THE DECADENCE OF EQUITY.[1]

It may surprise at first thought in this era of liberal law, when the equity dockets of our courts are overloaded and some even think we are in danger of being governed by courts of equity, that any one should assert there is such a phenomenon as the decadence of equity. But we all see and know that the separate system of equity has been for a long time on the decline, and so much of the substance of law has always been wrapped up in procedure that we should be justified in anticipating grave effects. My purpose is to show that these effects have accrued and are accruing, and that the decadence of equity as a system is involving the decadence of a substantial element in our legal institutions.

Everywhere we find two antagonistic ideas at work in the administration of justice—the technical and the discretionary. These might almost be called the legal and the anti-legal; with entire accuracy we may term them the legal and the pre-legal. For it we bear in mind that the object of law is the administration of justice, we see that that object may be accomplished, and often is, without law. Whether or not we agree with Markby that the judicial enunciation of a new rule and its application to a case *ex post facto* is of that character,[2] in archaic communities, past and present, justice without law is the normal type. Before the law, we have justice without law; and after the law and during the evolution of law we still have it under the name of discretion, or natural justice, or equity and good conscience, as an anti-legal element. Without entangling ourselves in the discussion as to the definition of law, we may say that laws are general rules recognized or enforced in the administration of justice.[3] But the very fact that laws are general rules, based on abstraction and the disregard of the variable and less material elements in affairs, makes them mechanical in their operation. A mechanism is bound in nature to act mechanically, and not according to the requirements of a particular case. Com-

[1] Read before the third annual meeting of the Nebraska State Bar Association.

[2] Elements of Law, § 16.

[3] Salmond, First Principles of Jurisprudence, 77. *Cf.* Gray, 6 Harv. Law Rev. 24. Pollock and Maitland, Hist. Engl. Law, Vol. 1, p. 25.

mon experience teaches us that, while laws tend to preserve and produce what is just and right in common estimation, "cases occur in which, owing to its necessary mechanical operation, the moral law is violated and broken by the positive law."[1] As Salmond puts it,[2] "We can never be sure in applying a general rule to a particular case, the eliminated elements may not be material; and if, peradventure, they are material, and we apply the general rule without regard to them, we fall into error. This is the great objection to the substitution of law for judicial discretion. The more general the rule, the greater is the tendency to error. But, on the other hand, the more guarded, qualified, and restricted the rule, the greater its complexity and the difficulties of its application." Between these difficulties, we seek to steer a middle course; but all the circumstances of modern life draw us to the strictly legal side, and the judge, bound hand and foot by a code and the maxim that that law is best which leaves least to the discretion of the judge, is our natural goal, not the oriental cadi administering justice at the city gate by the light of nature tempered by the state of his digestion for the time being. Although the researches of Sir Henry Maine[3] have shown us that equity is a stage in the growth of law whereby it is expanded and liberalized after the period of fossilization, as it were, that inevitably follows primitive struggles toward certainty and definite statement, we must not forget that it is also a necessary reaction in certain periods of growth towards justice without law. Clark tells us that "reasonable modification of existing law" is the fundamental idea of equity,[4] and discretionary interference with the operation of general rules in order to do justice in particular cases was obviously the original theory.[5]

[1] Paulsen, Ethics (Thilly's Tr.), 629.

[2] First Principles of Jurisprudence, 92.

[3] Ancient Law, ch. 2.

[4] Practical Jurisprudence, pt. 2, ch. 15.

[5] Doctor and Student, pt. 1, ch. 16, 45. Spence, Hist. Eq. Jur. Ct. Ch., bk. 2, ch. 1. Where there is no separate system of equity, there may be, nevertheless, a doctrine of permissible relaxation of rules with reference to the requirements of individual cases under certain circumstances. Ahrens, Cours de Droit Naturel (8 Ed.), Vol. 1, p. 177. Lasson, Rechtsphilosophie, pp. 238–39. This is often treated as a mere matter of interpretation, since the principle is concerned with the application of the rules only. Grotius, II, 16, 26. Trendelenburg, Naturrecht, § 83.

