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EQUITY AND "FUSION" IN ILLINOIS

ROGER L. SEVERNS*

ON the first page of a copy of a famous old law book, full of quaint phrases, in the handwriting of one who signed himself "C. Gray, 1735," there is the following inscription: "Vide 2 Vernon, 417, where it is laid down that a devise to A at 21, and to be paid at 21 are one and the same, and the distinction in this book laid down is without a difference." Whether C. Gray, Esq., wrote in petulance or whether he wished to preserve a citation for future use, his inscription serves as a reminder of the unstable character of many distinctions developed in legal thinking. The confusion and perplexity produced by the assumed universality of such distinctions as that between substance and procedure, between rule and discretion, and between law and fact are familiar. No less chaotic are the results reached by assuming the absolute character of the distinction between law and equity. The difficulty in each instance arises from the attempt to separate the distinction from the purpose for which it is made.

For nearly a century one of the most important aspects of legal reform in the United States has been the movement for reform in civil procedure. Wherever extensive efforts have been made to make over the existing rules and system of civil procedure there have been attempts at so-called "fusion" of law and equity. A great deal has been said and written concerning the advantages and disadvantages of fusion and a great deal has been said in criticism and in praise of the results achieved where fusion has been tried. Methods and means have been compared and the wise have disagreed.

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In the course of the code movement, later efforts at reform sought to avoid the difficulties with fusion that had attended earlier experience; frequently to no avail. Often fusion seemed to result in decided changes in substantive rights instead of merely modifying the methods by which those rights were recognized and protected. And as frequently, fusion seemed to produce new complications in the relation of equity to law in place of or in addition to the old ones. These results were false to the code ideal of simplification. That reforms in civil procedure should produce some changes in substantive rights was startling only to those who assumed the possibility of drawing once and for all a line of absolute distinction between substance and procedure, forgetting the famous admonition of Mr. Justice Holmes. The new complications in the old controversy between equity and law can be attributed in large part to a failure to examine and apply the terms "equity" and "law" and the "distinction between equity and law" in the light of the purpose of their use in the code provisions.

Serious and comprehensive reforms in civil procedure came to Illinois late in the course of the code movement. The Civil Practice Act of 1933 was the first attempt to accomplish the major objectives of that movement. In many ways the act differs from those adopted previously in other states and evidences the efforts of the draftsmen to take advantage of the experience of others.

Just what the act accomplishes in the direction of fusion is not entirely clear and the reports of six years of judicial experience with it are not greatly illuminating. It is believed, however, that the use of the approach to the problems of equity and law indicated above can accomplish much in the direction of avoiding some of the serious difficulties that have given fusion in some quarters its bad name.

Illinois has had a long tradition of the separate administration of the rules of law and equity. The Ordinance of 1787 provided for the creation of a general court for the Northwest Territory to have only a common law jurisdiction,¹ and contained a provision respecting the right to trial by jury. Equity

¹ "... There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction..." Ordinance of 1787, par. 4.
jurisdiction was extended to the courts of the Territory by an amendment to the Ordinance in 1805\textsuperscript{2} and in that year the territorial legislature created a separate court with a single judge to be called the Court of Chancery.\textsuperscript{3} At the same time provision was made for the legal effect and operation of the decrees of the Court of Chancery and they were placed upon the same footing as judgments at law.\textsuperscript{4} The procedure in Chancery was regulated by the territorial legislature in 1806\textsuperscript{5} and was revised in 1807.\textsuperscript{6} In 1816 it appears that the Illinois territorial legislature, in making provision for the court system for the territory, conferred upon the Circuit Courts both law and equity jurisdiction.\textsuperscript{7}

The laws passed by the first legislature after Illinois became a state provided for the exercise of the equity jurisdiction by the judges of the Supreme and Circuit Courts.\textsuperscript{8} Moreover, the practice and procedure of the High Court of Chancery, as far as shall be deemed applicable, was to be adopted.\textsuperscript{9} As has been mentioned before, there were extensive provisions for the legal effect of equitable decrees.

It appears that the separate Court of Chancery established by the territorial legislature for the Northwest Territory did not endure very long. According to one authority it did not exercise its power since no provision was made to pay the salary of the judge.\textsuperscript{10} Subsequent changes adopted the method employed so generally in the United States of providing for the administration of law and equity by the same courts but with separate law and chancery sides. This system continued.\textsuperscript{11} There were, of course, the usual constitutional provisions for trial by jury.\textsuperscript{12}

Down to the Civil Practice Act of 1933 the practice at law and in equity was regulated by separate statutes. The only

\begin{itemize}
  \item \textsuperscript{2} The Laws of Indiana Territory, 1801-1809, edited with an introduction by Francis S. Philbrick (Published by the Trustees of the Illinois State Historical Library, Springfield, 1930), p. clxiv.
  \item \textsuperscript{3} Ibid., p.108.
  \item \textsuperscript{4} Ibid., § 18, p.111.
  \item \textsuperscript{5} Ibid., p. 193.
  \item \textsuperscript{6} Ibid., pp. 507-13.
  \item \textsuperscript{7} Laws of Illinois Territory, 1815-1816, p. 48.
  \item \textsuperscript{8} Act approved Mar. 22, 1819, § 1, Laws of 1819, p. 170.
  \item \textsuperscript{9} Ibid., § 2, Laws of 1819, p. 170.
  \item \textsuperscript{10} The Laws of Indiana Territory, 1801-1809. Introduction by Francis S. Philbrick, pp. clxvi-ii.
  \item \textsuperscript{11} Constitution of 1848, Art. V, § 8; Constitution of 1870, Art. VI, § 12; Ill. Rev. Stat. 1939, Ch. 22, § 1.
  \item \textsuperscript{12} Constitution of 1848, Art. XIII, § 6; Constitution of 1870, Art. II, § 5.
\end{itemize}
glance in the direction of fusion which can be discerned through all this time is the provision in the Practice Act of 1907 for the transfer of cases begun on the wrong side of the court to the proper docket.\textsuperscript{13} Even this small gesture was spoiled by the fact that there was no saving in expense since there was required not only the payment of costs, but also the payment of filing fees. Hence it was as advantageous to begin all over again and it does not appear that the provision was often relied on.

Against this background of the traditional separation of law and equity, in an atmosphere of decisions reiterating that the Circuit Courts of Illinois on the equity side thereof are the descendants of the High Court of Chancery,\textsuperscript{14} the Civil Practice Act of 1933 must be viewed. Part of this background also is the more-than-eighty-years experience with fusion in other states.

The sober dignity of the language used by the New York Commissioners of 1847 in their attempt to correct the evils which they believed to inhere in the separate administration of law and equity reveals the seriousness with which they regarded the problems created by separate jurisdictions and the sincerity of their belief that a clean sweep of all the old forms was the only possible solution.\textsuperscript{15} On the other hand, faith that some, at least, of the old ways are best is reflected in the phrases of Section 31 of the Illinois Civil Practice Act of 1933.\textsuperscript{16} To some extent these differing beliefs exemplify the lack of agreement about the nature of equity and the content of the term "equity" that has characterized much of legal thinking. To understand and apply either section intelligently it is necessary to ascertain what significance is intended to be given to equity as it is used in each. When distinctions between actions at law and suits in equity or distinctions in the manner of pleading in such actions and suits are to be obliterated it is necessary to be sure what equity is in the minds

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\textsuperscript{13} Practice Act of 1907, § 40.  
\textsuperscript{14} Mahar v. O'Hara, 9 Ill. 424, at 427 (1847).  
\textsuperscript{15} "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." Code of Procedure of 1848, § 62. First Report of the Commissioners, p. 87.  
\textsuperscript{16} Ill. Rev. Stat. 1939, Ch. 110, § 155.
of the draftsmen as they propose such changes. In order to reach some conclusion as to this, it has been necessary to examine the content that has been assigned to equity through the long course of its development. Terms of the law have no greater tendency to remain constant in meaning through the years than have other word-symbols of ideas. The term equity has shared the common instability. With characteristic lightness of touch Maitland emphasized the nature of equity as a body of rules administered by separate courts of a special nature while in more ponderous terms the Supreme Court of Illinois spoke recently of equity as a developing system.

