



1995

The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities

Morton Gitelman

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Courts Commons](#)

Recommended Citation

Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L. REV. 215 (1995).

Available at: <https://lawrepository.ualr.edu/lawreview/vol17/iss2/2>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

THE SEPARATION OF LAW AND EQUITY AND THE ARKANSAS CHANCERY COURTS: HISTORICAL ANOMALIES AND POLITICAL REALITIES

*Morton Gitelman*¹

Separate courts of equity have largely passed from the legal scene in both England and the United States. Arkansas, however, still maintains the separation. The purpose of this article is to explain the historical background of the Anglo-American phenomenon of separate courts of equity and to explore the reasons in favor of and prospects for changing the current system, or merging law and equity into a unitary court system.

When Joseph Story published his brilliant commentaries on equity in 1835, he stated: "The Origin of the Court of Chancery is involved in the same obscurity, which attends the investigation of many other questions, of high antiquity, relative to the Common Law."² The obscurity referred to is only in the sense of the paucity of records concerning the work of the English Chancellors for the greater part of the history of the English courts. The broad outlines of how the Chancery Court came into existence and why it did so and the manner in which it remained separate from the other royal courts until 1875 are generally known. A recounting of that history will show rather clearly that the separation of law and equity was accidental. Following that recounting, this Article will not only explore the twists and turns that caused the English accidental separation to appear in America, but also the history of separate chancery courts in Arkansas; finally, the Article will present some thoughts on the prospects of unifying the courts.

I. THE HISTORY OF CHANCERY IN ENGLAND

A. The English Chancellor in the Early Anglo-Norman Period (1100-1285)

After the Norman conquest in 1066, the administrative machinery of government in England reflected the conquerors' need to consolidate political power and reduce internal violence in the kingdom. The

1. Distinguished Professor of Law, University of Arkansas.

2. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 39 (1835).

Normans did not wipe out the existing courts and procedures of local government, nor did they suspend or rewrite existing substantive or procedural law. Rather, what became known as the common law gradually won acceptance throughout the kingdom mostly because the royal courts which emerged as judicial institutions emanating from the King's Council in the twelfth and thirteenth centuries offered superior procedures for handling the most important disputes of the day (mostly involving possession of land).³

In the first hundred years after the conquest, central government in England was essentially the King in Council, and the Council embodied all of the functions of government: executive, legislative, and judicial. Wherever the King went in the country, the Council was part of his retinue. The King's Chancellor was probably the most important member of the Council, with a multitude of functions.⁴ Usually an ecclesiastic, the Chancellor kept the great seal, which sealed all official documents, including legal writs. The common law courts gradually emerged out of the Council and became fixed institutions sitting at Westminster. However, in those more fluid times, the Council and the King himself continued to receive petitions

3. Under feudal principles each lord was entitled to hold a court for his tenants, usually known as a "court leet" or "court baron." See F.W. MAITLAND, *EQUITY AND THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES* xxxvii (1909). Also, many courts represented franchises granted by the crown. The law applied in the feudal courts was usually founded on local custom. Although the feudal courts persisted until well into the seventeenth century, they were minimized by the royal courts—common pleas, exchequer, and king's bench. The royal courts offered better procedure (rudimentary jury trial, as opposed to wager of law and trial by battle), appeals, the creation of a record, relatively even-handed and inexpensive justice, and better methods of enforcing judgments. See, e.g., THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 139-59 (5th ed. 1956); see also *SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS* lvii-lix (F.W. Maitland ed., 1889) (Selden Society Series vol. 2).

4. 1 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 397 (7th rev. ed. 1956). Holdsworth described the Chancellor's broad functions by quoting Jeremy Bentham's critical summary:

He is "(1) a single judge controlling in civil matters the several jurisdictions of the twelve great judges. (2) A necessary member of the Cabinet, the chief and most constant advisor of the king in all matters of law. (3) The perpetual president of the highest of the two houses of legislature. (4) The absolute proprietor of a prodigious mass of ecclesiastical patronage. (5) The competitor of the Minister for almost the whole patronage of the law. (6) The Keeper of the Great Seal; a transcendent, multifarious, and indefinable office. (7) The possessor of a multitude of heterogeneous scraps of power, too various to be enumerated."

Id. Note that Bentham was describing the Chancellor's position at the turn of the nineteenth century; in the early Norman period, the Chancellor was not yet a judge.

seeking justice.⁵ The Chancery Court had its beginnings in the practice of royal disposition of humble petitions for justice.

Feudalism on the European continent was, at the time of the conquest, extremely decentralized. The relationship between lord and vassal was so personalized that a feudal knight was bound to fight for his lord even when the lord took up arms against the King. In England, however, by the time of Henry II in the latter half of the twelfth century, the central authority of the King and Council was firmly established. The principle that a free tenant was also a subject of the King was reinforced by the notion that both justice and peace in the Kingdom had its source in the King.⁶ In order to maximize the political advantage of the central government as the source of domestic peace, the King and Council undoubtedly looked upon petitions for justice as less of a chore than an opportunity and responsibility. In the early years after the conquest, these petitions were probably heard by the Council en banc, but as the requests for relief mounted, procedures and specialization were required. Thus, by the time of Henry II, the first of what became the common law writs and causes of action were issued as a matter of course and heard by royal justices sitting at Westminster.⁷ Later, when the trespass writs became important vehicles for maintenance of internal peace, the Court of King's Bench emerged from the Council, and eventually it also settled at Westminster.⁸

The emergence of specialized judges from the Council and the formation of royal central courts did not stem the tide of applications to the King's Council for legal aid. Although an aggrieved person could seek justice in the courts, the jurisprudential dichotomy of

5. 1 HOLDSWORTH, *supra* note 4, at 194. Theoretically, all the royal courts operated in the name of the King and the judges were all royal appointees. Some of the kings would occasionally sit in judicial matters.

6. 1 FREDERICK POLLOCK & FREDERICK W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 528 (2d ed. 1898).

7. Holdsworth puts the time a little later, around the end of John's reign, at the time of Magna Charta. 1 HOLDSWORTH, *supra* note 4, at 195-96. However, the causes of action for possession of property, most importantly the writ of novel disseisin, were clearly established between 1165 and 1190, and it is likely that the judges of common pleas settled at Westminster before the thirteenth century. Plucknett cites a chronicle stating that in 1178, Henry decreed a court of five justices. PLUCKNETT, *supra* note 3, at 147-49. One of the complaints of the barons that became chapter 17 of the Magna Charta in 1215 was that the court moved around too frequently, and the Magna Charta provided that the court should sit "in some certain place." None of the historical accounts establish a date certain for the Westminster site of common pleas, but the 1178 date is not too speculative for the carving out of the court from the Council.

8. PLUCKNETT, *supra* note 3, at 149-51.

right versus remedy was an ever-present hurdle for the potential plaintiff. The writ system which quickly established itself in the twelfth and thirteenth centuries was extremely formula driven. Because all legal writs were written and sealed in the Court of Chancery, the clerks in that court's office, and perhaps the Chancellor himself, could create new writs or causes of action to meet new circumstances. This power, although never formally established, was curtailed as the political power of Parliament grew in the last half of the thirteenth century.⁹ The causes of action reflected in the registers of writs were few in number. The disputes that could not fit into the formulaic requirements of the common law were either resolved in the nonroyal courts,¹⁰ left unresolved, or in small, but growing numbers, were matters of petition to the King and Council as the reservoir of royal justice.

B. The Rise of the English Chancery Court (1285-1550)

Professor Maitland, in his lectures on equity while Downing Professor of Law at Cambridge University, suggested that the Chancellor developed his judicial office and powers because the sheer volume of petitions to the King and council made for laborious reading.¹¹ Other historians, perhaps more accurately, note that the Chancellor acted along with or under the direction of the Council throughout most of the fourteenth and fifteenth centuries.¹² The exact date when the Chancellor began to act as a judge cannot be determined. William Baildon accepts the views of Professor Dicey:

As the Law Courts had branched off from the "Curia Regis," so the Chancery began to separate from the Council. The exact steps, by which the process of separation was carried out, cannot be known. But it may readily be supposed that the pressure of other business, and a distaste for the niceties of legal discussion, made the Council glad to first refer matters of law to the Chancellor, and next to leave them entirely to his decision. Whatever

9. 1 HOLDSWORTH, *supra* note 4, at 398. The Provisions of Oxford in 1258 expressed baronial concern that the Chancellor was inventing new writs, and the Statute of Westminster II in 1285 precluded the issuance of new writs without consultation with Parliament.

10. The nonroyal courts included the ecclesiastical courts, franchise courts, seignorial courts, and some special courts such as the fair courts that decided contractual and commercial disputes during the holding of fairs.

11. MAITLAND, *supra* note 3, at 3.

12. SELECT CASES BEFORE THE KING'S COUNCIL, 1243-1482 xxv (I.S. Leadam & J.F. Baldwin eds., 1918) (Selden Society Series vol. 35); SELECT CASES IN CHANCERY, 1364-1471 (William P. Baildon ed., 1896) (Selden Society Series vol. 10).

the steps of the change, a great alteration took place; and before the death of Edward III the Chancellor decided matters of equity on his own authority, and gave assistance to those hindered by violence from obtaining aid through the regular course of law. The date of his establishment as a Judge of Equity is approximately marked by a proclamation of Edward III, which referred matters of grace to the Chancellor's decision [22 Edw. III, 1349]. Though from about this date the Chancellor exercised an independent jurisdiction, the Council's power suffered no diminution. Both the Council and the Chancellor aided those whom the common law was unable to protect. Both the Chancellor and the Council enforced obligations binding in conscience though not in law. Attacks made on the power of the Chancellor are attacks on the authority of the Council, and the Council in Chancery can hardly be distinguished from the Chancellor's own Court.¹³

Disagreement about the exact date of the Chancellor's separate judicial existence does not obscure the fact that the Chancellor began to act judicially either with or separately from the Council during the fourteenth century. The types of petitions that flowed his way fell into two groups and were eventually known as the Latin side and the English side of the Chancellor's jurisdiction. The Latin side, so-named because all the proceedings were enrolled in Latin, dealt with petitions where the King was essentially the defendant. A typical case would be one where the petitioner alleged that the King's agents had wrongfully seized property through escheat by claiming there was no heir when the plaintiff was the true heir. The King could not be sued in the court of common pleas or in any of the other royal courts, so a petition to either the Council or the Chancellor was probably the only remedy.

