La Dolce Vita: Law and Equity Merged at Last!

George P. Smith II  
*The Catholic University of America, Columbus School of Law*

Walter W. Nixon III

Follow this and additional works at: [https://scholarship.law.edu/scholar](https://scholarship.law.edu/scholar)

Part of the Legal History Commons

**Recommended Citation**  
La Dolce Vita—Law and Equity
Merged at Last!

The forms of actions we have buried, but they still rule us from their graves.

F.W. Maitland, 1909.

Article 5, section 6 (a) of the proposed Constitution of Arkansas of 1970 states simply, “District Courts are established as trial divisions of the Trial Department. They shall have original jurisdiction of all justiciable matters not otherwise provided in this constitution, and such powers of review of administrative action as may be provided by law.” The schedule of the new document contains temporary provisions going to the scope of jurisdiction of the present courts by declaring:

The jurisdiction hereby conferred on District Courts shall include all matters previously cognizable by Circuit, Chancery, and Probate Courts and all judicial matters previously cognizable by County and Common Pleas Courts. The geographic districts and subject matter divisions of the Chancery and Circuit Courts existing at the time this Constitution takes effect shall become districts and divisions of the District Court hereby established until changed pursuant to this Constitution. . . .

With these two succinct sentences of article 5, the drafters of the proposed constitution are presenting to the voters a unique opportunity to blaze a new pathway in Arkansas’ judicial frontierland. A question certain to be in the minds of lawyers, circuit judges, and chancellors, as well as the voters themselves, is: In what ways and to what extent would adoption of this proposed constitution alter the patterns of justice in Arkansas? More particularly, what would be the long and short term results of fusing courts of law and equity in Arkansas?

Based upon an exegesis of the history of equity as a system of law, a comparison of Arkansas’ present separate courts system with its own predecessors and with systems of other states, and, further, based upon an in-depth investigation of the practical and theoretical arguments—both positive and negative—con-

The authors wish to acknowledge with gratitude the valuable suggestions and criticisms of the original draft of this manuscript made by Dean Ralph C. Barnhart and Professor Fredrick K. Spies. Professor Robert A. Leflar and Chancellor Thomas F. Butt also provided the authors with valuable insights into the discussion area. All views expressed herein, and errors of omission or commission, are solely the authors’ however.

cerning merger, it will be clearly seen that the merger of law and equity courts in the State would be neither a panacea for all judicial woes nor open a Pandora's box of abounding confusion. The merger, if effected, would present some operational difficulties in its inauguration, but it would ultimately ensure a more complete form of justice than does the present system.

I. THE HISTORICAL PERSPECTIVE

While some scholars of equity jurisprudence have suggested that the principles of the English Chancery system, which reached its maturity in the Elizabethan period, were but an embodiment of a reception of the Roman aequitas, or “criterion of correctness of law” as developed by the praetors of Rome, others have argued—perhaps more convincingly—that the equitable ideals of conscience, good faith, relief from hardship, morality, and complete justice derive from the Greek philosopher, Aristotle.  

2. JOLLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 56 (1957); Newman, The Place and Function of Pure Equity in the Structure of Law, 16 Hastings L.J. 406-08 (1965); Oleck, Historical Nature of Equity Jurisprudence, 20 Fordham L. Rev. 26-32 (1951); Re, Roman Contributions to the Common Law, 29 Fordham L. Rev. 447 (1961). Oleck submits that the concept of equity as the leavening of the strict law had its roots in the Code of Hammurabi, the Sumerian-Assyrio-Chaldean tablets, the Hebrew civilization, the philosophy of the ancient Greeks, and the civil and canon law of Rome.

3. In the Nichomachean Ethics, Aristotle defined the Greek word for equity, epieikeia, as “not the legally just but a correction of legal justice,” or “a correction of law where it is defective owing to its universality.” Thus, the Romans appear to have viewed equity as something to be found within the positive law—almost a self-correcting mechanism—while the Greeks recognized a need for a set of external, higher principles which would always be necessary to relieve men from the inevitable harshness of the strict law. Perhaps it is because of these divergent concepts of equity that equity and law developed as a single system in those countries of Europe which now have a civil law system, and as separate systems in England, and consequently, in the United States. See generally, ARISTOTLE, ETHICA NICOMACHEA, §§ 1137b5-1137b30, (ed. W. D. Ross) (London, 1925); Cardozo, The Growth of the Law (1924); Cardozo, The Nature of the Judicial Process (1921); Dicey, Introduction to the Study of the Law of the Constitution (7th ed. 1908); Holdsworth, 4 A History of English Law 278 (1924), 5 A History of English Law 217 (1924); Maine, Ancient Law 24, 27, 42, 55 (10th ed. 1884); Maine, Dissertations on Early Law and Custom (1883); Maine, Lectures on the Early History of Institutions (1875); Maitland & Montague, A Sketch of English History (1915); Maitland, The Forms of Action at Common Law (1936); Newman, Equity and Law: A Comparative Study (1961); Perry, Common Law Pleading (1897); Plucknett, A Concise History of the Common Law 673 passim (5th ed. 1956); Found, Organization of Courts, 26-90 (1940); Found,
Regardless of its origins, the expansion of the English Chancery system's jurisdiction, from royal dispensation of favors and in effect being the "keeper of the King's conscience," to a separate and independent system of jurisprudence, came about because of the resistance of the English common law judges to changes in their writs and forms of actions.\(^4\) The great struggle between the courts of law and the prerogative court was not resolved until the reign of James I (1603–1625), when the quarrel between Chancellor Ellesmere and Chief Justice Coke over the independence of Chancery was decided in favor of the High Court of Chancery.\(^5\) From that time forward, when there were conflicts between the rigidity of law and the flexibility of equity, equity would prevail.\(^6\)

