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IS EQUITY DECADENT?

By William F. Walsh*

In a paper in an early volume of the Columbia Law Review, entitled "The Decadence of Equity," Dean Pound asserted in substance that the development of modern equity into an established system of rules, applied very much as are rules at law, has brought into operation a process of decadence of equity as a living system of discretionary law. He gives as the agencies bringing about this decadence, first, the establishment in equity of the doctrine of case-law precedents resulting in the crystallization of modern equity, and second, the merger of law and equity by adoption of equitable actions and defenses at law, and by codes and other statutes merging legal and equitable procedure. He regarded it as inevitable that equity's development as a system of law with established principles and rules must necessarily destroy it as a system of law based on the exercise of judicial discretion. He cited several cases as illustrating decadence in equity: among others, a Nebraska case in which the higher court reversed the lower court's enforcement of an equitable mortgage of chattels to be subsequently acquired, holding the mortgage void by applying the legal rule, ignoring the controlling equitable rule; and another Nebraska case which held that creditors in following money of their debtor used fraudulently in the purchase of property would be restricted to the purchase price and legal interest thereon though the property had greatly increased in value, again applying the legal principle in disregard of the resulting trust and the equitable doctrine that the dishonest trustee is charged with any profits made by him in the fraudulent use of trust funds though such profits exceed interest at the legal rate. He classified these cases as illustrating the disappearance of equitable rules as a result of code merger.

It must be said, however, that these cases and all like them are

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†The substance of this paper was delivered as an address before the Equity Round Table of the Association of American Law Schools at Chicago, December, 1937.

1(1905) 5 Col. L. Rev. 20.
3Hart v. Dogge, (1889) 27 Neb. 256.
rather illustrations of mistaken law applied by courts in apparent ignorance of the law involved, in no way indicating any decadence of equity. These and other cases cited as indicating that code merger causes the courts to overlook obvious equitable rights furnish no excuse for the judicial ignorance and incompetence which they illustrate. Law and equity are simply brought together by code merger so that all relief, legal and equitable, may be applied in a single action without any change either of law or equity, except that the equitable rule must prevail in case of conflict, as in the case cited of an equitable mortgage of property to be acquired in the future, void at law because of the non-existence of the property at the time of the making of the mortgage.

As illustrating the point that equitable principles become hard and fast and are applied like legal rules, Dean Pound referred to the adoption at law of equitable estoppel, and to cases in which equitable doctrines have been applied by courts under the merged procedure so as to result in positive injustice, losing sight of the principle generally understood and applied by such courts that equitable relief may always be withheld or granted on special terms in the discretion of the court whenever justice demands it. But surely these are again illustrations of failure on the part of the courts either to understand or to apply law and equity combined under code merger. The court in every such case is a court of equity as well as a court of law, and must apply equitable principles exactly as though no merger had been made. Mistakes of this kind call for a better education of bench and bar in what code merger means. They cannot fairly be taken as decadence in equity, which is not changed in substance by code merger.

Dean Pound made clear that he was not condemning code merger. The moral of these cases he said was that we must be vigilant, we must fight for our equity so that law may be tempered with equity. The way to eliminate these mistakes is by teaching equity from the standpoint of the merged system so that misapprehension and misunderstanding of what the merger accomplishes may be finally and completely removed.

**What Are the Functions of Equity?**

I am convinced that equity's function is much broader than the modification of the harsh application of legal rules by the use of judicial discretion, and that Seldon's characterization of early equity as varying with the individual chancellor's ideas of justice
and reason, without the restraining influence of recognized and established principles, illustrated by his famous reference to the length of the chancellor's foot, has been too readily acquiesced in by modern scholars.4 We have very little actual material on the development of equity in Chancery prior to 1391. A very considerable part of the business of the Chancellor's Court from 1350, the date of the Ordinance of London which may be taken roughly as fixing the date when the Chancellor's Court began to function regularly, down to 1391 and later, consisted of the granting of relief in cases of outrage committed by powerful lords in clear violation of the common law, and these cases involved no element of equity in the modern sense. No doubt there were many instances of relief of a purely equitable character involving appeals to the chancellor's conscience during that short period of forty years, but we have very little evidence of the way in which the principle of judicial discretion was applied during that period. The 300,000 petitions to the Chancellor preserved from about 1391 down through the following century give us an abundance of evidence of equity's development during the fifteenth century, the earliest period of which we have definite knowledge of how the Chancellor exercised judicial discretion in granting equitable relief.