The English side of chancery (where the petitions were written in either French or, later, English) represented a range of cases from whence the concepts of equity emerged. Most of these cases were what we would refer to today as civil rights matters. The petitioners

13. SELECT CASES IN CHANCERY, *supra* note 12, at xviii; *cf.* SELECT CASES BEFORE THE KING'S COUNCIL, *supra* note 12, at xxiv. Leadam and Baldwin argue that "[t]he student of the chancery is apt to state prematurely the separate formation of the court." They proceed to put the date of a distinct court of chancery after 1458. SELECT CASES BEFORE THE KING'S COUNCIL, *supra* note 12, at xxv. For a recent view that the 1349 proclamation was a turning point, see ROBERT C. PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381 107-10 (1993). Palmer states that "[t]he proclamation of 1349 began a tradition of chancery activity that resulted in the chancellor's court of conscience." *Id.* at 109. Palmer's thesis is that the plague that devastated London in 1348 caused radical changes in the legal system and was the direct cause of the Chancellor's separate jurisdiction.

asked for help from the Chancellor or Council because they were somehow disabled from relief in the regular courts, even though the subject matter of the dispute was ordinarily within the subject matter jurisdiction of the common law courts. Usually, the petitions claimed poverty or the fact that the defendant was a powerful political figure who would interfere with justice. These petitions almost always ended with the plea of seeking help for the sake of God and in the name of charity.¹⁴

In order to resolve the large numbers of petitions¹⁵ the Chancellor had to develop some procedures unknown to the common law courts. After the issuance of a common law writ, the case would be sent to the local sheriff with directions to impanel a jury to find the facts and return a verdict when the royal justices would take the assizes. The Chancellor perforce had to utilize a quicker method of resolving petitions. He turned to a device, known as the subpoena, that had some previous use by the Council. The subpoena would order the defendant named in the petition or bill to appear personally before the Chancellor on a specific date to answer the allegations in the bill. At first, the subpoena was confined to personal appearance with a money penalty for failure to appear; later the device was adapted to require production of documents. The Chancellor, usually clerically educated, adapted many ecclesiastical procedures for hearings, and hearings on the allegations in the bill could easily resemble the Holy Inquisition.

While massive numbers of petitions from the early period of the Chancery Court have been preserved, there are few records showing defendants' answers or judgments. Unlike the common law courts where plea rolls were preserved from the beginning, the early

14. SELECT CASES IN CHANCERY, *supra* note 12, at xxi-xxii. Baildon notes that these types of cases were the bulk of the work of the Chancery Court in the early years, but they essentially disappeared by the end of the fifteenth century. The fifteenth century was tumultuous, politically dominated by the Wars of the Roses and the concomitant loss of law and order. Powerful lords had gangs of "retainers," and the term "maintenance" appears frequently in the legal literature, referring to the maintaining of these gangs that operated much like the "bad guys" in Hollywood westerns. King Henry VII, in the 1480's, either created or reinstated what became known as the Star Chamber, a court of criminal equity charged with handling riots and civil unrest. In the time of Henry VIII, a new court was created by the crown to serve the needs of the poor; it was called the Court of Requests and it lasted until the middle of the seventeenth century.

15. See SELECT CASES BEFORE THE KING'S COUNCIL, *supra* note 12, at xiii-xiv. Leadam and Baldwin state that the manuscript collection of chancery proceedings in the Public Records Office, "containing some 300,000 petitions, are too voluminous for any analysis or classification"

centuries of chancery practice are unreachable. As described by Baildon:

For a long time the defendant's answer was not recorded in writing. He appeared in answer to his subpoena, or was brought up in custody, as the case might be, and examined viva voce by the Chancellor. Judgment was thereupon delivered without further pleading, though possibly the plaintiff may have been examined when it was deemed necessary. This method of getting at the defendant's plea probably obtained in all the early cases, and accounts for the lamentable dearth of recorded answers.¹⁶

Baildon also describes the early cases in terms of subject matter and mentions the earliest uses of what later became some of the distinctive procedures of equity courts. His general conclusions about the early history of the Chancellor's court are:

The Chancellor's jurisdiction is an offshoot of that of the Council.

The cleavage had begun certainly in the reign of Richard II and probably in that of Edward III.

It was probably not complete and absolute until the statute of 3 Henry VII.

The equitable jurisdiction began with the Council, and not with the Chancellor.

It became exclusively the Chancellor's, probably by delegation from the Council, towards the end of the fifteenth century, but the details are unknown.

It was augmented from time to time by statute, but principally by the extension of its general principles by individual Chancellors.¹⁷

Remarkably, virtually none of the early petitions or bills addressed to the Chancellor or the Council used the word "equity" in the plea; however, the word "conscience" did appear frequently. Some authors have considered whether the theoretical concept in those early years was an appeal to the King's conscience as applied by his agents, the Chancellor and Council, or perhaps the idea that the conscience of the parties was the guide to decision.¹⁸

If the only business of the early Chancery Court had been to provide relief to those barred from viable access to the royal courts

16. SELECT CASES IN CHANCERY, *supra* note 12, at xxvii.

17. SELECT CASES IN CHANCERY, *supra* note 12, at xlv.

18. The most interesting discussion of these matters is found in LORD NOTTINGHAM'S CHANCERY CASES xxxvii-xl (D.E.C. Yale ed., 1957) (Selden Society Series vol. 73).

due to poverty or oppression, that court would not have survived for very long. However, another accident of history gave the Chancellor jurisdiction to resolve a very important area of legal disputes involving uses.¹⁹ This is best recounted by Maitland:

But then just at this time [when the Chancellor is restricted from hearing cases which might go to the ordinary courts] it is becoming plain that the Chancellor is doing some convenient and useful works that could not be done, or could not easily be done by the courts of common law. He has taken to enforcing uses or trusts [T]hey were very popular, and I think we may say that had there been no Chancery, the old courts would have discovered some way of enforcing these fiduciary obligations. That method however must have been a clumsy one. A system of law which will never compel, which will never even allow, the defendant to give evidence, a system which sends every question of fact to a jury, is not competent to deal adequately with fiduciary relationships. On the other hand the Chancellor had a procedure which was very well adapted to this end.

Thus one great field of substantive law fell into his hand — a fruitful field, for in the course of the fifteenth century uses became extremely popular.²⁰

19. The long history of the use is much too complex to be treated here. A capsule summary follows: Feudal tenures did not allow passing real property by will and the use emerged as a device to substitute for that deficiency, as well as a convenient device for avoiding feudal dues (the equivalent of estate taxes today). A landholder would enfeoff a friend or group of friends to the use of the designated beneficiary with instructions to enfeoff the beneficiary upon death or some other event. Therefore, when the landholder died, no feudal dues or wardships would flow to the lord. If the "trustee" failed to carry out the instructions, there was no remedy at common law, so the Chancellor began to fill the void in the fourteenth century. Henry VIII sought to put an end to the use as a tax avoidance device that, by the early sixteenth century, severely restricted royal income. The Statute of Uses in 1536 sought to merge what, by then, were seen as separate legal and equitable estates in land. The aristocracy rose, and after the Pilgrimage of Grace (an aristocratic demonstration against the government to protest the dissolution of the monasteries, but also a protest against the King's financial policies), Henry ameliorated the harsh effect of the statute by proclaiming the Statute of Wills in 1540 which, for the first time, authorized the devise of land. The effect of these events on property law still echo, as every law student who wrestles with the Rule in Shelley's Case knows. Henry also created a new court to carry out the policy of maximizing collection of feudal dues, the Court of Wards and Liveries.

20. MAITLAND, *supra* note 3, at 6-7. Even after Henry VIII sought to terminate uses in the famous Statute of Uses (1536), they remained in the law as trusts, and the Chancery Court retained jurisdiction over the devices. Palmer traces the spurt of growth in the popularity of uses to the plagues and provides a useful analysis of the development of the use in the fourteenth and fifteenth centuries. PALMER,

By the time of Henry VIII in the early part of the sixteenth century, the Chancellor, in addition to all of his other governmental functions, was firmly established in the Chancery Court, a court with a single judge. The pleas for the sake of God and in the name of charity had largely disappeared, and the beginnings of equitable jurisdiction and principles had emerged. Enforcement of uses and cases involving fraud, mistake, and accident constituted most of the work of chancery. What might have developed as a common law court in chancery was a separate court of equity.

C. The Battle of Jurisdictions: Common Law Versus Chancery (1550-1650)

The Tudor era in England, from Henry VII through Elizabeth I, was most remarkable in the modernization of governmental and legal institutions. The age was also the time of exploration, the origination of the modern nation-state, and the beginning of great social and religious change in England. Henry VII brought internal peace to the Kingdom and built strong central authority. Henry VIII brought religious upheaval by rejecting the authority of the Roman See and founding the Church of England. In that process, many new courts were created, primarily to oversee the confiscation and disbursement of the Catholic institutions and lands in England and to restrict the flow of money from England to Rome. The King's prerogative was the source for the judicial and administrative growth of government, and it established the conditions for the growing independence and power of Parliament.

Henry VIII began the process of selecting Chancellors from the world of law rather than from religious circles. After Cardinal Woolsey, Thomas More, who was trained in the common law, became Chancellor and held the office from 1529 to 1532. From the middle of the sixteenth century onward, a religiously trained Chancellor was the rare exception. The firmly established Chancery Court then began to encounter intense political resistance from the common law courts. Although the common law courts were also royal courts, with judges appointed by the King, the common law courts were politically aligned with Parliament while the Chancellor was closer

supra note 13, at 110-32. Plucknett states: "Indeed, in 1464 the Court of Common Pleas was once given the chance of recognising an equitable estate, with the reasoning that 'the law of chancery is the common law of the land.' This golden opportunity was lost, and so we had to wait four hundred years for the fusion of law and equity." PLUCKNETT, *supra* note 3, at 189 (footnote omitted).

to the King and his prerogative. The political difference was fought out in jurisdictional and theoretical legal disputes.

