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THE FUSION OF LAW AND EQUITY IN UNITED STATES COURTS

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The evolutionary process in the *substantive* law is one of change from the simple to the complex, as the law adapts itself to meet the needs of an advancing civilization wherein the social groups and business organisms are becoming ever more complicated in their forms and transactions. The *machinery* for the administration of these substantive rules, however, seems ever tending toward a greater unity and simplicity. Instead of a great many separate systems of courts, each system breeding a distinctive body of legal doctrine, the marked tendency has been to unite these in a single hierarchy of courts. Thus in England the local courts are merged in the county courts which in turn administer the law under the appellate supervision of the various judicial branches collectively known as the Supreme Court of Judicature. The law of probate and divorce, formerly separately administered in the ecclesiastical courts, the independently developed law of the admiralty, and the multiform rules of equity, theretofore separately worked out and enforced in chancery, are all now consolidated in their administration in one court which recognizes the ancient branches only to the extent of assigning the various classes of business to different divisions of the court.[1]

Most of these original separate courts were lost in transit to America. Only the chancery and the admiralty retained their separate existence in most colonies, and even these failed to take root in some of the colonies.[2] In most states, however, at the time of the

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[1] The story of the change in England from the old system of courts to the new, is interestingly told by Lord Bowen, "Progress in the Administration of Justice During the Victorian Period," vol. I, Select Essays in Anglo-American Legal History, 516.

[2] Some phases of the history of chancery courts in the colonies are treated in the following articles: "Courts of Chancery in the American Colonies," by S. D. Wilson, vol. 2, Select Essays in Anglo-American Legal History, 779, and "The Administration of Equity Through Common Law Forms in Pennsylvania, id., 810. See also "New Light on the History of the Federal Judiciary Act," by Charles Warren, 37 Harvard Law Rev., 49, 96:

"It is to be recalled that, at this period, equity jurisdiction existed in only a portion of the States, and that for over a hundred years prior to the Revolu-

adoption of the Constitution equity was administered in chancery courts, as a separate system from the common law. The Constitution of the United States and its early amendments clearly recognize "law" and "equity" as being distinct branches of jurisprudence. Thus in the Judiciary Article it is provided:

"The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—*to all Cases of admiralty and maritime Jurisdiction;*—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States; between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (Article III, sec. 2, cl. 1.)

Similarly, the Eleventh Amendment recites that:

"The Judicial power of the United States shall not be construed to extend to any suit *in law or equity,* commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Likewise the separate status of common law actions is implicit in the language of the Seventh Amendment:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The subsequent history of the administration of equity in this country is familiar enough. The Congress did not, as no doubt it might have done, create separate national courts of equity and law, but organized only one system of courts in which might be tried cases at law, and cases in equity, according as the same judge happened to be playing the role of common law judge, or of chancellor. But the declaration at law, and the bill in equity retained their dis-

tion, it had been bitterly attacked in most of the colonies. There were Courts of Chancery, in 1787, in New York, South Carolina, Maryland, Virginia, and to some extent in New Jersey; in Pennsylvania, Delaware and North Carolina, there were no such courts, though the common law courts had certain equity powers; in Connecticut and Rhode Island, the Legislature exercised some powers of a Court of Chancery; in Massachusetts and New Hampshire, there were common law courts only, having a few very limited equity powers; Georgia had only common law courts."

tinct names and characteristics, and the case had to be one in law *or* in equity. This merely carried out the traditional and prevailing practice in most of the States.

The simplifying and rationalizing movement which got under way with the adoption of the Field Codes in the forties, pruned off as an unnecessary excrescence the separate administration of equity as a detached body of law, and initiated the practice of enforcing legal and equitable rules, without respect to their origin, in the same action. The only practical distinctions were that in case of conflict the equitable rule prevailed, and jury trial continued to be demandable as of right only on issues which previously had been triable at law rather than equity. This latter distinction, as to jury trial, has even been abolished in some states, such as North Carolina, Texas, and Georgia,[2a] where all issues of fact, though previously triable in chancery, are triable as of right to a jury.