During this period the system of uses by means of which the more onerous burdens and abuses of feudalism were avoided, was developed in the Chancellor's Court. A system of property law which to a considerable extent displaced the feudal law of property of the common law courts was developed by the Chancellor, a quite definite system of law based on recognized and established principles, refuting very completely the position taken by Seldon.5

4Blackstone, describing Chancery at the end of the fifteenth century, said that "no regular judicial system at that time prevailed in the court; but the suitor when he thought himself aggrieved found a desultory and uncertain remedy, according to the private opinion of the Chancellor." 3 Blackstone, Comm. 53. Professor Holdsworth says: "In early days there were no fixed principles upon which the Chancellors exercised their equitable jurisdiction. The rule applied depended very much upon the ideas as to right and wrong possessed by each Chancellor. Hence there is a considerable amount of truth in Seldon's well known aphorism. 'Equity is a roguish thing. For law we have a measure... Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot.'" 1 Holdsworth, Hist. Eng. L. (1935) 467, 468.

5See Walsh, Equity (1930) 18-22, for a brief review of this development, citing Digby, Hist. L. Real Prop., (5th ed. 1897) 326, 327, 328; Huston, Enforcement of Equitable Degrees (1915) 94, 95, 99, 100; Maitland, Equity (1932) 117, 120. Prof. Maitland said, Maitland, Equity (1932) 27, 28, as to the avoidance of feudal rules by the system of uses: "You will see that the success of this scheme would have been marred if the
The extensive development during this period of equitable relief in contract where debt or covenant would not lie, so brilliantly developed by Professor Barbour, and being second only to uses in scope and importance, is almost equally potent as a refutation of Seldon's position. In this first formative period of equity's development a system of relief in cases of fraud was worked out, not only in cases of specialties procured by fraud but also in other cases of simple fraud in which no relief could be had at law. Relief from penalties and forfeitures, enforcement of assignments of rights of action, recovery in specie of chattels of unique value and relief from mistake, are some of the more important additional fields of equitable relief initiated and developed during this period, all of which together constituted a quite definite body of law developed and applied by a single highly organized court, based on a precedent of principles rather than of mere decisions. A very considerable part of the principles which dominate equitable relief today were thus initiated and to a considerable degree developed in the fifteenth century, giving exceedingly scanty support to Seldon's aphorism relating to the chancellor's foot.

No doubt the discretionary power of the chancellor or judge in equity is a fundamental characteristic of equitable relief. My contention is that this is just as true today as it always has been, and that in the early period, very much as at the present time, he established and followed definite principles which go back to the fifteenth century and which include the most important of the principles under which equity is administered today. Of course it is true that in modern equity there has been a more conscious reliance on precedent than in the earlier period, and the rules under which equity acts have been greatly developed and systematized. Nevertheless it is a fundamental principle in the practical application of these rules that the court has a discretionary power to

courts of law had compelled the feoffees to fulfil the honorable understanding by virtue of which they had acquired the land. If they had begun to say 'after all this land is the feoffor's land the feoffees are a mere screen or the feoffees are merely the feoffor's agents,' then the whole scheme would have broken down—wardship, marriages, forfeitures, escheats would have followed as a matter of course."


See sketch of the development of the action at law on the case for fraud, preceded by relief in equity in the fifteenth century in fraud cases by way of restitution, there being no relief at law at that time, in Walsh, Equity (1930) 492, 493, note 8.

See Walsh, Equity (1930) 25-27, and authorities there cited.
withhold relief or to grant it only on special terms fixed by the court where under the special facts of the particular case justice demands that the relief usually given be withheld or be granted only on such special terms. What evidence have we of a purely discretionary equity even in this period of equity's earliest development?

I do not think that we can fairly say that equity exists simply to grant discretionary relief in hard cases at law. Its function is very much broader. It may fairly be regarded as the spiritual and reforming influence of the law, correcting deficiencies in the law where legal relief is inadequate, and leading the way to reforms in the law. Thus equity's action in the development of uses practically eliminated most of the obsolete doctrines of feudalism after feudalism ceased to exist as an active social and governmental system. This led directly to the enactment of the statute of uses, under which the modern conveyance by deed took the place of conveyances by livery of seisin, permitting the creation of future executory estates impossible under the old law, and the statute of wills which restored the power at law to devise land.