By 1550, the Chancery Court acted in roughly five categories of cases. First, and foremost, chancery dealt with uses. Second, a growing number of cases involved enforcement of contracts, an area of law that had not been theoretically developed in the common law courts.²¹ The third area of the Chancery Court's work, and the one that invoked the greatest enmity of the common law judges, was to intervene, usually by injunction, in cases where the strict rules of common law engendered inequitable results:

Fraud, forgery and duress were some of the chief grounds of [the Chancellor's] interference. Even after judgment at law he would issue an injunction against the enforcement of the judgment Such interference was very necessary. The courts of common law allowed fraud to be set up as a defence; but they were unable to order the cancellation and delivery up of documents obtained by fraud. Thus if a bond had been wholly or partially satisfied, but not given up, the obligor might sue at law for the whole amount [T]he Chancellor would relieve against mistake, where an instrument had been drawn up which did not express the true intent of the parties; or against accident, where for instance, a money bond had imposed a penalty in case of non-payment by a day, and accident had prevented payment by that day.²²

The other two areas of jurisdiction involved the use of the writ of subpoena and the contempt power to provide relief the common law courts were unable to provide, and to investigate matters of account.²³

The common law judges scornfully denied the power of the Chancellor to interfere with a judgment rendered by a common law court that was regular on its face. Defenders of the Chancellor

21. See generally C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT (1949). Contract law was considered to be in the realm of ecclesiastical courts, where breach of faith was invoked by the plaintiff, or local or fair courts. The common law courts gradually spun out a theory of contract from what had been considered tort cases, and the *assumpsit* language of most of the writs of trespass on the case (e.g., defendant undertook (*assumpsit*) to cure the plaintiff's horse and through his negligence the horse died) was not fully adapted to purely executory contracts until early in the seventeenth century.

22. 1 HOLDSWORTH, *supra* note 4, at 457-58.

23. 1 HOLDSWORTH, *supra* note 4, at 458-59. There was a common law writ of account, but it was very cumbersome and involved a three-step process. The chancery procedure was very popular because it was relatively streamlined.

responded, and several tracts were published on both sides of the issue:

In Edward IV's reign [in 1484] Fairfax asserted that the King's Bench might forbid the parties from resorting to any other jurisdiction, if the case fell within the jurisdiction of the common law courts. In another case of the same reign, Huse and Fairfax declared that if the Chancellor committed the parties for disobedience to an injunction, they would release them by Habeas Corpus.

. . . [T]he question became so burning that it occasioned a literary controversy. The Doctor and Student discussed the relations between law and equity with a bias in favour of the equitable jurisdiction. It was answered by a serjeant who took the strict common law line He argued that the equity of the Chancellor was wholly uncertain and arbitrary; and that the Chancellors thought the common law needed amendment, only because they were ecclesiastics, and knew not its goodness This pamphlet was answered by the "Little Treatise concerning Writs of Subpoena." . . . [I]n Edward VI's reign the students of the common law complained to the Council of the encroachments of the Chancery. At the end of Elizabeth's reign the differences became acute. A barrister was indicted . . . for applying for an injunction after a judgment at common law.²⁴

In the course of the long-running dispute over this issue, some important jurisprudential ideas emerged from the invective dispatched by both sides. The most important concept developed was that the equitable injunction, entered to prevent a common law judgment holder from enforcing his judgment, was not an attack on or re-examination of the judgment, but was rather an in personam decree stating that it was inequitable to enforce the judgment because of the special circumstances. Despite the fierce attacks of the common law judges insisting that the equitable proceedings were nothing less than a reformation of the judgment in an irregular court, the equitable principle took hold and remained a cornerstone of equity.

The dispute came to a head during the reign of James I. The lead adversaries at this time were two of the most powerful legal figures in England, Edward Coke, Chief Judge of the Court of Common Pleas, and his long-time political rival, Francis Bacon, attorney general (a position once held by Coke in the reign of Elizabeth I). Coke was an adamant and passionate advocate for the common law courts and resisted the Chancery Court at every turn:

24. 1 HOLDSWORTH, *supra* note 4, at 459-61.

Coke decided in several cases that imprisonment for disobedience to injunctions issued by Chancery was unlawful. In one case, "it was delivered for a general maxim in law that if any court of equity doth intermeddle with any matters properly triable at the common law, or which concern freehold, they are to be prohibited." So far did Coke carry his opposition that he even contended that a decree for specific performance was always unjust to the defendant because "it deprived him of his election either to pay damages or to fulfil his promise. . . . If the party against whom judgment was given, might after judgment given against him at the common law, draw the matter into the Chancery, it would tend to the subversion of the common law, for that no man would sue at the common law, but originally begin in Chancery, seeing at the last he might be brought thither."²⁵

Coke argued that the Chancellor's jurisdiction violated the Statute of Praemunire of 1354 and a statute of 1403. The 1354 statute was obviously promulgated to curb jurisdiction of ecclesiastical courts (the statute precluded use of courts subordinate to foreign courts), and Coke's reference to that statute did not carry much persuasive weight. The other statute seemed to prevent relitigation after a final judgment, an early expression of the idea of *res judicata*. The response to this argument was that the statute did not mention the Court of Chancery, and further, that in chancery it was not the judgment that was examined but the conduct of the parties.

The controversy reached King James, who referred the matter to Bacon and others for advice. By that time the political rift had grown between the common law courts and their parliamentary adherents and those who were aligned with James's absolutist views of the King's prerogative. Therefore, it was no surprise when James issued an order on July 26, 1616 resolving the dispute in favor of the jurisdiction of chancery.²⁶

The order of King James I firmly settled the political star of the Chancery Court. The common law judges, however, did not give up their dispute with equity. They turned their fury toward a

25. 1 HOLDSWORTH, *supra* note 4, at 461. Defenders of chancery responded to Coke by claiming that these injunctions did not interfere with the common law; all the Chancellor was concerned with was the conduct of the parties. 1 HOLDSWORTH, *supra* note 4, at 461.

26. 1 HOLDSWORTH, *supra* note 4, at 463 n.3. "We do will and command that our Chancellor . . . shall not hereafter desist to give unto our subjects . . . such relief in equity (notwithstanding any proceedings at the common law against them) as shall stand with the merit and justice of their cause, and with the former ancient and continued practice . . . of our Chancery." 1 HOLDSWORTH, *supra* note 4, at 463 n.3. Later that year, James removed Coke as chief judge, and a year later, in 1617, Bacon was named Chancellor.

lesser equity court, the Court of Requests, which had been established to hear the causes of poor persons. The common law judges refused to acknowledge the legitimacy of the court, ignored all its orders, and issued a multitude of prohibitions against its jurisdiction. That court was finally abolished in the mid-seventeenth century.²⁷

D. The Flowering of the Chancery Court (1650-1750)

By the middle of the seventeenth century, the Chancery Court was operating as a regular tribunal. Decrees and proceedings were being reported regularly,²⁸ and a chancery bar was practicing in that court. The jurisdiction of the court was relatively fixed, and the great central principle of equity jurisdiction lying in cases where there was no adequate remedy at law was the product of James's order of 1616. Chancery was hopelessly behind in its docket.²⁹ The Chancellor still had responsibility for other governmental functions, and the tradition of the Chancellor's personal status as the dispenser of equity meant that the expansion of the court by adding additional chancellors was inappropriate. Historians have established that the assertions of some seventeenth century authors that the Chancellor was sole judge is not an accurate portrayal of the actual proceedings in chancery. The Master of the Rolls and, under him, the Masters in Chancery, carried much of the burden of the docket.³⁰

The flowering of equity jurisprudence in England commenced with the Chancellorship of Nottingham in 1673; he is often referred to as the father of equity. Followed by a series of highly qualified and respected lawyers in the late seventeenth and throughout the eighteenth centuries, equity finally was accepted as part of the law

27. SELECT CASES IN THE COURT OF REQUESTS A.D. 1497-1569 xlii (I. S. Leadam ed., 1898) (Selden Society Series vol. 12).

28. The written history of the common law courts began with the *Year Books* in the thirteenth century. For nearly the first two hundred years of the Chancery Court, there were no written reports and thus no concept of precedent. The first Chancery reports did not appear until the late 1500's; regular reporting was a seventeenth century event.

29. MAITLAND, *supra* note 3, at 10. "Its independence being thus secured, the court became an extremely busy court. Bacon said that he had made 2000 orders in a year, and we are told that as many as 16,000 cases were pending before it at one time; indeed it was hopelessly in arrear of its work." MAITLAND, *supra* note 3, at 10. Maitland is referring to the period between 1620 and 1650. During the Commonwealth in the mid-seventeenth century, there was a brief attempt in Parliament to abolish the court on the ground that it too closely resembled its criminal equity counterpart, the Court of Star Chamber. The effort failed, but some procedural reforms were passed.

30. 1 HOLDSWORTH, *supra* note 4, at 416-21.

of the land in England. Due in large measure to the establishment and flourishing of a specialized bar and improved reporting of decisions, it became a subject for text books. Blackstone's Commentaries treated equity extensively and spread the concepts to the American colonies and later to the early republic.

The period between 1650 and 1750 established the scope and content of equity jurisprudence. This was the same period when the American colonies were importing and developing legal systems. Perhaps it was inevitable that the American colonies adopted not only the substantive content of equity, but also the separate equity court itself.

