

EQUITABLE DEFENSES

WALTER WHEELER COOK

The original New York Code of Civil Procedure, which proposed to bring about a fusion of common law and equity, contained no specific provision relating to equitable defenses. In view of doubts that were expressed—doubts which apparently were not shared by the Court of Appeals¹—the following amendment was made in 1852:

“The defendant may set forth by answer as many defenses and counter claims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both.”

A large number of the codes contain substantially similar provisions. The framers of the Connecticut Practice Act, which was not adopted until 1879, had an opportunity to draft their code in the light of some thirty years of discussion of the New York Code. In that act we do not find a separate provision for “equitable defenses.” The matter is provided for in the following language:

“Sec. 5554. Administration of legal and equitable rights. All courts which are vested with jurisdiction both in law and in equity, may, to the full extent of their respective jurisdictions, administer legal and equitable rights and apply legal and equitable remedies, *in favor of either party*, in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action; but wherever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail.”²

In states not having codes of procedure, and in which common law and equity are still kept distinct, there are frequently statutes providing for “equitable defenses” in law actions. The following is an example:

“Any defendant may plead in defense to any action at law in the Supreme Judicial Court, any matter which would be ground for relief in equity, and shall receive such relief as he would be entitled to receive in equity, against the claims of the plaintiff; such matter of defense shall be pleaded in the form of a brief statement under the general issue. And, by counter brief statement, any plaintiff may plead any matter which would be ground for relief in equity against any defense set up by any defendant in an action at law in said court, and shall receive such relief as he would be entitled to receive in equity against such claim of the defendant.”³

¹ *Haire v. Baxter* (1851) 5 N. Y. 357.

² *Connecticut Practice Book* (1922) 12.

³ Maine Rev. Sts. 1903, ch. 84, sec. 17.

Down to 1915 "equitable defenses" were not permitted on the common-law side of the federal courts.⁴ In that year, however, Congress enacted the following statute:

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."⁵

It is an interesting fact that from the outset the courts of the different jurisdictions have disagreed as to the legal effects of these various statutes. Even if one confines his attention to the decisions of a single state, he finds, more often than not, that it is not possible to piece them together into a self-consistent system. My friend, Professor Hinton, has recently given us a description of the chaotic condition of the authorities, especially under the state codes.⁶ A similar divergence of view has already shown itself among the lower federal courts.⁷ It is the purpose of the present discussion to try to discover how this great diversity of opinion has come about.

Before one can give a rational interpretation to these provisions for "equitable defenses," one must, it is believed, have a correct idea of the relation of the equity law to the common law, before the enactment of the statutes in question. As to this, there are two schools of thought. One, among whose leading champions are found Langdell,⁸ Ames,⁹ and

⁴ See Ames, *Lectures on Legal History*, 104-115; E. H. Abbott, Jr., *Fraud as a Defense in the Federal Courts* (1915) 15 COL. L. REV. 489.

⁵ Act of March 3, 1915 (38 Stat. at L. 956), amending sec. 2746 of the Judicial Code.

⁶ *Equitable Defenses Under Modern Codes* (1920) 18 MICH. L. REV. 717.

⁷ Compare *Keatley v. U. S. Trust Co.* (1918, C. C. A. 2d) 249 Fed. 296, with *Plews v. Burrage* (1921, C. C. A. 1st) 274 Fed. 881. In the latter case the Court of Appeals of the First Circuit adopted the view of Learned Hand, J., dissenting in the former case from the decision of the majority in the Second Circuit. The precise question has not yet been passed upon by the Supreme Court. For discussion of these cases, see (1922) 22 COL. L. REV. 482; 35 HARV. L. REV. 345; and 20 MICH. L. REV. 680.

⁸ PROFESSOR C. C. LANGDELL, *Brief Survey of Equity Jurisdiction* (1887) 1 HARV. L. REV. 58: "Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a *res*, which by law has no owner, is a subject of ownership, nor that a *res* belongs to A which by law belongs to B; nor can it impose upon a person or a thing an obligation which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law."