The enforcement of contracts in the fifteenth century by the Chancellor's Court where debt or covenant would not lie was followed by the development of assumpsit at law, starting in the latter part of the fifteenth century. Is there any doubt that this extensive jurisdiction in equity led the common law judges to work out similar relief at law, by using the action on the case based on the supposed deceit involved in the breach of contract, resulting quickly in the development of assumpsit? Chancery gave up this jurisdiction after the new action of assumpsit gave adequate relief at law, retaining jurisdiction in specific performance cases where damages at law was inadequate. In much the same way and for like reasons the granting of relief by equity in cases of fraud referred to above was followed by the development at law of the action on the case for fraud and deceit. The abandonment of equitable relief in these cases after the remedy at law had developed followed as in cases of simple contract.

9The ancient writ of deceit at law up to the latter part of the fourteenth century was limited to cases of fraudulent use of legal process. 3 Holdsworth, Hist. Eng. L. (1935) 407. Instances of deceit on the case in 1367 and thereafter based on breach of warranty as to quality, really cases of contract brought in the form of deceit, are cited in 3 Holdsworth, Hist. Eng. L. (1935) 407, 408. For the subsequent development of case for deceit based on false representations knowingly made see 5 Holdsworth, Hist. Eng. L. 417, note 1.
The development at law in the eighteenth century of implied assumpsit based on the fiction of a promise implied by law to prevent unjust enrichment, including cases of contribution between cosureties and copartners, was really the adoption at law of that part of equitable relief in which the fiction of an implied trust is used where justice requires it, the law using the implied promise just as equity uses the implied trust as the tool by which justice is done.\(^{10}\) In these cases equity in most states retains a concurrent jurisdiction.

That choses in action of all kinds were not assignable at law prior to the seventeenth century is a matter requiring no elaboration. The Chancellor enforced such assignments of choses in action not purely personal from the fifteenth century onward, simply because justice demanded such relief and no relief could be had at law. Finally in the eighteenth and early nineteenth centuries the law courts found a way to incorporate into the law this form of equitable relief by the use of the fiction of an implied power to collect in the assignee in the name of the assignor. The fiction has been dropped today, and the assignee is everywhere recognized as the real owner of the chose as he always has been in reality since equity established his right in the fifteenth century.\(^{11}\)

The lien theory of mortgages is a direct result of the carrying over into the law of the principles established by the Chancellor's Court in the early part of the seventeenth century. Equity, though recognizing the purely technical legal title of the mortgagee, enforced the real ownership of the mortgagor by establishing his equity of redemption, and by charging the mortgagee as a trustee if he exercised his legal right to take over possession of the mortgaged property and collected the rents and profits. Equity treated the legal title and right of possession as existing in the mortgagee only for the purpose of establishing and protecting his

\(^{10}\)Walsh, Equity (1930) 90-91, 495 (as to constructive trusts in fraud cases enforced at law by actions in quasi-contract to prevent unjust enrichment).

security for payment of the mortgage debt. The lien theory now prevailing in the great majority of the states establishes at law the ownership of the mortgagor, and the security of the mortgagee as a lien. In the remaining states the legal ownership of the mortgagor is recognized at law for most purposes. In so far as the lien theory has not been adopted in these states law and equity are in conflict, with the confusion and positive injustice which must necessarily result from opposing rules relating to the same matter in the same sovereign state.

The reforming influence of equity in the development of the law is illustrated also by the rule initiated in equity and subsequently adopted at law that the contents of a lost or destroyed written instrument may be established by secondary evidence, and by the adoption at law of the equitable rule that a contract providing for a penalty will not be enforced, the plaintiff being limited to his actual damages. The distinction between provisions in contracts for liquidated damages and for penalties illustrates this rule taken from equity by the law courts. Equitable defenses to specialties which were among the first cases in which the Chancellor directly intervened to change the rights and obligations of the parties at law because reason and justice demanded it, were not adopted into the law except in the defense of illegality until modern statutes provided for the setting up of equitable defenses generally in law actions. Equitable estoppel is another equitable doctrine now generally regarded as fully adopted by courts of law, in non-code as well as code states.

In all these cases equity initiated important reforms in the law which reason and conscience demanded, preventing the enforcement of the conflicting legal rule by in personam control of the

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12For a detailed treatment of the development of equitable jurisdiction over mortgages see Walsh, Mortgages (1934) 6-13. On the development of the lien theory see ibid., 19-33, and authorities there cited.

13Underwood v. Stanev, (1666) 1 Ch. Cas. 77; Kelley v. Riggs, (1794) 2 Root (Conn.) 126; Ames, Specialty Contracts and Equitable Defenses, Lectures on Legal Hist. (1913) 104.