II. AMERICAN COLONIAL CHANCERY COURTS

The state of legal systems in early colonial America is rather unknown. The charters and other documents for the proprietary colonies state only that the proprietors had the authority to enact ordinances and laws for the respective colonies or plantations, to the extent that those ordinances and laws were not repugnant to the laws of England.³¹ Colonial judicial records are sparse, and although the early charters were modeled on the feudal grant to the Palatinate of Durham, which had a Chancellor, none of the early colonies created or filled that office. The most likely reason is lack of need; most colonial courts were local and they sometimes acted legislatively as well as judicially.

Perhaps the first chancellor on American shores was Sir Edmund Andros, royal governor of Connecticut. When James II invoked quo warranto proceedings in 1685 with the design of revoking the colonial charters of the proprietary colonies in New England, Connecticut resisted and petitioned to remain out of the dominion of New England. However, the petition was denied, and in October of 1687, Connecticut was annexed to Massachusetts and the other royal colonies. By that time, Andros was already governor of the other colonies. In Boston, on March 3, 1686, Andros and his council enacted the following:

Be it further enacted, by the authority aforesaid, that there be a Court of Chancery within this dominion which shall have power to hear and determine all matters of equity in as full and ample manner as his Majesty's High Court of Chancery in England has or ought to have, to be held by the Governor, or such person

31. See generally W.K. KAVENAGH, FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY (1974).

as he shall appoint to be Chancellor, assisted with five or more of the Council, who in this court shall have the same power and authority as masters of chancery in England have or ought to have, which court shall sit at such times and places as the Governor shall from time to time appoint.³²

In 1688, the Glorious Revolution in England deposed James II and brought William and Mary to the throne. It also brought the dissolution of the dominion structure of the royal colonies of New England. In New York, which had become a royal colony by virtue of James's accession to the throne (he had been Duke of York), the new assembly in 1691 reconstructed the judicial system. The governor was designated as the Chancellor of the Court of Chancery.³³

32. *Id.* at 193. Earlier, in Massachusetts, the Puritans sought to codify the law beginning in 1635. In 1648, the fruit of their efforts appeared in the code entitled *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts*. This codification was arranged alphabetically and was partly a code of conduct Biblically prescribed and partly a set of regulatory statutes. Tucked between a long section on *Innkeepers, Tippling, Drunkenness* and another regarding *Justice*, a section entitled *Juries, Jurors* provided:

It is ordered . . . that the Constable of everie town upon Proces from the Recorder of each Court, shall give timely notice to the Freemen of such town, to choos so many able discreet men as the Proces shall direct which men so chosen he shall warn to attend the Court wereto they are appointed . . . which men so chosen shall be impanelled and sworn truly to try betwixt partie and partie, who shall finde the matter of fact with the damages and costs according to their evidence, and the Judges shall declare the Sentence (or direct the Jurie to finde) according to the law. And if there be any matter of apparent equitie as upon the forfeiture of an Obligation, breach of covenant without damage, or the like, the Bench shall determin such matter of equitie.

Haskins asserts that this provision indicates that law and equity were merged in colonial Massachusetts. G.L. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 183 (1960). In the eighteenth century, Massachusetts, like Pennsylvania, exhibited a strong antipathy to separate courts of chancery.

33. 1 *THE COLONIAL LAWS OF NEW YORK* 230 (1894). The first assembly of the Colony of New York began on April 9, 1691, and on May 6, 1691 the following was enacted:

[T]here shall be a Court of Chancery within this Province which said Court shall have power to hear and Determine all matters of Equity, and shall be Esteemed & accounted the High Court of Chancery of this Province: AND BE IT FURTHER ENACTED by the authority aforesaid, that the Governour & Council be the said High Court of Chancery, and hold and keep the said Court; And that the Governour may Depute, Nominate & Appoint in his Stead a Chancellor, and be assisted with such other Persons of the Council as shall by him be thought fitt and Convenient, together with all Necessary officers, Clerks, and Registers as to the said High Court of Chancery are needfull.

Id.

There is no indication that these early chancery courts ever sat or conducted any business. However, the pattern of a separate chancery court tied to the royal governor was to have a strong political impact during the eighteenth century.

The 1688 revolution in England had many repercussions for the course of legal institutions in England and the colonies. Parliamentary government was firmly established in England, and individual rights were becoming more important. The royal judges, previously labeled as "Gods"³⁴ were, by the time of the revolution, beginning to lose their power to control the common law jury. In the eighteenth century, jury independence was a political force, and the idea that the jury could decide the law as well as the facts was gaining force. The Chancellor, sitting always without a jury, and a vestige of the royal prerogative, was unlikely to enjoy the respect of those who advocated democratic government.³⁵

Between growing colonial legislative resistance to the power of royal governors and political muscle-flexing by colonists who resented tight controls over trade, the atmosphere in America in the early eighteenth century was not conducive to chancery courts. The most profound reaction was in Pennsylvania. Under the terms of William Penn's charter in 1681, he was authorized to erect a court of equity, but declined to do so.³⁶ Between 1684 and 1721 several attempts by the General Assembly to create an equity court failed (usually due to vetoes in England). In 1720, a separate equity court was established:

But this court, founded in 1720, was the first and only separate Court of Equity Pennsylvania has ever had. Considerable business was transacted by it. But unfortunately for the court's existence the Governor was its Chancellor, and the colonists were so jealous of any power exercised by the King of England or his represen-

34. REPORTS OF CASES IN STAR CHAMBER 177 (William P. Baildon ed., 1894). John Winthrop, who became governor of the Massachusetts colony in 1629, although a Puritan, expressed the view that the law should be expressed by magistrates who were "Gods upon earth." HASKINS, *supra* note 32, at 120.

35. See generally M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978). Other prerogative courts were also the subject of democratic wrath. In the colonies the Vice-Admiralty courts were a flash point for the American revolutionists. Those courts enforced the customs and were charged with collecting duties. One of the precipitating events leading to the American revolution was the so-called Writs of Assistance case.

36. Sydney G. Fisher, *The Administration of Equity Through Common Law Forms*, 1 LAW Q. REV. 455 (1885).

tative the Governor, that in 1736 they brought to an end the only real Court of Chancery they ever possessed.³⁷

For more than a hundred years after 1736 the common law courts in Pennsylvania tried, sometimes successfully, to provide equitable remedies through the forms of the common law. In 1836, the Pennsylvania legislature gave equity powers to the law courts.

By the time of the American Revolution, several factors combined to inspire fresh consideration of the merger of law and equity in the early Republic. These included antipathy toward royal governors and chancellors, the growing independence and political role of juries, and the emerging debate in England about the separate Chancery Court.

III. THE MOVEMENT TO MERGE LAW AND EQUITY

The English High Court of Chancery survived a parliamentary attempt to abolish the court during the Commonwealth period. The attempt was based not only on the antipathy toward institutions of royal prerogative, but also on the Chancellor's association with the much-hated court of criminal equity, the Star Chamber.³⁸ What probably saved the court from extinction was that chancery had turned away from the ad hoc decision; Selden's roguish remarks about the Chancellor's foot³⁹ were less descriptive of the tribunal, and chancery was operating on a system of precedent much like the common law courts. Moreover, the substantive jurisdiction of chancery was fixed.

A hundred years after the Commonwealth period, in the mid-eighteenth century, rational minds could see that chancery was not so much a court of conscience as another specialized court. Why,

37. *Id.* at 457.

38. See SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER xxxv-lxxi (I.S. Leadam ed., 1903) (Selden Society Series vol. 16); William Hudson, *A Treatise of the Court of Star Chamber*, in 2 COLLECTANEA JURIDICA § 6 (1792) (discussing judges of the court and the Chancellor's involvement).

39. J. SELDEN, TABLE TALK 64 (1689):

Equity in Law, is the same that the Spirit is in Religion, what every one pleases to make it; sometimes they go according to Conscience, sometimes according to Law, sometimes according to the Rule of Court.

Equity is a Rouguish thing, for Law we have a measure, know what to trust to, Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call a Foot the Chancellor's Foot, what an uncertain Measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.

then, should equitable principles not be applied throughout the law? Lord Mansfield, Chief Judge of King's Bench, sought to establish common law reform by injecting equity into common law decisions.⁴⁰ In the famous case of *Moses v. Macferlan*,⁴¹ Mansfield decided that a defendant should provide restitution for money had and received if the plaintiff could show "*ex aequo et bono*" that the money received by the defendant should belong to the plaintiff.⁴² Mansfield's efforts to inject equity into the common law did not go uncriticized. One of the "letters" of Junius in 1770 was a scathing attack on Mansfield, charging Mansfield with trying to take away the right to a jury by contaminating the common law with equity:

Instead of those certain positive rules by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice. Decisions given upon such principles do not alarm the public so much as they ought, because the consequence and tendency of each particular instance is not observed or regarded. In the mean time, the practice gains ground; the court of King's bench becomes a court of equity; and the judge, instead of consulting strictly the law of the land, refers only to the wisdom of the court, and to the purity of his own conscience.⁴³

Junius went on at length and compared Mansfield to Rhadamanthus, the mythical judge of Hades, who punished first and then heard the cause.⁴⁴

Although Mansfield was not wholly successful in infusing equitable principles into the common law, his pronouncements on the subject furthered the idea that the Chancery Court was not necessarily the sole repository of equity. Mansfield's efforts laid the groundwork for the nineteenth century efforts commonly referred to as the merger of law and equity. A more proper description of this merger would be the reformation of the court system into a unified system, that is, the abolition of a separate court of chancery.

By the early 1800's, chancery procedures in England were so confused, expensive, and time consuming that the Chancery Court

40. 1 J. OLDHAM, *THE MANSFIELD MANUSCRIPTS* 99-102 (1992). Oldham points out that Mansfield twice rejected the Chancellorship on grounds of political insecurity (the Chancellorship changed with each new administration), but that he was very close to the Chancellor and previous Chancellors.

41. 2 Burr. 1005 (K.B. 1760).

42. *Id.* at 1012.

43. 2 LETTERS OF JUNIUS, No. XLI 50 (Woodfall 1851).