These and other expressions are typical of the truth that terms and the definitions of terms will vary as do the purposes of their use.

What has been the content which time and usage have assigned to "equity"? In an instructive essay Pollock has said that the notion underlying the term equity as it first came to be used in the English law was "that of a doctrine or authority capable of preventing the hardship which otherwise would ensue either from the literal extension of positive rules to extreme cases or from the exclusion, also by a strictly literal construction, of cases that fall within the true intention of the rule." Thus at the beginning, there was in the idea of equity a blending of power and the purpose and manner of its exercise; power to modulate strict rules and an ideal which gave direction to power. Equity was a symbol for the desire of men that the impartiality and universality of the rules of strict law should yield when common fairness and right required it. It was the element of flexibility in law.

The curious story of how the administration of this flexibility fell into the hands of the Chancellor is a thrice-told tale. But when the Chancellor came to be looked upon as the chief

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18 "The above and similar cases, though not deciding the question here, evidence a recognition by this court that rules of equity jurisdiction have developed and are developing, and that judicial proceedings must be adjusted to facts as they are. All who are conversant with the history of equity jurisprudence know that as a distinct system it has been of constant growth and development from its inception, covering a period of hundreds of years." First National Bank v. Bryn Mawr Bldg. Corp., 365 Ill. 409 at 421, 6 N. E. (2d) 654 at 661 (1937).
20 Ibid., p. 181.
source of equity in the sense just described, the term began to take on a new meaning. The process and forces which turned the Chancellor into a judge, turned his determinations into rules and gave a new content to equity. It was said that he administered equity, and there was meant not merely that he had the power to modify strict law and might be moved by ethical considerations to exercise it, but also that he administered rules which his growing judicial habits had created. "Rules are the limits that the continued exercise of discretion establishes." Thus the Court of Chancery was not merely administering equity, it was a court of equity, and the rules there formulated were the rules of equity.

In this way the meaning of equity came to be extended. The word meant more than power and a certain manner of using power. In turn, this enlarged meaning produced a further extension. Even the methods which the Chancellors developed for the discovery of facts and the system which they created for the orderly conduct of the business of the court came to be spoken of as equitable. Ethical considerations for the exercise of prerogative powers came to be blended with a developing body of rules and a unique judicial procedure.

Equity never quite ceased to signify a modification of the application of strict law where right and fairness required it. But from the procedure in Chancery, the rules, and the earlier meaning came the common use of the term in the period of the competing jurisdictions of common law and chancery courts. Equity meant the rules for the exercise of the Chancellor's extraordinary powers, which powers by then ran in the deep grooves which continued use had worn. It meant the peculiar methods by which those powers were made effective. It meant also a certain discretion in the application of rules, legal or equitable. In a given context the word might mean any one of the three or it might mean all of them in combination. The notion of discretion in equity always carried with it a suggestion of higher moral quality and tone.21

Modern equity must be looked at against this back-

ground. Today the term may signify at one time powers, rules, procedure, and discretion. But as time has passed the element of discretion with its accompanying ethical significance has shrunk in proportion to the elements of powers, rules and procedure. With the decline of discretion the significance of equity as the element of flexibility in law also diminishes. Formal English equity suffered from the blight of excess that has always afflicted flexibility in all legal systems. Cohen has said that "legal history shows, if not alternating periods of justice according to law and justice without law, at least periodic waves of reform during which the sense of justice, natural law, or equity introduces life and flexibility into the law and makes it adjustable to its work. In course of time, however, under the social demand for certainty, equity gets hardened and reduced to rigid rules, so that, after a while, a new reform wave is necessary."  

The decline of discretion in equity is not always apparent. The equity judge still feels that he wields a broader discretionary power than is permitted in the administration of ordinary legal remedies. And he is right. But the discretion which is his, in many if not most instances, amounts to little more than a choice of result depending upon the weight given to certain factors which precedent requires him to consider. The discretion which was a creative force for the development of new rules and the recognition of new interests out of prevailing social, moral and ethical ideals has steadily if imperceptibly lost momentum. Such an element is never wholly lost to equity any more than the creative element disappears from law itself. But it tends to approach the vanishing point in the time of the maturity of law.

"What, then, is equity?" The answer must be different today from that when Bentham asked the question, but the appraisers do not agree. Equity is many things, or rather the term is used in many senses and confusion results.

Certain powers of the courts are spoken of as equitable powers. Certain orders which judges give are thus described


23 Cases dealing with the application of the "clean hands" maxim are familiar examples.

to set them off from ordinary judicial action because of a peculiar dramatic quality which they possess. Historically the Chancellor possessed an extraordinary power of issuing commands and requiring obedience to them which distinguished the relief he awarded from that obtainable in ordinary actions at law. The ability to command the performance of specific acts and to compel compliance by coercive methods remained essential in the modern legal system. Most of the other so-called equitable powers are simply powers which equity judges and law judges possess in common, what differences exist being principally differences in terminology, procedural machinery, or reasons for their exercise.25

The creative genius of equity is said to be exemplified by the modern trust. But the creation of the trust belongs to history. The child becomes independent of the parent and the trust tends to become an institution. In the law of trusts and of mortgages the role of equity has been creative but the law relating to both has been marked-off from the rest of equity.

A large area of the sphere covered by the term equity is occupied by specific equitable remedies. These are the tools which the equity judges forged to accomplish the proper adjustment of legal relations, most of them developing when the jurisdiction of the Chancery was in its period of greatest growth. These tools have acquired names usually derived from some feature of the procedural process which originally obtained in the Chancery Court. Injunctions, decrees for specific performance, the constructive trust, decrees for accounting, the following of trust funds, receiverships, and non-statutory declarations of rights are characteristic contributions of equity to the field of remedies.

The body of principles and rules which has been developed regarding the proper use of these remedies is perhaps the largest part of modern equity. Frequently when equity or substantive equity is spoken of, this part of law is meant. In this sense, equity is simply part of the legal system; the principles and rules grouped under the heading “equitable” are so placed for historical reasons.

Modern equity includes, too, a body of procedural rules

and techniques which are its own. Some of the most important of modern procedural reforms have resulted from the adaption to a unified procedural system of the rules which equity judges perfected. The mode of trial, fact-finding technique, a system of pleading, and certain rules for the orderly conduct of judicial business served to set off equity procedure from that at law in the matured legal system.

And finally there is discretion in modern equity as in all law. In the process of becoming law equity has retained something of its earlier flexibility. As has been pointed out, discretion in equity is a compound of power and the discretion and technique of the exercise of power. The division and centralization of power as between courts and other governmental agencies is not the same as it was in the early period of equity's growth. Judicial interference with the application of legal rules is of rarer occurrence. A new science of legislation appears to be asserting serious claims to supply flexibility. And the development of administrative techniques as employed by bodies which are not yet courts has elbowed judicial discretion into a smaller space. But this was foredoomed when the Chancellor became a judge. Yet enough of power remains or is vouchsafed to make its exercise important.

The greatest change in modern equitable discretion is in the direction of its exercise. Equity seldom so boldly asserts its contradiction to or its power to modify the application or administration of positive legal rules. Legislative and administrative action today absorb much of the necessity for this and the infiltration of equitable principles into law has removed many anachronisms. Most of the discretionary power which remains in equity today is directed toward the adaptation of existing remedies to meet new requirements of action, and the recognition of new interests created by social change.26 The period of equity in the sense of discretionary power institutionalized to modify, relax, reshape and refit the rules of law to meet the shifting conditions of society appears to be past.27 The relation between law and social change

is being regulated by other agencies with different techniques. Thus in the end, the term "equity" becomes a term of art. The earlier symbol of an ideal looks across the years that have marked the process of becoming to the present denotation of an area in the modern legal order. Powers, remedies, rules, procedure and a certain distinctive character of discretion make up modern equity and these are within and not without the modern legal system.