Indeed, we may refer its origin to the exercise of that same power of dispensing with the law in particular cases for particular reasons that afterwards brought about the downfall of the Stuarts. Equity, then, started as a reaction towards justice without law [1] and in its development became a system wherein the element of judicial discretion was given greater play, and the circumstances of particular cases were more attended to than the fixety of legal rules would permit. But as soon as it began to be a system, for the reasons already indicated, the scope of discretion began to narrow. A good view of this process may be had by comparing the results reached by various writers who have essayed to define equity, all of whom are in a measure right, for they have merely seized on different stages as the bases of their definitions. Maine's definition of equity has been criticised in so far as it refers to "a body of rules" on the ground that "the true and original distinction between law and equity is one, not between two conflicting bodies of rules, but between a system of judicial administration based on fixed rules and a competing system governed solely by judicial discretion." [2] But Maine's definition simply errs in being too exclusively a definition of developed equity. If we take Clark's statement that equity is "the judicial modification or supplementing of existing rules of law by reference to current morality," [3] follow it by Maine's statement that it is a "body of rules, existing by the side of the existing civil law and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles," [4] and add that it becomes a fixed body of rules admitting of somewhat greater freedom of judicial action, for historical reasons administered in certain fashions and for certain cases only, we shall have traced fairly well the steps in the evolution from the original equity to the modern system. And through it all, under one name or another, we shall see the idea of wider discretion, greater freedom of application, more elasticity in view of particular cases, or, to quote once more from Clark, of "reasonable view of the circumstances

[1] Salmond, First Principles of Jurisp., p. 93. [2] Salmond, l. c.

[3] Practical Jurisprudence, l. c. [4] Anc. Law, p. 27.

of the case."[1] In truth, Blackstone was not all in error, much as our modern text writers differ with him, when he gave equity the Grotian definition of "the correction of that wherein the law (by reason of its universality) is deficient."[2]

But when we have come to a *system* of judicial discretion, we are back very near to our starting point. The reaction toward justice without law has long spent itself, and the powerful forces that make for law have drawn the pendulum back. The anti-legal element has come to be a minimum once more, and the work of liberalization being accomplished, the system whereby it was brought about remains merely as an accident of judicial administration, requiring men for historical reasons to seek relief here rather than there, or in this way rather than that, without sensibly affecting the substance of the rules applied. So that while, despite the analysis of Austin[3] and the historical investigations of Maine, there are still those who think "the fundamental distinction between law and equity" is "as eternal as the difference between rights *in rem* and rights *in personam*,"[4] the growing opinion among jurists is probably expressed by Judge Dillon when he says: "The separation of what we call equity from law was originally accidental, or at any rate was unnecessary; and the development of an independent system of equitable rights and remedies is anomalous and rests upon no principle. The continued existence of these two sets of rights and remedies is not only unnecessary, but its inevitable effect is to produce confusion and conflict. The existing diversity of rights and remedies must disappear and be replaced by a uniform system of rights as well as remedies."[5] We can not well doubt that the needs of the future will bring this about. And yet, so far as such an event involves, as I shall endeavor to show that it will, the undue elimination of the element of judicial discretion, the result can not be permanent. The conflict between the two ideas, justice according

[1] Practical Jurisprudence, p. 216. Bentham has called attention to the essentially arbitrary element involved in these ideas. Prin. Morals and Legislation, p. 17, n. 1.

[2] Bl. Comm. Vol. 1, p. 61. [3] Jurisp., lect. 36.

[4] 4 Harv. Law Rev., pages 394–95.

[5] Dillon, Laws and Jurisp. Eng. and Am., p. 386.

to law and justice without law, will not down. To the extent that equity represents the latter idea, Dean Ames is perfectly right in calling it "fundamental" and "eternal." It was remarked long ago that law and equity are in continual progression, that "a part of what is now strict law was formerly considered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."[1] But in becoming law a principle of equity loses its quality of elasticity. Hence we may look, not unreasonably, for an action and reaction from law to equity behind this progression. To quote from Amos, "The alternative appearances of law and of equity as the mutual checks and corrections of one another are lasting and not transitory phenomena. However severely and peremptorily equity, and all the arbitrary judicial power implied in its exercise at particular epochs, may be controlled and discredited, there is reason to think its resurrection must constantly be waited for. So soon as a system of law becomes reduced to completeness of outward form, it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand. The invariable reaction against this stage is manifested in a progressive extension, modification, or complete suspension of the strict legal rule into which the once equitable principle has gradually been contracted."[2] We are dealing, however, with the present and immediate future. Although we may believe, on whatever grounds, in a resurrection of equity in the remote future, the present is a period of law. Commercial and industrial development, as Montesquieu saw in his day,[3] make for certainty. The commercial world demands rules. No man makes large investments trusting to uniform exercise of discretion. It may be that the judge's decision "will be governed by 'the social standard of justice,' but the essential point is that no human being can tell how the