44. *Id.* at 53.

was a scandal.⁴⁵ Between 1825 and 1850, two separate Chancery Commissions examined and reported on the system and recommended many reforms, some of which were adopted.⁴⁶ When Charles Dickens published *Bleak House* in 1852-53, however, the public consciousness of the systemic defects of chancery became widespread. Dickens had experienced several personal brushes with chancery courts in the 1820's while seeking to enforce his literary rights against piracy. Although he won most of his cases, it cost him more than he ever received, and he never again sought the aid of chancery. His fictional case of *Jarndyce v. Jarndyce* brought to the surface the scandalous conditions of chancery as they existed in 1825, although some had already been cured.⁴⁷ Even though the house of chancery was not quite as bleak as Dickens's portrayal, the separateness of chancery became an important political issue. In 1875, a unified court system was enacted by parliament and chancery became a division of the High Court of Justice.

Meanwhile, in America, after the Revolution, the issue of separate chancery courts was debated and acted upon. On the national level, the question first arose in the Continental Congress when that body considered the instrument of government for the Northwest Territory. As described by Professor Blume:

A committee of the Continental Congress, appointed to draw up a plan of government for the Northwest Territory, recommended in 1786 that a court be established to consist of five judges who should have "a common law and chancery jurisdiction." The provision for a "chancery jurisdiction" appeared in a later plan, but still later was dropped, and was not included in the Ordinance of 1787 which provided for the appointment of a court to consist of three judges who should have "a common law jurisdiction." The first governor of the Territory, St. Clair, at once recognized that this grant was "restrictive as to any Powers in Equity," and

45. Until 1813 there were only two judges in the chancery court, the Chancellor and the Master of the Rolls; the docket was hopelessly in arrears. Moreover, the Chancery Clerks charged fees for every document filed, and under chancery practice every time someone was born or died who was remotely connected to a dispute concerning an estate, everything in the case had to be done all over again. Many times all the assets in an estate would be consumed by fees, costs, and attorneys' fees. Another rule that led to scandal was that chancery could not dispose of parts of disputes, but only of the entire controversy; that rule led to many delays and costs.

46. One of the most important advances was to increase the number of judges. By 1875, when the court was abolished, it had seven judges.

47. See W.S. HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN 79-115 (1929), for a fine account of how *Bleak House* reflected reality.

so advised Judges Parsons and Varnum in 1788. Although the Ordinance did not prescribe what local courts might be established by the legislative authority of the Territory, neither the governor and judges in the adoption of laws (before 1799) nor the members of the general assembly in the making of laws (after 1798) saw fit to establish courts of chancery or confer general equity powers on the county courts of common pleas. They did, however, from time to time, provide that specified types of relief usually obtainable only in courts having chancery jurisdiction might be given by the common law courts. This was how equity was being dealt with in Massachusetts and Pennsylvania, and it may be significant that Judges Parsons and Varnum were from New England, and especially significant that Governor St. Clair was from Pennsylvania and thoroughly familiar with the Pennsylvania practice of administering equity through common law forms.⁴⁸

By the time of the Constitutional Convention in 1789, no constituency existed for including a separate court of chancery in the judicial article of the Constitution. No convention debates are recorded in connection with the phrase in Article III extending the judicial power of the United States to all cases in law and equity. It was in the ratification period, when the Federalist papers and Anti-Federalist papers appeared, that questions about the law and equity phraseology appeared. None of the papers on either side took up the issue of separate courts of chancery; rather, the debate centered on the issue of jury and nonjury trials.⁴⁹ The antifederalist arguments that judges would decide cases without juries and stray from the strict letter of the law and the Constitution echoed the Junius attack on Lord Mansfield twenty years earlier.⁵⁰ That same argument would appear again, one hundred years later, in Arkansas.

In the early republic years and beyond, states and territories did not generally create separate chancery courts. States primarily

48. William W. Blume, *Civil Procedure on the American Frontier*, 56 MICH. L. REV. 161, 193 (1957).

49. See U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: A RECONSIDERATION OF THE "BROAD EQUITABLE POWERS" OF THE FEDERAL COURTS 35-41 (Aug. 31, 1988), for a summary of these positions.

50. One of the antifederalist papers, *The Federal Farmer*, noted that combining law and equity powers in the same hands was very dangerous. It observed that in Great Britain the powers were divided, with the decision of the law in the law judges, the decision in equity in the chancellor, and the trial of the fact in the jury. *Id.* at 39. Note that at this time, the last decade of the eighteenth century, the ultra-democratic position that juries could decide the law as well as the facts had widespread acceptance. The early federal treason trials after the Whiskey Rebellion brought that issue to a head, and by the 1820's both state and federal trial courts would not allow juries to decide the "law."

followed the federal model and gave chancery powers to the circuit courts (or their equivalents), leaving it to the legislature to create chancery courts if and when those courts were considered necessary. In 1848, when New York adopted the Field Code of Procedure, a new era began.⁵¹ The Code completely reformed civil procedure and replaced common law forms of action with general civil complaints. Most importantly, the Code removed all distinction between equitable and legal forms of action and remedies.⁵²

In the 1850's, code pleading quickly became commonplace, although some states did not fuse law and equity completely. Unfortunately, one of those states, Kentucky, was the state that was selected as the model for Arkansas.⁵³ Interestingly, these early years of code pleading in America coincided with chancery reforms in England and the publication of *Bleak House*.

IV. CHANCERY COURTS IN ARKANSAS

Arkansas was part of the Louisiana Territory from 1803 to 1812. From 1812 to 1819, Arkansas was designated as a portion of the Missouri Territory; when Missouri became a state, the land was

51. Although the New York legislation of 1848 is generally regarded as the first American abolition of the distinction between law and equity, some historians argue that this honor belongs to Texas. See, e.g., Ford W. Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEX. L. REV. 801 (1950); Edward L. Markham, Jr., *The Reception of the Common Law of England in Texas and the Judicial Attitude Toward that Reception, 1840-1859*, 29 TEX. L. REV. 904, 910 (1951).

52. Until code pleading became commonplace, jurisdictions without a separate chancery court maintained the distinctions between legal and equitable forms of action. C.M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* § 44, at 45 (1897). Hepburn observed:

But, while some of the American Colonies and States, following the example of England, did in fact vest the powers of equity in courts which were entirely distinct from the courts of law, the tendency in America was to delegate both the equitable and the legal jurisdiction to the same judges. Nevertheless, no attempt was made to fuse the two systems of remedial justice into one. The same judge would sit at one time as a court of law, at another as a court of equity; but, as a court of law he could not enforce an equitable right, however closely connected with the case before him; as a court of equity he could not enforce a right for which his court of law afforded an adequate remedy. In either case, and at the end, perhaps, of protracted and expensive litigation, the unfortunate seeker for justice was thrown out of court because he had mistaken his form of remedy. He might try again, but only in a new proceeding, in a distinct court, and under a very different form of procedure, although on the same material facts, and often before the same judge.

Id.

53. *Id.* §§ 92-93, at 95.

designated the Arkansas Territory until statehood in 1836. Territorial laws regulated the judicial system from the year 1810. A law of the Louisiana Territory provided:

In all cases where a remedy cannot be had in the ordinary course of the common law proceeding, the general [circuit] court shall exercise chancery jurisdiction; and the complainant may, on filing a bill or petition with the clerk of the general [circuit] court, stating the nature of his complaint, obtain from said clerk a summons which shall be served and returned as in ordinary cases.⁵⁴

The law also provided for extensive procedures to be followed in chancery cases, including instructions for the court clerk to "keep a regular chancery docket and enter all decrees and other proceedings in a cause in a separate book kept for that purpose."⁵⁵ The act was amended in some minor particulars, including venue, during the Missouri Territory years. After Arkansas became a separate territory, a few changes were made. In 1828, a major act dealing with circuit courts stated:

There shall be established in each county of the respective circuits, a circuit court, with the following jurisdiction, to wit: original jurisdiction in all cases of one hundred dollars and upwards; appellate jurisdiction agreeable to the laws of this territory, from decisions of justices of the peace; and exclusive original jurisdiction in chancery cases . . .⁵⁶

When Arkansas became a state in 1836, the predominant model was to vest chancery jurisdiction in the same court that heard common law actions. Like the federal system, circuit courts in Arkansas had a common law and a chancery side. The first constitution of Arkansas maintained the courts as they existed in territorial times, with the addition of a provision giving the legislature power to establish separate courts of chancery.⁵⁷

54. J. STEELE & J. M'CAMPBELL, *LAWS OF ARKANSAS TERRITORY*, Chancery Proceedings § 1, at 108 (1835). See generally Henry P. Dart, *The Colonial Legal Systems of Arkansas, Louisiana and Texas*, 12 A.B.A. J. 481 (1926).

55. STEELE & M'CAMPBELL, *supra* note 54, Chancery Proceedings § 16, at 115. Among the many procedural provisions, § 19, adopted three days after the main act, provided that if either party "should require a jury for the determination of any facts arising in the suit the court shall cause an issue to be made up and direct a jury to be empanelled without delay." STEELE & M'CAMPBELL, *supra* note 54, Chancery Proceedings § 19, at 119.

56. STEELE & M'CAMPBELL, *supra* note 54, Circuits § 2, at 122 (passed Oct. 22, 1828).

57. ARK. CONST. of 1836, art. VI, § 1. The 1836 Constitution provided: "The

For nearly twenty years after statehood, the General Assembly did not deem it expedient to establish separate chancery courts. The territorial laws governing chancery jurisdiction in the circuit courts were reworked somewhat in 1837, but the territorial structure continued to be the foundation for the courts.⁵⁸

The first separate court of chancery appeared in 1855, born out of some of the most controversial and colorful incidents in Arkansas history. The origin of this court stemmed from a case brought on the chancery side of the Pulaski Circuit Court by the State against the trustees of the Real Estate Bank of Arkansas. The State sought to compel the divestiture of assets due to the state.⁵⁹

General Assembly . . . when they deem it expedient, may establish Courts of Chancery." Article VI of that constitution provided: "Until the General Assembly shall deem it expedient to establish Courts of Chancery, the Circuit Courts shall have jurisdiction in matters of Equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law." ARK. CONST. of 1838, art. VI, § 6. The latter provision is retained verbatim in the current constitution, ARK. CONST. art. VII, § 15, and the first provision remains almost exactly the same, with the words "separate courts of chancery" instead of "Courts of Chancery." ARK. CONST. art. VII, § 1.