In the beginning of equity the atrophy of common law caused an appeal to prerogative. The Chancellor, trustee of the sovereign power, saw inadequacies, injustices, and imperfections in the workings of the existing legal order and did something about them when it was expedient to do so. Remedies came before rights, and discretion before rules. Continued exercise of discretion wore paths, and remedies regularly awarded came eventually to rest upon rights added to the legal order. Thus was the law enriched. The very essence of formal equity was and is the created remedies which in turn produced, by familiar processes, rules, principles, devices, and concepts. These remedies, and a distinctive and characteristic point of view in their exercise, itself the product of the discretion before described, are together the source of all things today called equitable.

So equity was fitted into the legal order, but there were difficulties in the process. The original idea of the exercise of a power outside of the law and superior to it tended to prevent assimilation of equity as part of the legal system to the ordinary institutions for law administration. In England a separate court administered the "equity law." In the United States in those places where separate courts were not created, the principle of separation was carried out by a division of cases into those calling for ordinary treatment and those requiring the special application of the equity law. Judges were expected to behave as chancellors when performing the latter function and to keep the two sides of their courts separate and distinct.

This caused trouble. Because of the fact that equity originally endeavored to grant relief from the universality of law
and thus acted to add to, modify and correct legal rules it was the necessary result that the rules and principles which came to form the equity law were formulated as opposed to the ordinary rules of the common law. This led to confusion, to dissatisfaction, to injustice, and finally to reform. As equity became law it was inevitable that sooner or later it must be assimilated to the rest of law.

The break down of separate equity administration was followed by the period of fusion. In general, so-called fusion of law and equity aims at the eradication of conflicting results that might obtain depending upon which jurisdiction was invoked, and the prevention of the injustice resulting when litigants are penalized in one way or another for resorting to the wrong court. There are differing viewpoints as to the means by which these aims are best accomplished and these will be discussed hereafter.

The main charges against the order of affairs before fusion were three. The confusion caused by separation of jurisdictions has been mentioned. The time-honored division of the equity jurisdiction into the three classes of exclusive, concurrent, and auxiliary is a recognition of the difficulties which beset the administration of the legal system under such conditions. The fact that equity and law were parts of the same system and existed for the same ends was not sufficiently recognized to allow them to work smoothly together. The origin of equity and the attitude toward it engendered by the case-hardening of law caused the mirage of separate systems organized for different ends. The idea of a superior ethical quality operated to embalm the discretionary equity of the administrative chancellors. The result was chaos. Over-refined notions of the adequacy of legal remedies and the idea that certain kinds of problems were sacred to law courts or to juries led the equity courts into countless errors of refusal. In other situations differing remedies led to surprisingly different results in parallel cases. Likewise, attitudes on the part of law judges that certain interests should only be dealt with in equity led to hardship occasioned by nonrecognition.

A second charge against the existing separation was the expense it added to the already high cost of litigation. An honest error in choosing the wrong court was penalized, if not by a loss of right of action, at least by the necessity for the payment of additional costs. This is not to mention the cost of the delays, inefficiencies, and opportunities for dilatory tactics which the system made possible.

Finally, when the legal order faced the period of fusion, there were anachronisms and artificialities in the procedure both in equity and at law which would have brought about reform even without the problems which competing jurisdictions created. Common law pleading was doomed. Mode of trial in equity although benefited by absence of the jury as of right, was embarrassed, hindered, and delayed by the use of outmoded fact-finding techniques.

The desire for simplicity, order, and certainty produced the new order of things. Fusion of law and equity spread rapidly from New York to many of the other states. And in England, also, statutes and rules banished competing jurisdictions.\(^\text{29}\) In New York, as has been said, simplicity, order and certainty were sought through a statute abolishing the formal distinction between actions at law and suits in equity.\(^\text{30}\) In England, we are told that the distinction between law actions and equity actions was thought to be so deeply imbedded that it could not be wiped out. Therefore, provision was made for the administration of law and equity by the same court in the same case with a provision that in case of conflict between legal and equitable rules, equity should prevail.\(^\text{31}\) Less ambitious attempts at fusion frequently took the form of statutes providing for equitable defenses to actions at law\(^\text{32}\) and statutes providing for the transfer of causes from law to equity and from equity to law.\(^\text{33}\)


\(^{32}\) Scott and Simpson, Cases on Judicial Remedies, p. 1146.

\(^{33}\) Ibid., p. 1150.
The objects of a legal system from the point of view of those who advocated abolition of the formal distinction between law and equity are well stated in the report of the New York Commissioners.

The object of every suit, so far as modes of proceeding are concerned, is to place the parties whose rights are involved in it, in a proper and convenient form, before the tribunal by which they are to be adjudicated; to present their conflicting allegations, plainly and intelligibly to each other and to the court; to secure by adequate means a trial or hearing of the contested points; to obtain a judgment or determination adapted to the justice of the case; and to effect the enforcement of that judgment, by vigorous and efficient means. This object is not peculiar to any form of remedy, whether it be legal or equitable, or whether it fall within any one of the subordinate classes of actions, as they now exist at law, but is common to all.34

Thus the terms “law” and “equity” are not to be regarded as terms describing separate systems, but as describing simply parts of a single system. Indeed the terms as applied to procedure must cease to have any save an historical significance. There is ample justification for this point of view. There was a time when English law knew no such separation of jurisdictions or the powers of courts, nor any essential difference in the character of legal rules. Equity in the sense of flexibility was in the administration of the rules by courts. This was in the days before rigor iuris; and rigor aequitatis35 was in the distant future. In a sense, therefore, the ideal of this sort of fusion must have for its realization a retracing of steps. Equity is simply a part of law—all except the clear essence that signifies the intelligent administration of legal rules. Let equity be diffused and let it permeate the entire legal system! There is no validity to a distinction in any excepting an historical sense.

This is an ideal, and the New York Commissioners thought they had established the foundation for its attainment when they phrased the famous Section 62 before referred to. That Section 62 and its successors36 have seemingly not affected

36 The present provision is New York Civil Practice Act, § 8: “. . . There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.”
its realization\(^{37}\) is not the fault of the draftsmen. Nor is it entirely the fault of the judges into whose hands was given the task of construction and interpretation. Lack of success must be attributed to causes that inhere in the traditional structure of the legal system; factors that make impossible in law, as elsewhere, a complete break with the past.

It is not always remembered that from the first there have been those influential in guiding the course of the law who have not agreed with the ideal. Nor has this been in every case due to an unconsidering conservatism. The system of equity has been regarded as one of the brilliant achievements of the Anglo-American legal order.\(^{38}\) It has been strongly argued that those parts of our legal system which were developed by courts of equity as distinguished from courts of law bear a deep impress which they derive from the nature of their origin. In order to make them operate successfully, a separation from the rest of the system is necessary, since otherwise they would fall into the rut of ordinary law administration. Holdsworth has forcefully expressed this point of view.\(^{39}\)

The separate courts of law and equity and their separate systems of procedure and pleading and evidence are dead. But they "rule us from their graves," because they still live in the separate rules which they have created, and in the separate intellectual caste which they impose upon those who study and apply them.

It is also argued that the separation, having become traditional, cannot be abolished by legislative fiat nor can the legal thinking of centuries done in the traditional forms of law and equity be swept from the minds of the administrators and practitioners of the modern law. In the test of experience this has proved to be true. Sometimes the attempt to mix traditional modes of thinking with modern code provisions has not done justice to the best in either.\(^{40}\)

\(^{37}\) See Clark, Code Pleading, pp. 47-50.