[1] Millar, Historical View of Eng. Govt., quoted in Spence, Hist. Eq. Jur. Ct. Ch., Vol. 1, p. 322, n. a.

[2] Amos, Science of Law, pages 57–58. Lord Hardwicke seems to have had much the same idea (see Kerly, Hist. Eq., pages 175–76), and Spence makes a suggestion in the same direction, Hist. Eq. Jur. Ct. Ch., Vol. 1, page 416.

[3] L'Esprit des Lois, bk. 20, ch. 18.

social standard of justice will work on that judge's mind before the judgment is rendered."[1] Hence the inevitable development from the roguish equity of which Selden spoke, which varied with the length of the Chancellor's foot,[2] to Lord Eldon's equity, which was made up of doctrines "as well settled and made as uniform *almost* as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case."[3] But one more step, namely to *apply* the principles as fixedly "almost" as those of the common law are applied, and the days of a living equity are passed. Before I come to this stage, upon which I believe we have entered, let me first call attention to the agencies by which the development and decadence of equity as a system have been brought about, that their operation may be marked in modern equity. These agencies I take to be five: (1) The introduction of the common law theory of binding precedents and resulting case-law equity; (2) as a legitimate consequence, the crystallization of equity culminating under Lord Eldon; (3) the adoption of equitable actions and equitable defenses in the common law; (4) the conjunction of legal and equitable jurisdiction in the same courts, so general in America; and (5) the abolition of the distinction between law and equity in procedure and the resulting power of courts to administer both or either in the same action. The first of these is the root of all that follow. The very thing that made equity a system must in the end prove fatal to it. In the very act of becoming a system, it becomes legalized, and in becoming merely a competing system of law insures its ultimate downfall.[4] Well might Falstaff say to an Elizabethan audience "there's no equity stirring" when precedents were beginning to be cited in the Court of Chancery.[5] The immediate beginning of the end was the adoption of equitable principles

[1] Jabez Fox in 14 Harv. Law Rev., 43.

[2] Selden Table Talk, tit. Equity.

[3] Gee *v.* Pritchard (1818) 2 Swanst. 402.

[4] Lord Esher's expression "equity law" suggests the nature of the change. See A Century of Law Reform, p. 196.

[5] See Phelps, Falstaff and Equity. Compare also the effects of the doctrine of binding precedents upon the discretion of the common law courts. Pollock and Maitland, Hist. Engl. Law, Vol. 1, p. 169.

and introduction of equitable actions and defenses in the common law. This revolution, almost coincident with the crystallization of equity under Eldon and his immediate predecessors, did away with all real need of a separate *system*, while at the same time it merely infused more liberal and enlightened rules into the law, and left the element of discretion as small as ever. And although Judge Maxwell has told us that "codes do not change principles,"[1] I venture to think that a court, which no longer sees anything about a principle, which is before it to be applied, to indicate that it demands greater laxity in its application than the ordinary rules of law, will be very apt to apply one like another, and all in the legal, not the equitable way. The successive operation of these legalizing agencies has left but one step for the immediate future, namely, a complete absorption or blending of the two systems into one, and such an event is now commonly predicted by jurists.[2]

Without speculating upon the results of this impending fusion of the substance of law and equity, let us see some results already manifest in the decadence of equity as a system. The great impairment of the characteristic and fundamental element of discretion, involved in the growth and crystallization of a *system* of equity, has been remarked. But are we to say that modern equity has lost all of its real function; that it is only a historical appendage, something a little better than a vermiform appendix of the law, which the legislative surgeon must sooner or later remove? There are many that think so. In a recent history of equity we read the following statement of the causes leading to the fusion of the courts of law and equity in England: "The discretionary powers of the equity judges, as we have seen, had long since vanished, and the question now, therefore, was whether one-half of the rules affecting a class of subjects should be administered by one judge and the rest by another, or whether each should administer the whole."[3] Another recent writer says that the "distinction of legal systems was in truth only a division of legal subjects," and that "the real effect of the profession of different principles

[1] Code Pleading, Preface.