Maitland,¹⁰ is, that the equity law does not "conflict" with the common

PROFESSOR C. C. LANGDELL, *Classification of Rights and Wrongs* (1900) 13 HARV. L. REV. 673, 677:

"Can equity then create such rights as it finds to be necessary for the purposes of justice? As equity wields only physical power, it seems to be impossible that it should actually create anything. It seems, moreover, to be impossible that there should be any other actual rights than such as are created by the State, *i. e.*, legal rights. So, too, if equity could create actual rights, the existence of rights so created would have to be recognized by every court of justice within the State; and yet no other court than a court of equity will admit the existence of any right created by equity. It seems, therefore, that equitable rights exist only in contemplation of equity, *i. e.*, that they are a fiction invented by equity for the promotion of justice. Still, as in contemplation of equity such rights do exist, equity must reason upon them and deal with them as if they had an actual existence.

"Shutting our eyes then to the fact that equitable rights are a fiction, and assuming them to have an actual existence, what is their nature, what their extent, and what is the field which they occupy? 1. They must not violate the law. 2. They must follow the analogy of one or more classes of legal rights. 3. There is no exclusive field for them to occupy; for the entire field is occupied by legal rights. Legal and equitable rights must, therefore, exist side by side, and the latter cannot interfere with, or in any manner affect, the former."

PROFESSOR C. C. LANGDELL, *Summary of Equity Pleading* (2d ed. 1883) 210-211:

"It is only by a figure of speech that a person who has not the legal title to property can be said to be the equitable owner of it. What is called equitable ownership or equitable title or an equitable estate is in truth only a personal claim against the real owner."

⁹ PROFESSOR JAMES BARR AMES, *Purchase for Value without Notice* (1887) 1 HARV. L. REV. 9:

"A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee."

¹⁰ *Lectures on Equity* (1909) 16-18:

"Then as to *substantive* law the Judicature Act of 1873 took occasion to make certain changes. In its 25th section it laid down certain rules about the administration of insolvent estates, about the application of statutes of limitation, about waste, about mergers, about mortgages, about the assignment of choses in action, and so forth, and it ended with these words:

'Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.'

"Now it may well seem to you that those are very important words, for perhaps you may have fancied that at all manner of points there was a *conflict* between the rules of equity and the rules of common law, or at all events a *variance*. But the clause that I have just read has been in force now for over thirty years, and if you will look at any good commentary upon it you will find that it has done very little—it has been practically without effect. * * * * At the very outset of our career we should form some notion of the relation which existed between law and equity in the year 1875. And the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy the law, but to fulfill it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needed, something that equity would

law, as the extracts printed in the notes below will show.¹¹ The other school of thought, represented by Spence,¹² Pomeroy,¹³ the framers of the Judicature Act¹⁴ and of the Connecticut Practice Act,¹⁵ Hohfeld,¹⁶ and Beale,¹⁷ maintain that equitable rights and other legal relations fre-

require. . . . Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here. Had there been a conflict here the clause of the Judicature Act which I have lately read would have abolished the whole law of trusts. (See also the similar views expressed by the learned author at pp. 46, 154, 156, 169.)

¹¹ See also Adams, *Equity* (8th ed. 1890) xxiv, xxxiv; Scott, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 COL. L. REV. 276.

¹² *The Equitable Jurisdiction of the Court of Chancery* (1846) *326, note: "The principles of Equity, or natural justice, have sometimes to be applied in contradiction to the positive law: Equity, in this sense, belongs to the Court of Chancery, and will be considered under the head of 'Equity and Conscience,' infra."

¹³ *A Treatise on Equity Jurisprudence* (3d ed. 1905) vol. 1, sec. 101: "With respect to another portion of these primary equitable rules and rights, it must be said that they are not legal rules and rights concerning the same subject-matter, or arising from the same circumstances; between the kind of equitable rules and rights and the corresponding portions of the law, there is, therefore, an antagonism; the equity courts admit and uphold a particular right as resulting from a certain state of facts, which the law courts not only refuse to recognize, but which they would deny and oppose. This contrariety existed to a much larger extent in the infancy of the system than it does now; it has gradually become less as the law itself has grown more liberal and equitable. That there should be any such conflict between two departments of a municipal law is undoubtedly a blemish upon the national jurisprudence; but this condition had a strictly historical origin, and the very progress towards perfection largely consists in the elimination of these instances of antagonism."

¹⁴ See the passage quoted in the extract from Maitland's *Equity*, *supra* note 10.

¹⁵ See the passage quoted at the opening of this discussion, *supra* p. 645.