This fusion of law and equity administration, under which we need no longer brand a suit as either "at law" or "in equity" took place as we have seen in England in the seventies under the Judicature Acts, which have been copied in the Dominions, and it now obtains in thirty of the forty-eight states of the Union.[3] Any separation of the stream of equity from the main channel of legal administration is today seen to be unjustifiable as an administrative device and explainable only as a historical survival from an era of multitudinous separate courts.

The desirability of reforming the practice in Federal Courts by abolishing the formal distinctions between proceedings at law and in equity, in harmony with the modern practice in England and most of the States, seems too clear for argument. Do provisions of the Constitution, above recited, offer any obstacle to this change? It may be of interest to note some *expressions* in opinions of the courts and in the writings of commentators which might lend color to the view that the Constitution has indelibly impressed the separation of law and equity upon the national judicial procedure.

Thus, in *Fenn v. Holme*,[3a] Mr. Justice Daniel, in passing upon the question whether an action at law in ejectment could be maintained upon an equitable title to land in the Federal Court in Missouri where the local practice permitted such action, said:

[2a] See note 25, *infra*.
[3] See 24 C. J. 24 n. 39.
[3a] 21 How. (U. S.) 481, 484, 488, 16 L. ed. 198 (1858).

"By the *Constitution of the United States,* and by the acts of Congress organizing the Federal Courts, and defining and investing the jurisdiction of these tribunals, the distinction between common-law and equity jurisdiction has been explicitly declared and carefully defined and established. Thus, in section 2, article 3, of the Constitution, it is declared that 'the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States,' etc.

"In the act of Congress 'to establish the judicial courts of the United States,' this distribution of law and equity powers is frequently referred to; and by the 16th section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided 'that suits in equity shall not be maintained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law,' at the same time affirming and separating the two classes or sources of judicial authority. In every instance in which this court has expounded the phrases, proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter, as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the Court of Chancery of England. . . . A practice has prevailed in some of the States (and amongst them the State of Missouri) of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles not complete or legal in their character; but this practice, as was so explicitly ruled in the case of Bennett v. Butterworth (11 How.), can in no wise affect the jurisdiction of the Courts of the United States, *who, by the Constitution and by the acts of Congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decision appropriate to each.*"

And Mr. Justice Matthews in passing upon the same question in *Ellis v. Davis,*[4] said:

"It has often been decided by this court that the terms 'law' and 'equity,' as used in the Constitution, *although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption,* do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the States, as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect or default of another (Railway Co. v. Whitton,

[4] 109 U. S. 485, 497, 3 Sup. Ct. Rep. 327, 27 L. ed. 1006 (1883).

13 Wall. 270, 287; Dennick v. Railroad Co., 103 U. S. 11), but new according to the course and analogy of the common law. Ex parte Boyd, 105 U. S. 647; Boom Co. v. Patterson, 98 U. S. 403."

Of similar purport is the language of Mr. Justice Gray, in *Re Sawyer*[5] as follows:

"The question presented by this petition of the mayor and councilmen of the city of Lincoln for a writ of habeas corpus is whether it was within the jurisdiction and authority of the Circuit Court of the United States, sitting as a court of equity, to make the order under which the petitioners are held by the marshal.

"*Under the Constitution* and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. Fenn v. Holme, 21 How. 481, 484-487; Thompson v. Railroad Co., 6 Wall. 134; Heine v. Levee Commissioners, 19 Wall. 655."

In the leading case of *Scott v. Neely*,[6] Mr. Justice Field for the court held that a creditor's bill in equity may not be maintained in the Federal Court in Mississippi by a simple contract creditor who had not reduced his claim to judgment, despite a local statute permitting it, and said:

"In Bennett v. Butterworth, 11 How. 669, 674, in commenting upon the practice prevailing in the courts of Texas, Mr. Chief Justice Taney, after observing that although the common law had been adopted in Texas, the forms and rules of pleading in common law cases had been abolished, and the parties were at liberty to set out their respective claims and defences in any form that would bring them before the court, said: 'Although the forms of proceedings and practice in the State Courts have been adopted in the District Court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state court. But if the claim is an equitable one, he must proceed according to rules which this court has prescribed (under the authority of the act of August 23d, 1842), regulating proceedings in equity in the courts of the United States'."