\(^{40}\) "The union of law and equity is justly considered to be the foundation principle of the code reform. The current resurrection of law and equity as distinct systems in New York can only be viewed with dismay by those interested in a simpler pleading which shall emphasize substantive rights, not
A case can be made for fusion and a case can be made against it. Those who argue for and those who argue against it agree in general as to the necessity for reform in the administration of the law. There are few fundamental differences as to objectives. Mainly, there is lack of agreement as to means to be employed. Frequently where law and equity are concerned disagreement is due to differences as to the nature and meaning of equity. These differences can be observed in the arguments, related to the problem here discussed, concerning the real or fictitious nature of the conflict between law and equity^41 and the question of whether equity should be taught as a separate course in law schools.42

Equity means discretionary power and its exercise, the principle of flexibility in law. It means certain powers possessed by courts. It means certain specific remedies and the rules for their use. It sometimes means certain groups of substantive rules concentrated around the devices of trusts, mortgages, and the concept of property. Equity signifies a certain system of procedure which includes a type of pleading, a mode of trial, and certain rules of practice. And equity means a certain technique for the handling of remedies that is described by the word discretion. The question in fusion is: "What is sought to be fused?" In the codes the question is: "What distinctions between law and equity are to be abolished?" And what is desirable to fuse or obliterate is an equally significant question. The trouble with some of the discussions of these questions is like that of Judge Selden^43 that too much of the merely logical is developed without any endeavor to interpret language in the light of the objectives which motivated its use. So often the discussions ignore what reform sought to do and so frequently the difficulty is in becoming entangled with the meaning of words. Code reform set out to accomplish certain results, to remedy certain con-

ditions which brought about malaise in the legal order. Certain conditions were to be eliminated. The general objectives were fairly clear. The confusion, in part, results from a violation of one of the first commands of judicial method when dealing with written words, i.e., to discover the meaning of a particular part, read the whole. The codes sought to eliminate conditions more than distinctions.

In New York when the code of 1848 became effective, the separate courts of law and of chancery had been done away with by constitutional change. There had been no thought of trying to abolish the distinction between those courts and other courts. The truth was the old courts were legislated out of existence and new courts were set up. There was a good object lesson in this which could have been better learned. When the Commissioners formulated the code, they tried to carry forward the work of eliminating the difficulties in the existing system, not to wipe out distinctions between things which were fundamentally not the same. Perhaps better language could have been employed. Perhaps the approach used in New York was unfortunate. Even so, what was undertaken was fairly obvious and need not have led to such difficulties as were raised.

Abolishing of distinctions means more than erasing dividing lines. When a partition is knocked out between two rooms, neither room in the "room" sense longer exists. The result is the creation of a new room out of the two. Eliminating distinctions means abolishing something which theretofore existed and creating something new. In the fusing of equity and law the question is what to eliminate and what to preserve in its existing form.

In the various forms which fusion has taken there has been no attempt to root out flexibility and make law more rigid. Especially today the effort seems to be toward a return to flexibility. No one has suggested that the powers of courts which were called equitable powers, particularly the power to issue commands, should be abolished. No one has contended, at least with much success, that the trust, the mortgage, and all so-called equitable interests in things should

cease to exist. Nor has there been any serious attack upon the various remedies or the bodies of rules for their exercise which form so large a part of modern equity. The principle of discretion in the administration of legal rules seems not to lack support.

The equity that is dealt with by statutes of fusion is the procedural equity. In many American jurisdictions there have never been separate courts of law and separate courts of equity. This has resulted in an extensive reshaping of procedural rules drawing from both the traditional English systems. As has been stated, the object of recent reform has been to permit by a modification of procedure the administration of both kinds of rules by the same court in a single action or proceeding to the end that there be complete adjustment of the difficulties between the parties with the least expense and delay.

To accomplish this object it has been necessary to eliminate the old systems of common law and equity pleading and to substitute a new system. It has been necessary to carry forward the devising of rules for the conduct of trials and proceedings in court consistent with the administration of the rules of equity and law together in the same case. There remain two modes of trial, since positive constitutional provisions protect the one and elimination of the other would obviously be ill advised.45

Differences between modern statutes are dictated by ideas as to the best means to accomplish these results. Is it best to try to induce the thinking away of the differences between actions at law and suits in equity by doing away with both and substituting the so-called code cause of action? Or is it better to provide for the same system of pleading in both and for the administration of legal and equitable rules in the same case? Or is it more desirable to maintain an equity side and a law side to the courts but permit of an easy transfer from one side of the court to the other? These are questions concerning which there can be great disagreement.

The ideal of complete fusion has already been stated.

45 In some jurisdictions constitutions are held to protect the right to a trial by the court or with an advisory jury. Clark, Code Pleading, p. 60.
Some have thought desirable a system in which all but an historical distinction in the meaning of equity as against that of law should be excluded.\textsuperscript{46} Others like Pound,\textsuperscript{47} have felt that in doing away with the distinctions in procedure between equity and law, the valuable characteristics of equity were in danger of being lost to the legal system. The latter point of view reveals a greater faith in equity’s ability to supply flexibility, while the former sees no distinguishing characteristic in equity in this regard. Pound saw legal rules tending to supersede equitable rules and acceleration in the hardening of equity as a result of the system of amalgamation of equity and law.\textsuperscript{48} On the other hand where too much separation is maintained, equity administration tends to become rarified and sanctimonious and to forget or ignore its partnership with law.\textsuperscript{49}

Experience has shown the difficulties of attempting too much in the way of fusion as well as those of attempting too little. Equity and law are terms that have become deeply imbedded in legal thinking. “The tradition of separation which they inherit will long cling to them.” It has been suggested, too, that the discretion which is necessary to the very existence of a working legal system is better kept in hand when restricted to exercise through its traditional form.\textsuperscript{50} “Moreover there are differences between 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

\textsuperscript{47} Roscoe Pound, “The Decadence of Equity,” 5 Col. L. Rev. 20 (1905).
\textsuperscript{49} Case law equity tends to reduce to rules what should remain discretionary. Rules of rigid application for determining adequacy of legal remedies frequently are substituted for an examination of the circumstances before the court to determine by comparison what remedy should be applied. See the cases dealing with a defendant’s insolvency for an example. It would seem that modern “fusion” could help to avoid this situation since the same judge could use either remedy. Also legal remedies might become less rigid in the hands of judges who were discretion conscious. See Robert Wyness Millar, “The Old Regime and the New in Civil Procedure,” Law: A Century of Progress, I, 252-7.
\textsuperscript{50} W. S. Holdsworth, “Blackstone’s Treatment of Equity,” 43 Harv. L. Rev. 1 (1929).
forms. Equity continues to exist though separate equity practice disappears."

Whether fusion is approached in the manner of the New York code or is attempted by provisions making possible the administration of legal and equitable rules together while recognizing the difference between them, either way, major problems are created. Even in jurisdictions where provisions for fusion have been more modest in their scope serious problems have arisen. The chief responsibility for working out sensible solutions of these problems falls upon the courts. And it is a responsibility which reviewing courts must share with trial courts. Reviewing courts are sometimes too far removed from first hand contention with these problems and should have and make use of the active cooperation of the trial judges who must apply the authoritative decisions made above.

There seem to be at least eight major problems involved in the fusion of law and equity. Some of these have received similar treatment in almost all jurisdictions in which they have arisen. Others seem to remain unsolved even in jurisdictions which have had comparatively long experience with fusion.