14For this development in equity see 1 Spence, Equitable Jurisdiction, (1845) 630; 1 Eq. Cas. Abr. 91, the statutes (8 and 9 Wm. III ch. 11, sect. 8 (1697), and 4 Anne Ch. 16, sects. 12, 13 (1705)) providing for recovery on bonds of only the actual damages made the rule the same at law as in equity. Later cases extended this rule at law as in equity to all actions on contracts. Astley v. Weldon, (1801) 2 Bos. & P. 346. See 2 Williston, Contracts (1936) secs. 775-779; Lloyd, Penalties and Forfeitures, (1915) 29 Harv. L. Rev. 117.


parties whenever that was necessary. That the law in the broad
sense is and always has been made up of law and equity combined
cannot reasonably be denied. That the true law in all these cases
of conflict was the equitable, not the legal, rule is equally unassail-
able. That the law courts followed so extensively the lead of
equity establishes definitely that equity not only operated to relieve
in cases of hardship, by the exercise of judicial discretion, but
actually reformed the existing law by the application of broad
principles of social justice which, to the extent which I have out-
lined, the law courts adopted as part of the common law.

DOES THE MERGER OF LAW AND EQUITY UNDER MODERN CODES
AND OTHER STATUTES CAUSE DECADENCE IN MODERN EQUITY?

The answer to this question is that never has equity more
effectually led the way in the law’s growth than during the period
which has followed the merger of law and equity. From this
point of view, by far the most important advance made by equity
in the last hundred years has been code merger. The law of the
land is no longer made up of two distinct systems competing with
each other in many important fields. The scandal of two opposing
rules applying to the same situation in the same sovereign state,
and the waste and delay involved in the necessity of an additional
suit in equity to restrain the enforcement of the legal rule, or in
securing equitable relief in addition to legal relief, have been
eliminated, as has been the necessity of starting a new action if
the plaintiff was mistaken as to the form of relief to which he
was entitled. When equity now extends specific relief to cover
a constantly broadening field the new law so established becomes
at once a part of the general law applied and enforced in all
courts and in all actions, since in every such case every court is
a court of both law and equity and every such action is both legal
and equitable. There is no longer any occasion for the adoption
at law of equitable rules. They become at once part of the
single system made up of law and equity combined.

There are, of course, many illustrations of error arising out
of misapprehension and misunderstanding of what code merger
means and of what it accomplishes. The cases discussed by Dean
Pound in his article in the Columbia Law Review are all of them
illustrations of this. Probably the most glaring mistakes of this
kind are the cases decided in New York, discussed by Dean Clark
in a later article in the Columbia Law Review.\footnote{Clark, The Union of Law and Equity, (1925) 25 Col. L. Rev. 1.} In \textit{Jackson v.}
Strong, in an action for an accounting based on the theory of a joint venture, the answer set up that instead of a joint venture between the parties the defendant had employed the plaintiff to aid him for the reasonable value of his services. Judgment for the plaintiff for such reasonable value was set aside, the court saying:

"Where . . . it appears that there never was any substantial cause for equitable interference, the court will not retain the action and grant purely legal relief but will dismiss the complaint. . . . The inherent and fundamental difference between actions at law and suits in equity cannot be ignored."

This was dictum, as the complaint was not dismissed but a new trial was ordered. On the new trial there could be no question of the plaintiff's right to amend his complaint so as to set up his action at law, the only difficulty with the original judgment in his favor having been his failure to have the complaint amended to conform with the proof on the trial, a technical matter of pleading. Though this dictum was followed in two or three cases in the lower courts, subsequent decisions of the court of appeals, following the law long settled by prior cases, establish conclusively that in any case brought for equitable relief, if it is found that the suitor is entitled on the facts as pleaded and proved only to legal relief, the court will give him a judgment for damages instead of the equitable relief which he sought.

In the great majority of the states, as in England, statutory merger of law and equity is an accomplished fact. The movement to establish such merger in the federal courts is so far advanced that its eventual success cannot be far in the future. In most of the non-code states a very considerable degree of merger exists under statutes providing for equitable defenses in law actions, and providing for the easy transfer from equity to law courts and vice versa of actions brought in the wrong court. Nevertheless in the many cases in which both legal and equitable relief is required in the same controversy, separate actions are still necessary in those states, the establishment of equitable defenses in law actions in those states is beset with confusion and uncertainty, and the maintenance of separate courts of equity involves considerable added expense. There is every reason to expect that code merger

18 (1917) 222 N. Y. 149, 118 N. E. 512.
19 See discussion of these cases in Clark, The Union of Law and Equity, (1925) 25 Col. L. Rev. 1.
20 These cases are cited and discussed Walsh, Equity 111, and notes.
in the federal courts will be followed by similar action in the remaining non-code states.