¹⁶ *The Relations between Equity and Law* (1913) 11 MICH. L. REV. 553, 555, reprinted in (1922) *Fundamental Legal Conceptions* 133, 136:

"THE CONFLICT OF EQUITY AND LAW: A jural relation may be exclusively equitable,—that is, one recognized and vindicated exclusively by an equity court. As regards every such case there is a conflict, *pro tanto*, between some valid and paramount equitable rule and some invalid and apparent legal rule. . . . [General discussion and examples.]

"THE SUPREMACY OF EQUITY OVER LAW: In case of conflict, as distinguished from concurrence, a jural relation is substantively determined by the equitable rule rather than by the legal.

1. Since, in any sovereign state, there must, in the last analysis, be but a single system of genuine law, since the various principles and rules of that system must be consistent with one another, and since, accordingly, all genuine jural relations must be consistent with one another, *two conflicting rules, the one 'legal' and the other 'equitable,' cannot be valid at the same moment of time: one must be valid and determinative to the exclusion of the other.*"

¹⁷ *Treatise on Conflict of Laws* (1916) 151-152: "It is clear, however, that there cannot be two separate and distinct laws prevailing in the same place at the same time; and therefore in fact, whatever may be the theory of the courts, one of the conflicting rights must be valid and the other invalid. It is submitted that the true explanation of the difficulty is that the equitable right is the prevailing one, that the legal right represents a prior condition of the law, before the unwritten law

quently "conflict with" and prevail over "legal" rights, and that the "legal" right is not, *as a matter of genuine substantive law, valid*.¹⁸

"Practical" lawyers are likely to consider discussions of such a question of theory as of purely academic importance. In the present instance, it is believed, the conflicting decisions of courts upon the matter of equitable defenses have been reached because of the differing theories which the judges composing the courts had upon this very matter of the relation of the equity law to the common law. To be sure, the theory was not always consciously worked out, but its presence becomes obvious when opinions are read with care.

To get at the matter as simply as possible, it will be well to take a concrete case, one which has recently engaged the attention of the federal courts under the statute of 1915.¹⁹ B gives to A an instrument under seal, apparently obligating himself to pay to A a sum of money. Assume that the instrument was given in exchange for a loan of money supposed by B to be genuine, but known to A to be counterfeit. No authority need be cited for the statement that in the absence of a statute B has no defense in a court of law to an action on the instrument.²⁰ Down to 1915 he had none in the federal courts.²¹ Does the statute give him one? It is argued by adherents of the "no-conflict" theory that until "set aside" by a direct equitable proceeding, the instrument is "binding."²² According to this view, under a system in which law and equity are distinct, B has no "defense" to the common-law action, but merely an affirmative equitable cause of action for cancellation.²³

was changed by the acceptance on the part of the profession of the equitable doctrines as law. . . ." In his *Equity in its Relation to Common Law* (1912), Billson takes the same view.

¹⁸ But it does have *procedural* effects. If the correct procedure is not used (where courts of equity are kept distinct from courts of law, the procedural law requires that appeal be made to a separate court, the court of chancery), the "legal" right will be enforced *as if* it were a genuine right. Compare the situation where, under the system of common-law pleading, a litigant tried to show under a denial matter which had to be pleaded affirmatively.

¹⁹ See the cases cited in note 7, *supra*.

²⁰ The law was changed in England by the Common Law Procedure Act of 1854, 17 & 18 Vict. c. 125, sec. 83.

²¹ The cases are cited in the discussions referred to in note 4, *supra*.

²² *Hancock v. Blackwell* (1897) 139 Mo. 440, 41 S. W. 205; *Perry v. O'Neill* (1908) 78 Ohio St. 200, 85 N. E. 41; *McIsaac v. McMurray* (1915) 77 N. H. 466, 93 Atl. 115.

²³ This seems to be the idea expressed by Dean Stone in the following passage: "Nor, indeed, did equity *deny the operation of rules of [common] 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 rules of law to define the substantive rights of the parties.*" (1918) 18 COL. L. REV. 97. (Italics are the present writer's.) It is difficult to see why equity enters any decree unless the plaintiff has a substantive equitable right that the instrument (in the case put) shall not be enforced, a substantive right which directly negatives the exclusively common-law right to have the instrument enforced.