The first and perhaps the easiest problem to solve is that which is created by the opposing formulations of the rules of equity and law in matters which for convenience can be called matters of substance. This problem has not caused a great deal of difficulty. Equity undertook in these situations to control the operation of the legal rule in order that no injustice result. In those cases where there is a clear collision, e.g., in the rules regarding fraud in the inducement as affecting sealed instruments, where both law and equity are to be applied together the equity rule must prevail. This is the result whether the statute so provides or not. Where the collision is not head-on and the administration of the equity rule depends largely upon discretion, the result is not so clear and will depend upon the extent to which equitable characteristics continue to control judicial administration. It is less obvious

52 Scott and Simpson, Cases on Judicial Remedies, pp. 1159-60.
than Walsh seems to think that there will be such sweeping changes in the character of certain rules of the substantive law. If, as the Restatement of Property seems to indicate, there is virtue and utility in applying the term "equitable" to certain interests in property, it appears unlikely that fusion will result ipso facto in the adoption of the lien theory of mortgages in states where the intermediate theory prevailed before.\(^{54}\)

A few constitutional questions have arisen other than the grave problem of jury trial. Most of these problems are solved without difficulty and have not caused trouble in the administration of law and equity together.\(^{55}\)

The discretionary character of equitable relief led to questions of whether or not, if the same court was given the power to award both legal and equitable relief, the result would not be either that all relief would become discretionary or that all relief would become of course.\(^{56}\) There has been little criticism along these lines and fusion has probably given substantially no trouble in this regard.\(^{57}\)

A much more serious question is whether or not the pleadings must indicate in advance whether the action is one "at law" or in "equity," and whether the proof must conform to this theory of the pleadings even though the pleader may prove himself entitled to relief upon some other theory. This is the so-called "theory of the case" doctrine. It has been criticized on the ground that "the former principles of equity jurisprudence are now a part of our one body of applicable legal rules" and the demand for relief is no part of the cause of action.\(^{58}\) It has been said that the "theory of the case" doctrine is attributable in part to code provisions limiting the relief to that asked in the complaint and in part to the fear of

\(^{54}\) Ibid.


\(^{57}\) See the point of view of the effects of "fusion" as stated by O. L. McCaskill in "One Form of Action, But What Procedure, For the Federal Courts," 30 Ill. L. Rev. 415 (1935).

depriving the parties of the right to trial by jury.\textsuperscript{59} Whatever the causes may be, a rigid insistence upon conformation of the proof to the theory of the case as stated in the pleadings seems to continue a vice which fusion was called upon to end.

Allied to this problem is the problem of the code cause of action. Questions difficult for the courts to answer have arisen as to the application of the doctrine of res judicata in cases where the plaintiff might have joined matters under the code which must have been handled in two suits under the former practice. Considerable difficulty has been experienced in these cases in deciding what makes up a cause of action.\textsuperscript{60}

There is also the problem of joinder of legal and equitable issues and causes of action. A number of questions arise concerning the extent to which joinder shall be permitted, and whether a plaintiff who could have asked for complete relief in equity shall be permitted under the code to split his cause of action so as to secure a jury trial as to matters of legal relief.\textsuperscript{61} There is also the problem of equitable defenses with its group of questions. What is meant by "equitable defense"? How shall equitable defenses be set up in the pleadings? What should be the mode of trial?\textsuperscript{62}

Finally, there is the problem of jury trial. The constitutional right to a trial by jury has been considered the greatest obstacle in the way of anything like a complete fusion of law and equity.\textsuperscript{63} It has created the greatest number of questions and is directly concerned in several of the problems already mentioned. The difficulty lies in the necessity for preserving the right as it existed at common law when in fact the other important procedural aspects have been radically changed. It has been thought inadvisable to extend the right of jury


\textsuperscript{63} Charles E. Clark, "Trial of Actions under the Code," 11 Cornell L. Q. 482 (1926).
trial, and various devices such as jury fees and provisions for waiver have been utilized to confine it. It may be, as Millar suggests, that American courts have tended to magnify the difficulty. Nevertheless, courts are required to devise some working formula for determining in advance of trial what matters must go to the jury and what matters should be tried by the court. The matter is sometimes further complicated by the assertion of a constitutional right to have equity matters tried by the court with a jury acting in no more than an advisory capacity.

These and kindred problems have made the course of fusion anything but a smooth one. Difficulties remain to be eliminated even in those jurisdictions where experience with fusion has been longest. Many of these difficulties seem to be occasioned by the fact that in the thinking which has been done about the provisions of modern procedural statutes equity is assumed to be a substance compounded of all the various elements already discussed. Without analysis it is taken for granted that this compound equity is intended wherever the term is used in the codes. Thus a habit of thought threatens to render equity vague to the point of losing whatever utility it possesses as a symbol. Different results could have been achieved by interpreting the symbol in the light of the purposes of its use, and the errors common to most distinctions declared to be fundamental could have been avoided.

Against a traditional background of the separate administration of the equity law and in an atmosphere sophisticated by the unfortunate experiences of others with the problems of fusion noted above, the Illinois Civil Practice Act of 1933 appeared. In view of the fact that fusion of law and equity was believed by many to be the "foundation principle of the code reform" and in view of the lack of agreement about what can be and is intended to be fused, it is not strange that the act should be received with scorn and praise.

66 Clark, Code Pleading, pp. 60, 61.
Still more recently, a notable attempt at reform was made in Illinois with the adoption of a new practice act, effective January 1, 1934. That act in substance seems to call for a real union of law and equity, but, apparently due to opposition the provisions concerning this point are sufficiently vague and uncertain as to make future litigation seem inevitable with the probable result of hindering, if not postponing altogether that vitally important feature of modern procedural reform.  

With this statement can be compared the following from the pen of an authority no less eminent in the field of procedure.

As witness [of the trend toward fusion] may be cited the case of Illinois, which in 1933, swung from a conservatism more pronounced perhaps, than that of any other Anglo-American jurisdiction to an acceptance of merger whose approach to completeness ranks it among the most advanced in the country.

Views so widely variant as these call for careful appraisal of the act to ascertain, if possible, just what has happened to "equity" under its provisions.

It may be safely assumed that the general objectives of the Illinois act were the same as those of the other statutes belonging to the new order of things in civil procedure. Although considerable infiltration of equitable principles had already taken place in Illinois, the separate administration of law and equity led the courts into the usual errors of non-recognition and refusal. Litigation was costly too, and there were the artificialities and anachronisms of the existing systems of common law and equity pleading to be dealt with. With these problems in mind, the draftsmen, prominent in the field of procedure, approached the task of realizing for Illinois the advantages and gains won by the code movement down to 1933.

Their first section mentions equity, and throughout the act the term is employed in such a way as to indicate that it

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held for them a useful significance. In modern usage, "equity" symbolizes powers, remedies, rules, procedure, and discretion. What is the Illinois "equity" of the Civil Practice Act?

The first, second, and fourth sections of the act furnish sufficient indication of the ideals which the draftsmen had before them. By the first section the act is made to apply to "all civil proceedings, both at law and in equity" with stated exceptions. In the second section the Supreme Court is empowered to make rules consistent with the act for the purpose of making it effective "for the convenient administration of justice, and otherwise, simplifying judicial procedure." Finally, in the fourth section it is provided that the act is to be liberally construed "to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." Nor is that ancient citadel of judicial conservatism, the rule that statutes in derogation of the common law must be strictly construed, to turn back the forces of change. The stated objectives are the objectives of the code reform, simplification, certainty in result, and elimination of delay.

Nowhere does the Illinois act provide that the distinction between actions at law and suits in equity has been abolished. Instead, Section 31, after abolishing the names used to distinguish the actions at law and their formal characteristics of pleading, provides that "there shall be no distinctions respecting the manner of pleading between such actions at law and suits in equity. . . ." And the same section speaks of causes of action "either at law or in equity." It is this approach that the proponents of fusion have chiefly criticized. A lawyer from a neighboring state was especially outspoken in charging that the act retained the old practice because it did not abolish distinctions between law and equity. He contrasted Section 31 with the language of the Missouri code to the disadvantage of the former.

But this and other criticisms are not entirely sound. Chiefly, they overlook the fact that "equity" is a term, the wordsymbol of an idea. Complete identity between a term and the thought it expresses is never possible. Moreover, many legal terms cover a congeries of ideas, and so shift in use as one element or another is emphasized. This oversight leads to the fallacy of assuming the same image whenever "equity" is used. Thus it is assumed to be necessary to provide that there shall be no "distinctions between actions at law and suits in equity" or that "there shall be but one form of action" in order successfully to accomplish the purposes of the code reform. It is likely that the view that terms in law have different meanings depending upon their use will be objected to as leading to confusion. The only answer is that such is the fact and confusion lies in the failure to recognize it.