[2] Dillon, Laws and Jurisp. Eng. and Am., p. 255.

[3] Kerly, History of Equity, p. 292.

of law by different courts was to distinguish and appropriate different classes of business."[1] In other words, there had come to be merely a specialization of jurisdiction, each dealing with its special class of cases in substantially the same way. In America we have had more or less generally one set of courts with both law and equity powers from an early period, so that we could hardly take this view as it is stated. But the substance of the assertion is true. Prior to the fusion of legal and equitable procedure, the symptoms of appendicitis had appeared. The law had cast off its medieval shell. It had become modern. Its rules had become liberal, and the only grounds of complaint, as far as its substance was concerned, were with reference to minor details or based on the inevitable results of the mechanical action of any legal system.[2] On the other. hand, equity had developed refinements and technical doctrines and was operating at some points no less mechanically than the law. A remarkable example is furnished by the English Judicial Trustees' Act. The principles of equity as to liability of trustees had become so well settled and were so fixed in their application that all room for discretion in a subject particularly requiring it was gone. As a result, unconscionable beneficiaries were able to use the principles of equity to work injustice until the legislature was compelled to intervene. When a statute is necessary to make equity do equity and to prevent its doctrines from working wrong and oppression, we may well speak of decadence in this connection. We have come a long way from the Chancellor who said that the law of his court was in no wise different from the law of God.[3] This is not a unique example. One might mention precatory trusts, a doctrine of "officious kindness," as James, L. J., called it, which created trusts where they were never intended, and, as trusts became technical and one might almost say legal, were attended with mischievous consequences. If it be said that we are happily rid of these, instances of the hair-

[1] Sir F. Jeune in 11 Law Quarterly Rev., at p. 14, 15.

[2] Moreover, the law preserved a certain element of discretion through the operation of the jury system. Every practitioner has had occasion to feel the force of Coke's remark that "the jury are chancellors." Hixt v. Goates (1616) 1 Rolle 257.

[3] Year Book, 4 Hen. VII, f. 5.

splitting propensities and the casuistry of modern equity[1] are not far to seek. Only a short time ago Lord Blackburn, one of the greatest of modern judges, had occasion to say of a decision: "It seems to be justice; but whether it is *technical equity* is a question which I think is not now before the house."[2] In another case, hardly ten years old, Lord Bramwell said: "Equity allows itself to be circumvented when it interferes with people's bargains. What Lord Compton has been charged is about ten per cent on the sum borrowed with compound interest. I suppose at his death the sum due from him was about £20,000. If he had agreed to pay the £10,000 and ten per cent. interest and there had been no agreement to insure, the appellants would have laid out half the annual amount for insurance, and on his death kept the sums insured. Can they be considered to have done that or its equivalent? *The resulting figures would have been the same.* I think not. *The rules of equity may be evaded, but must not be infringed.*"[3] One can not read this without feeling that the court was conscious of applying a technical rule, which it had no intention of carrying a whit beyond its letter. It was looking at the form of the transaction, not the intention of the parties, and it said to them: "Had you carried out your intention in another way, which would have led to the same result, the technical rule of equity would have been evaded." We can not wonder that one of the greatest of modern jurists speaks of equity as an artificial system and charges it with "excessive subtleties and refinements."[4]

But we must distinguish the refinements of equity which were concomitants of its so-called crystallization from those perversions which are resulting from its absorption into law and from the fusion of law and equity in procedure. Undeniably equity has been able to get rid of some of the former. Pollock tells us that "the Court of Appeal has been working hard of late years to bring equity more into accordance

[1] These terms have been applied by the learned editor of the Law Quarterly Rev. more than once in commenting on recent cases in the Chancery Division.

[2] Brooks v. Blackburn Benefit Soc. (1884) 9 App. Cas. 866.

[3] Marquess of Northampton v. Salt [1892] A. C. 1.