This brings us to the center of the problem. In what sense, if any, is the sealed instrument "binding" until "set aside"? To answer this we need to note that B is entitled in equity to: (1) a temporary injunction staying the suit at law, pending a hearing on the merits; (2) after the facts are determined, a perpetual injunction and an order that A deliver up the instrument for cancellation. We know that equity will make its decree effective by ordering the imprisonment of A until he obeys the decree, and by sequestration if necessary. Action will be taken against his attorney if with knowledge of the injunction he proceeds with the suit.²⁴ In other words, B has effective judicial weapons to *prevent A from enforcing the instrument*. The proceeding in equity, it should be noted, is in substance and effect *purely defensive*—B's only object in appealing to equity is to keep A from compelling B to pay the money. While the common-law court says that B owes A a duty to pay the money, the only rational explanation of the conduct of the chancellor is, that he takes the view that in equity B owes no duty to A to pay. Whatever affirmative relief is given B in the equity proceeding is given not because the instrument is *really* "valid until set aside," but because for historical reasons, the common-law court is prevented from recognizing its real invalidity.²⁵

In short, then, the equitable proceeding for cancellation is affirmative merely in form. In substance it is, if we take a realistic view of things, truly an "equitable defense" to the common-law action on the instrument. For purely historical reasons, the *procedural law* required that the "defense" be made effective by an affirmative proceeding in a separate court, rather than by pleading it in the court where the action on the instrument was pending. To the present writer nothing seems clearer than that it was the obvious intention of the framers of the codes and the "equitable defense" statutes to abolish this absurd and antiquated procedure, and to permit the invalidity of the instrument, in the case supposed, to be set up as a defense in form as well as in substance.

It has been argued that to do this is to make the fraud a "legal," *i. e.*, a common-law, defense.²⁶ Argument of this kind seems to be based

²⁴ *Allen v. Dingley* (1576) Choyce Cases in Ch. 113.

²⁵ That is, the sole object of decreeing affirmative relief, *viz.*, surrender of the instrument for cancellation, is to give B a defense in a common-law court, *i. e.*, to enable him to assert by a simpler mode of procedure a defense he already has in substance.

²⁶ This seems to be the view of Hinton in the article referred to in note 6, *supra*. Throughout the learned author seems to the present writer to confuse substance with form. For example, on pages 719-720, he takes the view that since a mistake in a mortgage deed could not be availed of in equity by answer, but only by a cross-bill for reformation, the defendant did not have an "equitable defense" in equity to the enforcement of the mortgage as written. With all deference to my learned brother, it is submitted that that is just what he did have, *in substance*. For reasons purely procedural, however, he could avail himself of this defense only by cross-bill. Suppose, before statutes permitting courts of equity to act *in rem* and "reform" the mortgage by decree, (that is, without requiring the mortgagee

partly on an idea that under the code we still have "courts of law" and "courts of equity,"²⁷ and partly on the idea that if made a "defense" in form the facts if disputed would necessarily be tried by the jury, instead of, as formerly in equity, by the court. The persistence in the minds of many American judges of the idea that under the reformed procedure we still have two courts, one of common law and one of equity, is a curious phenomenon, perhaps to be explained, in part at least, by the fact that in most states jury trial is constitutionally preserved for common-law cases and court trial for equity cases. It is, however, obviously untrue, and with it we may compare the attitude of the English judge who said:²⁸

"Whether it could be recovered at common law it is not necessary to decide, . . . we have to apply the general law, legal and equitable."

Equally unsound is the idea that if matter which formerly formed the basis of a defensive equitable proceeding is allowed as a defense *in form*, the mode of trial will necessarily be altered from court to jury. Obviously this is closely connected with the other idea of two separate courts.²⁹ To allow to be pleaded as a defense in form what was in substance always defensive, is not to go from a court of equity to a court of law, or even to appeal to the common-law powers of the court, but merely to change the procedural method of appealing to the equity powers of the combined court of common law and equity. To be sure,

to execute an instrument correcting the error) the plaintiff mortgagee had refused to obey the chancellor's decree to execute the necessary instrument. Would the chancellor then have proceeded to enforce the mortgage as it stood? Obviously not; and indeed he would prevent by injunction the mortgagee in such a case from taking any steps to use common-law remedies to enforce it, and would also commit the mortgagee to jail, there to stay until he obeyed the decree. To say that the mortgage "*was equally binding in equity as written, until reformed,*" as my learned brother does, seems a plain contradiction of the legal facts.

²⁷ Reynolds, P. J., in *Wurtlitzer Co. v. Rossman* (1916) 196 Mo. App. 78, 87, 190 S. W. 636, 639: "Mistakes of fact may be relieved *in a court of equity*, but are not cognizable in *a court of law* in a *purely legal* action." (Italics are the writer's.) This in a code state! Such language is, however, only too common.