When the New York Commissioners provided that the distinctions between actions at law and suits in equity were abolished no one expected the powers of courts called equitable powers, or the rules, remedies, or discretion of equity to drop out of the law. All these were necessary in the legal order. Nor was it thought, for example, that the distinctions between ordinary judgments for damages and decrees for injunctions, and the legal effects of them would disappear. Indeed, the only way to achieve the latter result would be either to abolish such judgments, or to abolish injunctions, or to abolish both of them and substitute something new. No such changes were contemplated. What was expected was that the difficulties with competing jurisdictions before discussed would end. Toward this result, the terms "equity" and "law" to describe different types of proceedings would, it was hoped, cease to be used. But the habits of lawyers and judges, the need for reliance on precedents couched in the old terminology, the linguistic features of constitutions, and the characteristic phrases of text books were too strong to be thus overcome.

It is not strange, therefore, that the Illinois draftsmen should begin more cautiously with language declaring that the distinctions in the manner of pleading between actions at law and suits in equity no longer exist. The fact that the term "equity" is not also abolished does not mean that beneficial results have not been or cannot be accomplished. To assume
so, is to be prey to the fallacy of assuming complete identity between the term and an idea and to fail to recognize that the term has more than one meaning.

Section 31 with other sections of the act achieves one of the major objectives of the reform movement. It establishes a unified system of pleading. And this is true fusion or merger. The systems of common law pleading and equity pleading are gone and in their place is a new system compounded of the best elements in both.76

To what extent does the Illinois act serve as a corrective of the other major ills caused by the separate administration of the rules of equity and law? It has already been pointed out that the act continues the use of the terms "equity" and "law" as describing different types of proceedings.77 Is it possible for Illinois courts to employ legal and equitable powers, grant legal and equitable remedies, and apply legal and equitable rules together in the same suit or proceeding? It has been stated elsewhere in this article that the circuit courts (including the Superior Court of Cook County) are given law and equity powers by the state Constitution.78

Down to 1934 the law and equity sides of these courts were maintained as distinct and separate as such a system permits.79 It seems quite clear that Section 44 of the 1933 act is intended to permit the use by the courts of both their law and equity powers and remedies in a single case or proceeding.80 Provision is made for the joinder in the pleadings of claims for legal and equitable relief. Moreover, it is provided that legal and equitable issues may be tried together where no jury is employed. Although the law and equity sides of the courts remain, the provisions for transfer do away with most of the evils of competing jurisdictions before

76 Edson R. Sunderland, "Analysis of the Civil Practice Act of 1933," 18 Jones Ill. Stat. Ann. 18 (1934). This author notes that uniform procedure in law and equity has been accomplished in most instances by making the equity rules applicable to both types of proceedings.
79 In Cook County the designation of certain judges as chancellors for the term, made the separation probably more complete there than elsewhere in the state.
80 Ill. Rev. Stat. 1939, Ch. 110, § 168.
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described. Judge Clark, severest critic of the efforts of the Illinois draftsmen and ardent advocate of the abolition of the use of the term "equity" in any save an historical sense seems to feel that the bad job of fusion accomplished by Section 44 is made worse by the fact that Section 981 preserves "that grand old anachronism," the injunction to stay proceedings at law. But there are situations where such injunctions, anachronisms or not, may serve useful purposes. At any rate, the act is sufficiently flexible and the rule-making power sufficiently broad to obviate any serious consequences of the retention of the injunction against proceedings at law.

From the above discussion it will be seen that at least two long steps toward procedural reform along the approved modern lines were taken in Illinois. The objection that the act fails to accomplish anything like the desired complete merger of law and equity seems to be based primarily on its terminology. Throughout, the phrases "actions at law," "actions in equity," "legal issues," and "equitable issues" are employed. As has been pointed out this technique has been praised and criticized. Along with this nomenclature, the term "civil action" is also used. The use of "civil action" has evidently caused some confusion, due largely to its employment in a strictly technical sense in the statutes of many other states. In a recent case, Frank v. Newburger, the Appellate Court, per Judge O'Connor, held that a verified motion under Section 7289 of the Civil Practice Act was proper to correct a decree for errors of fact in a mortgage foreclosure suit. This holding overruled an argument that Section 72 (formerly Section 89 of the Practice Act of 1907) merely

81 Ibid., § 133.
84 E. g. Ill. Civil Practice Act, §§ 31, 44, 61 ("Chancery Action"), 89.
86 E. g. §§ 5, 9. And see Rule 9.
87 Thompson's Laws of New York 1939, Part II, Civil Practice Act, § 8, which reads: "There is only one form of civil action. . . ."
89 Ill. Rev. Stat. 1939, Ch. 110 § 196.
provided for motions in the nature of writs of error coram nobis and was inapplicable to equity proceedings. The opinion reasoned the result on the basis of the consolidation, in part, of proceedings at law and in equity by the Civil Practice Act, citing Sections 1 and 31. A commentator interpreted this to be a determination by the court that the act "establishes one form of civil action in Illinois." In a letter Judge O'Connor pointed out the error, saying in part: "We think it obvious that the Civil Practice Act did not establish one form of civil action in this state and we have written many opinions to this effect." This view is supported by the language of some Supreme Court opinions, e.g. "The present suit, being an action in ejectment, is a suit at law and not in equity. . . ." Where the term "civil action" is employed it is used merely as a term of convenience where it is desired for some purpose to classify together "actions at law" and "in equity."

What is meant by "actions in equity" as distinguished from "actions at law"? The inquiry is directed at determining their meaning as used in the statute, not at determining a meaning that would be valid wherever the phrases might be employed. When Sections 31, 44, 61 and 63 are compared with Supreme Court Rule little doubt is left concerning the meaning of these terms. The phrase "action in equity" is simply used to designate those cases in which a claim is asserted to some remedy or remedies which by long established usage have been called equitable. Thus, in Illinois there are two types of action for the purposes of the Civil Practice Act, distinguishable by the character of the remedies

90 27 Ill. B. J. 284 (1939), where the commentator said: "Under this theory the terms 'law' and 'equity' are anachronistic but are used for convenience." The dissenting opinion in the Frank case seemed to indicate that Judge Matchett shared, to some extent, the commentator's view of the majority holding.
91 27 Ill. B. J. 313 (1939).
93 Section 5 provides that "every civil action," with some exceptions, "shall be commenced by the filing of a complaint." Section 9 provides for venue in certain types of "civil actions" some of which would be equitable in nature.
94 Ill. Rev. Stat. 1939, Ch. 110, § 259.9. This rule as presently worded was part of the original schedule of rules prepared by the draftsmen of the act.
95 This will, of course, include suits involving trusts and mortgages.
sought. And the act permits the joining together of both kinds of actions in the pleadings, and, subject to limitations, makes possible their being tried together.

Is such an approach justified, or does the continued use of the law and equity terminology perpetuate the evils of the old order of things? In the first place, the terminology employed has the advantage of being familiar. Moreover, differences have always existed between suits for the extraordinary equitable remedies and ordinary lawsuits. The absence of the jury as of right in the former class and the existence in fact of an "equitable" point of view are substantial distinguishing characteristics, neither of which features were sought to be eliminated by code reform. As long as the provisions of the act regarding joinder and transfer are applied by the courts in such a way as to promote the purposes of the reform, there need be few misgivings about the retention of the old terminology. Indeed, it is hard to see how, if the meaning of "equity" is properly understood, a change in terminology is productive of any thing except confusion.

In keeping with the mode of approach discussed above, the term "equitable" is used to modify "issues" in Section 44. The purposes of this section make the meaning of the phrase free from serious difficulty. It was contemplated among other things, that defensive pleadings stating matters which would have called for the granting of remedies formerly obtainable only through separate suits in equity, might be interposed to complaints seeking only ordinary relief. Again constitutional provisions regarding the mode of trial and considerations involving the equity point of view require the segregation of such matters. This is the more easily accomplished where familiar terms are employed.