58. REV. STAT. OF ARK. ch. 23, § 1 (1836) (approved Dec. 14, 1837):

The circuit court shall exercise chancery jurisdiction in this State in all cases where adequate relief cannot be had at law, and shall, in all things, have power to proceed therein according to the rules, usages and practice of courts of chancery, except when it may be otherwise provided by law, and to enforce their decrees by execution, or in any other manner proper for a court of chancery.

Id.

59. The Real Estate Bank of Arkansas was one of the two banks authorized by the Arkansas Constitution of 1836; the other was the State Bank of Arkansas. The first session of the General Assembly in September and October of 1836 authorized the two banks based on a glowing joint committee report on banking, extolling the virtues of public banking. JOURNALS OF THE FIRST SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS 51 (1837). The Real Estate Bank got off to a rocky start; it was the cause of the most famous incident in Arkansas legislative history when the Speaker of the House of Representatives, John Wilson (who had been made president of the Real Estate Bank as a compromise choice), took umbrage at an insulting comment by Major J.J. Anthony, a representative from Jackson County. Wilson stepped down from the Speaker's chair and engaged in a knife fight (Bowie knives, of course) with Anthony. Wilson received a paralyzing wound to his left wrist and, in turn, inflicted a fatal stab wound upon Anthony. Wilson was expelled from the General Assembly, indicted for murder, and acquitted on a plea of self-defense. 1 F. HEMPSTEAD, HISTORICAL REVIEW OF ARKANSAS 146-49 (1911).

By 1840, both banks were insolvent, and in 1846 the constitution was amended to prohibit the General Assembly from incorporating any bank. ARK. CONST. of 1836, amend. 1 (1846). After becoming insolvent, the directors of the Real Estate Bank assigned the assets to a board of trustees; the trusteeship was challenged and upheld in *Ex Parte Conway*, 4 Ark. 302 (1842). The trustees refused to accept any governmental directives or open the books to public scrutiny. Governor Pope

The Tenth Session of the General Assembly responded by establishing a separate chancery court.⁶⁰ Even though the political motivation

urged the legislature to do something in 1842, but nothing seemed to budge the trustees. On January 12, 1853, an act "directing the Attorney General to file a Bill in Chancery to divest the Trustees of the Real Estate Bank of the Assets of that Institution" was approved. Act of Jan. 12, 1853, 1852-53 Ark. Acts 195. The Attorney General, John J. Clendenin, apparently refused to act and Governor Conway employed a succession of special counsel, but by the end of 1854 nothing much had happened; the next session of the General Assembly responded with the creation of the new Chancery Court.

Five hundred of the two thousand bonds issued by the state in 1837 to fund the Real Estate Bank were hypothecated to a New York bank as collateral for a loan; the New York bank improperly sold them to a London banker, James Holford. The bonds, which had been reissued by the state in the 1860s, were eventually repudiated in 1885 by Amendment 1 to the constitution of 1874. ARK. CONST. art. XX; 1 F. HEMPSTEAD, HISTORICAL REVIEW OF ARKANSAS 145 (1911).

60. REV. STAT. OF ARK. ch. 28, § 1 (1857) (approved Jan. 15, 1855). This statute provided: "A separate court of chancery shall be established, to be held by a chancellor at the seat of government . . ." Although the court was established in Little Rock, there was no courthouse, and the enabling legislation provided that the court "may be held at any place at the seat of government most convenient to the chancellor. . . ." *Id.* § 4. Section 10 of the act provided that after the organization of the court, the clerk of Pulaski Circuit Court was to transfer all of the chancery records of that court and all chancery cases pending in Pulaski Circuit Court to the new chancery court. The bill establishing the court was passed on Jan. 12, 1855, a Friday; the reasons given were "so that the causes of the State, including that against the Trustees and officers of the Real Estate Bank, and those of individuals may be determined as early as practicable." ARK. STATE GAZETTE AND DEMOCRAT, Jan. 19, 1855, at 3. On Monday, January 15, 1855, Governor Conway nominated Hulbert F. Fairchild as chancellor, and apparently the senate confirmed him that day. ARK. STATE GAZETTE AND DEMOCRAT, Jan. 26, 1855, at 2; see also Diane Sherwood, *Pulaski Chancery Court*, ARK. GAZETTE, Apr. 5, 1942 (Sunday Magazine Section), at 3. The constitutionality of the court was immediately challenged in a quo warranto proceeding and upheld in *State v. Fairchild*, 15 Ark. 619 (1855).

True to its "mission," the first case on the new court's docket, on Feb. 7, 1855, was a bill to terminate the 1842 trust and create a receivership for the Real Estate Bank; in April, the court ordered the transfer of all assets of the bank from the trustees to a receiver. On April 20, 1855, Charles F.M. Noland was appointed receiver. On November 11 of that year, he was removed by order of the court and replaced by Gordon N. Peay, who was the Pulaski Circuit Court Clerk, cashier of the Real Estate Bank, secretary to the trustees, and a defendant in the chancery action! Peay served until his death in 1876 and was succeeded by W.B. Worthen. In 1874, Chancellor Yonley entered a decree giving an additional 15 years to debtors to pay off the outstanding mortgages in installments, but very little was ever collected. After the "Fishback amendment" to the constitution (repudiating the Holford bonds) was defeated in 1880, another attempt was successful in 1884 (now Article 20 of the constitution). 1 HEMPSTEAD, *supra* note 59, at 143-46. The Real Estate Bank had only been in general operation for three years, but it took 39 years to wind up its tangled affairs. Dallas T. Herndon, *The Real Estate Bank of 1836: A Pioneer Farm Loan Bank* (unpublished typescript, Arkansas State Archives, n.d.); see also W. B. WORTHEN, EARLY BANKING IN ARKANSAS (1906);

for creating the court was quite popular and considered worthy, a minority report of the House Judiciary Committee made some salient observations:

[T]he undersigned are unable to comprehend the reasons why the circuit judges of this State, having both chancery and common law jurisdiction, cannot hear and determine all cases in equity contemplated by said bill. Your minority committee are also of opinion that it would meet the wants of the country much more fully to abolish the distinctions in the chancery and circuit courts, so that circuit judges should exercise general jurisdiction and the practice of law should be so modified as to meet the change here suggested.⁶¹

Between 1855 and 1874, when the present Arkansas Constitution was ratified, three constitutions dealt with the chancery question. The "secession" constitution of 1861 repeated the provisions of the 1836 constitution regarding the chancery courts, but added a statement: "The special Chancery Court, heretofore created or established, for the County of Pulaski, is hereby confirmed in the jurisdiction conferred upon said court until otherwise provided by law."⁶² The "Civil War" constitution of 1864 returned to the exact language of the 1836 constitution; no mention was made of the one separate chancery court in Pulaski County.⁶³ The "carpetbagger" constitution of 1868 omitted all references to chancery courts, using instead language vesting the judicial power of the state "in the Senate sitting as a Court of Impeachment, a Supreme Court, Circuit Courts, and such other courts inferior to the Supreme Court as the General Assembly may from time to time establish."⁶⁴

Charles C. Fichtner, *History of Banking in Arkansas, in ARKANSAS AND ITS PEOPLE, A HISTORY, 1541-1930* 445-51 (David Y. Thomas ed., 1930).

The first chancellor, Fairchild, was elected to the Supreme Court in 1859; he was succeeded by U.M. Rose. At the end of the Civil War, Lafayette Gregg, a Republican, was appointed to the court, and after the reconstruction era T.D.W. Yonley was chancellor. The Sherwood article, *supra*, is an account of the history of the court, and although no sources are cited, much of the information in the article came from interviews with then Chancellor Frank H. Dodge.

61. 12 JOURNAL OF THE HOUSE OF REPRESENTATIVES 352-53 (10th General Assembly, 1854).

62. ARK. CONST. of 1861, art. VI, § 6. The present constitution essentially retains that language in Article 7, § 44: "The Pulaski Chancery Court shall continue in existence until abolished by law, or the business pending at the adoption of this Constitution shall be disposed of, or the pending business be transferred to other courts." See *Weber v. Pryor*, 259 Ark. 153, 531 S.W.2d 708 (1976).

63. The schedule to the constitution of 1864, § 9 provides for the election of supreme court judges, circuit court judges, and district attorneys, but makes no mention of a chancellor.

64. ARK. CONST. of 1868, art. VII, § 1.

The 1868 constitution, however, propelled Arkansas into the code pleading movement. A provision in the miscellaneous article of the constitution stated:

This Convention shall appoint not more than three persons, learned in the law, whose duty it shall be to revise and rearrange the statute laws of this State, both civil and criminal, so as to have but one law on any one subject; and, also, three other persons, learned in the law, whose duty it shall be to prepare a code of practice for the courts, both civil and criminal, in this State, by abridging and simplifying the rules of practice and laws in relation thereto⁶⁵

Thus, in 1868, a golden opportunity presented itself for Arkansas to join the growing group of states that had followed the lead of New York in 1848 by removing all distinctions between law and equity jurisdictions and procedures.⁶⁶ The commission did recommend adoption of code pleading, but instead of removing distinctions between law and equity, it followed the Kentucky Code of 1851, which had retained differences in administration of law and equity.⁶⁷ Neither the commissioners nor the legislators explained the choice of Kentucky as the model; however, because the separate court of chancery already existed in Pulaski County and had been operating for some thirteen years, one could conclude that if Arkansas had adopted the New York model entirely, an existing institution would have been closed down completely. The golden opportunity passed.

