one convinced that the emphasis placed by equity on duty and procedure still has as distinct a place in the law as the emphasis placed by law on right. Right and duty are correlatives. Each needs its emphasis. Each needs its champion. There is as much of a role for equity to play in the future as it has played in the past, though its has lost its separate court and its separate suit.

As to whether Dean Stone was right, however, in arguing that the analogy of the *cestui's* interest to contract or obligation was greater than, or as great as, the analogy to property is a question. Certainly when the use was universal and when it was revived as a use on a use, and when it was extended by the Law of Property Act, 1925,³⁹ the property element was predominant and not the trust and confidence. It is only when active duties are imposed, when there is a trust proper, that there is an argument for the predominance of duty. Dean Stone's dislike of treating an equity as property was not confined to the case of the *cestui*. It extended to the treatment of equitable restrictions as equitable easements, and to the conception of equitable conversion in connection with specific performance.⁴⁰ The argument against the "equitable easement" was supported by the perhaps blind application in an English case⁴¹ of the limitations of legal easements to equitable restrictions. Whatever the merits of his position, Dean Stone, now become Mr. Justice Stone, in 1926, admitted "the expansion of equitable rights *in personam* upon contracts into rights *in rem*—the process by which equity has brought itself to the point where it finds itself doing what a generation ago it said it could not do."⁴²

The discussion over rights *in rem* and rights *in personam* shows how meaningless those terms have become. The distinction between rights against a determinate and against an indeterminate number of persons has little meaning as applied to equities affecting property, nor is the

³⁸ For a good summary of his argument, see 18 Col. L. Rev. 99-107 (1918).

³⁹ 15 Geo. V, c. 20, § 1.

⁴⁰ As to this point see especially Stone, *Equitable Conversion by Contract*, 13 Col. L. Rev. 369 (1913).

⁴¹ *London County Council v. Allen*, [1914] 3 K.B. 642.

⁴² Stone, *Review of Cook: Cases and Other Authorities on Equity*, Vol. 2, 35 Yale L. Jour. 646, 647 (1926).

distinction between rights against the many and against the few any better. Who can tell where the few leave off and the many commence? As meaning rights against a person and rights against a thing, rights *in personam* and rights *in rem* meant something, and it is in this sense that the terms are commonly used when the attempt is made to place the equity. With this meaning now generally discarded,⁴³ the usefulness of the terms right *in rem* and right *in personam* would seem to be gone.⁴⁴

Another memorable discussion was that between Professors Cook⁴⁵ and Williston⁴⁶ as to the alienability of *choses in action*. A familiar example of the "fusion of law and equity" wrought by the procedure acts was the right acquired by the assignee of a *chose in action* to sue in his own name at law. Notwithstanding this undoubted right to sue at law, Professor Williston persisted in calling these assignments "equitable." He defended the use of the term "equitable" as indicating the origin of these assignments and as a warning of the equitable principles that had moulded them and which he considered did and should survive notwithstanding the right of the assignee to sue at law. This less common use of "equitable" has much to commend it if the sense in which it is used is made plain. Where an assignment of an interest is possible in equity and it is urged that such an interest be recognized as assignable also at law, there may be grave danger that the safeguards which alone make its assignability in equity defensible will be lost in the process. However, both Professor Williston's and Dean Stone's arguments were a far cry from that of the old historical jurists. They showed how telling the assaults of Cook and Hohfeld and Scott had been.

Both Dean Stone and Professor Williston thought there were equitable principles which there was great value in preserving. At an earlier time Dean Pound had said equity was worth fighting for.⁴⁷ In an indiscriminate "fusing," or an indiscriminate borrowing, these principles are likely to be lost. They are likely to be lost even in the administration of equity itself by judges with only a legal point of view. Whether the tendency to look on equities as property is inequitable may be doubted, but that the ethical tone which marked equity at its best should be lost, would be a

⁴³ See Hohfeld, *supra* note 14, 73-85.

⁴⁴ These terms are purposely discarded in The Restatement of the Law of Property by The American Law Institute. Tentative Draft No. 1, § 6, special note.

⁴⁵ Cook, Alienability of Choses in Action, 29 Harv. L. Rev. 816 (1916), 30 *id.* 449 (1917).