The experience of the courts with the act has not been long enough nor sufficiently varied to have produced authoritative determinations of how the major problems of fusion are to be met. There do exist a number of decisions which furnish some indication of the attitude of the judges toward

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97 Ill. Rev. Stat. 1939, Ch. 110, § 168, and see § 213 (Civil Practice Act, § 89).
the purposes and policies of the act. There is no hint of a hostile attitude such as has attended the adoption of sweeping legislative reforms of court procedure in some states. One court has said in response to an argument for a strict construction of the Rules of Court designed to give effect to the Act:

The purpose of the entire act was to simplify the procedure and the prime object of the act was to enable the parties to a cause to have the merits of their controversies passed upon by the courts—the realities considered rather than that the matter be decided on mere technicalities which often justly bring the courts into disrepute. If the act is to be liberally construed according to the substantive rights of the parties, as it is expressly provided, this purpose will be nullified and the act guillotined by strict construction of rules of court adopted to aid the carrying of the act into effect—a strange commentary to construe the act liberally but the rules strictly.98

A number of cases have appeared in the Supreme and Appellate Courts in which the provisions permitting the joinder of actions in equity and at law have been availed of. In ordinary cases these provisions with their supposed anachronistic terminology have evidently been giving little trouble. For example, in People ex rel. Ames v. Marx,99 in a suit against a taxpayer and his surety to collect motor fuel taxes it was held proper to permit the surety to file a counterclaim against his principal, claiming indemnity, and praying that the principal be ordered to assign all rights he had in certain bank claims. And in State Bank of St. Charles v. Burr100 a counterclaim for damages sounding in tort was permitted in a suit to foreclose a mortgage. In this case the issues on the counterclaim were transferred to the law docket and tried to a jury. Several other cases appear in the reports evidencing the extent to which joinder of legal and equitable actions is permitted, in which the opinions do not discuss the question.101

100 295 Ill. App. 15, 14 N.E. (2d) 511 (1938), reversed on other grounds in 372 Ill. 114, 22 N. E. (2d) 941 (1939). The joinder was held proper in the Supreme Court.
101 Barzowski v. Highland Park State Bank, 371 Ill. 412, 21 N. E. (2d) 294
Court handling of fusion statutes in some states has led to a continuation or resurrection of some of the old difficulties experienced in the days of competing jurisdictions. One of the principal sources of trouble, as already stated, has been the "theory of the case" doctrine. Under this doctrine, a litigant is required to allege facts which entitle him to the relief sought. And upon the trial he must prove such facts entitling him to relief consistent with the theory on which his pleading is drawn. The penalty for the nonconformist is dismissal, even though the facts proved show him to be entitled to different relief upon another theory. At the root of the matter, is the strict insistence upon agreement between the allegations of the pleadings and the proof. The result is to perpetuate the very vices which the codes were intended to correct.

The unfortunate results of this doctrine need not be reached in Illinois. Even though actions in equity and at law still endure, they do not necessitate any such consequences. Under the requirements of Section 31 it appears that the pleader must allege facts entitling him to the relief sought, since that section provides that "the substantial averments of fact necessary to state any cause of action either at law or in equity" shall not be affected in any way. But it would seem that under the language of Section 34 the court is not obliged to insist upon rigid agreement between pleadings and proof to the extent usual under the "theory of the case" doctrine. It is expressly provided that the prayer for relief shall not limit the relief obtainable, except in case of default. Moreover, the pleader may see—


105 Ill. Rev. Stat. 1939, Ch. 110, § 155.

106 Ibid., § 158.

107 The rest of the sentence containing this provision, "... but where other
cure a large measure of protection by asking for relief appropriate to different theories in the alternative. If "action in equity" is given the meaning herein contended for, the conclusion seems sound that, when the provisions of Section 44 with respect to transfer from one side of the court to the other are read with those of Section 34 just discussed, there will be no penalizing of litigants who have mistakenly drawn their pleadings upon an erroneous theory as to the kind of remedy they were entitled to. The language of Section 44, "... and when so transferred shall proceed as though commenced on the proper side of the court ... " seems intended to cover just such cases. To the suggestion that the provisions of Section 44 contemplate a transfer only at the pleading stage and not after or during trial, it may be answered that this does violence to the plain meaning of the language. The admonition of Section 4 that the act be liberally construed to effectuate its purposes will not be ignored. The provisions of Supreme Court Rule 9 requiring complaints to be designated "at law" or "in chancery" is easily complied with, since complaints are to be marked "in chancery" whenever any equitable remedy is asked. This rule is for purposes of administrative convenience and should cause no difficulties.

As has been mentioned before, fusion creates serious

relief is sought the court shall, by proper orders, and upon such terms as may be just, protect the adverse party against prejudice by reason of surprise," indicates an intention to reject the doctrine.

108 Ill. Rev. Stat. 1939, Ch. 110, § 158. It is provided in section 43 of the Civil Practice Act that, when in doubt as to which of two statements of fact is true, they may be stated in the alternative, "... and a bad alternative shall not affect a good one. . . ."


110 The phrase "causes of action," used in section 44 in association with "counterclaims," thus is used generally to signify any group of facts which together entitle the plaintiff to any relief whether legal or equitable.

111 Ill. Rev. Stat. 1939, Ch. 110, § 128.

112 Only two cases, decided under the Act of 1933, have been found in which the problem here discussed was involved: Acme Printing Ink Co. v. Nudelman, 371 Ill. 217, 20 N.E. (2d) 277 (1939), and Allen v. Illinois Mineral Co., 299 Ill. App. 537, 20 N.E. (2d) 898 (1939). In both cases complaints were dismissed because legal remedies were thought to be adequate. Neither of the opinions indicates that the problem was presented to the courts. The Acme case, moreover, involved tax proceedings in which certiorari was held appropriate.

113 Ill. Rev. Stat. 1939, Ch. 110 § 259.9.

114 But see Scott and Simpson, Cases on Judicial Remedies, p. 1158.
problems of what must be and what may be joined in a single action, and whether matters formerly triable together in an equity proceeding may be separated in order to secure a jury trial. Some of these problems have been solved in Illinois by making the joinder provisions permissive. The rule-making power of the Supreme Court has been utilized to solve others. Consistent with the design of the act to retain two kinds of actions but to permit them to be joined in the pleadings, the former suit in equity is treated as a unit for this purpose. All matters which could have been determined by an equity court in order to do complete justice between the parties may be treated as a single equitable cause of action. Matters which, under the former system, could be treated as separate suits at law and in equity, may be joined but are to be set out as separate causes of action and so designated. To avoid abuse, the trial court is empowered to determine whether such causes of action are properly severable and whether, if so, they shall be tried separately or together, subject, of course, to the requisite of preserving the right to trial by jury. The treatment of these problems is open to the objection that since the joinder provisions are permissive, undesirable multiple actions are allowed. In some respects, this approach is simpler, however, since it continues the older treatment of causes of action and avoids the confusing and difficult problems related to the code cause of action. The Illinois system makes easier the determination of the mode of trial. The former rule in equity concerning the granting of legal relief is continued and the pleader may thus merge his demands for legal remedies in his equitable cause of action or state them as a separate cause of action at law which he may join with a cause of action in equity. If properly merged, all matters will be determined as a single equitable cause of action.

115 Ill. Rev. Stat. 1939, Ch. 110, § 168.
116 Ibid., § 259.10.
117 Ibid., § 259.11.
Along with the problems of joinder and merger just discussed, fusion statutes have raised the problem of the equitable defense. And in some jurisdictions, less ambitious movements toward fusion have made use of the statutory device of permitting equitable defenses to actions at law. Some confusion over just what was meant by the term “equitable defense” resulted and its use has been criticized. Again, the confusion was due in large part to a failure to interpret the term in the light of its use. Equitable defense statutes were intended to put an end to the necessity of resorting to injunctive remedies to restrain proceedings at law. In the course of his modification of the ordinary law, the Chancellor undertook to control the operation of certain legal rules by directing injunctions to persons seeking unjustifiably to avail themselves of these rules. As equity became law, injunctions to restrain legal proceedings came to be recognized equitable remedies governed by a group of fairly definite rules. The cumbersome nature of such a system led to efforts to reform it. The term “equitable defense” was employed to describe matters which would be grounds for seeking injunctive relief against such proceedings at law. Such equitable defenses were formerly causes of action in equity albeit they were defensive or protective in nature. Perhaps some such phrase as “defensive equity” would have been better, but when the object is kept in view, the meaning is plain.