English courts of law and equity developed in their separate courses for about five hundred years, until both systems became stiffened with the arthritis of ages of tired formality and precedent. Thus it was, that in England in the mid-nineteenth century a reform movement began—partly original, partly borrowed from David Field, the great reformer of New York procedural law. The movement culminated with the Judicature Acts of 1873 and 1875, which radically simplified procedure and practice in English law, and which sought to abolish, in words at least, the distinctions between law and equity.\(^7\) Whether there has actually been a merger in England of the substances of law and

---

\(^4\) Oleck, supra note 2, at 32.

\(^5\) The difference was centered around Lord Coke's acts of restraint to prohibit suitors from going into equity for relief. Ellesmere, in retaliation, enjoined suitors from pursuing common law judgments with the end result being an obvious deadlock. In an effort to resolve the conflict, James I appointed a committee, which included the Attorney General, Sir Francis Bacon, to advise him. Ellesmere emerged the victor from the struggle when James decreed in favor of Chancery. Although dissension was still to be found between the courts of chancery and the law courts at various times during the 17th century, Chancery's position was never seriously assailed after Ellesmere's triumph. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 699 (5th ed. 1956). See generally, Smith, Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence, 41 WASHINGTON L. REV. 297 (1966).

\(^6\) See generally, HOLDSWORTH, SOME MAKERS OF ENGLISH LAW (1938); MAITLAND, EQUITY, 1-11 (1909); PLUCKNETT, supra note 5.

\(^7\) The Common Law Procedure Act of 1854 brought about a partial procedural fusion. 17 & 18 Vict. c. 125. The Judicature Act of 1873, which became effective in 1875, provided broadly that, "... generally in all matters not herebefore 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." 36 & 37 Vict. c. 68, sec. 25(11).
equity and not merely of the procedures is a question which continues to confound British legal scholars.  

Prior to the American Revolution, equity jurisprudence developed very haphazardly in this country. Some colonies had separate courts of law and equity. Others, notably Massachusetts, failed to establish a separate system, and in some, equity jurisdiction was vested in a royal governor or his appointee. The possibility of colonial hostility to equity has been suggested on the theory that it evoked memories of the hated Star Chamber Court which developed simultaneously with the High Court of Chancery in England, or that the very notion of equity and of discretion in the application of law ran counter to the Puritan ethic. After the Revolution, most of the states established separate courts of equity, even though New England remained reluctant to do so.

II. EQUITY IN ARKANSAS

The history of equity in Arkansas is unique and fascinating. During the first eighty-four years of Arkansas' existence—as a territory from 1819 to 1836 and as a state thereafter—almost all trial work was done in the circuit courts, which were authorized to exercise all jurisdiction not otherwise vested. Thus, the circuit courts necessarily had cognizance of both legal and equitable matters. The 1836 constitution of Arkansas authorized

10. Id.
11. Pound, The Spirit of the Common Law 53 (1921). Dean Pound notes that there was a hearty spirit of puritanism which could be found in the Constitution and attributes this to the fact that the Constitution, itself, was the work-product of men who believed in original sin and were resolved to leave no door open for transgressors which they could possibly shut.
13. On the question of whether the lower trial courts in Arkansas should be upgraded before merger is attempted, see Arkansas Judiciary Commission, Report to the 1965 General Assembly 55. The delegates to the Arkansas Constitutional Convention apparently followed this advice in drawing up the county trial courts section of the new document. Proposed Ark. Const., art. 5, § 7 (1970).
14. The Laws of the Territory of Arkansas Comprising the Organic Laws of the Territories of Missouri and Arkansas and the Laws Passed by the General Assembly of the Territory of Arkansas at the
the legislature to establish separate courts of chancery, but the General Assembly did not begin to do so until 1855. Perhaps the reason Arkansas did not immediately establish chancery courts is that the circuit judges were reluctant to relinquish their jurisdiction over equitable matters—much as present day chancellors and judges are reluctant to take on the added responsibility of administering both bodies of law.

It is pertinent, from an historical viewpoint, to note at this juncture an appeal to the Arkansas Supreme Court of a case decided in the Circuit Court of Pulaski County (Chancery side) in 1844, Hempstead & Conway v. Watkins, Adm'r of Byrd, wherein Judge Oldham waxed eloquent on the subject of what effect a legislative grant of concurrent jurisdiction to courts of

SESSIONS IN 1819 AND 1820 at 28, an enactment dated December 21, 1818, states: "Be it enacted by the general assembly of the territory of Missouri, That in all cases where a remedy cannot be had in the ordinary course of common law proceedings, the Circuit Court in each county shall possess and exercise chancery jurisdiction, in the same manner, and to the same extent, as the superior court of this territory now possesses and exercises the same, under the same rules and regulations which govern the chancery proceedings in said court."

At page 70, Acts passed by the Governor and Judges of the Territory of Arkansas, reads: All Missouri Territory laws "not repugnant to provisions of the original law of the territory [of Arkansas] shall be and continue in force as fully and to the same extent so far as applicable . . . ." dated August 3, 1819.