[5] 124 U. S. 200, 209, 8 Sup. Ct. Rep. 482, 31 L. ed. 402 (1888).
[6] 140 U. S. 106, 111, 11 Sup. Ct. Rep. 712, 35 L. ed. 358 (1891).

We may also note the pronouncement of Davis, J., in *Thompson v. Railway Companies,*[7] where a similar question was presented, as follows:

"The Constitution of the United States and the acts of Congress, recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the State courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit."

Similar expressions may be found in the opinions of the lower Federal Courts. For example, Sanborn, Circuit Judge, in denying the right to plead an equitable title as a defense in ejectment, in *Schoolfield v. Rhodes,*[8] said:

"There is no doubt that an equitable title may not be pleaded and proved, against a seasonable objection, to defeat an action at law in the Federal courts. The distinction between actions at law and suits in equity is not a mere matter of form. It inheres in the nature of judicial proceedings, it is strictly observed in the courts of the United States, and it is not affected by the statutes of the several states, nor by section 914, Rev. St., the act of conformity."

So also Connor, District Judge in *Crown Orchard Co. v. Dennis*:[9]

"In the investigation of decided cases, care must be had to ascertain whether they are actions at law or suits in equity. It will also be observed that in many cases found in modern reports the courts have, under the Code Procedure, administered both legal and equitable remedies in the same action, whereas this court is compelled to observe the distinctions *prescribed by the Federal Constitution* and statutes respecting actions at law and suits in equity."

And Neterer, District Judge, in *Bonifaci v. Thompson,*[10] observed that:

"United States Courts have always recognized the distinction between common law and equity, *under the Constitution,* as matter of

[7] 6 Wallace 134, 137, 18 L. ed. 765 (1867).
[8] 82 Fed. 153 (1897).
[9] 220 Fed. 516, 520 (1915).
[10] 252 Fed. 878, 880 (1917).

substance as well as of form and procedure, and this has been maintained, although both jurisdictions are vested in the same courts."

Likewise, Kenyon, Circuit Judge, in the recent case of *Dennison v. Keck*,[11] in holding that a claim for cancellation of a mortgage cannot be joined with an action to recover land, said:

"In the consideration of this case our attention is challenged by a question not raised in argument or in any way presented, but which we deem important, and that is whether this action is not an attempt in equity to ascertain and establish rights properly cognizable at law. The distinction between legal and equitable actions is preserved in the federal courts. It is not a trifling distinction, to be brushed aside at the whim or desire of litigants, *but is a fundamental and constitutional one,* arising under the Seventh Amendment to the Constitution."

The situation is thus described in 21 Corpus Juris, p. 27:

"By express provision of the constitution and the several judiciary acts, the federal courts are vested with jurisdiction both at law and in equity. The constitution also preserves the right of trial by jury in common-law cases, and from the beginning it has been provided by statute that suits in equity shall not be sustained in any court of the United States where a plain, adequate, and complete remedy may be had at law. *These provisions require and preserve* a sharp distinction between common-law and equity causes."

And the distinguished Committee on Jurisprudence and Law Reform of the American Bar Association of which Everett P. Wheeler, Esq., was then Chairman made in 1923 this guarded statement:

"The inherent distinction between the rights and remedies of parties in suits at common law and in suits in equity is recognized as an existing fact by the Constitution of the United States, but delay and injustice have often been caused by visiting upon the suitor disastrous consequences from a mistake made by his attorney in bringing his suit on the wrong side of the court." (Report of Committee on Jurisprudence and Law Reform, 48 A. B. A. Reports—1923—page 327.)

An elementary text (Hughes, Federal Procedure, 2d ed., sec. 135) thus phrases the matter: "The distinction between law and equity in the Federal Courts in all matters of procedure is carefully preserved and guarded, *for it is a distinction made by the Constitution.* Hence the Federal Courts preserve this distinction, and are not affected by the reform procedure adopted in many of the State courts abolishing it."

[11] 13 F. (2), 384, 386 (1926).

The foregoing quotations might be augmented by many others of like purport, but they suffice to show the trend of judicial and professional language on the subject.