²⁸ Collins, M. R., in *Bamatyne v. McIver* [1906, C. A.] 1 K. B. 103.

²⁹ The somewhat clumsy and ambiguous provisions of the original New York Code are perhaps the cause of much of the confusion relating to the mode of trying equitable defenses. Sec. 253 of that code provided as follows: "Whenever in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury unless a jury trial be waived, as provided in Sec. 266, or reference be ordered, as provided in sections 270 and 271." See also Professor Hinton's note in the second edition of his *Cases on Code Pleading* (1922) 609. As Professor Hinton points out in the article cited, this was interpreted as requiring equitable defenses to be tried by the jury. This unfortunate, though perhaps natural, interpretation has led to much of the difficulty. Professor Hinton's real point seems to be the undesirability of the introduction of jury trial into equitable issues. Upon that point I heartily agree. The introduction of "equitable defenses," *i. e.*, defenses in form as well as substance, does not necessarily require that result, as I try to show in the text.

the procedural law governing the court in the exercise of its common-law functions is thereby altered also; no longer can the plaintiff in such a case obtain a common-law judgment, as was possible under the former system. Since the appeal is to the equity powers of the court, the fact that the form of the defense is changed should not alter the mode of trial, which should still be to the court and not to the jury. Upon this point the clear and simple provisions in Connecticut are a model. They read as follows:

"All matters which, prior to January 1, 1880, were within the jurisdiction of a court of equity, whether directly or as incident to other matters before it, unless otherwise ordered, shall be heard and decided by the court without a jury, in the manner theretofore practiced in courts of equity; but a party seeking equitable relief shall specifically demand it as such, unless the nature of the demand itself indicates that the relief sought is equitable relief."³⁰

Possibly the discussion of one or two other examples may serve to emphasize the view here taken. A hypothetical case put by my friend, Professor Hinton, will serve for one.

"Suppose, for example, a rule of substantive law to the effect that a tenant's obligation to pay rent, in the absence of any agreement to the contrary, is not affected by the accidental destruction of the leased building. Suppose further that in the negotiations for a lease it was agreed that it should contain a proviso terminating the obligation to pay rent in case of a destruction of a building, but by some oversight this part of the agreement was omitted from the formal lease embracing an unqualified covenant for the payment of rent during the full term, and that such instrument was executed by both parties without noticing the omission. Now, if the building should be destroyed by fire, and upon the tenant's refusal to pay the rent thereafter accruing, an action should be brought on the covenant, it is well settled at common law that he could not successfully defend on the ground of such omitted provision. He was legally bound by the covenant as written, and not as it should have been written.

"But the tenant might bring a suit in equity for reformation of the lease, and if, as the result of that suit, he obtained a cancellation of the old lease and the execution of a new one with the proper proviso, he would then have a perfect defense which would defeat the action for rent.

"It is clear that the mistake, in the case supposed, was not a defense of any kind, but formed the basis of a suit in equity resulting in a reformed lease which gave a defense because of the proviso therein contained.

"In such a case neither the mistake nor the decree for reformation amounts to a defense. Formerly, at least, a decree in chancery had no more effect on legal rights and titles than the equities themselves. In the case supposed, the defense is purely legal because it rests on one

³⁰ Connecticut Practice Book (1922) 282; sec. 175 of the Rules under the Practice Act, carrying out, under the rule-making power of the courts, the provisions of Conn. Gen. Sts. 1918, ch. 297, sec. 5752.

of the terms of the reformed lease which has superseded the original lease. The sole effect of the decree was to bring pressure to bear on the lessor, which induced him to execute a new lease in place of the former one."

A careful reading of my learned brother's argument will show that he is working with the Langdell-Maitland view. According to the view here being urged, the plain truth is that, since equity will in the case put grant a perpetual injunction effectually preventing the landlord from collecting the rent, there is not and never has been from the beginning *in net substantive legal effect* a duty to pay the rent after the destruction of the building. To be sure, under the old cumbersome procedure, there was danger that the common-law court would enter a judgment as though there were; but there was always an effective equitable defensive procedure to prevent its collection. In the case put, therefore, the "reformation" ought today to be treated as a pure formality. Indeed, if we assume, as I think we must, that the destruction of the building permanently releases in equity the tenant from going on with the lease, there would today be no need of any reformation whatsoever if we permit the mistake to be pleaded as a defense. Quite properly, therefore, some courts have allowed mistakes which under the old system formed the basis for injunctions and reformation in equity to be pleaded as equitable defenses.³¹ Unfortunately some jurisdictions also submit the facts, if disputed, to the jury, for which there seems to be, as already indicated, no real basis in the provisions of most of the codes.