At page 73, Section 5, enacted August 3, 1819, states: "[The circuit judges shall exercise the same jurisdiction] which is exercised by the judges of the circuit courts of the territory of Missouri. . . ."

15. Ark. Const. art. VI, § 1 (1836) provides:
The judicial power of this State shall be vested in one supreme court, in circuit courts, in county courts, and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in corporation courts, and, when they deem it expedient, may establish courts of chancery.

Section 6 of the same article provides:
Until the General Assembly shall deem it expedient to establish courts of chancery, the circuit court shall have jurisdiction in matters of equity, subject to appeal to the supreme court, in such manner as may be provided by law.

Section 4 of the schedule of article VI states:
All actions at law which now are, or may be pending in any of the courts of record in the Territory of Arkansas may be commenced in or transferred to any court of record of the State, which shall have jurisdiction of the subject matter thereof; and all suits in equity may, in like manner, be commenced in or transferred to the court having chancery jurisdiction.

Provisions for establishment and maintenance of courts of chancery in Arkansas may be found in each of the State's five constitutions: Ark. Const. art. VI, §§ 1, 4, 6 (1836); Ark. Const. art. VI, §§ 1, 6 (1861); Ark. Const. art. VII, §§ 1, 6 (1864); Ark. Const. art. VII, § 5 (1868); Ark. Const. art. VII, §§ 1, 11, 15; see also, Proposed Ark. Const. art. 5, § 6(a), schedule III, § 4(b) (1970).

16. 6 Ark. 317 (1844).
common law would have upon the jurisdiction of equity courts.

It may be also observed that many eminent jurists like those of former times, entertain great jealousy against courts of chancery, and generally use all exertions to limit and restrict them in the exercise of their ancient jurisdiction. But we feel ourselves constrained to regard the ancient landmarks of the jurisdiction of chancery, and will endeavor to uphold, so far as in us lies, that magnificent fabric of judicial ethics, which has been reared in resplendent majesty by the most profound geniuses that ever erected a superstructure of human wisdom, or fashioned a system for the administration of human justice. We feel no disposition to display a vandal barbarism by lending a helping hand to demolish and destroy so splendid an edifice, replete with everything calculated to demand our admiration and reverence; nor would we remove a single stone or efface a single feature by which the harmony of the superstructure might be endangered, or which might mar the beauty of its fair proportions. For the purpose of fully ascertaining and clearly expounding the rule upon the question now before us, we have looked into the recorded wisdom of the sages, by whom the system of equity jurisprudence was brought into order out of confusion; and also into the decisions of those courts in America, which have, with a jealous eye, watched all encroachments upon its boundaries, while they have resisted the exercise of jurisdiction properly legal by courts of equity, and have, on all occasions marked out the limits of chancery and asserted its undoubted prerogatives. While we do not oppose the action of the legislature in conferring upon courts of law jurisdiction in matters originally equitable; or courts of law, by their own acts in disregard of the unmeaning trammels of technical absurdity, for the administration of strict and comprehensive justice upon the enlarged and ennobling principles of equity, in granting a remedy demanded by the clearest principles of right and wrong, in cases where they would formerly, by adhering to the rigid rules of the common law, have denied it, we will defend and sustain courts of chancery in the exercise of their undoubted jurisdiction, and withstand its being taken from them by force, by the grasping and expansive arms of common law tribunals.17

Since the opinions of the trial courts in the formative period of Arkansas jurisprudence are not available, little is known of the attitudes and feelings of the circuit judges who daily had to deal with two systems of law within a single courtroom. It must be remembered that in 1844 there had been no reform of the rules of civil procedure anywhere in the United States and that the rules of practice and pleading for law and equity were radically different. Hempstead, considered in this light, is indeed a bold and imaginative landmark defense for the powers of Chancery.

At approximately the same time that a trend began in other states to merge their separate courts of law and equity, Arkansas established in 1855 its first court of chancery in Pulaski

17. Id. at 366.
County.\textsuperscript{18} That court was not created because of an onerous caseload in the circuit court, but rather for the very specific purpose of wresting all the funds remaining in the hands of trustees of the defunct Arkansas Real Estate Bank.\textsuperscript{19} The problem boiled in an unsettled state from 1842 until 1853, when Judge John J. Clendennin, circuit judge sitting in chancery, declined to interfere for want of jurisdiction. The Legislature subsequently passed an act creating the Pulaski County Chancery Court on January 12, 1855. “Jurisdiction in all matters of chancery were [sic] transferred from the Circuit Court immediately after the act was signed and the first session of Pulaski Chancery Court was convened February 6, 1855, at 3 p.m. in the Senate chamber.”\textsuperscript{20}

Almost immediately thereafter, the Attorney General filed for a writ of quo warranto against Chancellor Hulbert F. Fairchild, “to show to what authority he exercises the office of chancellor and assumes to exercise a separate Court of Chancery jurisdiction, aside and apart from the Circuit Court in and for the county of Pulaski.”\textsuperscript{21} The Pulaski Chancery Court was held to be constitutional shortly thereafter by the Arkansas Supreme Court.\textsuperscript{22} One final interesting fact about the court is that, although the office of chancellor was made elective, no chancellor was elected until Frank H. Dodge stood for re-election in 1940. “This was not in defiance of the constitution but because it so happened each chancellor had been appointed to fill an unexpired term of his predecessor.”\textsuperscript{23}