It is therefore necessary that the bench and bar of the future shall have a thorough understanding of what this merger means. Every division of equity should be regarded from this point of approach. The old equity as a competing system often in conflict with the law continues to exist only in that narrow residuum which I have already indicated, and there is every reason to believe that that residuum will eventually disappear.

The best case illustrating code merger of law and equity is *Hahl v. Sugo*, a New York court of appeals case decided in 1901. The plaintiff obtained a judgment in ejectment to recover his land covered by the defendant's encroaching wall. The sheriff refused to enforce execution because removal of the wall by him was impracticable. Instead of asking and securing a mandatory judgment in the alternative requiring the defendant to remove the wall, the plaintiff moved for a court order requiring such removal which was denied. Thereafter in an action at special term brought to compel removal of the wall, the court held that the plaintiff had already had his day in court, when he should have sought and secured the judgment requiring the defendant to remove the wall. The original action in ejectment was also an action in equity in which he was bound to seek any equitable relief to which he was entitled. Not having done so in the former action, he was barred from maintaining another action for this relief. This doctrine makes code merger a real thing, not a pretense.

Law and equity are simply brought together in code merger, without changing equity and without changing law, except that in the cases of former conflict the equity rule necessarily displaces the legal rule. In the first Nebraska case discussed by Dean Pound, the controlling equitable rule that a valid mortgage of the after-acquired property arose when the property was acquired should have been applied by the court, instead of the legal rule which had been displaced by the opposing doctrine of equitable mortgages. In actions for injunctions against waste, trespass, nuisance, unfair competition or other injuries to business, specific performance and generally all other cases in which specific relief is given to enforce and protect legal rights, damages will also be given in most of the non-code states in order to eliminate the need of another action at law, though a separate action for damages may

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be brought therefor at the plaintiff’s election; but equity will not retain the action for that purpose if the plaintiff is not entitled to any equitable relief. In the code states, every such action is both at law and in equity, and complete relief, legal and equitable, must be given by the court which is a court of law as well as a court of equity, and the plaintiff will not be permitted another distinct action for damages, which he must recover if at all in the injunction suit. If on the facts proved and pleaded the plaintiff is not entitled to any relief in equity, but is entitled to damages at law, the court is a court of law bound to award such damages, after trial by jury, to which the defendant is entitled if he demands it, and the fact that the prayer for relief does not include damages is not controlling if the facts pleaded and proved establish his right to damages.22

Equitable defenses do not become legal defenses under code merger or under statutes in non-code states providing that they may be set up in law actions. Since in code states every action is both legal and equitable, so that complete relief of both kinds may be given as the facts pleaded and established may require, it is difficult to understand why in New York and some other code states it was deemed necessary to provide expressly by amending statutes for such defenses. The elimination of the suits in equity formerly necessary to establish such defenses and to restrain enforcement of the action at law was one of the primary purposes of code merger. That code merger is as yet not fully understood is illustrated by decisions in New York and some of the other states, contrary to the rule prevailing in most of the code states, that equitable defenses must be tried to the jury with the other issues, not to the court.23 These are quite obvious cases of the survival of the confusion and lack of understanding of code merger. Certainly no change should be made in the form of trial by making the defense available in the jury action. It is still an equitable issue to be disposed of according to the principles of equity, and

22For a discussion of the leading cases on these matters see Walsh, Equity (1930) 107-116, with frequent references to Clark, Code Pleading (1928).

23King v. Internat. Lumber Co., (1914) 156 Minn. 494, 195 N. W. 451; Citizens Trust Co. v. Goring, (1921) 288 Mo. 505, 232 S. W. 996; Susquehanna S. S. Co. v. A. A. Anderson & Co., (1925) 239 N. Y. 285, 146 N. E. 381. These cases admit that equitable counterclaims and equitable issues where both legal and equitable relief are sought are triable to the court. See additional cases cited in Clark, Code Pleading (1928) 65, note 73, also ibid., 61, 62, note 70, for a long list of cases from many code states holding that the trial of equitable defenses in these cases is to the court as equitable issues.
the form of trial continues unchanged exactly as do the substantive
doctrines involved. This is all in entire accord with code merger.
Law issues are tried to the jury, and equity issues are tried to the
court without change, but combining both in the same trial, saving
the expense and delay of separate trials and eliminating conflict
between law and equity.