It will have been observed by the reader, however, that they are by no means conclusive or even strongly persuasive on the exact point considered, i.e., the power of *Congress* to fuse the administration of law and equity in the national courts. They speak of a distinction between law and equity as being fixed by the Constitution, and so it indubitably is, in one respect, i.e., in that the Seventh Amendment gives suitors the right of jury trial in law actions, but gives no such right in equity suits. But that right, obviously, could easily be preserved if the two classes of cases were administered in the same form of action.[12] The remaining quotations are chiefly directed to the question, not of whether Congress may alter the Federal equity practice, but whether the States may do so. That they cannot seems abundantly clear from the mere fact that the judicial power of the Federal Courts is conferred by the national Constitution. Congress, by the Conformity Act, it is true, requires the Federal courts to conform, in a measure, to the local practice in law actions, but that Act does not embrace equity suits. These opinions, then, merely call attention to the Constitutional allusion to "law and equity" to show that Congress has *power* to *retain* in full flower the classical distinctions between the two forms of proceedings, and in this sense again, the distinction is a constitutional one, but this holding by no means requires the conclusion that Congress has no power to abolish these formal differences.

On the other hand some analogies may be drawn from the decisions which would indicate that Congress *has* such power.

Thus in some states, which have adopted the blended Code practice, the state Constitutions had conferred in language similar to that of the Federal Judiciary Article, jurisdiction "in law and equity" upon the courts, and it was held to be no obstacle to the amalgama-

[12] See *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. ed. 801 (1900), where Harlan, J., said: "As in Oklahoma the distinction between actions at law and suits in equity is abolished—each action being called a civil action, whatever the nature of the relief asked, Okla. Stat. 1893, 764, sec. 3882—we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury in respect of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode."

tion of the two jurisdictions in one form of proceeding.[13] Moreover, in the Enabling Acts of some of the territories, Congress had provided that the territorial courts should have (to quote one example) "chancery as well as common law jurisdiction." It was held at first that this prevented the Legislature from amalgamating the two systems, but this position was finally abandoned by the Supreme Court of the United States, and it was finally settled that such fusion was allowable.[14]

A somewhat more remote analogy is presented under the clause of the same Judiciary Article of the Constitution by which the judicial power is extended "to all cases of admiralty and maritime jurisdiction." This phrase is coördinate with that relating to cases "in law and equity." Congress has recently enacted a law (Title 46, sec. 688, U. S. C. A.): "That any seaman who shall suffer personal injury in the course of his employment, may at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy, in cases of personal injury to railway employees shall apply. * * *" An action by a seaman for an injury at sea, on the common law side has been upheld under

[13] See, in New York, for example, *Dobson v. Pearce,* 12 N. Y. 156, 62 Am. Dec. 152 (1854) and *N. Y. Cent. Ins. Co. v. National Protection Ins. Co.,* 14 N. Y. 85 (1856). But compare *Reubens v. Joel,* 13 N. Y. 488 (1856).

[14] *Hornbuckle v. Toombs,* 18 Wall. 648, 21 L. ed. 966 (1873): "Now, here is nothing which declares, as the Process Act of 1792 did declare, that the jurisdictions of common law and chancery shall be exercised separately, and by distinct forms and modes of proceeding. The only provision is, that the courts named shall possess both jurisdictions. If the two jurisdictions had never been exercised in any other way than by distinct modes of proceeding, there would be ground for supposing that Congress intended them to be exercised in that way. But it is well known that in many States of the Union the two jurisdictions are commingled in one form of action. And there is nothing in the nature of things to prevent such a mode of proceeding. Even in the Circuit and District Courts of the United States the same court is invested with the two jurisdictions, having a law side and an equity side; and the enforced separation of the two remedies, legal and equitable, in reference to the same subject-matter of controversy, sometimes leads to interesting exhibitions of the power of mere form to retard the administration of justice. In most cases, it is difficult to see any good reason why an equitable right should not be enforced or an equitable remedy administered in the same proceeding by which the legal rights of the parties are adjudicated. Be this, however, as it may, a consolidation of the two jurisdictions exists in many of the States, and must be considered as having been well known to Congress; and when the latter body, in the organic act, simply declares that certain Territorial Courts shall possess both jurisdictions without prescribing how they shall be exercised, the passage by the Territorial assembly of a code of practice which unites them in one form of action, cannot be deemed repugnant to such organic act."