III. A CONTINUING SAGA

Arkansas’ first constitution served the State for 25 years after statehood was achieved in 1836, and then in the turmoil and aftermath of the Civil War, the State adopted new constitutions in 1861, 1864, 1868, and 1874. Pursuant to very similar enabling

\begin{itemize}
  \item \textsuperscript{18} Greenebaum, \textit{Arkansas’ Judiciary: Its History and Structure}, 18 ARK. L. REV. 152, 156 (1964).
  \item \textsuperscript{19} Sherwood, \textit{Pulaski Chancery Court}, The Arkansas Gazette, April 5, 1942 (Sunday Magazine, p.3). Miss Sherwood writes: “Governor Yell, in 1842, displayed the situation before the legislature 'in a strong light,' declaring that when the Board of Directors of the bank made assignment to a Board of Trustees (like taking money from one pocket to put into another), the affairs of the bank were 'put beyond the scrutiny and control of the state, although the state remained responsible for the payment of interest on the bonds.’”
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} State v. Fairchild, 15 Ark. 619 (1855).
  \item \textsuperscript{23} Sherwood, supra note 19, at 12.
\end{itemize}
clauses in each of those documents, the General Assembly established several chancery courts in counties where they were deemed desirable.\textsuperscript{24}

Undoubtedly, the greatest reform in Arkansas law occurred in 1868 with the adoption of the Civil Code,\textsuperscript{25} which was based on Kentucky's Code and which was in turn part of the great legal reform movement instituted by David Field in New York in 1848. In the Code, Arkansas abolished the forms of action and put in their place the Civil Action.\textsuperscript{26} Unlike most of the Code states, Arkansas retained its few separate courts of law and equity. But a great step on the road to merger was made by the Code's abolition of the distinctions between legal and equitable actions. Dean Ralph Barnhart has summarized the change which the Code effected:

Here again it seems that the important thing in the minds of the code drafters was to relieve the pleader from having to decide at his peril that his action was one at law or in equity and be turned out of court if the judge disagreed with his choice. As with the forms of action, the one form of action provision of the codes did not pretend to change the primary rights and duties previously enforceable in the separate courts, nor was it intended to change the final relief granted. What was intended was to abolish the peculiar characteristics of legal or equitable actions in their manner of commencement and pleading. Hence both legal and equitable actions are commenced in the same way, utilize the same pleadings and are generally conformable to the same procedural rules.\textsuperscript{27}

Dean Barnhart asserts that the difference between judicial systems with a single court and Arkansas' separate courts system is "more apparent than real," in that the states with unified systems set up separate dockets, jury and equity dockets, while Arkansas "simply tries these dockets in separate courts."\textsuperscript{28} The equalizing mechanism is the statutory provision for automatic transfer to the correct court of actions erroneously filed in the wrong court with ease of transfer thereby being guaranteed.\textsuperscript{29} Although this statute would appear to guarantee transfer of actions between the courts, it has been pointed out that in practice the transfer is far from automatic.\textsuperscript{30}

\textsuperscript{24} Supra note 15.
\textsuperscript{28} Id. at 16.
The Arkansas General Assembly created a statewide chancery court system by Act 166 of 1903, which provided that, "Separate courts of chancery are hereby established in every county in the State of Arkansas."¹³¹ Reasons behind this legislative action are probably speculative at best, but it has been stated that the impetus was at least partly political: the chancellorships which immediately became available were first filled by executive appointment by Governor Jeff Davis, and were ripe plums for those who had gained the Governor's favor.³²

From 1903 to 1970, few substantial changes in the law-equity system were realized in Arkansas. Most alterations concerned the chancery districts: adding new ones, increasing or decreasing their size and composition, and in a few cases adding an extra chancellor to take care of heavy caseloads which built up—especially in Pulaski County.

Within recent years it has become clear that the caseloads of some chancery (and circuit) districts are much heavier than others. Under the 1874 constitution, it is possible for chancellors and circuit judges to exchange circuits for the purpose of expediting the disposition of cases. It has been pointed out that under the proposed constitution, since all chancellors and judges would be on equal footing from the beginning (e.g., all would be judges empowered to hear cases both at law and in equity), there would be a greater opportunity for, and possibility that, some temporary switching of judges to heavily crowded dockets could be achieved.³³

Under the present system, most chancellors seldom hear law cases and most circuit judges seldom try equity cases. Under the proposed constitution divisions of the District Court may be established permanently by the Supreme Court,³⁴ and law and equity divisions are declared by the schedule of the document to exist "until changed pursuant to this constitution."³⁵ If the proposed constitution is adopted, and if, as is probable, the supreme court acquiesces in the creation of law and equity divisions, it is likely that the present chancery

---

32. Speech by Robert A. Leflar, President of the Arkansas Constitutional Convention, made at the University of Arkansas Law School, Fayetteville, Arkansas, February 25, 1970.
33. Id.
35. Id. schedule III, § 4(b) (1970). Under this section divisions such as family law, probate, and criminal law could also be established.
judges would be assigned to the equity divisions and that the current circuit judges would be assigned to the law divisions. Assuming that the foregoing prediction is a reasonable one, it appears that the change in the administration of justice under the proposed merged system would be "in name only"—chancellors would be formally designated as judges, even though they are commonly referred to as judges today, and everything else would operate as it does presently, at least in the short run—which might well be defined as the lifetimes of all present chancellors and circuit judges who would accede to judgeships under the new system.