RESULTS OF THE MERGER OF LAW AND EQUITY

I need not repeat what I have already said on the merger of
the two systems by the adoption at law of equity rules through the
development of assumpsit, of the action on the case in fraud and
deceit, the assignability of choses in action not purely personal,
the lien theory of mortgages, the refusal to enforce penalties in
contract cases, and the adoption at law of the principle of equitable
estoppel. The enrichment of the law by these developments is
self-evident. Allowing the recovery of damages as incident to
the action in equity for an injunction against waste, continuous
and repeated trespasses and nuisances has resulted in the bringing
of these actions almost exclusively in equity. Complete relief is
secured in a single action, including an injunction restraining
further wrongful acts and the damages sustained up to the grant-
ing of the injunction. The separate action at law has become al-
most obsolete in these cases. Merger to that extent prevails by
decision in most of the non-code states. In others, as in New
Jersey, damages as such may not be recoverable unless they can
be brought under some principle of equitable accounting. In code
states no such question can arise.

Code merger ends the former extensive jurisdiction in equity
to restrain actions at law so that equities may be enforced, as well
as suits in equity for temporary injunctions in ejectment and other
suits at law. Since the litigant is always in equity under the merged
system, he may secure his injunction pendente lite in the principal
action, without the bringing of a separate suit in equity.

In trespass and nuisance cases the old rule that a disputed
question of title to the land involved, or a dispute as to the exis-
tence of a legal nuisance at law, must first be settled by an action
at law before equity will grant an injunction, except as an injunc-
tion pendente lite, has been eliminated in code states. Since the
court is a court of both law and equity bound to determine all
questions, legal and equitable, involved in the controversy, there
can be no question in code states that this ancient relic of a former time, which never had any valid justification, no longer exists.\textsuperscript{24}

A few additional situations may be referred to very briefly as illustrating how code merger operates to apply the correcting operation of equitable principles directly to the controversies involved, in effect changing the legal rule. A parol reservation of fixtures, crops, growing trees, dead and down timber or other parts of the realty, will not be allowed to modify a deed. Since the deed may be reformed in equity to give effect to the actual intent of the parties, correcting the mistake arising out of the omission of the reservation from the deed, in an action at law either by or against the grantor turning on his right to the things so reserved, he may plead and prove facts on which equity would "reform" the deed, in that way defeating the legal rule. In many cases of unilateral mistake in contract the party affected by the mistake will be affirmatively relieved in equity from liability on the contract if the other party has not changed his position, a serious interference with the common law doctrine of mutual assent which may be set up in an action at law on the contract. Of course, under code merger mutual mistake may always be set up as an equitable defense or counterclaim in the law action, or it may be set up by the plaintiff in an action to enforce the contract which the parties really intended. In an action of ejectment to enforce a forfeiture of a tenancy for nonpayment of rent or taxes, the breach involving merely the payment of money, the defendant may defend by paying the amount due with interest and costs, since equity relieves him from the forfeiture in such cases. These are merely samples of the effect of code merger on actions at law in the many cases in which the application of equitable rules changes the result of the action. The Nebraska case of a mortgage of goods to be subsequently acquired, discussed by Dean Pound, in the article already referred to, is simply another illustration, the equitable mortgage doctrine disposing of the case and overthrowing the legal rule, if the court had known and applied the controlling law.

Failure to understand and apply code merger was responsible for the continuation of the rule that a judgment at law must be recovered and an execution thereon be returned unsatisfied before an action can be brought in equity by the creditor, to set aside a conveyance in fraud of creditors. This has been corrected by

\textsuperscript{24} For the trespass cases on this question see Walsh, Equity (1930) 164; for the nuisance cases, ibid., 176, 177.
the Uniform Fraudulent Conveyance Act, now adopted in New York and other states.

**Contributions of Modern Equity to the Law's Growth**

Next in importance to the merger of law and equity as a factor in the development of modern law generally must be placed the development of equitable protection of business rights and interests. The rights involved are of course legal rights. Wrongs of this kind interfere directly with a man's right to make a living, and the recovery of damages periodically at law is so obviously inadequate as a substitute for this right that this development of the law has been almost exclusively in equity, the relief granted including an injunction restraining the wrong and the awarding of damages sustained up to the granting of the decree.