[4] Pollock, Essays in Jurisp. and Eth. p. 73.

with common sense."[1] The fusion of law and equity may have helped in this, as it has certainly helped the law, by obviating the circuitous and artificial methods forced upon equity by its history. The fact that equity had to employ such fictions as constructive fraud and constructive trust to do its work, gave an artificial and pedantic cast to many of its doctrines.[2] Just as equitable remedies engrafted upon common law actions have borne "equitable fruit,"[3] legal actions, made available to equitable claims, have borne the legal fruit of direct and straightforward proceedings. Such is the influence of procedure on the substance of the law, that this brushing away of the circuitous methods of equity is a great gain to the system. But the fusion of law and equity has developed new difficulties, and there are not wanting indications of serious results.

It is remarkable that of the many codes and statutes which provide for the so-called fusion of law and equity so few have provided for the supremacy of the equitable rule in case of conflict. Such a provision is contained in the English Judicature Act and in the Connecticut Practice Act of 1878. Of course we all assume that the equitable rule must prevail in such cases,[4] statute or no statute. But the fact remains that in practice this has not always been the event. Disappearance of equitable rules, however, has not been the only untoward result. Examination of the current reports will disclose four tendencies in the amalgamated system: (1) legal rules superseding equitable rules in certain cases; (2) equitable rules, or portions of them, disappearing; (3) equitable principles becoming hard and fast and legal in their application; (4) equitable rules becoming adopted in such way as to confuse instead of supplement the legal rule. I shall endeavor to give a few examples under each head.

Nebraska furnishes a conspicuous example of the superseding of an equitable rule by a legal rule. It was an old, well-settled, and eminently characteristic rule of the common law that a man could not grant or charge anything which he did not then have. This rule operated in many ways. A will being regarded at common law as a species of conveyance, it had the effect of preventing devises of

[1] l. c. 74. [2] See Pollock, Law of Fraud in British India, p. 41.
[3] Austin Abbott in 7 Harv. Law Rev. 77. [4] Dillon, l. c. 368.

after-acquired realty, and compelled legislative interference. It was applied to sales and mortgages of personality, and required the interference of equity. The equitable doctrine was that the assignment of or charge upon a future interest was a present contract to take effect and attach as soon as the *res* came into being. Under that view of the matter, there was no difficulty in enforcing the assignment of a mere expectancy, when once that expectancy had materialized. Hence in equity between the parties thereto such mortgages, transfers, or assignments were upheld. In Lamphere *v.* Lowe, [1] the question came before the Supreme Court of this State. Had the action been in replevin or trover, or of some *ultra*-legal character, we might have understood a judicial oversight of the equitable doctrine. But, of all possible proceedings, it was a suit for an injunction, in which a decree had been rendered recognizing the lien. In the opinion of the court, reversing this decree, no mention of the equitable rule is made. The rule of the common law is laid down in all its rigor, and we are cited to Bacon's Abridgment, a case from Maule & Selwyn, and four early cases from Massachusetts, a jurisdiction where for a long time equity had no foothold. No text on equity and no equity report is referred to. A succession of cases to which I need not refer has rooted this rule of the law firmly in our jurisprudence and I am informed that several of the district courts have even held that contracts to create charges upon or to deal with things not yet in existence are of no effect as contracts. It has been applied also to provisions in a lease whereby a landlord sought to secure a share of the crop reserved as rent. [2] Our State is not alone in this matter. In Kansas it was held recently that a mortgage of clay in a bank and of bricks to be made therefrom created no lien on the bricks. [3] A reviewer in one of the periodicals says in commenting on the latter case that "the whole subject should be left to equity." [4] But is it not left to equity, under our codes, when it comes into court? Where there are separate courts, or where law and equity are administered in separate proceedings, it is easy

[1] (1873) 3 Neb. 131. [2] Brown v. Neilson (1900) 61 Neb. 765.
[3] Townsend v. Allen (1901) 62 Kan. 311, 62 Pac. 1008.
[4] 14 Harv. Law Rev. 626.

to say that a subject should be left to equity. Under the Code, there is only a choice of rules. The result shows how dangerous this may be to many just and sound rules of equity. The instance I have given is not unique. Before I pass to the next head, let me give one more. It is a fundamental rule of equity that one who wrongfully holds trust funds with knowledge of their trust character is a constructive trustee for the beneficiary. In equity the property is in a sense that of the beneficiary, and under the Code one would expect, if anything, to see the circuitous method of constructive trust yielding to some more direct enforcement of liability. What shall we say, then, when we find a legal principle asserted to defeat it altogether? In a recent case, [1] a servant of the trustee wilfully misapplied trust funds in his hands. Instead of proceeding on the theory of constructive trust, the court held that he was not personally liable for the reason that a servant can not have possession.