If the changes envisaged by those who advocate unification of chancery and law courts in Arkansas are to be in name only, for the time being, the question might well be raised, Why merge? The answer is that the greatest benefits from merger will be realized only in the future. These benefits can best be understood if some knowledge of the philosophical ideal of the merged system is posited. That system, very simply, would have a single court, a single judge, one procedure, and a free exchange of the substantive matter of law and equity. As can be seen immediately, this construct is dramatically removed from the old

36. See note 32 supra.
37. See generally WALSH, EQUITY 36-39, 97-131 (1930); Bordwell, The Resurgence of Equity, 1 U. CHI. L. REV. 741, 749-50 (1934); Rundell, The Chancellor's Foot: The Nature of Equity, 27 U. KAN. CITY L. REV. 71, 84-85 (1958); Sedler, Equitable Relief, But Not Equity, 15 J. LEGAL Ed. 293, 298 (1963); Pound, Introduction to NEWMAN, EQUITY AND LAW A COMPARATIVE STUDY 9 (1961); Newman, The Place and Function of Pure Equity in the Structure of Law, 16 HASTINGS L.J. 401 (1965) and especially at 410, wherein Professor Newman expresses great admiration for the civil law as exemplifying the ideal merged system:

Now that law is no longer sacred and unchangeable, there is no further need to resort to forces outside the law in order to correct instances of failure of justice. The rules of law open to receive the doctrines of equity, and the correction of law comes about within the law itself. At this stage in the evolution of law there is no longer need for an equitable system separate from the main body of the law. Equity loses its separate identity; equity and law coalesce, and equity becomes an integral part of a unitary legal system. The most perfect expression of this stage in the evolution of law is the civil law, in which there is only one set of norms, designed, so far as public order and the social interest in the stability of transactions do not forbid, to provide for just solutions of all situations which may arise. This union of law and equity has not yet been reached in Anglo-American law, in which the long experience of administration of equity in a separate inner judicial system has created a moral curtain, now heavy with the mold of centuries, which hangs across our law, shutting off the principles of equity from the greater part of the law.

English system of chancery and law courts which existed prior to 1873, in which there were separate courts, separate judges, radically different procedures, and mutually exclusive bodies of substantive law and remedies.

Where does Arkansas fit into this scheme? From a one-court, one-judge, two-procedures, and two-substances system in 1836, Arkansas slowly began moving toward the present system, which is two-court, two-judge, two-substances, and one-procedure. The major steps along the way to this present system, as has been seen in the preceding brief history, were the establishment of a separate chancery court in Pulaski County in 1855, the major procedural reforms of the 1868 Civil Code, and finally the institution of a full two-court system on a state-wide basis in 1903.

Of the factors considered above—courts, judges, procedures, and substances—the most difficult in which to achieve complete merger is substance. The substance of the law is found in the statutes and the common law and relies upon adherence to precedent with a considerable degree of strictness. In most law cases, the parties are entitled to a jury trial on questions of fact. Alternatively, the substantive nature of equity inheres in its flexibility: equity is supposed to make special allowances for the particularities of each case. Although it has hundreds of years of precedent by now, equity is not absolutely tied to that precedent. The parties in an equity suit are not entitled to a jury trial, although either may request an advisory jury, the empanelling of which is entirely discretionary with the chancellor.

IV. A SIMPLE UNION?

The practical and constitutional difficulties of fusing the substantive elements of law and equity are clear and possibly even insurmountable: the law is static and equity is dynamic. It is well to note, however, that equity, as an element of social reform in society, is no longer such a driving, vital force. The various state legislative bodies instead are today serving the role as reform agents that equity originally enjoyed. As Professor Simpson has observed:

[It] would be idle to suppose that such fusion of legal and equitable procedure is equivalent to a complete merger of law and equity. . . . Moreover, there are differences between specific and substitutional relief, between a discretionary and a rigid application of remedies, between controversies suitable to determination by a jury and those not so suitable whether by reason of complexity or otherwise, which will survive any changes in procedural forms. Equity continues to exist though
separate equity practice disappears.\textsuperscript{38}

When he wrote those words in 1936, Simpson predicted the complete demise of separate equity practice in the United States would occur within fifty years.\textsuperscript{39} It seems rather optimistic to believe that prophecy—for even under the proposed constitution of Arkansas, equity practice would for the most part remain separate in fact, if not in name, for a good many years to come. So long as there are separate law and equity judges, attorneys will be required to distinguish between the legal and equitable nature of the subject matter out of which their cases arise. The bromide that, "old habits die hard," is probably the greatest obstacle to rapid and sweeping fusion of law and equity in Arkansas.\textsuperscript{40}

Among legal scholars there appears to be a considerable difference of opinion as to what merger is supposed to effect. Some expect and look forward to the ideal system,\textsuperscript{41} while others are satisfied with a fusion of procedures.\textsuperscript{42} Finally, there are those who take what might be called the most realistic view: recognizing that complete fusion is practically impossible, but nonetheless believing that there can always be improvement of the present system.\textsuperscript{43} This latter approach, it is submitted, is what the drafters of the proposed constitution have pursued.