Although it is a digression from the main subject, it may not be entirely out of place to call attention at this point to a similar example of the power of mere words to affect our thinking. If by mutual mistake the written memorandum of a contract fails to express the oral bargain, equity will, subject to certain limitations due to the statute of frauds,³² "grant reformation," and in a proper case, "enforce the contract as reformed." It seems clear that in many cases the recital that the "contract" is "reformed" is the merest formality. For example, if by error a fire insurance policy does not cover the property intended, and the property is destroyed before the error is discovered, equity will

³¹ *Loewenthal v. Haines* (1914) 160 App. Div. 503, 145 N. Y. Supp. 579; *Schlosser v. Nicholson* (1916) 184 Ind. 283, 111 N. E. 13; *Gun v. Madigan* (1871) 28 Wis. 158. Compare Professor Williston's discussion in his work on *Contracts* (1920) sec. 1559, where, in speaking of equitable defenses, he says: "Judgment for the defendant by a court of law has the same practical effect as a decree of rescission by a court of equity." Is not the judgment for the defendant rendered by a court of law and equity combined, rather than by a court of law, especially in states like Connecticut where equitable issues are still tried by the court even if pleaded as defenses?

³² See 1 Williston, *Contracts* (1920) secs. 1552-1555, for a discussion of the problem and citation of cases.

"reform" the policy and then "enforce it as reformed."³³ Now, as in the case put the property has already been destroyed, it is obvious that it must have been already insured in equity, or there could be no recovery. In other words, recovery is allowed in equity for property which was all the time insured in equity, and the recital that the policy is "reformed" is a mere idle ceremony.³⁴

Returning to the main discussion, suppose a case in which by mutual mistake too much land has been described in a deed which has been duly executed and delivered. Under the old system the grantee could recover at law in a possessory action. If the grantee obtained possession in some way, the grantor could not, at law, recover that possession. In equity, however, the grantor could, if sued for the possession, obtain an injunction staying the common-law action, and a decree for reformation. If the grantee were in possession, the grantor could obtain (1) an injunction to stay acts of waste, (2) reformation, and (3) a decree for the possession.³⁵ The Langdell-Ames-Maitland doctrine is, that until the reformation is accomplished the grantee "owns" the land. This view is obviously based on the idea that the common-law rights are valid until the decree is entered, a view which seems at variance with the legal facts; and there is not wanting evidence that it is not and has not been the theory of all courts.³⁶ Consequently, in many jurisdictions the

³³ *Snell v. Insurance Co.* (1878) 98 U. S. 85.

³⁴ So, where a building contract, as written, by mistake contained terms which both parties intended should be omitted, the builder was allowed an action in equity to "reform" the contract, and to recover damages by way of "equitable relief," for violations by the other person of the terms of the oral bargain. *West v. Suda* (1897) 69 Conn. 60, 36 Atl. 1015. As these violations occurred prior to the reformation, query: if the contract as written is "binding in equity" until reformation, upon what basis could the builder recover damages? Professor Williston, however, seems to take the same view as Professor Hinton. *Contracts* (1920) vol. 3, sec. 1552.

³⁵ *Gillespie v. Moon* (1917, N. Y.) 2 Johns. Ch. 585, is an early American case with an interesting opinion by Chancellor Kent.

³⁶ See the language of the court in the early Connecticut case of *Bundy v. Sabin* (1795) 2 Root, 209, 210, in which the court says: "The title to the land therefore in equity and good conscience, vested in said Eaton and passed from him to the petitioner The petitioner has lost his land unjustly" In the passage quoted from Ames, *supra* p. 647, language of this kind is called "clearly inaccurate." To the present writer it seems far more accurate than to say, as did Ames, and as many of his followers still do, that the *cestui que trust* owns, not the "land" but merely the "obligation" of the trustee. Note the accurate statements of Holmes, J., in *Goode v. Riley* (1891) 153 Mass. 585, 587, 28 N. E. 228, 229; "The effect of the evidence . . . is only to show that no conveyance was made of part of the land embraced in the description In order to do complete justice, the grantor who has used too extensive language should have a conveyance to set his title right on the face of the instruments. For as things stand, a purchaser without notice could hold him to the words which he has used." (Italics the present writer's.)

decisions would permit the grantor an "equitable defense" to an action to recover possession.³⁷ There are of course decisions to the contrary.³⁸ If, as may be done in many states, a copy of the judicial record is filed with the land records, the relief given by courts permitting equitable defenses is as effective as the more cumbersome procedure under the dual system.