this statute, in *Panama R. Co. v. Johnson,*[15] where the court said:

"In this connection it is well to recall that the Constitution by Sec. 1 of Article III declares that the judicial power of the United States shall be vested in the Supreme Court 'and in such inferior courts as the Congress may from time to time ordain and establish' *and by Sec. 8 of Article I empowers the Congress to make all laws which shall be necessary and proper for carrying into execution the several powers vested in the Government of the United States.* Mention should also be made of the enactment of the first Congress, now embodied in Secs. 24 and 256 of the Judicial Code, whereby the District Courts are given exclusive original jurisdiction 'of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.' The particular grounds on which a conflict with Sec. 2 of Article III is asserted are that the statute enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction, and to have it determined according to the principles of a different system applicable to a distinct and irrelevant field, and also disregards the restriction in respect of uniformity. For reasons which will be stated we think neither ground can be sustained.

"The statute is concerned with the relative rights and obligations of seamen and their employers arising out of personal injuries sustained by the former in the course of their employment. Without question this is a matter which falls within the recognized sphere of the maritime law, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in nonmaritime service. But, as Congress is empowered by the Constitutional provision to alter, qualify or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change by country-wide and uniform in operation. *Not only so, but the constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissable modification of it to be enforced as such through appropriate actions on the common-law side of the courts,—that is to say, through proceedings in personam according to the course of the common law.* Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 384; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 159."

It seems arguable from this that an enforcement of equitable rights through the common law channels or under a combined procedure, would be allowable.

But the climactic and well nigh conclusive argument is based on the fact that Congress has already broken down many of the tradi-

[15] 264 U. S. 375, 387, 44 S. Ct. 391, 68, L. ed. 748 (1924).

tional barriers separating "the two sides of Westminster Hall" without the constitutionality of such change being seriously questioned. By this legislation,[16] not only is it provided that if an equitable claim is erroneously asserted on the law side, or vice versa, on discovery of the error, the claim shall not be dismissed but, on proper amendment shall proceed,[17] but also even more significantly, it is enacted that equitable claims and defences may be asserted by way of plea or replication in actions at law.[18] The near approach of the practice as thus modified by the new legislation, to the blended system of the Code States, is seen in the fact that the parties to a law action may not merely assert therein simple equitable defences, but may even assert claims for such complicated relief as interpleader, and may bring in any necessary new parties incident to such relief.[19] Moreover, if a suit or claim, equitable in its nature, is tried as an action at law, but without a jury and hence in effect under the same mode

[16] These Acts of Congress were drafted by a Special Committee of the American Bar Association in 1911, which Committee incorporated in its report an argument in favor of the constitutionality of the proposed change, and likewise submitted an exhaustive and convincing brief on the subject prepared by Dean Roscoe Pound, one of the members of the Committee. 36 Am. Bar Association Report 459-462, 468, 469, 470-480. Congress enacted these proposals into law in 1915.

The practice as modified by this legislation is well summarized in Dobie on Federal Procedure (1928), 580-583.

[17] U. S. C. A. Title 28, sec. 397: "(Judicial Code, sec. 274a.) Amendments to pleadings. In case any United States Court shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form. (Mar. 3, 1915, c. 90, 38 Stat. 956.)"

[18] U. S. C. A. Title 28, sec. 398: "(Judicial Code, sec. 274b.) Equitable defenses and equitable relief in actions at law.—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 or 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 require. (Mar. 3, 1915, c. 90, 38 Stat. 956.)"

[19] *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235, 43 S. Ct. 118, 67 L. ed. 232 (1922).

of trial as in equity, the fact that there was a failure,[20] or even a refusal[21] by the trial judge to transfer the case or issues to the equity side will not be ground for reversal.