If the proposition is accepted that all deliberate efforts should be made in striving to attain the ideal legal system, then

\begin{itemize}
  \item \textsuperscript{38} Simpson, \textit{Fifty Years of American Equity}, 50 Harv. L. Rev. 171, 180 (1936).
  \item \textsuperscript{39} \textit{Id.} at 248.
  \item \textsuperscript{40} \textit{See} Delany, supra note 8, at 117, which appears to express the same idea from the British standpoint:
    \begin{quote}
      The truth of the matter is, of course, that the procedural fusion and the abolition of the distinction between the separate tribunals have not affected the difference in genesis between the rules evolved in those tribunals. The different technical approach to these rules, and the differences in the training of the men who practise in the separate fields, as has been pointed out by the present Master of the Rolls, will continue to militate against substantive fusion. . . .
    \end{quote}
  \item \textsuperscript{41} \textit{See generally} note 37 supra, and the works cited therein.
  \item \textsuperscript{42} \textit{Id.}
  \item \textsuperscript{43} Bordwell, supra note 37, at 750, where it is asserted that:
    \begin{quote}
      Some, no doubt, have looked for a complete fusion of law and equity both as to rights and remedies. It would seem a great loss if it were so. There is need for the active principle in the law as well as the static. But no one, it is believed, claims that the procedure acts, in wiping out the separate courts of equity and the separate suit in equity, had any such immediate object. The immediate object was frankly procedural. It was only carrying one step further the reform by which the common law actions were abolished. The abolition of the common law forms of action was not intended to change the substantive law. Incidentally, no doubt, much substantive law was affected. Likewise, with the elimination of the separate suit in equity.
    \end{quote}
\end{itemize}
perhaps the validity of one of the arguments in favor of merger is more manifest: namely, that the law can best absorb equitable principles if it is always administered in the same court by the same judge.

A real merger of the substantive rules of law and equity necessarily results from the merger of courts and of procedure. It has always been true that in cases of conflict between law and equity, . . . the rule in equity has been the only real law, the opposing rule at law being illusory and with no real force and effect, since it will be ineffective, and the enforcement of such a rule at law will be restrained by equity's power in personam over the parties to the controversy. The bringing together of the rules of law and equity in the same court and in the same form of action, to the end that complete relief both legal and equitable may be given in the same suit, results necessarily in overthrowing the illusory and conflicting rule at law and the establishment of the rule in equity as the controlling law of the case.44

Some critics have charged that the merger plan is merely change for the sake of change—pointing out that Arkansas has survived for ninety-six years (or sixty-seven years, counting from the establishment of a statewide chancery system in 1903) under the present system and might as well keep it. One chancellor has opined that if the proposed constitution were adopted, over 90% of all law and equity cases would be disposed of exactly as they are presently.45 The beauty of the present system, he asserts, is that it is automatic: the lawyer files his suit in either the circuit court or the chancery court, and he knows at once whether he may recover damages or obtain specific relief, whether a jury trial is possible, and who the judge—or chancellor—will be.46 Any difficulties arising as a consequence of an erroneous choice of court can easily be remedied by a transfer to the correct one.47 If the merged system were adopted, the chancellor believes that confusion would result over the assignment of the case to the proper "side" or division of the court, as well as over which issues would take precedence in cases where both legal and equitable questions are involved.48 The problem of when a defendant is entitled to a jury as of right and when at the court's discretion would also arise, according to such critics.49

44. Walsh, supra note 37, at 38.
45. Interview with Chancellor Thomas F. Butt, Fayetteville, Arkansas, February 16, 1970.
46. Id.
47. Id. But see LEFLAR, supra note 30.
48. Id.
49. See Fraser, The Effect of the Merger of Law and Equity on the Right to Trial by Jury, 21 OKLA. S.B.J. 561 (Mar. 26, 1960), for enlighten-
An additional disadvantage under the proposed system might arise when an attorney, knowing that the district court would have to assign his case to the appropriate side of the court, would tend to be sloppy in drafting his complaint or answer, or for tactical reasons even attempt to delude the court into assigning his case to the wrong side. In answer to this possible detriment, it is asserted that the present chancellors and judges in their new positions as District Judges would not tolerate such conduct, but would still continue to require a clear presentation of the issues in the pleadings. If this were so, then the problem of assigning cases to the proper side of the court would be no more difficult than keeping separate dockets for the separate courts is presently. In any event, lawyers today draft their pleadings with the same tactical purposes in mind, seeking to establish jurisdiction in one court or the other in keeping with what they conceive to be their own advantage.

The Arkansas Constitutional Revision Study Commission, in its report to the Governor in 1968, said on the question of merger:

The inconsistency of separate jurisdictions is demonstrated by the fact that the Supreme Court reviews both law and equity matters without difficulty. There seems to be no good reason why one trial judge could not consider matters arising in each of these areas of the law.\textsuperscript{50}

It is submitted that the position taken here by the Study Commission is somewhat oversimplified. There is a major difference between the supreme court and the circuit and chancery courts. The supreme court is an appellate court, in which a jury is never employed. The circuit and chancery courts—which would become known as the district court under the proposed constitution—are trial courts, in the former of which a jury trial is of right, and in the latter of which a jury is only advisory and is employed solely at the discretion of the chancellor. Professor Zechariah Chafee, Jr., expressed the thought rather cogently when he said the guarantee of jury trial "is the sword in the bed that prevents the complete union of law and equity."\textsuperscript{51}

\textsuperscript{50}ARKANSAS CONSTITUTIONAL REVISION STUDY COMMISSION, REVISING THE ARKANSAS CONSTITUTION—A REPORT TO THE GOVERNOR 73 (1968).