The second head, disappearance of equitable rules or of portions of them, is closely connected with that just considered. Here, again, let me start with our own State. In Hart *v.* Dogge[2] the second paragraph of the syllabus of the court reads: "Where property which has been purchased with money held in fraud of creditors advances in value beyond the legal rate of interest, the creditors, nevertheless in subjecting the property, will be restricted to the purchase price with legal interest thereon." One can see that the creditors ought not to have the property, but only a charge thereon to the amount of their debts. But to say that the trustee could speculate with the trust fund, and, when the speculation resulted favorably, pocket the proceeds earned with creditors' money seems startling. I am not here, however, to criticise the decision, but to call attention to the theory on which it proceeds, as illustrating the disappearance of equitable doctrines. The court does not work out its conclusion on the equitable notion of a trust. It takes the liability of the property purchased with the money held in fraud of creditors as a settled rule, and pro-

[1] Hodgson v. St. Paul Plow Co. (1899) 78 Minn. 172, 80 N. W. 956.
[2] (1889) 27 Neb. 256.

ceeds to apply it as it would any legal rule. The defendant had $5,000 of the fraudulent debtor's money. He bought the land with it. The law is that creditors may follow the money and charge the land. Very well. The land will be charged with the payment of the $5,000 and lawful interest. The method is purely legal, and that, too, in a creditors' suit. The best of courts may make mistakes. But such modes of handling the doctrines of equity are far more dangerous than any mistakes could be. By merely treating an equitable doctrine as a legal rule, the principle as to speculation in trust funds is completely eliminated. Nor is this a unique case in our reports. Many courts have had difficulties over the case of a devisee, heir, or beneficiary killing the testator, ancestor, or insured and attempting to profit thereby. I shall have occasion to speak of some of these decisions again in another connection. But our case of Shellenbarger *v.* Ransom[1] illustrates the point we are now considering. In the first ruling on that case, the court read an implied exception into the statute of descents. In the second it held, rightly enough one would think, that no power to make such exceptions had been conferred upon the judiciary. In neither case did the solution, obvious to the equity lawyer, that the legal title had passed but that the wrongdoer had made himself a constructive trustee, suggest itself. Another excellent instance of the effects of the reformed procedure in causing courts to overlook equitable methods and doctrines is furnished by a late case in Wyoming.[2] Plaintiff had a mortgage on some sheep. Defendant "instigated," so the report runs, a sale of the sheep by the mortgagor and obtained the money to apply on a debt due himself. The court held him liable as for conversion, and charged him, not with what he received, but with the value of the flock. The facts pleaded and proved determined what rules should be applied, and the court was at full liberty to make the defendant a constructive trustee, hold him for the proceeds that came into his hands, and thus reach a just result. It is evident that the whole equitable structure built upon the idea of constructive trust is crumbling away. Under the old procedure,

[1] (1891) 31 Neb. 61, 41 Neb. 631.

[2] Cone *v.* Ivinson (1893) 4 Wyo. 203, 35 Pac. 933.

such overlookings of the equitable doctrines applicable to important cases could not have occurred.