Moreover, the old distinction in the forms of appellate review of law judgments and equity decrees have reached the vanishing point under recent legislation which abolishes the writ of error and establishes the appeal as the sole method of review in the Federal Courts.[22]

The following language of Mr. Chief Justice Taft in *Liberty Oil Co. v. Condon Bank*,[23] indicates how completely he accepts the conclusion that Congress has taken all but the last step toward fusion:

"Nor, by the failure to order the transfer in this case, did the suit lose the equitable character it had taken on by the answer and cross petition of the defendant. *The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction between proceedings in law and equity is abolished and remedies at law and in equity are available to the parties in the same court and the same cause.* Neither legal or equitable remedies are abolished under such codes. 'What was an action at law before the code, is still an action founded on legal principles; and what was a bill in equity before the code, is still a civil action founded on principles of equity.' Sutherland on Code Pleading, Practice and Forms, sec. 87—DeWitt v. Hays, 2 Cal. 463; Smith v. Rowe, 4 Cal. 6; Howard v. Tiffany, 3 Sandf. 695.

"Section 274b is an important step toward a consolidation of the Federal courts of law and equity and the questions presented in this union are to be solved much as they have been under the state codes. United States v. Richardson, 223 Fed. 1010, 1013. The most important limitation upon a federal union of the two kinds of remedies in one form of action is the requirement of the Constitution in the Seventh Amendment that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.'

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[20] *National Surety Co. v. County Board of Education of McDowell County, et al*, 15 Fed. (2d) 993, 994. (C. C. A. 4th Cir. 19). (1926).

[21] *Arkansas Anthracite Coal, etc. Co. v. Stokes*, 277 Fed. 625 (C. C. A. 8th Circ. 1922).

[22] "An act in reference to writs of error" approved January 31, 1928 (Adv. sheet Federal Reporter, March 1, 1928), provides in part, "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

[23] 260 U. S. 235, 43 S. Ct. 118, 67 L. ed. 232 (1922).

"Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then if an issue at law remains, it is triable to a jury. Massie v. Stradford, 17 Oh. St. 596; Dodsworth v. Hopple, 33 Oh. St. 16, 18; Taylor v. Standard Brick Co., 66 Oh. St. 360, 366; Sutherland, Code Pl. and Pr., sec. 1157. The equitable defense makes the issue equitable and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. The same order is preserved as under the system of separate courts. If a defendant at law had an equitable defense, he resorted to a bill in equity to enjoin the suit at law until he could make his equitable defense effective by a hearing before the chancellor. The hearing on that bill was before the chancellor and not before a jury, and if the prayer of the bill was granted, the injunction against the suit at law was made perpetual and no jury trial ensued. If the injunction was denied, the suit at law proceeded to verdict and judgment. This was the practice in the Courts of Law and Chancery in England when our Constitution and the Seventh Amendment were adopted, and it is in the light of such practice that the Seventh Amendment is to be construed.

"Congress, we think, was looking toward such a union of law and equity actions in the enactment of sec. 274b, quoted above, and of sec. 274a, which, referring to courts of the United States, provides: [here the Chief Justice quotes the statutes set out in footnotes 17 and 18]

"To be sure, these sections do not create one form of civil action as do the codes of procedure in the States, but they manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and *are long steps toward code practice.*"

Nevertheless, enough shreds of the technical distinctions between law and equity proceedings still adhere to the judicial machinery[24] to make it highly desirable to complete the process of unclogging the wheels by abolishing those differences, except as to jury trial,[25] altogether.

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[24] The possibility of confusion and delay under the present hybrid system is illustrated by *F. C. Ayres Mercantile Co. v. U. S. Ry. Co.* 16 Fed. (2) 395 (3) (1926), where the trial court seems to have several times veered from trying the case at law, to trying it in equity, and vice versa. The superior convenience of the blended system is manifest in such cases as *Morris v. Texas Working Barrel Mfg. Co.* 13 Fed. (2d) 977, 978 (1926), where the court points out that Congress, though it has permitted equitable issues to be later injected into an action at law, does not permit the plaintiff at the outset to join legal and equitable claims in his complaint.