There is no space here for more than the most perfunctory reference to this development. It is a recent development. A beginning was made in a trade-mark case decided in England in the latter part of the eighteenth century. One of the earliest cases of this kind in the United States was decided in 1844. From these small beginnings the law of unfair competition and protection of business rights has developed into one of the most extensive and important divisions of modern law. Most of this development has been made in the last fifty years, and much that is most significant has been relatively recent. That trade-marks, trade names and business secrets are not property in themselves and are of value only as incidents of the business with which they are associated, and that the tort involved in their wrongful use is the stealing of that business by unfair competition, is law established by a great number of modern cases. In cases of direct injuries to business the determination of what is and what is not unfair competition has been a difficult problem involving the balancing of competition essential to business practice as against destruction of business interests by unfair means. The question of what is fair and unfair in business practice has been determined by applying the test of the average man, very much as in cases of negligence and nuisance. The element of fairness is peculiarly within the sphere of equitable action. But the judge in equity assumes no arbitrary power in these cases based on his individual ideas of right and wrong. He expresses or seeks to express a standard of right which is measured by the general standards of

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For a review of the cases on these topics see Walsh, Equity (1930) 223-234.
the community, in terms of the average person, so that the greatest freedom of action may be given to every person in his business without serious danger of its destruction by the unfair practices of others.

Cases involving the relations between capital and labor show the most striking development of law accomplished by equity in modern times. What is fair and unfair in the competition between employers and employed is determined in accordance with the standard of the average man. We have seen earlier narrow cases sharply limiting the rights of labor to assert its rights by collective action gradually giving way to more enlightened views. We have seen the dissenting opinions of Holmes and Brandeis finally becoming the law in most states. It seems a pity that this development should have been carried to such extremes by statutes such as the Norris-La Guardia Act and similar statutes in many states. The best interests of labor are tied up with the best interests of capital. At the time these statutes were enacted labor had attained a recognition of its rights in equity in most states, and even the federal courts were not far behind. Holmes and Brandeis were winning over the Supreme Court to the broad views of social progress involved in collective bargaining. It is exceedingly doubtful if the interference of politicians by the enactment of these extremely partisan statutes will be as beneficial to labor as would a more orderly development through decisions. There can be little doubt that the public interest has suffered through this interference with normal development of equitable relief.26

The development in equity of the protection by injunction of public or social rights is also a product of modern equity. Injunctions against public nuisances, usually in the form of purprestures interfering with navigable waters or other public ways or places, were exceedingly few prior to the nineteenth century. They were based on the protection of property rights of the state, though the real purpose was to protect the rights of enjoyment of the public in their use. It was a short and easy step to the restraint of public nuisances dangerous to the physical health of the community though no property right was involved, fully established under the modern cases. The next step was to restrain as public nuisances the carrying on of any activity which, seriously endangered public

26Walsh, Equity (1930) 238-250, contains a review of the development of labor law, with a discussion and citation of the more important cases. See ibid., 251-261, as to the superiority of the courts over politicians in settling these problems.
morals. Prevention by injunction is so superior in these cases to punishment under the criminal law after the harm to the public has been done, as to make self-evident the inadequacy of the remedy at law. Equity does not interfere with punishment of the offender by the criminal law in these cases. The purpose is to prevent ir-reparable injury to the public by restraining the wrongdoer. The latent power of equity to shape and develop new law on a higher plane of reason and conscience, and with an increased effectiveness to meet human needs has no better expression than in this development.27

The power of equity to shake off the incubus of an outworn or mistaken doctrine is illustrated by developments in the later cases in which the courts of several states have questioned the slogan: Equity protects property rights only. In the usual cases of purely personal torts such as assaults, negligence and false imprisonment, injunctions are not necessary or expedient. But wherever the remedy of damages is definitely inferior to prevention of the wrong, as it very clearly is in threatened or continued libels published maliciously to injure their victim, there seems to be no good reason why equity should not intervene. In England injunctions against libels are granted where the facts establish the libel and the absence of truth or privilege as defenses so completely that a verdict to the contrary would be overruled. The American cases have not as yet followed this lead, and have refused to act unless an injury to business is directly involved, such as a malicious libel as to the validity of a patent, or the malicious use of libels of the plaintiff's business by employees in a strike. The step forward to the position of the English cases is a short one and may come at any time.

The courts of several states have declared that they would protect purely personal rights by injunction where damages would be inadequate and the remedy would be expedient and effective, and in some cases they have enjoined interferences with purely personal rights. Enough progress has been made to justify the discarding of the doctrine that property rights only will be protected in equity, leaving the courts free to extend specific relief here as in other cases in which the remedy of damages is inadequate and specific relief would be expedient.