The Maine equitable-defense statute has been quoted above. In the case of *Martin v. Smith*,³⁹ the Maine Court seems to have substantially nullified the statute. The decision is obviously based upon what for convenience has here been called the Langdell-Ames-Maitland view, as the following quotation shows:

"In this action the plaintiffs set up only a legal right and prima facie sustain it by an effective deed of conveyance from the defendants themselves. Without some matter, legal or equitable, to upset or avoid that deed, there is no defense to the action. The evidence does not disclose any such matter. The only claim made affecting the deed is that in drafting it there was omitted one provision the parties intended to have inserted. The validity of the deed as it stands is not questioned, and its effect to vest title and right of possession in the plaintiffs is clear. It is a muniment of title and *must be given effect according to its terms in any action, legal or equitable, until duly reformed so that its terms shall have a different effect.*" (Italics are the present writer's.)

There are indications that under the federal statute of 1915 many of the federal judges are still in the grip of the idea that there can not be "equitable defenses" to "legal actions" and that the statute merely provides for equitable cross-actions.⁴⁰ It is to be hoped that when the matter comes squarely before the Supreme Court for decision, this view will not be taken, and that the more enlightened view of some of the judges of the lower federal courts will be adopted. There is nothing in the structure of the federal system or in the constitutional provisions for jury trial as at common law which prevents allowing fraud, mistake, etc., to be pleaded as equitable defenses and not as counterclaims, provided the defense is treated as "equitable" in the sense that it remains triable by the court. There are, of course, cases in which, as in *Liberty Oil Co. v. Condon National Bank*,⁴¹ the matter should be treated as constituting an equitable cross-action. In the case cited, the defendant was a stakeholder, sued by one of the claimants, and under the old system would have filed a bill of interpleader. An equitable cross-action was allowed, the other claimant brought in, and the case treated as if on

³⁷ This action to recover possession should not be called an action of ejectment. It is a code action to recover possession; as the "general law" of the jurisdiction does not entitle the plaintiff to possession, he necessarily loses.

³⁸ Some of the cases *pro* and *con* are cited by Hinton in the article cited in note 6, *supra*.

³⁹ (1900) 102 Me. 27, 65 Atl. 257.

⁴⁰ The cases are collected in the Note in (1923) 36 HARV. L. REV. 474, 477, note 25.

⁴¹ (1922) 43 Sup. Ct. 118; same case (1921, C. C. A. 8th) 271 Fed. 928.

the equity side of the federal court.⁴² Nothing in the enlightened opinion of the learned Chief Justice in that case, however, lends color, as has been supposed,⁴³ to the view that the statute requires all "equitable defenses" to be pleaded as equitable cross-actions, asking affirmative relief,⁴⁴ and it is not believed by the present writer that the Supreme Court will require so useless a formality where all that is really demanded by the situation is a defense to the claim of the plaintiff.⁴⁵

⁴² The plaintiff was in doubt whether he was still a plaintiff in a "court of law" or a defendant in a "court of equity." The question did not arise at the trial, as a jury trial was waived, but did arise in appealing the case. Should it be reviewed by writ of error or appeal? To make sure, the defendant had made up and certified by the trial judge both a bill of exceptions (which contained all the evidence) and a transcript of the record. The Circuit Court of Appeals held that he was still a plaintiff at law, *i.e.*, that the "equitable defense" was to be treated as if by statute it had been allowed in a court of law; and that therefore it could not consider the sufficiency of the evidence to support the finding of the lower court on the issues of fact. It affirmed the decision of the lower court on this ground. A certiorari brought the case before the Supreme Court, which, speaking through Chief Justice Taft, held that "the proceeding was changed by the defendant's answer and cross-petition from one at law to one in equity, with all the consequences flowing therefrom." This meant that the trial court could have tried the case made by the "equitable defense" without a jury, even though one had been demanded; and that the findings of fact were to be reviewed as on a chancery appeal. The judgment of the Circuit Court of Appeals was therefore reversed and the case sent back to that court for appropriate action.