[25] The procedural differences could only be completely swept away by following the example of North Carolina, Texas, and Georgia, and perhaps other States in providing for jury trial as of right on equitable fact issues (see 1 Cook, Cases in Equity, p. 173, note, and 35 C. J. 161, notes 46 and 47) but

The most forcible expression of the need for complete fusion of law and equity in the national courts, and the most authoritative opinion as to the power of Congress to effectuate it under the Constitution is the following passage from a speech of the present Chief Justice of the United States delivered before the American Bar Association in August 1922, about three months before his decision in the Liberty Oil Company case, above referred to:

"A perfectly possible and important improvement in the practice in the federal courts ought to have been made long ago. It is the abolition of two separate courts, one of equity and one of law, in the consideration of civil cases. It has been preserved in the Federal Court, doubtless out of respect for the phrase 'cases in law and equity' used in the description of the judicial power granted to the federal government in the Constitution of the United States. Many state courts years ago abolished the distinction and properly brought all litigation in their courts into one form of civil action. No right of a litigant to a trial by jury on any issue upon which he was entitled to the right of trial by jury at common law need be abolished by the change. This is shown by the every-day practice in any state court that has a code of civil procedure. The same thing is true with reference to the many forms of equitable relief which were introduced by the chancellor to avoid the inelasticity, the rigidity, inadequacy and injustice of common law rules and remedies. The intervention of a proceeding in equity to stay proceedings at common law and transfer the issues of a case to a hearing before the chancellor was effective to prevent a jury trial at common law long before our Constitution, and would not be any more so under a procedure in which the two systems of courts were abolished. Already under the federal code, there is a statutory provision which has not yet been much considered by the courts, by which an equitable defense may be pleaded to a suit at law. *If we may go so far, it is a little difficult to see why the distinction between the two courts may not be wholly abolished, and the constitutional right of trial by jury retained unaffected.*

"If the separation of equity and law for the purpose of administration is to be abolished in the federal system, and they are to be worked out together in the same tribunal, then a new procedure must be adopted. Who shall frame it? Shall Congress do it or merely authorize it to be done by rules of court? Congress from the beginning of the government has committed to the Supreme Court the duty and power to make the rules in equity, the rules in admiralty

the gain in casting aside all questions of whether the particular issue is legal or equitable seems outweighed by the loss in thus enlarging the boundaries of jury trial, already probably too widely extended. Pomeroy (1 Eq. Jurispr. sec. 116) disapproves of the introduction of the right of jury trial on equitable issues.

and the rules in bankruptcy. Moreover, this American Bar Association has for some years been pressing upon Congress the delegation of power to the Supreme Court to regulate by rule the procedure in suits at law. There would seem to be no reason why, where the more difficult work of uniting legal and equitable remedies in one procedure is to be done, the Supreme Court, or at least a committee of federal judges, should not be authorized and directed to do it. Of course the present statutes governing a separate administration of law and equity must be amended or revised by Congress, and certain general requirements be declared, but the main task of reconciling the two forms of procedure can be best effected by rules of court" (47 A. B. A. Rep. 259-61).

In accordance with that recommendation, the American Bar Association adopted a resolution whereby Congress was petitioned to create a Commission of justices, judges, and lawyers to frame statutory amendments providing for a unit administration of law and equity in the Federal Courts, and for a similar permanent commission to recommend to the Supreme Court, from time to time, amendments in the rules.[26] A bill embracing those recommendations was prepared by a Committee of the Association.[27] It was not introduced in its original form, however, but a substitute form[28] was introduced by Senator Cummins, which simply gave to the Supreme Court the power to make rules in actions at law[29] and gave such rules the force of statutes. This bill despite favorable committee report and vigorous support by various bar associations, has never passed the Senate, but will doubtless continue to be pressed for passage. If it is passed, it seems entirely probable that the Supreme Court will use the power so conferred to unify law and equity procedure. But an added section, in the following terms, has been proposed:

"(Sec. 2). The Court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at

[26] 47 A. B. A. Reports, 32, 33 (1922).
[27] 50 A. B. A. Reports 540 (1925).
[28] "Sec. 1. That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect."
[29] A power it has long possessed as to equity practice.

common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

It is submitted that this explicit grant of authority is an expedient measure of procedural reform, and is within the power of Congress under the Constitution.