⁴⁶ Williston, Is the Right of an Assignee of a Chose in Action Legal or Equitable, 30 Harv. L. Rev. 97 (1916); Williston, The Word "Equitable" and Its Application to the Assignment of Choses in Action, 31 *id.* 822 (1918).

⁴⁷ Pound, The Decadence of Equity, 5 Col. L. Rev. 20, 35 (1905).

great harm. That the principles guiding the administration of equitable relief should be lost would be a calamity. There is room for both law and equity in the legal system. May each contribute to the other as it has done in the past.

If equity is worth fighting for, how may this best be done? A rear-guard action is not sufficient. Equity in the past has been the forward element in the law. If it is to regain that position it must again take the offensive. Otherwise "decadence" is inevitable. But it cannot hope to regain that position by attempting to restore the conditions of the past. The separate chancery is dead, the separate suit in equity is doomed, but the need for a virile equity is as great as, or greater than, ever, and it must use the weapons of its own age.

Having lost its own court in most states and its separate suit in equity in at least half of the states, is there any advantage in the retention by equity of its separate course in the law school? Is not that as backward-looking as the separate court or the separate suit? There are many reasons for answering this in the affirmative. The present standardized course in Equity was instituted by men with an historical attitude now largely a thing of the past. Their teaching in a past generation, to use the language of Dean Pound,⁴⁸ tended to reenforce that "wall down the middle of every court of complete legal and equitable powers" which, despite the express provisions of the codes of procedure, the judges had tended to set up. Professor Cook's casebook was an attempt to break down that wall, and Dean Pound⁴⁹ thought that even with Ames' Cases a more modern doctrine might be taught, but the fact remains that the standardized course in Equity was instituted by those who were fighting a rear-guard action for equity and the question remains as to whether even with its more modern improvements such a course is not more suited for rear-guard action than for the offensive in which alone is victory.

In his paper written in 1912⁵⁰ Professor Cook gave many reasons why the separate course in Equity was misleading and even mischievous. His casebook carried out many of the ideas there expressed. However, it tended to give a new lease of life to the separate course. The writer has often wondered why that paper of 1912 did not have more effect. He believes now that in part it was because those who hoped for a virile equity feared that equity would itself be lost by distributing the substantially substantive parts of equity among contracts and torts and

⁴⁸ Pound, Review of Cook: Cases and Other Authority on Equity, Vol. 1, 37 Harv. L. Rev. 396, 398 (1924).

⁴⁹ Pound, *supra* note 48, 399.

⁵⁰ See *supra* note 3.

property. They feared that to confine the separate course to the "general part"⁵¹ of equity, now covered in the first volume of Cook's Cases, would be insufficient to prevent that loss. Probably in greater part it was due to the binding effect of the standard curriculum and to the existence of vested interests.

Much water has gone over the dam, however, since Professor Cook wrote in 1912. The old curriculum has seen its best days. A new school has arisen, not over-enamoured of the past. Procedure threatens to come into its own.⁵² And therein, it is believed, lies that hope for a militant equity that will repeat the conquests of former days. Let Contracts and Torts and Property have what properly belong to them. Give Titles some content by making it a course in Vendor and Purchaser, corresponding to Sales, and covering both the contract and the conveyance. Give to Contracts and Torts whatever has become substantially substantive and is necessary for a well-rounded presentation of those subjects. But place equity where it belongs and where it has always belonged, under Procedure.⁵³ Trusts does not belong there, nor much of what has come to be substantially substantive law in various fields. But the driving force of equity has always been procedure and will remain such.⁵⁴ The equity of today becomes the right of tomorrow. When this ceases to be the case, our law will be moribund, or worse.

One reason for putting equity under procedure or remedial law in the law school curriculum is that it may take its proper place under the code procedure. Whether we like it or not, we must accept the code and make the most of it. Whether the name equity is retained is unimportant as long as we have the substance. But names stick, and there would seem little likelihood to the writer that "equity" is in for a demise. If it is dropped, some other word will have to be invented to take its place. In line with the general trend of this argument are the new Cases on Pleading and Procedure by Dean Clark.⁵⁵

Lastly a word must be said as to the fusion of law and equity which was

⁵¹ Pound, *supra* note 48.