In the field of specific performance of contract the early vigor which was shown by the Chancellor in the fifteenth century has not

27See Walsh, Equity (1930) 198-209.
been conspicuous in modern developments. Some progress has been made by the Uniform Sales Act toward more liberality in enforcing specific performance of contracts for the sale or purchase of chattels, but the courts have hindered rather than helped this development. The extensive and recent development of arbitration contracts and their enforcement has been by legislation made necessary by weak or mistaken decisions of the courts. Modern cases, however, have greatly extended specific performance of contracts to make improvements or to perform affirmative acts of any kind extending over a considerable period where special reasons exist requiring specific performance instead of the recovery of damages after performance of the work by another contractor. Not much remains of the old notion that the Chancellor must supervise such performance either personally or through a representative.

The doctrine of mutuality of performance and the elimination of Fry's mistaken notion of mutuality of remedy as essential to specific performance have been put on a firm and well-reasoned basis by the later cases. There is still much room for improvement in many states in the law covering performance of conditions in contract express or implied. There can be little doubt that the doctrine of substantial performance of conditions in contract, now established to a considerable extent at law, originated in equity.

The refusal of many courts to permit a defaulting purchaser of land to recover payments made by him though they greatly exceed any damages resulting, and even though no damages arose from his breach, is a definite failure of the merged procedure to accomplish a result which equitable relief against forfeiture clearly demands.

Late cases in several states reject the generally accepted doctrine that the risk of loss falls on the purchaser for losses by fire or otherwise suffered prior to the closing of the contract, though in other respects the same courts accept and apply the vendor-purchaser relation doctrine that the vendor holds the title as trustee for the purchaser and as security for the payment of the purchase price. Professor Williston's position that the risk of loss falls on the purchaser in such cases only when there has been a transfer of possession to him, has been adopted in the Uniform Purchasers and Vendors Risk Act, adopted by the Commission in 1935, and enacted substantially in New York as sec. 240a of the Real Property
Law. There are some practical reasons for this insistence on change of possession, but no legal principle requires it, and the cases are strongly against it. The statutory change is a compromise which in the usual case of non-transfer of possession eliminates the purchaser's risk of loss, and therefore has the merit of according with the understanding of the average layman.

Law school teachers still disagree as to the basis of the vendor-purchaser relation. Professor Langdell's position that the doctrine of equitable conversion has no application prior to the date of closing under the contract seems unassailable, but this does not mean that the implied trust between vendor and purchaser, admittedly established law, is not justified. The implied trust which equity enforces is based on the intent of the parties that the purchaser shall become in substance owner of the property in rem, subject to payment of the price, assuring to him possession and enjoyment in the future on the closing of title. The retention of possession and income by the vendor during the interval is entirely consistent with this, which effectuates the purchaser's right to specific performance.

On the whole we may fairly say that equity has applied equitable principles in specific performance cases without any loss arising out of the merger of law and equity; that important progress to better law considerably extending specific relief has been accomplished under the modern cases.

Statutes have been necessary to establish declaratory judgments, but equity led the way by giving relief of this sort in declaring the existence of equitable mortgages and other liens prior to their enforcement, in providing for the collection of debts of a decedent falling due years after his death, and in the construction of wills prior to the carrying out of their provisions. The entire doctrine of declaratory judgments might have been developed in equity without the aid of statutes, but the fact that equity cases pointed the way to this statutory development is anything but evidence of decadence.

In interpleader, equity developed in the early cases much narrower and technical law, most of which has been removed by modern decisions. Interpleader statutes substituting motions for actions in these cases have greatly simplified and extended this important and characteristic form of equitable relief.

We may fairly conclude that modern equity, instead of being decadent, has tremendously extended its effectiveness as the
spiritual principle or soul of the law in remedying its shortcomings, correcting its mistakes and leading in its reform by the establishment of broad principles of social justice under merger of law and equity. The history of the origin and development of equity and of its relation to the law is absolutely indispensable to any real understanding of it. To consider it piecemeal as part of the law of contract, tort, property, landlord and tenant, and the like is largely to defeat any real understanding of it and of its relation to the law. Code merger makes equity far more important than before. Instead of eliminating equity or converting it into law, code merger has brought it into the modern legal system freed of the old restraints, with all its principles and practices unchanged and unimpaired, and operating directly in all cases. We should continue to teach equity as a distinct and separate course if we are to understand its history and its nature. The great danger of teaching it in a scattered way in the other courses is that the spirit of equity may be lost in the shuffle and equity rules may be taught narrowly as so many additional legal rules. This danger of losing the spirit of equity in applying it as part of the law is the substance of what Dean Pound warned against in the article with which our discussion opened.