\textsuperscript{51}CHAFEE & RE, CASES AND MATERIALS ON EQUITY 24 (5th ed. 1967).

See also Chafee, Foreword in RE, SELECTED ESSAYS ON EQUITY iv (1955),
If the proposition were accepted that for the foreseeable future in Arkansas there would continue to be separate sides of the district courts and—perhaps more importantly—separate judges, then the jury problem would not arise any more often than it does under the present system. Sometime in the distant future, when there may be areas of the State in which a single district judge could, and would—for purposes of convenience and economy—handle all cases, both legal and equitable, the problem of his deciding whether the case is predominantly at law or in equity might arise. It is submitted, however, that the proposed system contains the needed flexibility to remedy any such difficulties. 52

At this juncture, yet another statement by the Study Commission is relevant:

Experience in the other states, nearly all of which have combined law and equity jurisdiction, indicates that a single trial level jurisdiction is quite satisfactory. 53

This, too, is a rather broad generalization. To understand why, a cursory examination of the classes of equity jurisdiction which exist in the United States today is essential. There are three main classes: (1) Those in which equity is administered in a separate court from law and by a different procedure, 54 (2) Those in which both jurisdictions are vested in a single court, but which court has separate sides or divisions, 55 and (3) Those

where he states:

There is only one genuine reason today for distinguishing an action at law from a suit in equity—the constitutional right to a jury trial in civil cases. I recognize some advantages in that time-honored method of settling disputes, but people are getting so busy that I wonder whether we can afford to use that method much longer. As waivers of juries become more frequent, the antique barrier will become barely discernible.

52. Perhaps the "paramount issue" test referred to in Fraser, supra note 49, could be adopted in Arkansas to relieve this problem if and when it should arise.

53. Arkansas Constitutional Revision Study Commission, supra note 50, at 73.


in which equity is administered in the same court and by the same procedure as law. Since every state has its own peculiar history and needs, and since there are changes constantly being made in the administration of justice across the country, it is almost impossible to correctly categorize every state into one of these classes.

Arkansas is a good example of the difficulty which arises in classification. Upon first blush, the State would appear to belong to the first class. Yet, when it is remembered that the Civil Code provides for automatic transfer and for a single form of practice and pleading, it is seen that the procedures of law and equity are at one with each other.


Joiner and Geddes, supra note 54, at 1110-14, however, list the following: ARIZ. REV. STAT. ANN. R. CIV. P. 2 (1956); ARK. STAT. ANN. § 27-201 (Repl. 1982); CAL. CODE CIV. P. ANN. § 307 (Deering 1953); COLO. REV. STAT. ANN., R. CIV. P. 2 (1951); CONN. GEN. STAT. §§ 7738, 7813, 7819 (1949); GA. CODE ANN. §§ 3-104, 37-901, 37-902 (1936); IDAHO CODE § 5-101 (1948); IND. STAT. ANN. § 2-101 (Burns, 1946); KAN. GEN. STAT. ANN. § 60-201 (Corrick, 1949); KY. R. CIV. P. 2 (1953); MNI. R. CIV. P. FOR DIST. CT. 2.01 (1952); MO. REV. STAT. § 506.040 (1949); MONT. REV. CODE ANN. § 93-2301 (1947); NEB. REV. STAT. § 25-101 (1943); NEV. COMP. LAWS § 8500 (1929); N.M. R. CIV. P. FOR DIST. CT. 2 (1953); N.Y. CIV. PRAC. ACT. § 8 (Cahill-Parsons, 1955); N.C. CONST., art. 4, § 1; N.C. GEN. STAT. § 1-9 (1953); N.D. REV. CODE § 32-0109 (1953); OHIO REV. CODE § 2307.02 (Baldwin, 1953); OKLA. STAT. tit. 12, § 10 (1951); S.C. CODE § 10-8 (1952); S.D. CODE § 33.0101 (1939); TEX. CONST., art. 5, § 8; UTAH CONST., art. 8, § 19; UTAH R. CIV. P. 2 (1953); WASH. REV. CODE § 4.04.020 (1951); WIS. STAT. § 260.08 (1955); WYO. COMP. STAT. ANN. §§ 3-301 (1945).

Joiner and Geddes did not include Alaska and Hawaii in their compilation of statutes, since neither had become a state at the time the survey was made. Louisiana was also omitted from their list.

The confusing nature of Arkansas' judicial history is illustrated by comparing the various editions of *Pomeroy on Equity Jurisprudence*, section 42: in the 1881 edition, Arkansas is listed as having two jurisdictions but only one tribunal; both the 1905 and 1918 editions place Arkansas in the category of states having one court and one procedure; and the 1941 edition interlinearly notes that Arkansas does have separate courts of law and equity. As stated in note 54, supra, CHAFEE & RE classified Arkansas as having two courts and two procedures.
Earlier it was observed that in some respects Arkansas' courts system was unique. Nowhere is that fact better illustrated than by comparing some of the salient features of Arkansas' equity administration with those of the other three states listed as having separate courts and separate procedures. In Delaware, Tennessee, and Mississippi, joinder of claims for legal and equitable relief is not permitted. In Arkansas, such joinder is permissible. In the other three states the presentation of an equitable defense in actions for legal relief is not permitted. In Arkansas, such a defense is not only permitted, but it is required to be presented in the defendant's answer. And, finally, in the other "unmerged" states, there can be no equitable counterclaim in actions for legal relief. Again, Arkansas not only permits it, but requires it.