⁴³ By the writer of the Note cited in note 40, *supra*.

⁴⁴ It is obvious from a reading of the opinion that the learned Chief Justice is not attempting to draw the distinction between defense and counterclaim as such, but merely to determine whether the so-called equitable defense is to be treated as part of a common-law proceeding or as in equity. His remarks about "equitable defenses" having the effect of "cross-actions" must be read in the light of the particular case before him, where very obviously a cross-action was the only solution. They should not, therefore, be interpreted as passing on the general question here under discussion, and it would be unfortunate if they should have the result attributed to them by some commentators.

It should be noted, perhaps, that the reasoning (but not necessarily the result reached) by the learned Chief Justice in the case of *American Mills Co. v. American Surety Co.* (1922) 43 Sup. Ct. 149, seems to point in the direction of the view attributed to him by the writers in question. Construing Equity Rule 30, which requires a defendant to set up any counterclaim arising out of the transaction, the learned Chief Justice held that legal counterclaims are not included, for (he argued) a contrary holding would enable the equity plaintiff to "compel one who has a cause of action at law to bring it into a court of equity and then try it without a jury." If we recall that the same judge has both common-law and equity powers, no such result would necessarily follow. We might well hold that the counterclaim was directed to the common-law powers of the court. However, the result reached was undoubtedly a sound one, for professedly the court had power to adopt rules governing procedure in equity only, and could not without additional statutory authority regulate the method of enforcing common-law claims, which it would be doing if Rule 30 were interpreted to cover common-law counterclaims.

⁴⁵ Or a defensive replication in confession and avoidance of the facts stated in a plea. See the cases cited in note 7, *supra*.

From the foregoing, it is evident that we are far from that fusion of common law and equity law into one harmonious system which the framers of the codes doubtless had in mind. This, to be sure, is partly due to the provisions of the codes themselves. So long as we retain jury trial in all cases in which it existed prior to the "fusion," and court trial in all cases in which that existed prior to the same time, we shall have to keep the two systems of law to some extent distinct. There is, of course, no real reason for retaining such provisions,⁴⁶ and our English cousins have made greater progress towards fusion and resulting simplicity because of their refusal to insist on retaining jury trial in all cases as at common law.⁴⁷ However, the inability to bring about complete fusion so long as these provisions stand, need not, if we will look realistically at the relation of the common law to the equity law, prevent us from bringing about much greater simplification than we now have in the majority of our states.⁴⁸

In conclusion, it may be emphasized that there can be found in our law probably no better illustration than the group of cases under consideration, of the fact that clearness in matters of fundamental legal analysis is both well worth while from the purely practical point of view and absolutely essential if we are ever to blend common law and equity law into a single, harmonious, and self-consistent system.

⁴⁶ For example, under our present system, if one furnishes necessaries in the shape of food, lodging, etc., to an infant, he may recover from the infant at law, and is entitled to jury trial if the facts are disputed. If he advances money which the infant spends for necessaries, he can recover, if at all, only in equity. *Marlow v. Pitfield* (1719) 1 P. Wms. 558. If the facts are disputed, the trial must therefore be to the court if either party insists upon it (at least under many codes, possibly not in New York), subject of course to the power of the court to take the advisory verdict of a jury. Such instances can be multiplied indefinitely.

⁴⁷ The reference here is not to the somewhat drastic restriction imposed by statute in 1920, and which is much criticized (see [1923] 155 Law Times, 46), but to the situation as it was before that legislation.

⁴⁸ In *Keatley v. U. S. Trust Co.*, *supra* note 7, the Circuit Court of Appeals of the Second Circuit (Learned Hand, J., *dissenting*), not only held that a replication setting up fraud was not a good "equitable defense" (replication by way of confession and avoidance) to a plea of release, but raised the point of its own motion, the defendant having raised it neither below nor on appeal. As Learned Hand, J., points out, even if the District Court were wrong on its interpretation of the statute, the question did not go to the *jurisdiction* of the court. Doubtless the majority were confused by the loose and ambiguous use of that word in the equity cases. See my discussion of this in *The Powers of Courts of Equity* (1915) 15 COLUMBIA LAW REVIEW, 106.