The next point, that equitable principles are becoming hard and fast and legal in their application under the reformed procedure, has received some illustration from what has gone before. A conspicuous example of the acquisition of a legal shell by an equitable principle is furnished by the law of estoppel. We now regard precedent as at least of equal weight with the equities of the case on questions of equitable estoppel. It may be said that estoppel is an equitable principle borrowed by the law, and that its fate is an incident of the general absorption of rules of equity by the law. But other equitable doctrines are going the same way. If any doctrine is distinctly equitable, it is that equity regards that as done which ought to be done. What shall we say, then, when this principle is consciously applied, as a fixed rule of law, to reach an inequitable result?[1] Specific performance is still in the special field of equity, and some lingering remnants of discretionary power remain in connection with it. What shall we say, then, to a court of the highest standing deciding a case of specific performance on what an acute critic has justly termed "a good point forensically," but without "much substance"?[2] But let me come nearer home. It is a most salutary principle of equity to hold trustees and persons in a fiduciary relation strictly to their duty. Starting from this principle, our court has established the absolute rule that a preference by a corporation of a debt upon which the officers or directors are liable as sureties is of no effect.[3] Certainty is a great thing, and corporate officers and creditors now know exactly where they stand. Suppose, however, that twenty-five per cent. of the capital stock of a corporation remained unpaid. Zealous directors, in the interest of all concerned, to procure money to run the corporate business, became sureties on the company's paper. It fails. Those who would not help the corporation in its difficulties are to be exonerated on their stockholders' lia-

[1] Foster *v.* Reeves [1892] 2 Q. B. 255.

[2] Hope *v.* Walter [1900] 1 Ch. 257. See 16 Law Quarterly Rev. 108.

[3] National Wall Paper Co. *v.* Columbia National Bank (1901) 63 Neb. 234, 88 N. W. 481.

bility to the extent to which the loyal and willing members lent their names; for no preference, however honest, of the debts on which they are liable can be sustained.[1] Understand me. I am not criticising. I am merely seeking to point out how an equitable principle can give us a hard and fast rule which in its necessarily mechanical operations will fall upon the just and the unjust. Another illustration is furnished by a recent decision in Kentucky.[2] It is settled that a trustee who has conveyed the trust property in breach of trust may repent and bring a suit in equity to get it back. This is a highly equitable rule, not inconsistent with the right of the beneficiary to follow the trust fund where the transferee took with notice. But being an equitable rule, one would think it ought to be applied equitably, and that it ought not to be applied when it would work inequitably. In the case referred to, however, it was held that as the trustee might have repented and maintained such an action at any time during the period allowed by the statute of limitations, and as his suit was barred on its expiration, the beneficiary was barred by what barred him, and could not maintain a suit thereafter. Thus a doctrine meant to do justice to the trustee becomes a rule whereby infant beneficiaries are barred of their right to follow trust funds by the non-repentance of the person who has wronged and defrauded them. Cases of this sort are coming to be legion, but I must pass on with only the further remark that competent critics have charged such misfortunes as the failure of the Tilden will to similar hard and fast applications of the rules as to testamentary trusts. As Dean Ames puts it, equity is made to convert "a regulating principle, which depends for its life solely on natural justice, into a positive rule having no defense either in policy or in principle."[3]

The next point, that equitable rules are made to confuse legal rules instead of supplementing them, might be sustained by many examples. Let me be content here with one. I have mentioned already the difficulties which

[1] This point is made in Mueller *v.* Monongahela Fire Clay Co. (1898) 183 Pa. St. 450, 38 Atl. 1009.

[2] Willson *v.* Louisville Trust Co. (1898) 102 Ky. 522, 44 S. W. 121.

[3] 5 Harv. Law Rev. p. 240.

courts have encountered in dealing with the murderer profiting by his wrong. After going over all these cases, one cannot but feel that much of the judicial floundering has been due to the confusion incident to the fusion of law and equity.

Are we, then, to condemn the reform which has given us one procedure instead of two, which allows litigants to adjust their disputes in one cause instead of two, which has relieved us of circuitous methods and put direct ones in their place? Surely not. To declaim against the fusion of law and equity to-day is no less futile than were the ponderous arguments of the sixteenth century sergeant-at-law who inveighed against chancery in his "replication" to Doctor and Student.[1] The moral, I take it, is simply that we must be vigilant. Ihering has told us that we must fight for our law.[2] No less must we fight for equity. Law must be tempered with equity, even as justice with mercy. And if, as some assert, mercy is part of justice,[3] we may say equally that equity is part of law, in the sense that it is necessary to the working of any legal system. We who have the shaping of the law in our hands in this era of the decadence of equity have no less responsibilities than those who pleaded and judged in its founding, its development, and its crystallization.

ROSCOE POUND.

[1] Hargrave, Law Tracts, p. 322.

[2] Kampf um's Recht (14 Ed.), p. 52.

[3] Lorimer, Institutes of Law, p. 314.