Prior to 1903, the legislature created a number of additional chancery courts, each by separate act.⁶⁸ In the 1903 session, on February 13, Act 19 reorganized the Fourth Chancery District; ten days later the Seventh Chancery District was created by Act 35. On the same day, February 24, the legislature reorganized the Second Chancery District; on April 9, Act 129 reorganized the Third District

65. ARK. CONST. of 1868, art. XV, § 11.

66. By 1868, code pleading had been adopted in twenty states. *See* HEPBURN, *supra* note 52, at 92-109.

67. The Code of Practice and Procedure was approved July 23, 1868. Act of July 20, 1868, 1868 Ark. Acts 145.

68. The Pulaski Chancery Court was the only chancery court in the state for 30 years; the legislature did not create a second court until 1885, when the First Chancery District was created for Pulaski, Faulkner, and Lonoke counties. Act of Apr. 1, 1885, 1885 Ark. Acts 171. Between 1885 and 1903, the General Assembly created several additional chancery districts and rearranged existing districts. The Second Chancery District was created by Act 156 of 1891, 1891 Ark. Acts 266; the Third by Act 9 of 1893, 1893 Ark. Acts 12; the Fifth by Act 31 of 1889, 1889 Ark. Acts 38; the Fourth by Act 26 of 1899, 1899 Ark. Acts 29; and the Sixth by Act 76 of 1901, 1901 Ark. Acts 126.

(on the previous day the Sixth District was realigned). On April 15, the legislature granted chancery and circuit courts concurrent jurisdiction to remove minors' disability. Clearly, the General Assembly was being inundated with bills to expand and realign the separate chancery courts, and a joint house-senate committee was created to study the situation and draft legislation to establish chancery districts throughout the state.

In April of 1903, well into the legislative session, the *Arkansas Gazette*, under the prominent headline, "Chancery Courts in Arkansas: Argument Favoring Their Abolition by the Legislature," published a lengthy letter signed "Attorney." The letter presented many of the historical arguments against chancery courts advanced in sixteenth and seventeenth century England and eighteenth century America; therefore, it is worth restating at length:

To the Editor of the Gazette:

One of the distinguishing features of the chancery courts, as compared with what are known as the common law courts, is trial by one man without the right of trial by jury; for while the chancery courts sometimes empanel a jury to try a question of fact their decision is not binding, but merely advisory upon the chancellor, and he may disregard it if he wishes.

The right of trial by a jury of his peers was long fought for and insisted upon by the English people, and so far was this carried that originally whenever a question of fact was to be tried no one was qualified to sit as a jurymen unless he came from the vicinity of the occurrences and knew something about the case; indeed the matter must have been settled by the witnesses, and the very disqualification most frequently urged now was necessary to enable a man to act as a jurymen at all.

. . . .

There was a battle royal between the two systems of chancery and common law courts in England, the chancery courts [an]nouncing that they had the right to correct the common law, wherever they found it deficient, and to exercise the right to bind men's consciences to do differently from what the common law said they might do, wherever "the common law, by reason of its universality, was deficient." The conscience of the chancellor then became the controlling factor in the case, and Lord Coke, the great expounder of the common law, remarked that the conscience of the chancellor was generally "governed by the length of his foot," meaning, possibly, that as the feet of different chancellors might be of different lengths, their consciences might vary, in the same manner and that in one of these courts securing justice might be a game of chance. Lord Bacon, the greatest of

the English chancellors, was found to be corrupt and impeached for accepting a gift from a litigant who had a case pending before him, although he decided the case against him.

These two classes of courts, the chancery and common law, existed in this country separately until 1848, when the legislature of New York adopted the code of civil procedure. The fundamental distinction between this and any system which had preceded it was (1) the abolition of the distinction between suits in equity and actions at law; (2) the abolition of all common law forms of action, and (3) the establishment of one ordinary, universal means by which rights are maintained and duties enforced in a judicial controversy called a "civil action."

There was an effort made in Arkansas and the adoption of the Code of Civil Procedure, about 1868, was intended to accomplish the same thing, but while the law provided that there should be but one form of action, unfortunately it did not abolish separate courts of chancery. The object of the reformed procedure was to provide that no man should be deprived of a remedy for a wrong or protection of a right, no matter in which court he brought his suit. That the same court might give him equitable relief if the facts showed he was entitled to it, and also legal relief. But our predecessors in the constitutional convention of 1874 evidently did not think such courts ought to be established at that time [quoting Article 7, section 15 of the constitution].

...

The only chancery court then in existence in the state was that at Little Rock, and as to it the framers of the constitution provided in section 44 of the same article that "the Pulaski chancery court shall continue in existence until abolished by law or the business pending at the adoption of this constitution then shall be disposed of," thus evidently expecting it to be dispensed with.

There is no positive provision in the constitution of 1874 that provides for the establishment of separate chancery courts, but the single statement in the section above quoted, "until the general assembly shall deem it expedient to establish courts of chancery," is the sole foundation upon which the entire chancery court system has been built up in this state. The framers of the fundamental law of Arkansas evidently did not deem any chancery court, separate and apart from the circuit courts, as at all necessary to the well-being of this commonwealth, and only permitted the legislature to establish them when the legislature deemed it expedient. The chancery courts, therefore, are the creation of the legislature and not of the constitution, like the other courts of the state.

There is positively no reason in the world why the circuit courts cannot administer equitable relief, as well as law or legal

remedies, and should do so. Terms of the circuit courts might be held to try criminal business solely, and likewise civil action. The absolute abolition of the distinction between common law and chancery courts has been adopted by nearly all of the states in the Union, and from recent developments in our state it does seem as if some of the heavy load of the keepers of the consciences of the people of Arkansas ought to be unloaded on the juries of the country, in connection with our circuit judges. In a common law court the bars between the common people and the administration of justice are not in evidence, and the watchful eye of the general public is always on the judge.

For these reasons perhaps the legislature will deem it expedient to abolish the chancery courts. Government by injunction or contempt ought not to be popular in a democratic form of government, anyhow.⁶⁹

On the same day the letter appeared in the newspaper, the Arkansas Senate passed Senate Bill 281 to establish chancery districts throughout the state by a vote of 17-14, with 4 senators not voting.⁷⁰

69. *Chancery Courts in Arkansas: Argument Favoring their Abolition by the Legislature*, ARK. GAZETTE, Apr. 21, 1903, at 4; cf. REPORT TO THE ATTORNEY GENERAL, *supra* note 49 (analyzing the expanding use of equity powers of federal judges in a wide variety of cases).

70. JOURNAL OF THE SENATE OF ARKANSAS 321 (1903). The Bill was introduced as Senate Bill 259, drafted by the joint committee of both houses, and offered by Senator Sam Simpson. *Id.* at 267. The Journal does not record any votes on Senate Bill 259. Senate Bill 281 first appears under the sponsorship of Senator Alonzo Covington on April 20, 1903. *Id.* at 317. Several amendments to exempt particular counties from the bill failed; a petition from the Garland County Bar Association in opposition was read, also to no avail. *Id.* at 317-18. The bill was passed on April 21 and sent to the house. *Id.* at 321. According to the newspaper, "Mr. Moore of Newton opposed the bill, saying that he had tried to have his county exempted from the bill, but had failed. His county did not want to be in a chancery district. The bill, he said, simply created an office for three more men without doing any good. . . . Mr. Campbell of Randolph said the bill would entail an additional expense of \$8,000 per annum on the people and he opposed it. [A month later, the General Assembly appropriated \$16,000 to pay the salaries for a two year period for the chancellors of the eighth, ninth, tenth, and eleventh districts. Act of May 20, 1903, 1903 Ark. Acts 411.] . . . Mr. Stevens opposed the bill and said not a single reason had been given why the chancery districts should be increased." *Chancery Bill Passed in House*, ARK. GAZETTE, Apr. 25, 1903, at 3. The bill passed in the house on April 24, by a vote of 46 to 43. *Id.* A one-vote swing in the house (11 representatives did not vote and 45 votes were necessary for passage) or a two-vote swing in the senate would have defeated the bill. JOURNAL OF THE HOUSE OF REPRESENTATIVES 662 (1903). The day the bill was returned to the senate from the house, April 27, it was enrolled and sent to Governor Jeff Davis at 2:06 p.m. That same afternoon, the Governor signed it [it became Act 166] and sent forward four names to be confirmed as chancellors. JOURNAL OF THE SENATE OF ARKANSAS 344-46 (1903). The next day, the senate confirmed three

So, in 1903, when England and a majority of the American states had abolished separate chancery courts and had either completely merged law and equity under the New York model or had single courts with a law side and an equity side as under the federal model, Arkansas entered the twentieth century carrying the full weight of the anomaly of separate courts of equity.

V. THE PROSPECTS FOR MERGER IN ARKANSAS

Only four states, Arkansas, Delaware, Mississippi, and Tennessee, still have separate courts of equity. In these states, the problem of jurisdiction is always present. The inefficiencies of a fuzzy line of demarcation between "equity" cases and "law" cases have always been the primary concern of advocates of merger. Complete merger of law and equity, however, under constitutional systems that guarantee a trial by jury, cannot be accomplished. The more accurate phraseology for merger would be "reduction of the differences between law and equity."⁷¹ The system in Arkansas that keeps two separate courts is the least efficient and useful system possible. Even though many difficulties arise when a single court has both a law and an equity side, a single court is preferable to the separate courts.⁷²

The essence of the jurisdictional problem is conceiving a theoretical model for defining equity disputes. No truly satisfactory model has ever been devised. The Arkansas courts, for example, have wavered between looking at the remedy sought and the substantive content of the pleadings.⁷³ The absence of a theoretical

of the nominees and rejected one. *Id.* at 347. One interesting sidelight to the proceedings in the General Assembly is that only three weeks prior to passage of Act 166, the senate, sitting as a court of impeachment, acquitted Chancellor Leland Leatherman of the Third Chancery District on each of eleven counts of high crimes and misdemeanors and misconduct in office. *JOURNAL OF THE ARKANSAS SENATE* 258-59 (1903). Leatherman was represented by T.M. Mehaffey and J.F. Loughborough. *Id.* at 258.