⁵² See especially Arnold, The Role of Substantive Law and Procedure in the Legal Process, 45 Harv. L. Rev. 617 (1932).

⁵³ Procedure is here used in its wide sense as equivalent to remedial law.

⁵⁴ Professor Patterson very happily defines equity as "the 'quasi-administrative' element in our legal system." 9 A.B.A. Jour. 649 (1923). He thus avoids identifying it with the old Chancery practice and at the same time emphasizes the element of discretion which it must continue to have if it is to repeat the conquests of the past. The historical definition of equity would make equity an anachronism instead of something alive and with a future.

⁵⁵ Clark, Cases on Pleading and Procedure (1933).

the object of the procedure acts. Lest such fusion result in the "confusion" deprecated by Dean Pound in his *Decadence of Equity*⁵⁶ it must be more carefully delimited than is ordinarily the case. Some,⁵⁷ no doubt, have looked for a complete fusion of law and equity both as to rights and remedies. It would seem a great loss if it were so. There is need for the active principle in the law as well as the static. But no one, it is believed, claims that the procedure acts, in wiping out the separate courts of equity and the separate suit in equity, had any such immediate object. The immediate object was frankly procedural. It was only carrying one step further the reform by which the common law actions were abolished. The abolition of the common-law forms of action was not intended to change the substantive law. Incidentally, no doubt, much substantive law was affected. Likewise, with the elimination of the separate suit in equity. That a plaintiff seeking relief, or that a defendant, should have to resort to two courts in what to outward appearances was one matter seemed intolerable in 1828 to Lord Brougham,⁵⁸ and this was the keynote of the reform. There was no desire to abolish the trust.⁵⁹ There was no desire to destroy a single equity which anyone had had before the reform. There was a desire to abolish a red-tape which seemed intolerable.

The abolition of the common-law actions did not wipe out the common law. Neither did the elimination of the separate suit in equity wipe out equity jurisprudence. Much of equity jurisprudence, however, had reached a state where it was ready to be absorbed into the law itself, where its existence apart from the law seemed to create two clashing, rival systems in a single state. Much equity had "filtrated into"⁶⁰ the law, much had been incorporated in the law by legislative act. But in the unification of procedure there was offered an opportunity for further fusion and simplification which, unfortunately, has not gone very far. Professor Cook has pioneered in the field of mistake in the third volume of his *Cases on Equity*, and no doubt the courts have done more than is realized, but in general this process is still in its pioneer stage. It has been impeded by

⁵⁶ See *supra* note 47.

⁵⁷ See Billson, *Equity in Its Relations to the Common Law* (1917), 3; Clark, *The Union of Law and Equity*, 25 *Col. L. Rev.* 1, 10 (1925); Dillon, *The Law and Jurisprudence of England and America* (1895), 386; Hogg, *Law and Equity—The Test of Their Fusion*, 22 *Jurid. Rev.* 244 (1911); Maitland, *supra* note 12, 20; Taylor, *The Fusion of Law and Equity*, 66 *Univ. Pa. L. Rev.* 17 (1917); Taylor, *Law Reform*, 11 *Ill. L. Rev.* 402 (1917).

⁵⁸ *Law Reform, Speeches* (2d ed. 1838), 390.

⁵⁹ Maitland, *supra* note 12, 152.

⁶⁰ Billson, *supra* note 57, 7.

old quarrels as to conflict and the nature of the rights of the *cestui* which should be things of the past. In the opinion of the writer it has been impeded by the continued existence of the separate course in equity which would seem a survival of those quarrels. A "technical"⁶¹ equity should give way to a virile equity. Equity should be spelled with a little "e"⁶² and not with a big "E." It should be the progressive force it once was when it was essentially procedure, and should make the most of the modern weapon, the code procedure, as it once did of the subpoena.

⁶¹ Pound, *supra* note 47, 28, quoting Lord Blackburn.

⁶² This would seem to be the sense in which Professor Williston uses the term "equitable" and to be the sense in which it is used in the phrase "equitable defenses." The practice of the past to use equity as an adjective rather than as a noun should be revived.