In view of the above discrepancies, perhaps Arkansas should be placed in the second class, by recognizing that instead of calling our separate jurisdictions "sides" we call them "courts." But even this is inaccurate. For, in Oregon, which is a state having separate sides in a single court, there is no specific authorization of joinder of legal and equitable causes, and the Oregon Supreme Court has not upheld such joinder.

The principal difference between Arkansas and other states in this class is that Arkansas has separate judges. As the comparison with Oregon demonstrates, Arkansas is more progressive in some ways than those states which have one court and one judge. Vermont, which is often placed in the first class because it has separate courts of law and equity, is actually a better example of the second class because (a) the same judges sit in both law and equity courts, (b) cases are easily transferred between courts, and (c) there is only one form of action. Should Arkansas adopt the proposed Constitution, the State would undoubtedly be moved into the second class.

The great majority of the states are classified as having abolished all distinctions between law and equity courts and procedures. But when some investigation is made of the states which are so classified, it comes to light that Arkansas has a

60. Supra note 58.
62. Supra note 58.
64. See Denney, The Separation of Law and Equity in Oregon, 4 Willamette L.J. 18, 19 (1966).
more merged system in some ways than do some of those jurisdictions.

In New York, the birthplace of the Field Code and the vanguard of merger and reform, after over one hundred years of operation under a unified system, distinctions still remain; in fact, the New York courts' experience has been reported as being a "bewildering diversity of result." In groups of cases brought in equity when they should have been brought at law, the courts have sometimes granted legal relief, sometimes transferred the case to the trial calendar for jury trial, and sometimes dismissed the case entirely, which forces the plaintiff to bring an altogether new action at law, fraught with such pitfalls as the tolling of the statutes of limitation.

In 1848 the reformers in New York recognized three principal difficulties in achieving a uniform procedure in cases theretofore cognizable at law and in equity: (1) the form of the judgment and the means of enforcing it are quite different at law and in equity, (2) the modes of pleading in the two systems were quite at variance with each other—habit and familiarity with the old methods breed insistence upon theories of pleading, and (3) the requirements of jury trial in law actions and trial by the court in equity actions are almost irreconcilable because of constitutional mandates. None of these difficulties have withered away through the simple fiat action of statutory merger—even after more than one hundred years under the Field Code.

Finally, Michigan, which is also in the "totally merged" category, does not allow joinder of legal and equitable causes of action, and does not permit assertion of equitable defenses or counterclaims to actions at law. Thus, in its procedural rigidity, Michigan resembles the unmerged states of Mississippi, Tennessee, and Delaware. Arkansas, although it still has a two-court system, can afford more complete justice than can Michigan in one court.

67. Id.
69. Id.
70. Joiner and Geddes, supra note 54. But see King, The Union of Law and Equity: A Dissent, 37 MICH. S.B.J. 10 (April 10, 1958), which is a direct response to the Joiner and Geddes article.
V. Conclusion

From a reconstruction of the history of equity jurisprudence from ancient to modern times, with some knowledge of the types of systems presently found in the United States, and in the light of some of the arguments for and against merger, what can rightly be determined about the need for and possibilities of changing the present methods of administering justice in Arkansas?

First, it is seen that no state—nor any nation, for that matter—has attained a level of ideal merger of law and equity. Secondly, Arkansas, although sometimes erratically, has in reality moved toward the ideal system of complete justice since its beginning as a state, and at the present time it is in a better position, relatively speaking, than some states whose systems are, on their faces at least, more merged than our own. Thirdly, it is clear that if the proposed new system were adopted there would be several immediate, but for the most part temporary, problems: changing the names of courts, eliminating the title of chancellor, instituting a system of assigning cases to the proper side of the court, and in some instances acclimating judges to hearing both legal and equitable cases. Finally, major alterations in the legal system of Arkansas under the proposed revision would occur gradually and over a period of time: absorption of equitable principles and remedies into the common law, conversion from a two-judge system to one in which a single judge hears all cases, and increased utilization of provisions allowing transfer of judges to relieve overcrowded dockets.

It is submitted that the advantages far outweigh the disadvantages, and that Arkansas would ultimately benefit from this further step on the road to merger of law and equity. If the proposed constitution is adopted by the voters in November 1970, perhaps in another one hundred years Arkansas will

71. Speech delivered by Mr. John I. Smith, Washington County Delegate to the Arkansas Constitutional Convention, at the University of Arkansas Law School in Fayetteville, Arkansas, February 25, 1970. Mr. Smith remarked that in several sparsely populated areas of Arkansas it would even now be practicable to allow one judge to hear both law and equity cases. He particularly stressed the waste of time and the expense which occur under the present system, with circuit and chancellor judges traveling their circuits to hear only one or two cases, and suggested that one man could do both jobs more efficiently.

72. See Arkansas Judiciary Commission, Report to the 1965 General Assembly 55.
approach very near to the ideal system of one court, one judge, one procedure, and one substance: *La Dolce Vita!*

George P. Smith, II*
Walter W. Nixon, III

---

* B.S., 1961, Indiana University; J.D., 1964, Indiana University; Certificate, 1965, Academic De Droit International, De La Haye, Palais De La Paix, The Netherlands; Associate Professor of Law, University of Arkansas.