71. STASON ET AL., *INTRODUCTION TO LAW AND EQUITY* 89 (1953).

72. See HEPBURN, *supra* note 52. For a recent example of this problem, see *Union Pac. R.R. v. State*, 316 Ark. 609, 873 S.W.2d 805 (1994), where the Arkansas Supreme Court held that a chancery court did not have subject matter jurisdiction over a pleading seeking an injunction to require the railroad to allow the construction of a street across its right-of-way, because the appellant failed to show there was no adequate remedy at law. *Union Pac.*, 316 Ark. at 611, 873 S.W.2d at 806. Interestingly, the railroad never made that argument, and the case was filed in a circuit-chancery court. *Id.* at 615, 873 S.W.2d at 808.

73. This article is not the place to delve into a long line of ambiguous and sometimes conflicting cases. Besides, the task has already been accomplished in a thorough and closely reasoned article. See Mark R. Killenbeck, *And Then They*

model is what complicates the jury trial/nonjury trial dichotomy. However, this residual complication is no reason for having separate chancery courts, because most courts have used the "remedy sought" formula rather than the "substantive area" formula to decide whether a civil case requires a jury trial. In Arkansas, the right to a jury trial is easy to determine; the test is whether the cause of action was known to the common law at the time of the 1874 constitution.⁷⁴

Commentators have consistently supported merger of law and equity into a unified court.⁷⁵ Political realities, however, have made such a rational and progressive reform difficult. Since 1903, the existence statewide of chancery districts and a growing number of chancellors have made for a strong and vocal force against merger.

Several attempts at merger have come and gone in recent years. The most comprehensive appeared in the proposed constitution of 1970 which would have replaced circuit, chancery, probate, and the judicial portions of county and common pleas courts with a district court.⁷⁶ The 100 elected members of the Constitutional Convention

Did . . . ? Abusing Equity in the Name of Justice, 44 ARK. L. REV. 235, 317-37 (1991); see also *Union Pac. R.R. v. State*, 316 Ark. 609, 873 S.W.2d 805 (1994) (utilizing the substantive content test).

74. *Hester v. Bourland*, 80 Ark. 145, 95 S.W. 992 (1906). In the federal courts, the problem is more difficult. See WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2301-2317 (1971). Of course, even the mechanistic Arkansas formula can be problematic. See, e.g., *Baker v. State*, 215 Ark. 851, 223 S.W.2d 809 (1949) (holding that courts should look to early English cases in ascertaining the common law).

75. See Killenbeck, *supra* note 73, at 312-41; Mark R. Killenbeck, *Nothing That We Can Do? Or, Much Ado About Nothing? Some Thoughts on Bates v. Bates, Equity, and Domestic Abuse in Arkansas*, 43 ARK. L. REV. 725 (1990); Howard W. Brill, *Law and Equity in Arkansas: Will Liles v. Liles Lead Us Out of the Morass?*, 1987 ARK. L. NOTES 1; George P. Smith, II & Walter W. Nixon, III, *La Dolce Vita—Law and Equity Merged at Last!*, 24 ARK. L. REV. 162 (1970); Ralph C. Barnhart, *Pleading Reform in Arkansas*, 7 ARK. L. REV. 1 (1952).

76. ARK. CONST. art. V, § 6(a) (proposed draft 1970): "District Courts are established as trial divisions of the Trial Department. They shall have original jurisdiction of all justiciable matters not otherwise provided in this constitution, and such powers of review of administrative action as may be provided by law." In Schedule III, § 4(b) of the 1970 document, the following language made the sweep of the new district court clear:

The jurisdiction hereby conferred on District Courts shall include all matters previously cognizable by Circuit, Chancery, and Probate Courts and all judicial matters previously cognizable by County and Common Pleas Courts.

The geographic districts and subject matter divisions of the Chancery and Circuit Courts existing at the time this Constitution takes effect shall become districts and divisions of the District Court hereby established until changed pursuant to this Constitution.

ARK. CONST. art. V, § 6(a) (proposed draft 1970); see also Ronald L. Boyer, *A New Judicial System for Arkansas*, 24 ARK. L. REV. 221 (1970).

were nearly unanimous in their approval of the new Constitution,⁷⁷ but the document was rejected by the voters in November of 1970. An unsuccessful attempt to have a constitutional convention in 1975, and another failure in 1979-80, probably significantly set back constitutional revision in Arkansas.⁷⁸

With constitutional revision unlikely, a constitutional amendment of the judicial article presented the next best approach to merger. In 1991, a new judicial article was presented to the General Assembly for endorsement as a proposed constitutional amendment.⁷⁹ The senate recommended the proposed amendment for referral to the voters, but shortly before the end of the legislative session, the house failed to pass the amendment by a vote of forty-nine to twenty-five (where fifty-one were needed for passage). The proposed amendment's failure in the house was attributed to controversy over a provision in the proposed article allowing the General Assembly to refer merit selection of judges to the voters.⁸⁰ The lesson to be learned by this latest failure is that comprehensive revision of the judicial branch of Arkansas government is extraordinarily difficult

77. Robert A. Leflar, *Constitutional Revision in Arkansas*, 24 ARK. L. REV. 155, 160 (1970).

78. The ill-fated 1975 convention was precluded by a lawsuit challenging the validity of the enabling act in providing for appointment of sitting legislators as representatives to the convention, "another civil office." The Arkansas Supreme Court held that appointment, rather than election of delegates to the convention, violated the people's inherent rights to reform their government. *Pryor v. Lowe*, 258 Ark. 188, 523 S.W.2d 199 (1975) (plurality opinion); see also Cal Ledbetter, Jr., *The Constitutional Convention of 1975 and Some Remaining Constitutional Problems*, 29 ARK. L. REV. 199 (1975). An earlier attempt to hold a constitutional convention failed in 1918, when the act to refer the matter to the people was defeated at the polls in the general election. That proposal said nothing about merger of law and equity and continued the separate chancery courts. The 1979-80 effort, again failing at the polls, differed from the 1970 proposal for merger; Article 5, § 9 of the proposed constitution of 1980 stated: "The Circuit Court shall sit in divisions of law, chancery, and family matters. Equity and probate matters shall be vested in the chancery division. A separate judge shall be elected to preside over each division unless otherwise provided by law" In 1991, midway through the legislative session, then Lieutenant Governor Jim Guy Tucker proposed another attempt at a convention. The proposal received little support and went nowhere. *Constitutional Convention Dies Unborn in Committee*, ARK. GAZETTE, Mar. 21, 1991, at H6.

79. S.J. Res. 10, 78th Leg., Reg. Sess. (1991). This resolution was referred to the Senate Committee on State Agencies. The resolution was amended twice in the senate and several amendments were added during the house debate. In its final version, S.J. Res. 10 would have amended the constitution to merge "all matters previously cognizable by Circuit, Chancery and Probate Courts" into circuit courts. *Id.* § 18(B)(1).

80. ARK. GAZETTE, Mar. 27, 1991, at H1. The proposed provision is in § 17(A) of S.J. Res. 10.

because the comprehensive restructuring typically has many opposed to one small portion of the proposal.

One possibility for merger would be to change the Arkansas Code rather than the constitution. All of the Arkansas chancery courts are creatures of statute, and a few simple words could accomplish merger. Simplicity, however, stops at the "brick wall" of political reality. The widespread vested interests of chancellors, chancery courts, and their supporters render a simple legislative solution unrealistic.⁸¹

VI. CONCLUSION

That the rise of a separate chancery court in England was a product of historical accident is beyond dispute. The separate chancery court created in Arkansas in 1855—at a time when most American jurisdictions were heading toward unification—was the product of political necessity and expediency, not reasoned choice. Unifying law and chancery matters in one court would obviate many if not most of the problems of unclear jurisdictions.⁸² A great deal of litigants' time and money is spent on resolution of jurisdictional lines between law and chancery, and judicial resources are expended needlessly.

One can easily find agreement on the wisdom of unifying law and chancery courts. The best way to accomplish the task is the remaining question. Perhaps another attempt to present the electorate with a constitutional amendment of the judicial article should be pursued. Senate Joint Resolution 10 of 1991 is certainly worthy of reintroduction in the General Assembly. Revision of the section giving the legislature authority to pursue merit selection of judges may

81. The General Assembly has chosen to follow a "patchwork" approach to solving some of the problems of separate courts of chancery. Many judges are "circuit-chancery" judges; however, this is not much help. *See supra* note 72. Whether chancery judges can hear criminal cases on exchange with circuit judges or by agreement is questionable. *See Hewitt v. State*, 317 Ark. 362, 877 S.W.2d 926 (1994). In *Hewitt*, the defendant, convicted of second degree murder, objected to the chancellor's "status as the trial judge" due to an alleged lack of subject matter jurisdiction. *Hewitt*, 317 Ark. at 362, 877 S.W.2d at 927. The supreme court did not directly address the issue because the defendant did not properly raise the issue at trial. *Id.*

82. In one recent case, the Arkansas Court of Appeals was confronted with the issue of whether a chancery court can reform a circuit court judgment. *See Pryor v. Raper*, 46 Ark. App. 150, 877 S.W.2d 952 (1994). This same issue was disputed by common law judges and chancery advocates in England during the 16th century. *See supra* notes 21-26 and accompanying text.

satisfy many of those who opposed the resolution in 1991.⁸³ Barring another constitutional convention in the near future, amendment of the judicial article is the best hope for unification of the courts.

83. The provision in S.J. Res. 10 that caused some legislators concern read: "Supreme Court Justices, Court of Appeals Judges, Circuit Judges and District Judges shall be elected on a nonpartisan basis by a majority of qualified electors voting for such office. Provided however, the General Assembly may refer to a vote of the people at any general election the issue of merit selection of members of the Supreme Court and the Court of Appeals. If the voters approve the merit selection system, the General Assembly shall enact laws to create a judicial nominating commission for the purpose of making merit selections of members of the Supreme Court and Court of Appeals." S.J. Res. 10, 78th Leg., Reg. Sess. § 17(A) (1991). Some legislators were troubled by the nonpartisan language and others by the concept of merit selection.