Nevertheless, equitable defense statutes created two serious problems. The first was how to plead such matters, whether as mere defenses or as cross-actions. The second involved the mode of trial. If such matters become merely defenses to actions at law it could be argued that they should be tried by the jury as any other defenses.

Soon after the adoption of the Civil Practice Act of 1933

120 Scott and Simpson, Cases on Judicial Remedies, p. 1146.
122 Ibid., p. 133.
doubts were expressed as to whether that act permitted equitable defenses to actions at law. The language employed is far from being a clear expression of the legislative intention regarding this important matter. The solution appears to rest upon the construction which the Supreme Court will ultimately place upon Sections 38, 43, and 44, together with the interpretation of its own Rules 10 and 11. In Section 38 it is provided that "... any demand by one or more defendants... whether in the nature of set-off, recoupment, cross-bill in equity or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross-demand in any action..." In Section 43 parties are permitted to plead as many counterclaims and defenses as they may have and, when in doubt as to which of two statements of fact is true, "... when they appear in different counts or defenses (whether legal or equitable) ..." to state the counts or defenses in the alternative. Finally Section 44 allows a defendant to set up in his answer "... any and all cross-demands, whatever, whether in the nature of recoupment, set-off, cross-bill in equity, or otherwise. ..." If it is remembered that the stated purpose of the act is to provide for the speedy and final determination of controversies according to the substantive rights of the parties, a case can be made for equitable defenses. The act has preserved actions in equity as distinct from actions at law. Defensive equity suits to relieve against oppressive legal proceedings are necessarily within this class. Where the statutory provisions above set forth employ the terms "demands" and "cross-demands" it seems reasonable to say that such terms include as "demands" relief which defendants might be entitled to against the improper enforcement of legal proceedings. In view of the manifest intention of Section 44 to permit joinder of legal and equitable actions and issues and thus to abolish such a large part of the evils of the former system, any other holding

125 Ill. Rev. Stat. 1939, Ch. 110, § 162, italics supplied.
126 Ibid., § 167.
127 Ibid., § 128.
would seem unjustifiable. The unfortunate uses of the term "cross-bill in equity" in Sections 38 and 44 must have been intended to cover actions defensive in nature and to have been employed because such actions are asserted by a defendant. Rules 10 and 11 covering the merger and joinder problems before discussed lend added support to these views, particularly since Rule 11 is expressly applicable to defensive pleadings. The retention in Section 9 of injunctions to stay proceedings at law is made necessary by the fact that the Civil Practice Act does not apply to certain types of proceedings which are regulated under special statutes.

Assuming that equitable defenses are permitted in Illinois, a question arises as to how they shall be pleaded. In view of the provisions of Sections 38 and 44 providing for the setting up of cross-demands and for their designation as counterclaims, they should be set forth as cross-actions praying affirmative relief. But it should be noted that both Section 38 and Section 44 are expressly subject to rules of court. It would seem desirable for the Supreme Court by rule to permit such matters as in substance merely contest the plaintiff's right to recover, to be set forth as defenses in the answer. A counterclaim should be required only where the facts necessitate affirmative relief in addition to defeating the cause of action.

Finally, the lack of clearly expressed intention in the Illinois statute presents an additional problem. Assuming that equitable defenses are permitted, may the defendant who has failed to assert such a defense in proceedings brought against him, obtain an injunction in a separate action against the enforcement of the plaintiff's claim. This seems a likely

128 Ibid., §§ 259.10 and 259.11.
129 Ibid., § 133.
131 The point was involved in Allen v. Sanders, 369 Ill. 466, 17 N. E. (2d) 28 (1938) but was not considered by the Supreme Court, since it was not passed upon by the trial court. It appears that "equitable defenses" were allowed in Brand v. Schmitz, 293 Ill. App. 114, 11 N.E. (2d) 974 (1937).
result in view of the fact that the joinder provisions of the act of 1933 are permissive. Here again the same criticism of the allowance of multiple actions may be made.\textsuperscript{134}

The approach employed in Illinois has made easier the determination of the mode of trial, not only where equitable defenses are involved, but wherever a proceeding before a court includes both equity and law matters which must have been separated under the former system. As has been pointed out before, the act preserves the equity action as a unit and provides for equitable issues which may arise in actions at law. The constitutional guarantee of the right to trial by jury is simply a requirement that the right continue as at common law. Where equity actions simply carry forward under the new procedure the old equity suit as a unit, there is no difficulty under Section 44 in determining the mode of trial, even when such action is joined with other matters which can not be merged into the equity action. The section wisely allows the court in its discretion to order separate trials where convenience will be served.|218

Likewise, the use of the term "equitable issues" to designate, among other things, matters defensive in nature but formerly causes of action in equity, and the provisions for their separate trial and transfer from one side of the court\textsuperscript{136} to the other seem adequate to guard against expansion of the right to jury trial beyond the extent of the constitutional guarantee. The provisions of Section 64\textsuperscript{137} employ the device of requiring jury demands from each party at the earliest practical time. Where the plaintiff begins an equity action and the facts proved show him to be entitled to legal but not equitable

\textsuperscript{134} This problem was involved in the situation presented in Printers Corp. v. Hamilton Inv. Co., 295 Ill. App. 34, 14 N. E. (2d) 517 (1938). In this case an injunction was allowed to restrain the enforcement of judgments obtained by confession where motions to vacate the judgments had been overruled. Apparently the problem of the propriety of equitable defenses was not passed upon by the court. See criticisms of the case in 27 Ill. B. J. 205 and 6 U. of Chi. L. Rev. 500. And see the reference to this case in the letter of Judge O'Connor in 27 Ill. B. J. 313, mentioned before (note 91).

\textsuperscript{135} Ill. Rev. Stat. 1939, Ch. 110, § 166. See also the provision for juries in equity cases in Ill. Rev. Stat. 1939, Ch. 110, § 187.

\textsuperscript{136} Ill. Rev. Stat. 1939, Ch. 110, § 168; and Rule 11, Ill. Rev. Stat. 1939, Ch. 110, § 259.11. These transfer provisions were employed in State Bank of St. Charles v. Burr, 295 Ill. App. 15, 14 N.E. (2d) 511 (1938); 372 Ill. 114, 22 N.E. (2d) 941 (1939).

\textsuperscript{137} Ill. Rev. Stat. 1939, Ch. 110, § 188.
relief, the case can be transferred to the law side of the court. In this event, it would seem constitutionally necessary to grant a jury demand by either party.\textsuperscript{138}

The year 1933 marked the end of a long tradition of the separate administration of law and equity in Illinois. In spite of the criticisms mentioned before, it now appears that some of the greatest advantages of the movement toward fusion have been realized and some of its most serious difficulties avoided. Complete fusion is impossible in Illinois as elsewhere where constitutional guarantees of trial by jury as at common law exist. Moreover, complete fusion requires the creation of a procedural system entirely new in place of the old. The nature of even the formal side of law does not easily permit such a complete break with the past. Equity still exists in Illinois, as it still exists wherever the common law and equity tradition took root. Whether the Civil Practice Act will establish for Illinois the complete partnership between the two elements in the legal system that is the ideal of the code movement will depend upon whether or not the courts continue to interpret and construe the act in the light of its purposes. The preservation of the term "equity" in the procedural system may serve as a reminder of the need in law to strike the proper balance between flexibility and rule.